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**RONALD DWORKIN'S LEGAL
AND POLITICAL PHILOSOPHY**

by

Raymond Bazowski, M.A.

**A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of**

Doctor of Philosophy

Department of Political Science

**Carleton University
Ottawa, Ontario
July 29, 1993**

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RONALD DWORKIN'S LEGAL AND POLITICAL PHILOSOPHY

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in partial fulfilment of the requirements
for the degree of Doctor of Philosophy

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Abstract

Ronald Dworkin is one of the most important contemporary legal and political writers in the English-speaking world. This thesis analyzes the connection between Dworkin's political, moral, and jurisprudential theories. In legal circles Dworkin is best known for his celebrated "right answer" thesis which proposes that hard cases in law do have right answers. To sustain this thesis Dworkin develops a novel theory of law in which adjudication is portrayed as an interpretative exercise involving moral and political as well as strictly legal arguments. At a most fundamental level, this interpretative exercise aims at supplying a justification for the coercive force which law has within a discrete legal and political jurisdiction. In elaborating and refining this view of the law, Dworkin has assembled a number of powerful arguments intended to establish a justification for the coercive force of law in Anglo-American liberal democracies. Central to this justification is Dworkin's contention that Anglo-American liberalism is normatively constituted by a commitment to equality. Dworkin understands this core value of equality to entail, among other things, a distributive ethic centering on resource equality and a political ethic dedicated to official tolerance of different moral viewpoints. According to Dworkin, a proper apprehension of these liberal values allows one to understand how suitably conceived judgements in law are available even in hard cases where the explicit law is vague or silent.

In this thesis it is contended that Dworkin cannot consistently support his view of the law in liberal political democracies. The problem in large part lies with his understanding of liberal political morality. Taking seriously the counsel of modern deontologists, Dworkin attempts to define liberalism in terms of procedural or transactional relations rather than in terms of a shared understanding of a moral good. This procedural view of the liberal subject, however, disguises a more fundamental political value which underlies the liberal positions which Dworkin champions--the value of individual self-development. This thesis concludes that individual self-development risks being impaired rather than improved by the market-based distributive scheme and the court-centered politics which Dworkin promotes.

CONTENTS

Introduction	1
Chapter 1 Between Utility and Rights: Liberal Deontology and The Question of Justice	
1 Introduction	13
2 From Natural Right to Individual Rights	21
3 Rawls's Theory of Justice	40
4 Nozick's Theory of Entitlement	49
Chapter 2 Dworkin's Right Answer Thesis	
1 Introduction	57
2 Right Answers in Law	63
3 Taking Rights Seriously	78
4 Constructing A Theory of Justice	81
5 Rawls's Contract and the Right to Equality	93
Chapter 3 Dworkin on Rights and Utilities	
1 Introduction	104
2 Equal Treatment and Individual Rights	109
3 Affirmative Action and Civil Rights	124
4 Freedom of Speech: The Case of Pornography	144
5 The Right to Civil Disobedience	162
6 Abstract Equality and The Neutrality Principle	166
7 The External/Personal Preference Distinction	175
Chapter 4 Distributive Justice I: Equality of Welfare	
1 Introduction	199
2 The Problem of Measurement	208
3 Equality of Success and Reasonable Regret	213
4 How Reasonable is the Idea of Reasonable Regret?	234
Chapter 5 Distributive Justice II: Equality of Resources	
1 Introduction	241
2 The Auction	242
3 Market Corrections	
i Handicaps	249
ii Cravings	269
iii Talents	274
4 Insurance and Equality	286

Chapter 6 Distributive Justice III: The Place of Liberty	
1 Introduction	299
2 True Opportunity Costs and the Abstraction Principle	301
3 A Theory of Improvement	308
4 Equality or Liberty?	312
Chapter 7 Democracy, Community and Adjudication	
1 Introduction	332
2 Two Definitions of Democracy	336
3 The Detached Conception of Democracy	341
4 The Dependent Conception of Democracy	353
5 Democracy and the Value of Community	361
6 Democracy and Adjudication	374
Chapter 8 Interpretation and the Law	
1 Introduction	382
2 A Theory of Interpretation	392
3 External and Internal Scepticism	408
Chapter 9 Law as Integrity	
1 Introduction	416
2 Conventionalism	420
3 Pragmatism	425
4 Integrity	427
5 Fraternal Obligations	436
6 Community of Principle	446
7 Law Beyond Law	452
Chapter 10 Hercules as the Legislator	
1 Introduction	463
2 The Politics of Interpretation	464
3 Dworkin's Normative Defence of the Law	483
4 Liberal or Conservative?	498
Chapter 11 Ethics and Community	
1 Introduction	513
2 Ethics and Politics: Two Strategies for Reconciliation	518
3 Volitional and Critical Interests	524
4 Two Models of Ethical Value: Impact and Challenge	532
5 Critical Interests and the Problem of Paternalism	547
6 Community and Critical Interests	561
7 From Ethics to Politics	570
Conclusion	577
Bibliography	586

Introduction

In his disquieting examination of historical changes in conceptions of the moral virtues, Alasdair MacIntyre has recently argued that the language of morality is in a state of grave disorder.¹ According to MacIntyre, this disorder arises from a prevailing moral idiom that draws together from our collective past an ill-assorted and decontextualized set of conceptual fragments for which there can no longer be any common ground or consensus.

Illustrative of this confusing moral pluralism, MacIntyre suggests, are the apparently irresolvable controversies over what rules should govern a conception of justice in liberal societies. For it would seem that, in attempting to affirm some combination of the modern concepts of utility and of rights, both the theory and practice of liberalism have given rise to arbitrary claims and counter-claims about basic principles of justice.

To press this point, MacIntyre refers to arguments taken up by John Rawls and Robert Nozick as examples of how incompatible views of justice can be generated from nominally similar premises about liberal individualism. Thus, beginning with a shared understanding of the importance of treating human agency as inviolable, Rawls furnishes

¹ See Alasdair MacIntyre, After Virtue, 2nd edition (Notre Dame: University of Notre Dame Press, 1984).

a conception of justice based on a consideration of the equality of needs while Nozick establishes a conception of justice based on a consideration of fair entitlements. Rawls favours redistributive policies that would secure a more egalitarian society. Nozick favours libertarian policies that would safeguard the legitimate rights of property and contract. The difficulty with these two prototypical liberal arguments, MacIntyre contends, is that our liberal pluralist culture possesses no rational criterion for deciding between them.

There is, however, another contemporary theorist whose philosophical reflections on the constitutive morality of liberalism appear to directly challenge MacIntyre's verdict. Ronald Dworkin, an American jurisprudential and political theorist, has gained considerable notoriety for his contention that there are right answers to political and legal arguments, and that liberal communities possess the cultural and political resources to apprehend and realize these answers in their own institutional arrangements. It is this broad claim of Dworkin's which is the subject of this dissertation.

Dworkin's writings on law and politics over the last three decades represent a singularly determined challenge to the orthodoxies of legal positivism and the associated political theory of utilitarianism. The attention which his arguments receive amongst students of law has led one writer to remark that Dworkin is "probably the most influential figure in contemporary legal theory."² But, Dworkin's reputation is not limited to jurisprudential circles. His many topical political writings appearing in popular periodicals like The New York Review of Books, and his more theoretical articles on

² Alan Hunt, "Reading Dworkin Critically," Reading Dworkin Critically, Alan Hunt, ed. (New York: Berg Publishers, 1992), p. 1.

politics and morality, have gained for him an undisputed standing as one of the most pre-eminent of contemporary liberal political philosophers. Much of this repute has been earned by Dworkin's efforts at producing an egalitarian theory of distributive justice, which one critic has described as "by far the most sophisticated attempt to date at devising an inclusive formula for establishing individual claims on the social product."³

Yet, with the exception of Stephen Guest's recent monograph, Ronald Dworkin⁴ (which is concerned principally with Dworkin's jurisprudential theory), there has not been a full length study of his explicit political theory despite the widespread critical notice that his books and articles have received. This dissertation aims to redress the balance by concentrating primarily on the political and moral theory which Dworkin regards as central to his jurisprudential project.

Although reconstructing Dworkin's moral and political theory is made difficult by the often times periphrastic constructions which he is fond of employing, the fundamental theoretical direction he has staked out can be discerned by observing the philosophical positions he opposes. At a most general level, Dworkin has tried to show that, contrary to the theoretical counsel of legal positivism, a theory of law need not exclude moral considerations from its purview *ex hypothesi*. Furthermore, he has consistently maintained that, although the moral calculus of utilitarianism may properly play a role in some classes of political decisions, it is an insufficient ground for legal decisions which must attend to the principles which justify existing law.

³ David Mapel, Social Justice Reconsidered (Urbana, Ill.: University of Illinois Press, 1989), p. 39.

⁴ Stephen Guest, Ronald Dworkin (Stanford: Stanford University Press, 1991).

While such opposition to legal positivism and the primacy of utilitarianism inclines Dworkin in the direction of natural law theory, he makes no appeal to those metaphysical assumptions of "natural moral facts" which guide classical natural law theorists. There is, Dworkin argues, an obligatoriness in law which goes beyond the norms of obedience as described by positivism, yet which is not derived from antecedent metaphysical assumptions about a morally ordered universe. In other words, for Dworkin there may be something called "moral objectivity," but this does not in turn imply that there are corresponding "moral objects" in the nature of timeless moral facts existing independently of human experience.

To maintain this type of distinction, Dworkin engages in a theoretical project that includes a novel theory about the role of moral argument in law. While insisting that moral argument needs to be rooted in human experience, Dworkin wishes to avoid that form of extreme subjectivism which equates moral objectivity with a simple thesis about intersubjectivity or coincidence of belief. Rather, he proposes to find, within the established law of discrete communities, the very source of the morality which gives to that law its obligatory status. In this way, Dworkin enjoins us to see law as supplying its own apodeictic resources which can explain the ground of legal obligations. Such resources, Dworkin argues, must of necessity include those background moral and political theories that are in some way implicit in established law, or that at least can be shown to be required in any consistent application of the law.

The magnitude of Dworkin's theoretical task can be gathered from his controversial "right answer thesis." This thesis refers to the familiar problem of how

judges are to dispose of novel cases which do not ostensibly come under a clear rule of law. A legal positivist would normally consider this a case where a judge would have to exercise discretion and reach beyond the law for appropriate standards that could conceivably apply to the issue at court. Dworkin resists this positivist construal of judicial discretion because he thinks it implies a kind of arbitrary judicial subjectivism that could be characterized as relativism or nihilism. Instead, Dworkin tries to argue that in hard cases which do not fall under a clear rule of law, judges nonetheless have a duty to seek out the "right answer." Such a duty implies in turn that there are indeed right answers to be found in hard cases, at least in principle, and a judicial decision, correctly rendered, would amount to the assignment of existing, even if not previously recognized, legal rights and obligations.

In order to maintain such a thesis, it is incumbent upon Dworkin to show that there are sufficient reasons to conclude that a legal system contains, if only implicitly, a set of coherent moral and political principles which can establish a link between the totality of settled law and present hard cases. This is a tall order, and, in a number of articles and books, Dworkin has attempted to sketch such a theory of law around the several concepts of "articulate consistency", "chain practice", and "law as integrity." These concepts reflect Dworkin's successive efforts to come to terms with the philosophical problems which have been raised by the right answer thesis, in particular, the problem of how categorical moral principles can be rendered from the contingencies of historically specific legal and cultural forms of life. In striving to construct a programmatically non-metaphysical moral theory underlying his view of law as a

uniquely principled activity, Dworkin attempts the enormously difficult task of fashioning something like a modern Kantian moral theory shorn of all references to a noumenal world.

It is the contention of this dissertation that, despite his resourceful and often creative theoretical arguments for a moral point of view which is presupposed by the specific institutional and political practices of liberalism, Dworkin fails to demonstrate that this expressly political morality can furnish categorical rather than merely instrumental rules of action. This failure thus leaves Dworkin's jurisprudential theory without the support necessary to sustain his claim of establishing a philosophically secure albeit non-naturalistic link between law and morals.

The dissertation consists of eleven chapters. Chapter one discloses how difficult Dworkin's self-appointed theoretical assignment is by examining recent efforts to devise a modern liberal "deontological" theory of justice. Characteristically, deontological theorists contend that the application of justice must be concerned principally with determining the question of right, a question that is distinct from, and, more importantly, prior to, any considerations of the good. On this view of justice, the state is expected to display official neutrality among competing conceptions of the good in those instances when its laws touch on the fundamental values of its citizens. Because Dworkin's own political writings have often been regarded as a prime example of this latter theoretical view,⁵ an exploration of modern deontological liberalism will help clarify some of the

⁵ See, for instance, Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," Liberalism and the Moral Life, Nancy Rosenblum, ed. (Cambridge: Harvard University Press, 1989), p. 160

philosophical issues involved in his attempt to derive categorical moral principles from the historical contingencies of liberal political culture.

Chapter two introduces Dworkin's original theoretical quarrel with legal positivism in which he contends that adjudication must be conceived of as a species of moral and political argument. Because Dworkin portrays political and moral arguments as culturally specific modes of reasoning, he presents his theory of adjudication in the main as an enterprise appropriate to the Anglo-American political tradition. For Dworkin, this means that Anglo-American liberalism can be described by a coherent set of moral and political principles, the most fundamental of which consists of an overarching commitment to an abstract concept of equality. In many of his articles on law and politics, Dworkin subsequently undertakes to make concrete what this commitment to equality entails in terms of civil liberties, distributive justice, and democracy.

Chapters three to seven review these arguments roughly in the sequence that they have appeared in Dworkin's evolving work. These chapters contain most of Dworkin's explicit political and moral writings, which, taken together, are meant to illustrate how substantive principles can be adduced from the commitment to an abstract concept of equality. Thus, chapter three consists of an examination of Dworkin's theoretical arguments defending both familiar civil liberties like the freedom of speech, and more recent and controversial policies like affirmative action. In this chapter, close attention will be paid to Dworkin's distinction between policies and principles, and his contrast between personal and external preferences, both of which are contrived to demonstrate

that individual rights function as trumps over utilitarian political decision-making. It will be argued that the general thrust of Dworkin's defence of classic civil liberties, together with his endorsement of affirmative action policies, requires more than the "procedural" argument which his distinctions between principles and policies and personal and external preferences are intended to furnish. It will be maintained that Dworkin must at least employ an implicit assumption about the value of individual self-development if he is to reconcile the libertarian and egalitarian strands of his prescriptive political theory.

Chapters four through six detail the intricate set of arguments which Dworkin has constructed to show that a commitment to equality is best realized through a distributive theory of justice that aims at achieving equality of resources. Chapter four contains a summary and critique of his case against an alternative distributive approach which stresses equality of welfare, while chapter five describes his argument for equality of resources as a distributive norm. Chapter six once again returns to the issue of civil liberties, however, this time, the problem shifts to determining their status in a political theory in which social distributions are regulated not by utilitarian considerations but by the principles endorsed by resource egalitarianism. It will be argued that Dworkin's claim that a resource theory of equality resolves, at least at the theoretical level, the conflict between liberty and equality, is ill-founded. Furthermore, it will be argued that, to the extent to which Dworkin's theory of distributive equality relies on market transactions to determine what constitutes equal shares, his implicit assumption about the importance of individual self-development noted in chapter three is seriously undermined.

Chapter seven discusses Dworkin's theory of democracy. Having argued that

liberal political morality requires both extensive civil liberties and social distributions which aim at equalizing resources, Dworkin attempts to outline the basic principles of liberal democracy that could best give effect to these fundamental requirements. In this chapter, a parallel is drawn between Dworkin's reflections on the conditions necessary to ensure a flourishing democracy and Rousseau's deliberations on this same problem. The purpose of drawing this parallel is to show how Dworkin's liberalism can simultaneously appear radical and conservative.

This comparison is continued in chapters eight through ten which return to the question of adjudication as it is posed in Dworkin's most recent and notable jurisprudential work, Law's Empire.⁶ In this latter work, Dworkin both modifies and deepens his critique of legal positivism, as well as other jurisprudential theories, in the process of elaborating his own full-length theory of the law. The most significant change between Dworkin's earlier deliberations on the connection between law and morals and his present theory is that he has now come to embrace a fully interpretative view of the law. Accordingly, chapter eight will be devoted to a discussion of Dworkin's theoretical understanding of the act of interpretation, while chapter nine will describe his own interpretative theory which he names "law as integrity." Chapter ten concludes this account by submitting to critical scrutiny Dworkin's theory of political obligation which ostensibly gives to the concept of law as integrity its moral force.

In chapter eleven, the missing component in all of Dworkin's jurisprudential, political, and moral writings is explored. The assumption which has consistently

⁶ Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986).

governed Dworkin's approach to the question of what constitutes the law is that the political morality underlying the law in liberal democracies is fundamentally egalitarian. But that assumption has always been stated in provisional terms, as comprising a suitable conceptual viewpoint according to which different theories of justice, or democracy, or adjudication, can be compared and assessed. However, because Dworkin has routinely portrayed this conceptual viewpoint as a notion which is contingent on a prior consensus concerning its functional value in provoking debate over liberal moral and political principles, he can justly be accused of begging the question. Is a commitment to equality a genuine defining characteristic of liberal societies, or is it simply a convenient assumption by which Dworkin is able to order his theoretical arguments in favour of a specific political morality he happens to find agreeable? In a recent essay, "Foundations of Liberal Equality,"⁷ Dworkin attempts to respond to such a question by showing that a political morality dedicated to equality can be seen to be continuous with a model of personal ethics which has played a consequential historical role in the development of modern humanism. This important essay deserves close attention because it returns us to the question with which the dissertation begins, namely the prospect of effectively generating a deontological theory of liberalism. In this and in the concluding chapter, it will be contended that, even though Dworkin does succeed in showing why part of the deontological project would be more fruitfully understood in terms other than a austere contrast between notions of the right and the good, his own theoretical view of the connection between these concepts ultimately makes problematic the appeal of a liberal

⁷ Ronald Dworkin, "Foundations of Liberal Equality," The Tanner Lectures on Human Values XI, Grethe B. Peterson, ed. (Salt Lake City: University of Utah Press, 1990.)

political morality. Thus, it will be argued that, because his theoretical view remains lodged in a conventional understanding of liberal individualism, Dworkin does not resolve but merely displaces the crucial question of how a liberal society is to understand the common good.

It should be noted in advance that there are several intrinsic difficulties involved in presenting Dworkin's various arguments in the order and fashion contemplated in this dissertation. To begin with, a large part of Dworkin's writings began as occasional pieces which later were collected in the volumes Taking Rights Seriously and A Matter of Principle.⁸ Reconstructing Dworkin's arguments from these volumes and succeeding sources is a complicated task, not simply because they represent an evolving theoretical enterprise, but also because he often modifies and sometimes abandons positions altogether in light of criticisms without explaining how these alterations bear on his general theory of law. Moreover, the oblique quality of his occasionally circuitous theoretical manoeuvres is not helped by the fact that, when confronted by critics for advancing ambiguous or contradictory propositions, Dworkin's standard reproach is to say, though not demonstrate, that he is misunderstood.

Another problem relates to Dworkin's customary style of argumentation. Dworkin's positive arguments are usually constructed in the course of refuting alternative positions. But often these other positions are of Dworkin's own design, meant to capture certain philosophical themes and ideas he wishes to oppose. Because Dworkin's mode of reasoning frequently consists of this kind of conjectural dialogue with unnamed

⁸ Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1978); Ronald Dworkin, A Matter of Principle (Cambridge: Harvard University, 1985).

opponents, it is difficult to reliably identify the context of his theoretical engagements let alone assess the strength of his critiques of opposing viewpoints.

Although these several difficulties make a simple exposition of Dworkin's thought a daunting task, this dissertation will adopt his own interpretative protocols and attempt to reassemble his theoretical enterprise in such a manner as to show it in its best light. This means, among other things, that a thematic unity will be assumed to exist between his early and recent writings. This assumption is used to justify treating his early writings on law and politics as an important prelude to his more fully-developed theory appearing both in Law's Empire and in his subsequent articles on personal and political ethics. But the same interpretative strategy which is used to register a continuity in Dworkin's theoretical project will also be employed for purposes of developing an immanent critique of his work. What is meant by immanent critique in these circumstances is simply that the critical standards by which Dworkin's work will be appraised are the very standards explicitly raised, or tacitly implied, by his own political and moral theory.

Chapter One

Between Utility and Rights: Liberal Deontology and the Question of Justice

1. Introduction

Dworkin's political theory has regularly been depicted as an example of modern deontological liberalism. But what does it mean to say that a theory of liberalism is "deontological"? It is John Rawls who employs the term in A Theory of Justice when drawing a contrast between utilitarianism and his own conception of justice as fairness.¹ In trying to explain the provenance of his own theory of justice, Rawls declares that the two main concepts of ethics are those of the right and the good, and that the structure of an ethical theory is largely determined by how it defines and connects these two basic notions. From these elementary propositions, Rawls draws a broad distinction between two types of ethical theories: teleological and deontological.

For Rawls, classical utilitarianism is an example of a teleological theory which defines the good independently from, and antecedently to, the right. This leads utilitarianism to equate the right with a principle maximizing the good, whether this principle is understood to mean maximizing pleasure or the satisfaction of preferences. By consigning the right to a principle of maximizing the good, utilitarianism is, therefore, able to countenance the sacrificing of individual interests for the sake of overall or average utility. Rawls's primary objection to the utilitarian ethic is that its

¹ See John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), p. 21.

aggregative reasoning makes a morally and logically illicit leap by projecting utility maximizing acts of the individual onto society. The result is that utilitarianism does not take seriously the distinction between persons because it permits the sacrificing of individual interests in a morally arbitrary fashion.

In contrast, a deontological theory, which gives priority to the right over the good, must take into account the separateness of persons. It does this by stipulating constraints on individual and collective pursuits of the good which act to regulate these pursuits. At a most general level, these constraints consist of an injunction to respect equally each person's essential autonomy when devising those rules governing the distribution of social goods. As a first order principle, this deontological injunction would rule out the straightforward utilitarian balancing of individual gains and losses for purposes of maximizing the good. Rather, respect for each person's autonomy must entail the replacement of a single standard of good with a principle of neutrality towards the plurality of individual conceptions of the good. In so doing, a deontological theory subsumes a notion of the good under the concept of right, with the latter representing the expressly political principle commanding the state to display equal respect for its citizens when framing and administering laws.

But from whence does the concept of right come? And what are we to make of a notion of autonomy? For Rawls the principles of right are not something discovered in nature but are constructed through a philosophical procedure that meets considered judgements about what makes for fair and voluntary agreements in moral and political matters. And autonomy is that condition which makes possible individual choice, and

which, therefore, gives moral credence and coherence to the procedure of fair and voluntary agreement.

This might sound somewhat circular, and, indeed, Rawls's neo-contractualist argument for his two principles of justice has often been subjected to such criticism. Yet his basic characterization of the opposition between teleological and deontological ethical theories has had a considerable influence on subsequent debates over the terms and prospects of liberalism. After Rawls it has been commonplace for liberal theorists to seek something like a deontological theory of liberal justice in an effort to avoid the alleged moral arbitrariness of utilitarianism.

But is the concept of autonomy which seems so central to these efforts to arrive at a deontological liberal theory sufficient to its task of supporting non-arbitrary conceptions of justice? Michael Sandel, in his well known critique of the premises of deontological liberalism, suggests not.² While accepting Rawls's description of the conflict between deontological and utilitarian views of justice, Sandel argues that the autonomous subject given to us in Rawls's theory is either too radically situated, or too disembodied, to assent to any consistent principles of right, let alone the principles advanced by Rawls.

Sandel proposes in turn that the autonomous subject must be envisaged not in the individualist and instrumentally rational fashion favoured by Rawls and other liberal theorists, but must instead be conceived in intersubjective terms, as someone who is in

² See Michael J. Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982).

part a constitutive being formed by self-reflective aims and life-plans, and by associations in the various communities of which she or he is part. It is not a wholly sovereign individual, then, but a subject implicated in and formed by experiences in the home, workplace, community, and nation, who, as a matter of contingent fact, is faced with the concomitant problems of what is just.

It is such an intersubjectively constituted subject, Sandel continues, who can make defensible claims about responsibility and desert when distributional questions are posed. Sandel's argument thus shifts the locus of liberal deliberations on justice to the question of how an individual subject constitutes herself or himself within any particular community, and, therefore, how responsibility and desert can be assigned to those individual choices which happen to raise questions of justice.

These issues of community, responsibility and desert, bear on the dilemma mentioned earlier with regards to MacIntyre's sombre assessment of the incoherence of liberal theories of justice. MacIntyre had noted that disputants over distributive shares in society characteristically make their claims in terms of desert, that is, what each feels he or she deserves or is owed by virtue of his or her status, effort, or life situation. According to MacIntyre, it is the inability of modern liberal theory to answer one way or the other what is involved in desert that leads to the interminably combative nature of differing claims to justice. For instance, while Rawls denies that desert plays a role in distributive questions, Robert Nozick cannot supply, in any truly adequate sense, a deep foundation for what he claims is deserving in legitimate entitlements.³

³ See *infra*, pp. 40-56, for a discussion of the distributive theories of Rawls and Nozick.

The result of this inability to situate individuals in communities, and to engender a corresponding concept of desert, is that, despite claims to ethical objectivity, deontological theories themselves often seem to become little more than the arbitrary expression of preferences dressed up theoretically as individual rights. Indeed, this would appear to be one of the recurring features of what have been designated as deontological liberal theories. Beginning with a general premise that the right must be prior to the good, the concept of right more often than not is collapsed into a notion of rights as protective spheres surrounding individuals, or as sets of entitlements which are regarded as an individual's due. This latter process of theoretically installing rights as a stipulative part of the more general concept of right imparts a good measure of confusion to deontological arguments about justice. This confusion bears some comment.

The shift from the concept of right to that of rights may only appear to involve a subtle difference in shades of meaning. The case is not so simple, however, for there is an irreducible difference between these two terms. Customarily, the concept of right has been used as a moral term signifying what is morally obligatory, while rights have implied a sphere of subjective freedom.⁴ A look at how these two words are ordinarily employed helps to bring this distinction into sharp relief.

⁴ It is true that in the English language the meaning of rights is not restricted to permissible acts. Indeed "rights" is such a protean term that it is very difficult to speak about its precise meaning. For example, in a renowned analysis of the concept of rights as employed in legal language, W.N. Hohfeld distinguished four core meanings which can obtain in the assertion of a right: a bare liberty, a claim right, a power, or an immunity. A summary of Hohfeld's analysis of rights can be found in Joel Feinberg, Social Philosophy (Englewood Cliffs, N.J.: Prentice-Hall, 1973), ch. 4. For expository purposes, however, the meaning of rights will be restricted, in this dissertation, to its familiar political connotation of liberties, that is, the permission to engage in, or avoid, acts as an agent sees fit.

There is a difference between saying that some act is the right thing to do and saying that an individual has a right to do some act. In the first case, one is saying that an act is required, that it is the proper thing to do. In the second case, one is saying that an act can be done, that it is permissible. By saying that a certain act is right, one distinguishes it from acts that are wrong. On the other hand, saying that one has a right to do an act does not, in itself, imply that the act thus performed is either right or wrong. It is simply an assertion that an agent can choose to perform an act. Though in this second case, one can conceivably have the right to do some act which, at least on someone's judgement, is wrong. Is there any connection, then, between what is right, in the sense of what is proper and just, and rights in the sense of permit or ability? One possible connection can be formulated in the following way: it is *right* (in the sense of proper and just) that individuals have *rights* (in the sense of license or sanction) to choose to do or refrain from certain acts.

This formulation would indeed seem to fit a general liberal interpretation of the moral warrant of rights. Why this freedom to choose is proper and just is not immediately evident. Still, if the acts or the consequences which flow from free choices are morally indifferent, than presumably there can be no moral objection to the principle that it is right for individuals to have rights. For this is simply another way of saying that what is neither commanded nor prohibited is properly left to an individual's own judgement. But what if an individual, in electing to exercise his or her right to freely choose, chooses an act which is wrong? Is it right to have a right to do wrong? This rather awkward construction represents one of the crucial questions facing a liberal

theory of rights. For it is some such question which forces a liberal rights theorist to confront the problem of the moral warrant of rights.⁵

Of course, there have been many different types of liberal responses to this kind of question. One characteristic response is to assume an agnostic attitude to the question of right and wrong in the first place. Because we have no assurance that we fully know what is right or wrong, we must simply concede the right to choose. This is a common justification for many of the classic civil liberties that have come down to us such as the freedom of speech or the freedom of conscience. But it can also be argued that the agnostic position undermines itself in one crucial respect. If we cannot be sure of what is right or wrong, how can we be sure that it is right that people have rights to choose? This is a paradox, incidentally, which continually attaches to the principle of toleration.

But there are other common responses to the question of whether it is right to have a right to do wrong. One could maintain that there are certain things which are right and wrong, and at the same time allow the principle that an individual has the right, within limits, of choosing to do what is wrong. One could justify the licence to do wrong, for example, on the grounds that such freedom is the opportunity cost of learning. Rights in this case expedite the development of the personality. Or, again, one could argue that there is a domain of acts for which, as a matter of contingent fact, only an individual can be responsible. From this moral fact, one might conclude that no public

⁵ In an imaginative and historically sensitive interpretation of the grammar of liberal rights, Edward Andrew argues that a question such as this confuses the conceptual character of rights which are in all essentials properties that can be disposed of in any way an agent sees fit. See Edward Andrew, *Shylock's Rights* (Toronto: University Press, 1988), pp. 3-22, 191-99, and *passim*. While this may be an accurate description of the dominant liberal self-understanding of option rights, it still begs the question of why option rights need be entertained in the first place.

authority has a warrant to command or prohibit acts belonging to this domain, except where the public good absolutely requires such interference.

While familiar, these arguments for the rightness of entertaining rights encounter some rather elementary difficulties. For instance, where does one demarcate a domain of acts for which only an individual can be responsible? Or again, how much of the opportunity cost of learning can be rightfully tolerated? More generally still, when is it right for individuals to have rights in specific cases, and can one derive a sweeping rule to fit all cases?

There is one last answer to some of these questions that is prevalent in philosophical literature. A strong case can be made that it is right that individuals have rights because it is only through the exercise of one's freedom that an individual can genuinely be said to do a right act for the right reasons. And the right reason, in this case, is that one imposes an obligation on oneself to do the right act by one's own free choice. This self-imposed obligation can then be contrasted with those kinds of obligations assumed out of a consideration of rewards or a fear of sanctions. Thus, doing a right act or forbearing from doing a wrongful act in consideration of rewards or punishments means that the agent does not understand what it is about the act which makes it rightful. More simply, it means that the agent acts from the wrong motives. There is, therefore, an intrinsic worth to free choice inasmuch as it establishes the conditions by which an individual is able to undertake right acts because she or he knows them to be right.

But what if one were an agnostic about what is right and wrong? Does the licence to choose which is signified by rights have the same intrinsic worth? In fact, is it at all meaningful to say that it is right or proper or just to have rights in such a case? Does the concept of right serve to qualify anything about rights? These are not simply a series of interminable questions about definitions. Rather, they speak directly to the claims made by those liberal theorists who would argue that our considered judgements about justice require a deontology that gives an ethical priority to the notion of right, and, therefore, of rights, over any conception of the good. As attractive as these morally stringent standards might sound in liberal political cultures, theorists who subscribe to some sort of deontological position fail to make it clear in a conceptual sense how an ethical notion of right implies any particular set of rights. And without such a demonstration, the connection between the concepts of right and good is actually obscured rather than made clear by the modern deontologist.

2. From Natural Right to Individual Rights

Something of the scope of this problem can be illustrated by moving from the analytic question of what possible connections obtain between the concepts of good, right, and rights, to an inspection of the historical context within which rights themselves became a distinguishable concept. Such an historical examination helps to illuminate the character of the moral universe to which the concept of rights ostensibly belongs, and clarifies what is at stake in contemporary arguments for a deontological conception of justice.

If the notion of rights is taken to imply an unencumbered power of acting or choosing, hence, defining a sphere of freedom, then it is generally agreed that such a concept played no significant part in the moral and political discourse of western culture until the sixteenth century. The genesis of modern rights doctrines can be traced to a complex set of historical circumstances in which the prerogatives claimed by rulers of emerging national states and the political imperatives of expanding commercial classes, together with persisting religious strife, and new humanistic and scientific modes of thought, all acted to produce novel ways of thinking about received moral vocabularies. These changes in moral vocabulary have usually been attributed to the founders of modern natural law theory, including Grotius, Hobbes, Pufendorf, and, of course, Locke. In laying the groundwork for a modern natural rights theory, these writers both employed and reworked the terminology of traditional natural law. And in so doing, they were able to elicit new meanings from within the conceptual boundaries long demarcated by traditional natural law, new meanings which were to signify different ways of talking about justice.

To get a sense of the new meanings, it is worth contrasting some of the ways in which questions of justice have been posed in different historical settings. Consider, for example, the question of property. For St. Thomas Aquinas, whether an individual has a natural right to property would not, strictly speaking, be a comprehensible question. Instead, when he addresses the issue of property, Aquinas asks the following question: is it natural for individuals to possess external things? By natural Aquinas means what is right according to nature. Aquinas's response, in this case, is that private possession

is not opposed to natural justice or that which is naturally right.

At the same time, Aquinas qualifies the morally indifferent status of simple private possession by referring to other precepts of natural justice. For instance, Aquinas declares that natural justice prohibits luxury and gluttony. He likewise condemns usury as unnatural. And, Aquinas links proprietorship with yet another precept of natural justice, that of charity. Thus, while the private proprietor might not be transgressing the dictates of what is naturally right by virtue of simple ownership, he or she is at the same time instructed by that same natural justice to avoid luxury, refrain from the practice of usury, and exhibit Christian charity to the poor. Because natural justice commands these several practices, this effectively transforms the sense of ownership, making its rightful application conditional on the moral comportment of the proprietor.

Compare this with Locke's argument that individuals enjoy natural rights to property by virtue of the labour they bestow upon it. His initial stipulation that such rights are restricted by the needs of others may appear to harken to the Christian natural law precept commanding charity. But Locke finds ways to transcend his original restrictions on property, and, in the process, transforms property into a fully foundational right of nature, different in kind from the morally indifferent, though circumscribed, endorsement afforded to private possession by Thomistic natural law.⁶

⁶ See *infra*, pp. 28-30, for a more fully developed account of Locke's views on property. The description of Locke presented here is influenced by Andrew's thoughtful treatment of the "grammar of Lockean claims" in *Shylock's Rights*, *op. cit.* It should be noted, however, that there remains considerable scholarly debate as to whether Locke abandoned the Thomistic tradition of natural law. Classic statements about Locke's modern naturalism can be found in C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962; and Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953). For the contrary view that Locke retained more than the terminological trappings of Thomistic natural law, see James Tully, *A Discourse on Property: John Locke*

The unfettered command over individual property has become the quintessential model of what liberal rights are meant to represent. But historically, the notion of rights extends further. Take, for example, a question of justice posed by Plato in the Crito. Should Socrates take advantage of an opportunity to escape the legal sentence of death imposed by a court of law, a sentence which could be construed as unjust? A modern liberal theorist might interpret this dilemma as one involving a question of the individual's right to civil disobedience. Plato, however, does not ask whether Socrates has the right to civil disobedience in these circumstances. Rather, the dialogue revolves around the question of whether it is right for Socrates to disobey the laws. Again, this is a significantly different way of posing a question about what is just. Indeed, the question of civil disobedience was to become a recurring theme in medieval writings. But to kill a tyrant was never considered an individual right. Instead, the question typically was posed as one of determining under what circumstances it would be right to resist a tyrant, and which body of citizens could rightfully decide these circumstances.

What these examples show is that for classical and medieval thinkers the question of right characteristically referred to what is proper in the context of a way of life sanctioned by, or lived in accordance with, nature, with nature including some reference to the natural ordering of a community. So the notion of right in these cases had, as it were, built into it a context that included proper roles for a life lived in common. Rights, on the other hand, are personalized. They are in all essentials private and denote discretionary powers of the individual. Characteristically, rights are something claimed

and his Adversaries (Cambridge: Cambridge University Press, 1980); and John Dunn, The Political Thought of John Locke (Cambridge: Cambridge University Press, 1969).

against fellow members of a community, with community often construed as something co-extensive with all of humanity. Rights have in this way become intimately linked to a view of adversarial social relations, either potential or real.

What is involved in the historical restyling of natural right as rights which stand as personal claims against fellow members of a community? The answer can only be fully understood by looking at how the transposition was effected from within the terms of traditional natural law. Traditional natural law theorists would commonly employ the term *ius* or *right* to signify two things: rightful rules of action, and the right to act as provided by such rules. In continental philosophy and jurisprudence, these two correlative notions of *ius* are customarily referred to as objective and subjective right. What had been consistent throughout most of the history of traditional natural law theory was that one could not presume the existence of subjective right without a corresponding notion of objective right. This simply means that with traditional natural law, an agent's right to act in a particular case is sanctioned or directed by the *rules of action* described by objective right. Modern natural rights theory starts out employing this same terminology, but, at the same time, achieves a shift in emphasis from objective to subjective right in a way that ultimately detaches the latter from the former.

Several processes were at work in this transformation. One of these had to do with the way reason itself was understood to elicit principles of morality. Christian natural law thinkers used the term *synderesis* to portray a disposition of mind to think of general and broad rules of moral conduct. Such principles as were discovered by this moral faculty were to be considered law-like inasmuch as they stood for categorical

injunctions to act in particular ways that were productive of the good.

Successive natural law thinkers in the sixteenth and seventeenth centuries were able to give a different sense both to the moral faculty of reasoning about right, and to the obligatory laws derived by such reasoning. *Synderesis*, or reasoning about right, becomes right reasoning, or, to put it more neutrally still, correct reasoning. One can see this modification in the understanding of moral reasoning in the works of both Grotius and Hobbes, both of whom model right reasoning after the deductive logic of mathematics. Grotius, for example, gives a rationalist interpretation to the character of natural law when he asserts, "Just as God cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil."⁷ Grotius envisions natural law as a series of propositions set together in a deductive system, propositions whose imperative truth would be binding even if God did not exist. Although Grotius allowed that such a latter premise was indeed blasphemous and could only be entertained in an hypotheticalal sense, his conceptual gesture toward an immutable, authorless system of natural law marked the beginnings of the secularization of received theological doctrines.

Although his design for a deductive system of natural law had secular implications, Grotius's own writings still did not depart radically from theological conventions. The rationalist interpretation of natural law had, after all, been an important part of the scholastic tradition. Moreover, Grotius accepted the fundamental premise that

⁷ Hugo Grotius, Prolegomena to the Law of War and Peace (New York: Liberal Arts Library, 1957), p. 10.

man is naturally a social animal, from which traditional natural law theorists commonly derived their principles for an affable and righteous social life. It was Hobbes who pushed the rationalist interpretation of natural law one step further. Like Grotius, Hobbes conceived of natural law as a series of principles that could be deduced from a self-evident axiom. But Hobbes proved a more thorough-going rationalist than Grotius. Starting with a collection of materialist assumptions about matter in motion, Hobbes arrived at what he considered a pellucid and incontrovertible natural injunction: self-preservation. For Hobbes, self-preservation is deemed a *right* of nature according to which any action taken for this end must be regarded *a priori* as legitimate. In contrast to this all-encompassing right of nature, Hobbes's laws of nature appear to be instrumental and hypothetical rules of reason, rationally efficacious means to secure the end of self-preservation.

What Hobbes had accomplished in this reordering of the traditional categories of natural law was nothing less than a theoretical revolution. Replacing what previously had been envisaged as an ordered plurality of goods with a single inclination to self-preservation, styled as a right of nature, Hobbes inverted the conventions of natural law theory. Through this simple theoretical inversion, he was confident that he had demonstrated how order could arise from natural disorder simply through enlightened self-interest. And what enlightened self-interest reveals is that a social contract amongst equally self-regarding individuals is the only rationally efficacious foundation for political order.

Hobbes scandalized his contemporaries with the frank materialism and apparent ethical neutrality of his writings. Most subsequent social contract theorists tried to distance themselves from these more opprobrious elements of Hobbes's theory, while still retaining the individualist and consensual thrust of his contractarian argument. For example, Pufendorf dissented from Hobbes's view of an amoral, egoistical natural individual, yet incorporated the same in his own contractarian theory, albeit supplemented with propositions about a dualistic human nature including sentiments to sociability. Locke likewise rejected the amoralism of Hobbes's natural man, but like Pufendorf, Locke did not stray far from the form of Hobbes's contractual argument. Both of these mainstream modern natural rights theorists tried both to conserve the moral authority of traditional natural law and affirm the individualist thrust of Hobbes's contractarianism. In so doing, they rejected Hobbes's implicit positivism and explicit absolutism in favour of what might best be called quasi-natural rights which serve to define the purpose of civil association, and which represent individual claims against the sovereign power of the state.

Because Locke's argument continues to inform contemporary philosophical deliberations on the moral foundations of liberalism, it is worth a brief examination. In formal terms, Locke's contract differs from Hobbes's insofar as Locke's natural individuals, for the purpose of preserving life, liberty and property, contract to form a civil society and abide by the majority resolutions of this conventionally instituted association. It is civil society, defined in terms of the natural rights of its members, which empowers government by way of a fiduciary trust. What this means is that the

legislative and adjudicative powers of the state must be thought of as grants from society, and must, therefore, be exercised for the end of preserving those rights designated by the terms life, liberty and property.

However, one of the philosophically most beguiling parts of Locke's argument has always been the status of those rights to life, liberty and property which are ascribed to natural man.⁸ Locke allows that natural men are both at liberty, and yet under obligation to observe certain natural laws. That is, Locke wished to accommodate both Hobbes's portrayal of a boundless natural freedom to conventional Christian natural law with its morally prescriptive character. The crucial conjunction occurs in the manner in which life, liberty and property are presented as natural rights. The burden of Locke's argument concerning property is that it is an alienable right. Property derives from the person, or from the labour of a person to be more precise. And, to the extent that one possesses one's self, one's person, including one's labour, then such property can be disposed of in any manner its owner chooses.

Not surprisingly, it is the condition of a commercial society that property, including labour, be alienable, and therefore be bought and sold at whatever price its owner can command. Yet, Locke contends that life and liberty are inalienable rights. If they are inalienable, then a person cannot dispose of his life and liberty at his will. But why should these latter rights be inalienable? Because, Locke declares, a man's life and liberty are not his own but rather belong to God, his creator. And God's command,

⁸ In this dissertation, the following conventions will be followed regarding gender and language. When references are made to historical figures like Locke whose language reflects a patriarchal sensibility, no effort will be made to alter masculine pronouns and referents. In all other cases gender-neutral language will be employed.

known to man as natural law, prohibits the alienation, although not forfeiture, of life and liberty. It is in this fashion that Locke, more judicious than the Hooker he so deftly praised, was able to wed Hobbes and St. Thomas Aquinas. It was in fact a politically bold marriage, for if the rights of life and liberty are gifts of God, they are sacred and cannot be ceded or traded away, and this effectively precludes wilful submission to a despotic government or the voluntary enslavement to another person. In this way, Locke's adroit admixture of traditional natural law and a modern concept of rights as properties could be put in the service of defending the absolute freedom of a commercial society, together with civil freedoms in a constitutionally limited state.

However, Lockean natural rights soon experienced successive transformations as liberal political and social institutions evolved. They were expanded with the addition of cognate rights, radicalized, and, along the way, denaturalized into something called civil or human rights. In the process, the philosophical underpinnings for such rights, which Locke had contrived in his artful joining of natural law and liberties, became increasingly tenuous. One can witness the radicalization of Lockean rights in the writings of Thomas Paine and in the political principles enunciated in the French Revolution.

Paine took Locke's alienable property right and reversed its moral import. The property one had in one's own person, said Paine, is a sacred right whose maintenance, protection, and cultivation cannot be transferred. For Paine, this conception of a sacred and inviolable property in one's own person became the foundation for a class of personal rights including the right of each man to vote for representatives. While Paine continued to use the language of natural and sacred rights, his derivation of personal

rights from an amended Lockean view of property tended to contract the sacred, the natural, and the conventional.⁸ Such a contraction is likewise evident in the preamble to the *Declaration des Droits de l'Homme et du Citoyen*. While the authors of the *Declaration* describe the Rights of Man as "natural, inalienable and sacred," they proceed to explain these rights functionally, as "simple and indisputable principles...conducive to the preservation of the Constitution and to the happiness of all."⁹

It is this sense of natural rights as simple and indisputable principles, *tout court*, which was to prevail in European and American liberalism. A. P. d'Entreves, for instance, contends that by the middle of the eighteenth century, natural rights had for all intents and purposes been severed from the concept of objective right associated with traditional natural law. They functioned instead as marks of a new political morality characterized by a secular rationalism, individualism, and radicalism.¹⁰

This secularization (or denaturalization) of rights resulted in numerous complications to those simple and indisputable principles for which early liberal theorists had fought. The complications arose as the rights of man began to compete with cognate rights. One such cognate right which emerged historically in tandem with successful

⁸ It would appear that Paine was the first to introduce the expression "human rights" into English in his translation of the French Declaration of Rights of Man and Citizens. Such a terminological interpolation signifies the extent to which the term "natural" increasingly was becoming either redundant or irrelevant when speaking of rights. On this terminological innovation by Paine, see Martin P. Golding, "The Concept of Rights: A Historical Sketch," *Bioethics and Human Rights*, Elsie L. Bondman and Bertram Bondman, eds. (Boston: Little, Brown, 1978), p. 47.

⁹ *Declaration des Droits de l'Homme et du Citoyen* cited in A.P. d'Entreves, *Natural Law* (London: Hutchinson and Co., 1970), p. 51.

¹⁰ See d'Entreves, *ibid.*, pp. 51-64.

liberal revolutions was the right to national self-determination. Another was the conception of positive or welfare rights which have come to coexist uneasily with those option rights connected to the Lockean tradition of natural rights.¹¹ Still further complications have arisen for the Lockean conception of rights as special group, class, or even species claims for just treatment have been assimilated into the language of rights.

While the extension of rights claims has created a series of conceptual difficulties for liberal theorists, a more serious problem for rights advocates is the enduring philosophical scepticism about the moral warrant for rights. Such scepticism had, in fact, followed closely upon the first elaboration of natural rights. It certainly was implied, if not actually enunciated, by Locke's philosophical heir, David Hume, who expressed reservations over the possibility of deriving prescriptive statements from statements of fact. However, it was not Hume but Edmund Burke who provided the first great challenge to the doctrine of natural rights. Burke's challenge amounted to an historicization of natural rights into inherited, prescriptive rights born of the settled conventions of nations, classes and races. Opposing the radical implications of rights doctrines that were being played out in the French Revolution, Burke denied that abstract, indeterminate natural rights had any moral purchase. In their place, Burke

¹¹ Critics of positive rights usually contend that their civic enforcement represents an unwarranted interference with individual liberties and amounts to a justification for a paternalistic state determining the "genuine" needs of its citizens. For a classic statement to this effect, see Isaiah Berlin, "Two Concepts of Liberty," Four Essays in Liberty (Oxford: Oxford University Press, 1969), pp. 118-72. For an insightful critical response to Berlin's indictment of positive liberties, see Charles Taylor, "What's Wrong with Negative Liberties," Philosophy and the Human Sciences Vol. 2 (Cambridge: Cambridge University Press, 1985), pp. 211-229.

championed entailed rights, which, through the test of historical time, had proven their worth in securing the peace and prosperity of a nation. Yet, this same Burkean principle of prescriptive rights was liable to the historicist critique, for if rights are born in history, all sets of entailed rights have the potential for equal legitimacy, even those generated by successful revolutions.

A much more richly textured criticism of natural rights was submitted by Hegel in his observations on the abstract character of the notions of equality and freedom which liberal theorists invoked in their arguments for rights. Describing the Reign of Terror during the French Revolution as a manifestation of the drive to absolute freedom and equality implied by natural rights theory, Hegel demonstrated how the very abstractness of these principles could lead to the complete annulment of all conditions necessary to social order.¹² However, Hegel did not himself abandon the principles of freedom and equality which liberalism had come to represent, but tried to show how the application of such principles required a much more fully developed understanding of the terms of morality, family and religion in civil society, or what he called *Sittlichkeit*.¹³ A somewhat similar criticism of natural rights was levelled by Karl Marx. Remarking that the much-heralded natural rights of man secured a view of egoistic, bourgeois individuals, Marx pointed out the irony involved in simultaneously championing the

¹² See Hegel's brilliant philosophical portrait of the Terror in The Phenomenology of Mind, J.B. Baillie, trans. (New York: Harper Colophon Books, 1967), pp. 599-610.

¹³ Hegel's attempt to reconcile the abstract principles of freedom and equality with an historical and cultural content can be seen in Hegel's Philosophy of Right, T.M. Knox, trans. (London: Oxford University Press, 1971).

private interests of civil society and the universal interests of liberal citizenship.¹⁴

While these several criticisms of natural rights were telling, perhaps the most devastating internal blow to the whole edifice of rights doctrines came from the nineteenth century utilitarian heirs to Lockean liberalism. Jeremy Bentham was one for whom natural rights spelled an awkward if not dangerous moral colloquialism. Writing of the French Declaration of Rights, Bentham was haughtily dismissive: "Natural Rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,--nonsense upon stilts."¹⁵ Relegating the whole idea of a social contract to the realm of fiction and falsehood, Bentham sought a philosophically more defensible basis for law and politics in his own theory of utility. It was by way of his doctrine of utility that Bentham managed to give a positive construction to rights. According to Bentham, rights are the products of settled law which impose legal duties on people, and, coincidentally, establish corresponding rights. The rights that are entailed by positive law gain their immediate sway from the fact that they are supported by legal sanctions, and they derive their deep justification from the interests they serve as measured by overall social utility.

Bentham's utilitarian rendering of liberal rights, however, contains an obvious problem. If all rights are the effects of legal obligations whose purpose is to secure overall social utility, then what is there to prevent modifications to these rights in ever changing calculations about social utility? John Stuart Mill, one of Bentham's utilitarian

¹⁴ For Marx's criticisms of liberal rights taken in an Hegelian vein, see "On the Jewish Question," Karl Marx: Selected Writings, David McLellan, ed. (Oxford: Oxford University Press, 1978), pp. 39-62.

¹⁵ Jeremy Bentham, "Anarchical Fallacies," The Works of Jeremy Bentham, John Bowring, ed. (New York: Russell and Russell Inc., 1962), p. 501.

followers, recognized the consequentialist implications of the Benthamite view of justice. Mill attempted to find a more certain foundation for the familiar liberal rights by adducing a different psychological principle underlying these claims to justice. Following Bentham, Mill describes rights as obligations of justice. And, like Bentham, Mill allows that all human actions and institutions are rooted in basic human desires for happiness. But the desire underlying the obligations of justice, Mill asserts, is so powerful that it produces a qualitatively different social effect. According to Mill, such a desire

gathers feelings around it so much more intense than those concerned in any of the more common cases of utility, that the difference in degree (as is often the case in psychology) becomes a real difference in kind. The claim assumes that character of absoluteness, that apparent infinity and incommensurability with all other considerations, which constitute the distinction between the feeling of right and wrong and that of ordinary expediency and in expediency.¹⁶

Mill's attempt at finding a psychological principle which could yield an imperative equivalent to traditional concepts of natural rights contains its own difficulties. If the human desire for happiness which underlies obligations of justice is different in kind from that involved in other instances of utility, then it would be incumbent upon Mill to devise a dualistic and hierarchically ordered conception of human nature. If, on the other hand, the desire leading to obligations of justice is merely different in degree from other desires, this difference in degree would have to be accounted for in a way that would always result in preferences for rights. Mill's failure to supply either type of argument underlines the difficulties in trying to reconcile rights with utilities while employing the

¹⁶ J.S. Mill, Utilitarianism (Indianapolis: Bobbs-Merrill Co., 1957), p.67.

basic conceptual framework of utilitarianism.

It is precisely this difficulty in reconciling the principles of utility and of rights which has inspired many contemporary liberal theorists to propose a deontological alternative to utilitarian conceptions of justice. This brief historical review of the passage from natural to civil to human rights was undertaken to show some of the issues at stake in such a deontological project. Early theorists of natural rights made the case that at least some rights are derivative from, or commensurate with, an objective principle of right whose independent moral status is supposedly established in nature or by God. Successive rights doctrines relied less and less on the metaphysics of a morally informed and informing nature, or on an interpretation of God's providential plans. Instead, such doctrines tended more often to invoke a conception of duty contingent upon a calculation of personal benefits to be gained from the general observance of authoritative legal rules. But without the classical or Christian natural law underpinnings for rights, their sanctity and inviolability were no longer assured. In these circumstances where liberal natural rights were first asserted within an amended view of natural law, and then subsequently denaturalized in the form of civil or human rights, one witnesses changes in the conception of justice itself.

In classical and Christian natural law, justice was considered a virtue whose exercise required practical judgement. In this view of justice as a virtue, primary emphasis was placed on the disposition or character of an individual who was to comport himself or herself in a just manner. As with other virtues, the disposition to act justly was something acquired through education and experience. One learned to be just by

emulating just acts. Acquiring a sense of what constituted just acts implied the ability to make judgements about what was right and proper in different situations. Practical reasoning thus called for the competence to apply general precepts to specific circumstances. And intrinsic to this view of justice, particularly in matters of distribution, was the acknowledgement of an ordered world. From the perspective of classical and Christian natural law, the worlds of nature and man form a series of ordered goods, of ranks, grades and distinctions. It is with respect to the merit or desert called forth by such ranks, grades and distinctions that just distributions are to be made.

Liberal rights were the calling cards of a new world whose principles were to be voluntary political organizations devising and administering laws which did not discriminate against persons in respect of those characteristics hitherto considered most significant to individuality. It was, in short, a reaction to, or an emancipation from, a world conceived in terms of ranks, grades and distinctions. In departing from the classical and Christian view of justice as a virtue which embraced natural order and natural distinctions, this emancipatory liberal theory tended to regard justice more in terms of procedures, indeed, as something called procedural justice. What this means is that justice is resolved into a set of rules governing actions rather than portrayed as a virtue made manifest in the choice of actions. Such rules of justice gain their legitimacy on the strength of their generality, their universal applicability. At the same time, the precondition for such pure procedural rules of justice is a subject whose basic attributes, relevant to a legal-moral point of view, are similarly universal.

And this is how liberalism typically depicts the legal-moral personality, precisely

as a universal, abstract individual. The subject of liberal justice is, for the relevant purposes of justice, equal to all other subjects. Such formal equality is almost always the methodological starting point for liberal deliberations on the constitution of justice. For the contractarian theorists, this equality is signalled by the methodological individualism of the contract itself. Hobbes's contracting parties, no less than Locke's, are all equal to each other in those respects relevant to the original contract. And the rights which contracts are meant to secure are envisaged as belonging to each subject equally.

Significantly, these various avowals of equal rights point to the very inequalities they are meant to overcome. Thus conservative critics of this egalitarian aspect of liberalism have always condemned its levelling implications. Radical critics of this liberal egalitarianism, on the other hand, have customarily assailed it on the grounds that such egalitarianism remained too formal to take into account the effects of real inequalities. It is among these historically specific tensions contained in different views of the moral significance of equality and inequality that the modern rights-based view of liberal justice has secured its political and philosophical stature. But it has proven to be a precarious stature.

Part of the difficulty in the rights based view of justice has already been alluded to in the previous discussion of the utilitarian challenge to the metaphysics of natural rights. Utilitarianism sought a more certain foundation for the terms of morality in the realm of individual desires. At the same time, the egalitarian aspect of a rights based view of justice does find its counterpart in utilitarianism. With utilitarianism, the methodological individualism common to all liberal thought is translated into the

theoretical stipulation to treat individuals as equal bearers of preferences when making calculations of general or average utility. Thus, utilitarianism continues to make a theoretical virtue of individual equality. But with utilitarianism, this methodological injunction renders no moral guarantees about equal rights, for, in the end, the purview of utilitarian justice is social utility, or, less majestically, the utility function.

Disquieted by the unstable foundation which individual rights have in utilitarianism, modern deontological theorists insist that a liberal conception of justice must give priority to the principle of the right over that of the good. At the level of theory construction, this means that the elements of justice constituted by such principles cannot be predicated on any unique vision of what is good. At the level of political application, such a conception of justice would mean that some class of individual rights cannot be sacrificed in the interest of public welfare.

What makes this particular task seem so intractable is precisely the philosophical constraints which modern deontological theorists assume. Appraised of the various critiques levelled at classical natural rights theorists, the modern deontologist proposes to construct objective principles of political right without relying on a naturalistic basis for morality, that is, without assuming the presence of moral facts established in nature or by God. In light of such philosophically stringent standards, deontological liberals commonly employ a theoretical strategy which involves reworking that historically constitutive part of liberalism, namely its methodological individualism. In its modern incarnation, this theoretical strategy begins with some minimal characterization of human nature, and utilizes some version of rational choice or game theory as a decision

procedure to arrive at what hypothetically could be considered as commonly agreed upon sets of rules for action. In this way it is assumed that one is employing, as best as possible, neutral tests of rationality to elicit standards of justice against which actual political and legal arrangements can be appraised. But such a general strategy for arguing for principles of justice raises a pressing philosophical question. How can a method devised to elicit hypothetical principles of justice convey moral force in the real world? Or, to put the question in a slightly different form, what must be assumed about the constitution of individuals and societies in order to make these speculative principles of justice appropriate as evaluative standards for existing political institutions? The best way to answer these questions is first to observe how two of the most influential modern deontological liberal theorists understand the question of the philosophical status of their arguments.

3. Rawls's Theory of Justice

John Rawls's Theory of Justice represents the best known attempt to fashion a deontological theory of justice. The importance of Rawls's work is attested to by the fact that most contemporary liberal thinkers, including Dworkin, invariably employ his theory as a reference point in their own accounts of liberal justice. In keeping with his belief that justice is a matter of the right rather than the good, Rawls is concerned with discovering a conception of justice capable of producing distributive rules that would be fair to every member of society without presupposing that they all share the same view of the ends of life.

The theory of justice he finally settles upon is composed of two principles which are governed by a set of priority rules. The first principle specifies equal liberties for all: "Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system for all."¹⁷ The second principle consists of a two-part distributive rule, the first of which is usually referred to as the "difference principle":

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.¹⁸

Because Rawls's two principles of justice are regulated by a set of priority rules, they represent a definite ranking of the familiar liberal values of liberty and equality. The first priority rule establishes the predominance of liberty over equality: "The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty."¹⁹ The second priority rule points to the proper relationship between economic efficiency and wealth maximization, on the one hand, and just distributions and equality of opportunity on the other: "The second principle is lexically prior to the principles of efficiency and to that of maximizing the sum of advantages; and fair

¹⁷ Rawls, A Theory of Justice, *op. cit.*, p. 302.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

opportunity is prior to the difference principle."²⁰

Rawls furnishes two different arguments in support of these principles of justice. The first argument analyses the idea of equality of opportunity which he claims is an intuitive feature of liberal justice. According to Rawls, the problem with the principle of equality of opportunity, as it is ordinarily understood, is that it only seeks to neutralize the disadvantages occasioned by historical patterns of inequality. Thus, under normal circumstances, policies devoted to instituting equality of opportunity look only to erasing the disadvantages caused by such morally arbitrary circumstances as a person's race, sex, or class origins. The trouble with this view, Rawls states, is that it does not take into account the morally arbitrary disadvantages which flow from natural inequalities in talents and abilities. In other words, if individuals do not deserve to be advantaged by such contingent social characteristics as sex, skin colour or family wealth, then neither do they deserve to be advantaged by differences in their natural aptitudes, for both kinds of advantages are arbitrary from a moral point of view.

In saying this, Rawls effectively denies that the notion of desert should play a role in determining rules of distributive justice. Because no one can claim to deserve the purely accidental advantages he or she happens to enjoy, no one can demand rewards in proportion to his or her merits. However, Rawls does not conclude that this means that everyone should receive equal amounts of social goods. Rather, denying that distribution should be tied to merit only opens the door to speculations about what distribution of social goods is in fact just. And, according to Rawls, reflection should tell us that the

²⁰ *Ibid.*, pp. 302-3.

difference principle, which allows inequalities only if they improve the conditions of the most disadvantaged class of individuals, is the most reasonable distributive principle to adopt.

This first argument for his principles of justice analyses what Rawls regards as an intuitive belief about the fundamental importance which the ideal of equality of opportunity has in the liberal political ethic. However, Rawls also supplies another, more famous, argument for his principles of justice using the device of a social contract. Rawls suggests that by using the idea of a social contract to model an ideal bargaining situation, one can determine which principles of justice it would be rational to embrace. To set the stage for this contract, Rawls proposes that regardless of people's unique ideas of what constitutes the good life, they all would recognize that certain "primary goods" are desirable as means to pursue their chosen ends in life. These primary goods include both socially distributed goods like wealth, opportunities and power, and rights and liberties, as well as natural goods like health, intelligence, strength, imagination and talents.

This "thin theory of the good" is intended to provide the motivation for Rawls's contractors in their deliberations over the distributive rules they should choose for their society. For what these rules are destined to distribute are those social primary goods with which individuals can pursue their discrete life plans. But in order for these deliberations to be fair, Rawls proposes that contractors in the "original position" must be ignorant of their status in society or the goals they actually have. Only if this "veil of ignorance" is stipulated can we be assured that the contractors will not seek to bargain for distributive rules that reinforce the advantages they already enjoy. The veil of

ignorance thus acts as a filter for reasoning about distributive rules by enjoining all contractors to visualize themselves as potentially occupying any position in society. In this way, each person must weigh the results which any distributive rule will have for all social roles, on the assumption that he or she could occupy any of those roles.

Rawls is convinced that the veil of ignorance favours a single strategy for rationally choosing principles of justice. That strategy, known as "maximin", entails choosing distributive rules that would maximize the benefits one would receive if one happened to find oneself in the worst-off position in society. The maximin strategy is, Rawls concedes, a conservative approach to reasoning about choices in circumstances of uncertainty, but he is confident, nonetheless, that in the special circumstances described by the original position it would be the most rational approach to follow. And, not surprisingly, what the maximin strategy recommends in the way of principles of justice are precisely the two principles which Rawls has independently adduced as intuitively acceptable.

Rawls's contractarian argument is offered as a purely hypothetical exercise in illustrating how one can think about rationally choosing principles of justice. Although its value, therefore, is primarily heuristic, Rawls believes that the demonstration it offers helps to clarify our understanding of moral principles. Moral reasoning, according to Rawls, consists of a process of accommodating one's considered moral judgements to a theory which best accounts for the principles underlying those judgements. Calling this a method of "reflective equilibrium", Rawls describes it as a dynamic process in which we both alter our moral judgements in light of the best theory we can devise to explain

them, and adjust the theory in order to uphold the strongest of our considered moral judgements.

His social contract argument, then, can be seen as an element in this mode of moral reasoning. It supplies the theoretical support for the intuitive judgements we have about justice, and is, for that reason, modelled on premises shaped by those judgements. Given this understanding of the process of reflective equilibrium, Rawls asserts that moral principles like those of justice cannot be arrived at through an *a priori* deduction: "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead its justification is a matter of mutual support of many considerations, of everything fitting together into one coherent view."²¹

Rawls's two principles of justice have, of course, been subjected to many criticisms. For instance, Brian Barry maintains that the conservative maximin strategy is not strictly required of the contractors in Rawls's original position, and, therefore, his distributive rule remains unsupported in his theory.²² On the other hand, H.L.A. Hart and Thomas Nagel propose, in different ways, that Rawls's principles of justice are not generated but modelled by his social contract. And significantly, both Hart and Nagel conclude that this contract itself presupposes a distinctively liberal conception of the good that remains unsupported in Rawls's theory.²³ Finally, Michael Sandel, as previously mentioned, suggests that Rawls's contractors represent a problematic depiction of moral

²¹ *Ibid.*, p. 21.

²² See Brian Barry, The Liberal Theory of Justice (Oxford: Clarendon Press, 1973), pp. 87-107.

²³ See Thomas Nagel, "Rawls on Justice," and H.L.A. Hart, "Rawls on Liberty and its Priority," Reading Rawls, Norman Daniels, ed. (Oxford: Basil Blackwell, 1975), pp. 1-53; 230-252.

personality, and are, in any event, not thickly enough constituted to rationally choose his principles of justice.²⁴

As it turns out, Rawls has, in a number of articles written subsequently to A Theory of Justice, come to modify the theoretical import of his conception of justice, partly in response to some of these criticisms.²⁵ In A Theory of Justice, Rawls can be seen to express two different accounts of the moral force underlying his principles of justice. First, to the extent that he portrays individuals in the original position as mutually disinterested rational calculators, his principles of justice appear to be nothing more than instrumental rules of action serving individual interests. Aside from the fact that such instrumental or prudential rules of action are questionable as a foundation for categorical moral duties, Rawls's description of rational self-interest is open to the criticism that it leaves out of account those crucial aspects of our moral personality which normally play a role in determining what we recognize as our moral obligations.

However, there is a second interpretation of Rawls's conception of justice which can be found in A Theory of Justice. It is this second, Kantian, interpretation which Rawls has invoked in different ways in his more recent articles. On the Kantian view, Rawls explains, moral persons are

²⁴ See M. Sandel, Liberalism and the Limits of Justice, *op. cit.*, pp. 155-174.

²⁵ See, for instance, John Rawls, "Kantian Constructivism in Moral Theory," Journal of Philosophy, Vol. 77, no. 9 (1980), pp. 515-72; "Social Unity and Primary Goods," Utilitarianism and Beyond, A.K. Sen and B. Williams, eds. (Cambridge: Cambridge University Press, 1982), pp. 159-85; "The Basic Liberties and Their Priority," The Tanner Lectures on Human Values III, S.M. McMurrin, ed. (Salt Lake City: University of Utah Press, 1982), pp. 3-87; "Justice as Fairness: Political not Metaphysical," Philosophy and Public Affairs, Vol. 14, no. 3 (1985), pp. 223-51; "A Kantian Conception of Equality," Post-Analytic Philosophy, J. Rajchman and C. West, eds. (New York: Columbia University Press, 1985), pp. 201-13; and "The Idea of an Overlapping Consensus," Oxford Journal of Legal Studies, Vol. 7 (1987), pp. 1-25.

characterized by two moral powers and by two corresponding higher-order interests in realizing these powers. The first power is the capacity for an effective sense of justice, that is, the capacity to understand, to apply and to act from (and not merely in accordance with) the principles of justice. The second is the capacity to form, to revise, and rationally to pursue a conception of the good.²⁶

From the Kantian perspective, therefore, the contractors in the original position are not to be understood simply as rational calculators choosing the most efficacious means to achieve their ends, but as free and equal individuals who are capable of displaying their moral freedom in the act of choosing their ends and the principles of justice by which they agree to live.

Seeing the contractors as autonomous moral agents, choosing moral principles that can be made universal, relieves part of Rawls's problem of endowing his principles of justice with a categorical force, but it leaves him open to a new round of charges. By describing the formal conditions of choice in the original position as a matter of maximizing primary goods, Rawls can be subjected to the same criticism which Hegel levelled at Kant. For it could be said that the abstract character of individual choice in the original condition allows any selection of principles to meet the test of universality. Rawls's response is to say that the choice of these principles is constrained by our understanding of what features of an individual's moral personality are relevant to questions of justice. And significantly, Rawls now has come to regard the identity of those relevant features of moral personality as something that is "implicitly affirmed

²⁶ John Rawls, "Kantian Constructivism in Moral Theory," *op. cit.*, p. 525.

in...the public culture of a democratic society."²⁷

In grounding his conception of justice in moral choices reflecting a particular understanding of autonomy made possible by the public culture of a democratic society, Rawls has, in effect, relativized his Kantian interpretation of the foundations of justice. His principles of justice are now explicitly presented as appropriate only to those societies whose public culture supports the idea of autonomy necessary to them. Rawls supports this new position in two partially contradictory ways. On the one hand, he proposes that certain shared beliefs about the freedom and equality of citizens nurtured by the institutional practices of democratic societies are an essential precondition for the two principles of justice he stipulates. On the other hand, he suggests that his principles of justice answer to the distinctly political problem of discovering how to reach a consensus on the rules of social co-operation in the face of public disagreement over what substantive goods society as a whole should endorse and attempt to realize. Thus, at one and the same time, he suggests that there must be a degree of moral unity in a society over the values of freedom and equality expressed in its institutional practices, as well as sufficient moral pluralism to require principles of justice that are neutral among competing conceptions of the good. But one can fairly complain that this merely installs a liberal solution to the problem of justice by assuming what is at issue--that is, whether a society defined by moral pluralism can achieve consensus over principles that give effect to the moral ideals of freedom and equality. And as shall be seen in due course,

²⁷ *Ibid.*, p. 518.

this same complaint can also be made against Dworkin's characterization of liberal justice.

4. Nozick's Theory of Entitlement

Dworkin not only poses the question of a liberal theory of justice in a manner that resembles Rawls's modified Kantian approach, but he also in large measure accepts Rawls's egalitarian convictions regarding the role of individual desert in determining economic distributions. However, Dworkin is more willing than Rawls to explicitly endorse market transactions as a measure of egalitarian distributions, and in this respect, his conception of distributive justice responds to certain concerns about individual choice which occupy an important place in Robert Nozick's "entitlement theory." Perhaps the best known philosophical rival of Rawls, Nozick has presented a theory of justice which rests on the idea that individual rights are the essence of political morality. Thus, in the opening lines of Anarchy, State and Utopia, Nozick boldly asserts that "Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights," he continues, "that they raise the question of what, if anything, the state and its officials may do."²⁸

Such a categorical endorsement of the idea of individual rights, Nozick explains, serves to fortify the Kantian moral precept that persons are to be regarded not as means for others but as ends in themselves. On the face of it, this concern for the moral autonomy of individuals appears to unite Rawls and Nozick, and, indeed, both share the

²⁸ Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), p. ix.

same critical view of utilitarianism as a political ethic which fails to take seriously the distinction between persons. But Nozick is also critical of Rawls's view of autonomy, particularly as it is manifested in his distributive theory of justice. Claiming that his argument against employing desert as a criterion for deciding distributive shares denies to individuals any moral worth for the choices they make, Nozick thinks that Rawls's theoretical account of moral freedom and responsibility is contradictory: "One doubts that the unexalted picture of human beings Rawls's theory presupposes and rests upon can be made to fit together with the view of human dignity it is designed to lead to and embody."²⁹

Nozick's own theory of distributive justice, on the other hand, allegedly rescues moral freedom and responsibility for the individual by making individual choice the grounds for legitimate entitlements. For Nozick, the paradigm for legitimate entitlements is the ownership of property, and he presents what is, for all intents and purposes, a modern Lockean theory of distributive justice based on the right to property. That theory consists of three parts: a principle justifying initial acquisitions, another principle stipulating what constitutes legitimate transfers, and a third principle indicating how unjust distributions are to be rectified.

The core proposition of Nozick's entitlement theory is uncomplicated. Whatever is justly acquired can be legitimately transferred in any way its owner wishes. Because Nozick thinks that a person's entitlement to something is determined solely by the history of its initial acquisition and transfer, he strenuously objects to "patterned" or "end-state"

²⁹ *Ibid.*, p. 214.

distributive theories which specify a formula for the ideal distribution of goods. The only distributive precept that Nozick recognizes is the maxim, "From each as they choose, to each as they are chosen."³⁰

However, if the legitimacy of freely chosen transfers of property is always contingent on the legitimacy of initial acquisition, Nozick still has to explain what justifies an initial acquisition. It is in his principle of justified initial acquisitions that Nozick most closely follows the lead of Locke. He begins by observing that if we wish to treat persons as ends and not as means, we must acknowledge that there is something about the person which is inviolable. The notion of the inviolability of the person is best captured, Nozick thinks, by the idea of self-ownership. In other words, individuals can only be regarded as moral ends if they can be seen to own their own persons, which implies that they are in moral possession of their bodies, talents, ambitions, and labour.

In light of this principle of self-ownership, the general direction of Nozick's deduction should be obvious. The application of a person's powers and capacities to the appropriation or transformation of previously unowned things produces legitimate entitlements to them. However, Nozick recognizes that there is no mysterious moral alchemy through which a unique property right is fixed in a thing by the mere fact that a person applies his or her labour to it. His response, in this situation, is to alter the nature of the question. Rather than asking what it is in the application of a person's labour to an unowned resource that bestows a property right in it, Nozick asks what objections could there be to private appropriation of previously unowned resources? He

³⁰ *Ibid.*, p. 160.

suggests that the most conspicuous objection to private appropriation is that it might potentially worsen the condition of those left without property. This allows him to introduce the "Lockean proviso" by which initial acquisitions can be seen to be legitimate: "A process normally giving rise to a permanent bequeathable property right in a previously owned thing will not do so if the position of others no longer at liberty to use that thing is thereby worsened."³¹

The appending of the Lockean proviso to the right of initial acquisition appears to tie private appropriation strongly to considerations of the welfare of others. But Nozick distances himself from any stringent interpretation of this limitation. Thus, he explains that the proviso only means that a general worsening of material circumstances of propertyless individuals justifies condemning private appropriation. He subsequently offers a number of unexceptional arguments intended to prove that a market economy based on private appropriation increases average utility more than would an alternative economy where resources remained in common. These arguments include the assertion that private ownership secures the efficient and profitable use of resources, encourages experimentation, stimulates risk-taking behaviour, protects future generations because it provides a place for the propensity to save, and supplies protection for individuals by ensuring that the labour market is sufficiently large and dispersed that no one can be discriminated against in matters of employment.

All of these factors taken together, Nozick proposes, should lead one to conclude that present unequal distributions in a free market economy are in the main just because

³¹ *Ibid.*, p. 178.

they are based on morally unassailable entitlements. He doesn't deny that we might entertain moral sentiments calling for the improvement of the lives of those who suffer from inequalities, but such sentiments, he insists, cannot be the grounds for rights to the redistribution of people's legitimately acquired property. As Nozick bluntly states, "The particular rights over things fill the space of rights, leaving no room for general rights to be in a certain material condition."³²

Nozick's argument for the exclusive right to private property is the centrepiece of his entitlement theory. It is, likewise, an important element in his theory of the state. Nozick's explicit political theory involves a state of nature argument designed to show that individuals without government would naturally come to adopt a political system in which the state plays a minimal regulatory role. Such naturally free individuals, Nozick argues, would eventually subscribe to "protective agencies" offering to mediate in disputes over entitlements, and otherwise guard members's entitlements against the claims of non-members. Because everyone has the rational incentive to join the protective agency best capable of defending his or her property, the strongest of these agencies naturally emerges as the *de facto* state with a monopoly of coercive power. But, because the initial enrolment in a protective agency is motivated by an interest in preserving property rights, the state minted in this process invariably will be a minimal state, exercising its coercive powers to administer the rules that make private property and exchange possible.

³² *Ibid.*, p. 238.

Unlike Rawls, Nozick gives little attention to the question of method in moral reasoning. Thus, his entitlement theory and his argument for a minimal state are offered as speculative constructs whose validity rests on the perceived truth of such elementary premises as the Kantian injunction to respect the autonomy of persons, and moral principle of self-ownership. Needless to say, Nozick's essentially hypothetical arguments have gained their fair share of criticism. For instance, G.A. Cohen has little difficulty showing that not only does Nozick's self-ownership principle not imply any particular rights in things, but that his Lockean proviso is calculated to make a defence of capitalism seem morally plausible by deliberately limiting what is to count as moral injury in private appropriation.³³ And in a somewhat different vein, Thomas Scanlon has persuasively argued that Nozick fails to show how the idea of the inviolability of the person can serve to ground any strong set of rights and obligations. According to Scanlon, without attending to the specific context within which such rights are said to exist, and to the consequences which the exercise of these rights have on others, Nozick's theory of entitlements lacks a firm justification.³⁴

The weakness of Nozick's formal arguments for entitlements notwithstanding, his objections to patterned distributive theories of justice have stood as strong reminders that a political theory which cherishes the concept of moral autonomy must indicate the circumstances in which individual choice is to be the determining factor in social

³³ See G.A. Cohen, "Self-Ownership, World-Ownership, and Equality," Justice and Equality Here and Now, Frank S. Lucash, ed. (Ithaca, N.Y.: Cornell University Press, 1986), pp. 108-35.

³⁴ See Thomas Scanlon, "Nozick on Rights, Liberty, and Property," Philosophy and Public Affairs, Vol. 6, no. 1 (Fall, 1976), pp. 3-25.

distributions. The intuitive force behind this idea that individual choice must ultimately resolve distributive questions is ostensibly captured in Nozick's famous Wilt Chamberlain example. In this hypothetical morality tale, Nozick imagines a society governed by a patterned distributive theory like Rawls's difference principle. All individuals possess exactly the amount of resources which the distributive theory recommends. In this society Wilt Chamberlain is in great demand by basketball teams because his skills draw large crowds. Chamberlain signs a contract with one team whereby he is allowed to retain twenty-five cents of every ticket price for himself. This transaction is made transparent to all customers because they deposit the twenty-five cents themselves in a special box for Chamberlain as part of the price of admission. Because it is assumed that everyone starts out with a legitimate amount of resources as dictated by an accepted distributive theory, and because all further transactions are entered into voluntarily, Nozick concludes that there can be no objection to Chamberlain's resulting wealth. In particular, Nozick insists that because all questions of justice have been exhausted by the initial distribution of resources, there can be no grounds for redistributing any of Chamberlain's wealth that ensued from voluntary transfers.³⁵

Nozick's Chamberlain example is designed to illustrate not simply the sovereignty of consumers or contractors in economic decision-making, but the consequences for justice in presupposing that individuals are masters of their own choices. Although Dworkin rejects Nozick's argument for legitimate entitlements, he does accept his moral

³⁵ Or, as Nozick puts it in the interrogative, "By what process could such a transfer among two persons give rise to a legitimate claim of distributive justice on a portion of what was transferred, by a third party who had no claim of justice on any holding of the others *before* the transfer?" Nozick, Anarchy, State, and Utopia, pp. 161-62.

lesson about the role of individual choice in a theory of justice. For Dworkin, this means assembling a theory in which liberty and equality do not pull in opposite directions. In the succeeding chapters we will have occasion to observe how he tries to fulfil this theoretical ambition. But first, it is necessary to see how Dworkin understands the connection between law, politics and morality, for it is in this connection that he claims to discover the grounds for a theory of justice.

Chapter Two

Dworkin's Right Answer Thesis

1 Introduction

In a series of articles which appear in Taking Rights Seriously and A Matter of Principle, Ronald Dworkin has sketched out the elements of a novel and resourceful theory of law meant to embrace distinctively modern convictions about the requirements of justice and other principles which make up liberal political morality. His characterization of liberal political morality is based on an abstract conception of equality, and is elaborated around the critical notion of individual rights as trumps which oblige government to treat its citizens equally and with a due respect for their autonomy. The best way to grasp Dworkin's complex argument about the connections that obtain between law, politics, and morality is to begin with his early criticisms of legal positivism.

In what has often been characterized as a third theory of law¹, Dworkin contends that legal facts cannot be separated from morality in the manner provided by legal positivism. Rather, law has as its constitutive basis a set of moral and political principles which determine its scope and purview. What these principles consist of, however,

¹ John Mackie, for instance, describes Dworkin's jurisprudential doctrine as a third theory of law standing between legal positivism and natural law theory. See J. Mackie, "The Third Theory of Law," Philosophy and Public Affairs, Vol. 7, no. 1 (Fall, 1977), pp. 3-16. However, as shall become apparent when the discussion turns to Law's Empire, Dworkin is not so much interested in proposing an alternative to legal positivism and natural law doctrines as he is in transcending certain conceptual distinctions normally associated with these jurisprudential theories.

cannot be determined independently of a legal culture. Although his theory of law is in this way culturally dependent, in effect a theory about Anglo-American law, Dworkin persists in employing language resonant of moral objectivity.

For instance, in his celebrated "right answer" thesis, Dworkin proposes that in all legal disputes, one of the parties at court has a "right" to a favourable ruling, and the judge is under a duty to arrive at the right answer in his or her judgement. Or again, in his theory of justice, Dworkin maintains that all individuals are in possession of a basic moral right in virtue of which governments are constrained to act or refrain from acting in certain ways. In both these examples, Dworkin refers to moral premises which conclude in categorical injunctions, i.e., a judge's *duty* to arrive at right answers; a government's *duty* to govern in accordance with fundamental moral rights. If one were to accept such injunctions as categorical rather than hypothetical or instrumental rules of actions, a corresponding case would have to be made for the objectively moral character of the initial premises. Dworkin doubts that any conclusive argument can ever establish the "objective" moral character of the initial premises, yet at the same time he resists the sceptical inference that moral arguments must be interminably subjective. Instead, Dworkin tries to show that certain formal characteristics about the nature of moral and legal reasoning can themselves supply a justification for accepting some set of injunctions as having a categorical force *within* a particular political culture.

It is, therefore, a particular understanding of moral objectivity which Dworkin entertains in his theory of law and politics. Dworkin attempts to elaborate and defend his particular notion of objectivity through the successive concepts of "articulate

consistency", "chain practice", and, more recently, "law as integrity".² Essentially, these concepts refer to the idea that moral objectivity itself is theory dependent and can only find purchase within the terms of a specific theory. This implies that a moral theory which does not endorse a correspondence theory of truth can still aspire to objectivity through a coherence theory of truth which demands consistency among principles.

Debates over the epistemological soundness of coherence versus correspondence theories of truth, or, alternatively, debates between representationalist and anti-representationalists, or between realists and anti-realists, have occupied much of twentieth century philosophy.³ A correspondence theory of truth, variations of which can be imputed to such different thinkers as Plato, Locke and Rudolph Carnap, holds that the truth of an assertion is dependent on its accuracy as a representation of reality. In other words, the truth condition of a statement is found in its correspondence with the reality of which it purports to be an account. A coherence theory of truth, versions of which can be attributed to John Dewey and the later Ludwig Wittgenstein, and, more recently, to Thomas Kuhn, Paul Feyerabend, Michel Foucault, and Donald Davidson, holds that, because description and explanation are irremediably rooted in specific cultural experiences and expressed in particular languages, there can be no external vantage point

² "Articulate consistency" is the term Dworkin uses to describe the assembling of principles and their practical derivatives in several of the articles in Taking Rights Seriously. In this first book, Dworkin also employs the generic term, "the constructive approach," to designate a form of reasoning that can yield the sought after conceptual consistency. In A Matter of Principle, this terminology was replaced by the expression "chain practise" where the development of law was compared to the practice of writing. Finally, in Law's Empire, Dworkin uses the term "law as integrity" to convey the idea that the interpretation of law requires a commitment to bring principles together into an intelligible whole.

³ For an introduction to some of these debates, see Richard Rorty, "Solidarity or Objectivity," Objectivity, Relativism, and Truth Philosophical Papers, Vol. I (Cambridge: Cambridge University Press, 1991), pp. 21-34.

by which a correspondence between statements and reality can be discerned. Hence, on this view, the idea of truth is itself a construct signifying the internal coherence which statements or beliefs exhibit.⁴

Although he does not engage in any extensive discussion of the distinction between a correspondence and a coherence theory of truth, Dworkin's general argument about the nature of moral reasoning, and his occasional affirmative references to Donald Davidson⁵, suggest that he supports this latter view of truth in moral argument. Thus, rather than search for the referents or ground of a moral theory, much like Rawls in his recent writings, Dworkin contends that we must look to see how well the theory hangs together. What this means practically, Dworkin thinks, is that it is perfectly legitimate to say that, for a particular political culture with established laws and jurisprudence, there are objectively right answers in law and objectively right principles constituting justice. In the final analysis, such right answers and correct principles derive their validity from a general theory whose function is to explain and reconcile those bedrock principles which ostensibly underlie the legal, moral and political practices of a society.

It is important to realize that Dworkin's theory of law is culturally relative and that his understanding of moral objectivity is theory dependent; otherwise one misses what is central to his jurisprudential project. It is a theory of law developed to describe and justify legal practices of a liberal political culture, and it is in equal measure a theory

⁴ For a contemporary statement of a coherence theory of truth, see Donald Davidson, "A Coherence Theory of Truth and Knowledge," Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson, Ernest LePore, ed. (Oxford: Basil Blackwell, 1986), pp. 307-19.

⁵ See, for example, Law's Empire, p. 458n22.

of law whose claim to moral objectivity is contingent on an antecedent theory of what constitutes liberalism. But how can one arrive at these principles which constitute liberalism as a self-contained coherent theory? Because Dworkin has foreclosed the possibility of starting with self-warranting moral principles, he requires a context for the test of theoretical coherence. For Dworkin, that context is comprised of those legal and political practices which are presumed to be common to liberal societies. In jurisprudence, subscription to the tenets of legal positivism is one such common practice, and it is by applying the test of coherence to positivism that Dworkin seeks to find those principles which could figure in a sound theory of law. Likewise, in his political theory, by accepting that some form of utilitarianism prevails in liberal political decision-making, Dworkin tries to discern those principles which could give credence to individual rights in the face of utilitarian calculations.

What this means is that Dworkin's own theory of liberalism is powerfully influenced by the assumptions of legal positivism and utilitarianism which form the background context for his own arguments. Does this imply that his right answer thesis and his political theory of rights only make sense as rejoinders to positivism or utilitarianism? In a reply to criticisms of his political theory in this vein, Dworkin makes an admission that would seem to support such a contention.

My aim is to develop a theory of rights that is relative to other elements of a political theory....Of course that makes rights relative in only one way. I am anxious to show how rights fit into different packages, so that I want to see, for example, which rights should be accepted as trumps over utility if utility is accepted, as many people think it should be

accepted, as the proper background justification.⁶

Although Dworkin concedes that his own argument for liberal political rights presupposes this contrast with utilitarianism, he maintains that is not necessarily the case that a theory of rights is only plausible in such a theoretical confrontation. Rather, his point is that a theory of rights is particularly apposite to a liberal world where utilitarian considerations prevail because such a theory is able to establish its ethical attraction precisely by teasing out the moral implications of certain fundamental assumptions underlying utilitarianism. But it is also conceivable, Dworkin continues, that one could argue for some set of universal rights that pertain for any political theory, although he proposes no such theoretical enterprise himself. In any event, Dworkin wisely suggests that appeals to rights are surely not the only moral ammunition one can muster in the face of odious political actions, even if such appeals do find a rather appropriate home in a liberal world predicated on a commitment to equality.

Let us for a moment concede Dworkin's formulation of the problem: to find a theory of law and justice whose constitutive moral principles can in some way be demonstrated as objectively appropriate to liberal societies. There is an immediate and obvious question which this theoretical project must confront. How can substantive moral principles be adduced for a liberal society in the face of scepticism about the warrant of all moral principles, or, alternatively, in the face of scepticism about what are generally conceded to be liberal moral principles? Dworkin's strategy in this instance is to turn

⁶ Ronald Dworkin, "A Reply to Hart," *Ronald Dworkin and Contemporary Jurisprudence*, Marshall Cohen, ed. (Totowa, N.J.: Rowman and Allanheld, 1984), pp. 289-90.

scepticism on its head. Rather than use scepticism as an argument to terminate any further moral reasoning, Dworkin places a suitably domesticated scepticism at the centre of his moral argument. Dworkin thus proceeds to assemble a theory of liberalism along the following lines: if one is to be sceptical about final answers in morality, how can one nonetheless proceed to think and act in recognizably moral ways? Dworkin's answer has something of a Kantian ring to it. If one can bring together principles that conform to a test of coherence, then it could be said that these principles do have objective moral force. In his early writings, this test of coherence is made the centrepiece of his right answer thesis. In this chapter, a preliminary inspection will be made of that thesis, and the moral and political argument it presupposes.

2. Right Answers in Law

Dworkin initially established his reputation in legal philosophy by taking to task the positivist view of the law.⁷ Legal positivism first emerged as a distinct doctrine of law in the writings of the English jurist, John Austin. A follower of Jeremy Bentham, Austin was determined to free the analysis of law from speculative questions about justice and right. Accordingly, he undertook to describe the law as a social phenomenon

⁷ It should be noted that Dworkin's argument against legal positivism has undergone changes as he developed his own theory of the law. For instance, Joseph Raz detects three distinct phases in the evolution of Dworkin's legal views, beginning with his critique of H.L.A. Hart in the 1960's, followed by the emergence of his own "hybrid" theory of the law in the 1970's, to be replaced, in the late 1970's, with an interpretative theory in which the notion of coherence becomes a central concept in identifying the law. See Joseph Raz, "Dworkin: A New Link in the Chain," *California Law Review*, Vol. 74, no. 3 (May, 1986), pp. 1103-19. For the sake of simplicity in exposition, what Raz describes as Dworkin's first and second phase will be collapsed into a single theoretical problematic in this chapter, while Dworkin's interpretative turn will be treated separately in chapters eight through ten.

consisting of a set of commands issuing from a determinate sovereign. And he defined the sovereign as the highest authority in a state whose commands are habitually obeyed, and who has the power to punish in the event of non-compliance with those commands. With this definition of law as a social fact, Austin was convinced that he had emancipated the study of law from the controversies surrounding moral enquiry: "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."⁸

Although Austin established the fundamental theoretical outlook of legal positivism, with its strict separation of law and morals, his own description of law as command came to be revised by modern legal positivists like Hans Kelsen and H.L.A. Hart. Kelsen initiated this revaluation of the positivistic description of law by locating the source of law not in the fact of a sovereign's command, but in the *Grundnorm*, or basic norm, of a society.⁹ On Kelsen's view, laws are "ought-propositions" directing public officials on the use of their coercive power. At the same time, laws have an obligatory status because they belong to a legal system containing criteria for recognizing valid legal rules. In turn, the legal system as a whole acquires its prescriptive force from the basic norms of a society which validate its rules for recognizing what counts as law.

While Kelsen effected a shift in the positivistic analysis of the law by locating the source of law's validity in the social phenomenon of obedience rather than command, it

⁸ John Austin, The Province of Jurisprudence Determined (New York: Noonday Press, 1954), p. 184.

⁹ See Hans Kelsen, Pure Theory of Law (Berkeley: University of California Press, 1967).

has been H.L.A. Hart who has provided the most authoritative modern version of legal positivism.¹⁰ According to Hart, law is made up of primary and secondary rules. Primary rules grant rights or impose legal duties while secondary rules confer powers on individuals or institutions. Secondary rules are, in effect, rules about rules, for they stipulate how and by whom primary rules can be made or altered. For instance, the various provisions which regulate how legislatures are to be composed, and by what procedures they can duly enact legislation, are examples of secondary rules.

The distinction between primary and secondary rules allows Hart to classify societies according to the complexity of their legal systems. Thus primitive societies, Hart claims, have only primary rules, which are binding simply because members of the society accept them as binding. But this also means that the laws of primitive societies are indistinguishable from their other social rules, and, for this reason, are not amenable to the kind of analysis which positivism envisages. However, when societies develop secondary rules, the idea of a distinct set of legal rules is born and the foundations of a modern municipal legal system are established.

For Hart, the key to the development of a modern legal system is the existence of a master "rule of recognition" by which the sum of secondary rules, and, by implication, the totality of primary rules, acquire their legal mandate. The master rule of recognition is the most fundamental of secondary rules which stipulates which acts are to be regarded as acts of law. On the issue of the moral warrant of the master rule of

¹⁰ Hart's now classic account of the law is contained in The Concept of the Law (Oxford: Clarendon Press, 1961).

recognition, Hart more or less follows Kelsen's lead, although he insists that his account of a rule of recognition is more empirically-oriented than is Kelsen's notion of a *Grundnorm*. Thus, for Hart, the answer to the question of what rule of recognition obtains in a legal system can only be given by observing how members of that society regularly behave in legal circumstances.

However, as part of his description of the normal functioning of a developed legal system, Hart acknowledges that there are instances where a rule of recognition does not render sufficient guidance in determining whether a specific secondary or primary rules applies. In adjudication, Hart states, such legally ambiguous cases make it incumbent upon judges to exercise discretion and engage in judicial law-making. Significantly, he sees no need to search further for any grounds that would authorize judicial discretion, claiming that such authorization is, in effect, conferred retroactively on a successful judicial decision: "The truth may be that, when courts settle previously unenvisioned questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success."¹¹

In a pair of notable articles, Dworkin takes issue with what he calls Hart's "model of rules" view of the law.¹² In these early articles, his most general objection to Hart's positivistic theory of the law is that it is descriptively inadequate. It is inadequate because Hart's formal rule of recognition which supposedly establishes the criterion for

¹¹ *Ibid.*, p. 149.

¹² See Dworkin, "Model of Rules I," and "Model of Rules II," Taking Rights Seriously, pp. 14-45; 46-80.

identifying the law of a jurisdiction cannot account for principles which are demonstrably at use in adjudication. In particular, the positivist test for law cannot explain why judges from time to time draw on moral and political principles not stipulated by secondary rules in order to decide cases. Dworkin thinks that the fact that moral principles play an explicit role in legal decision-making creates a conceptual embarrassment for legal positivists who persist in maintaining a separation between legal and moral arguments. Thus, Dworkin's brief against positivism here is simply that there is no hard and fast distinction which can be drawn between authoritative legal rules and extra-legal moral rules in judicial deliberation

While he urges the view that law is implicated in morality, Dworkin refuses, however, to take the position that law is equivalent to morality. His conceptual prohibition against a complete identification of law and morality is undertaken for some rather elementary reasons. If law is regarded as equivalent to morality in the sense that the positive laws of a political community are exhaustive of the moral rules for that community, then this would foreclose the possibility of appeals to morality as a basis of criticism for such laws. It would, in other words, collapse normative into positive statements. If, on the other hand, the ascription of law was reserved only for those positive rules which clearly conformed to independently verified moral rules, then a larger part of what a community normally takes for laws would be excluded. And the validity of those accepted as laws on the test of morality would remain contingent upon the belief in some ultimately authoritative moral order. This would have the effect of collapsing positive statements of law into autonomously derived normative statements.

In contrast, Dworkin seems to want to take a middle position which would accept that law is constituted by specific constitutional, legislative, and judicial acts of a political community, with the proviso that these "legal facts" themselves require a justificatory base.

It is this concern for providing a justificatory base for arguments at law which leads Dworkin to reject a second tenet of Hart's positivism - the assumption that judicial discretion must be employed in hard cases. Dworkin thinks Hart errs in his construal of judicial discretion because typically judges frame their decisions, even in hard cases, in terms of an obligation to determine which party is in the right. From this surface structure of the legal language used in courts, Dworkin infers that there is indeed always a right answer to questions of law, and that, even in hard cases, one of the parties has the right to a decision in his or her favour.¹³

It is important to realize that Dworkin's assertion that there are always right answers in law is motivated both by philosophical and political concerns, or, to state it more accurately, by a philosophical concern that is, at bottom, political. On a philosophical level, Dworkin wishes to draw a contrast between the invention and discovery of the law. It is for this reason that he ascribes to Hart the view that judicial discretion involves arbitrarily drawn decisions. By doing so, Dworkin is able to depict

¹³ Dworkin qualifies this idea of a prior right to a favourable judicial ruling when it comes to criminal cases. In civil law, he maintains that invariably one or the other party has the right to a favourable decision, and it is not a right which a judge can arbitrarily assign through some sort of discretionary judgement. The same does not quite hold for criminal cases. In criminal cases, while a defendant can be said to have a right to acquittal, the prosecution does not have any equivalent right to a conviction. In such circumstances, Dworkin allows that a judge might quite properly acquit a guilty defendant for some overriding policy reason. On this point, see Dworkin, Taking Rights Seriously, p. 100.

positivism as a legal doctrine committed to the view that part of the law is the invention of judges acting on their own subjective convictions, which he thinks is tantamount to saying that in some instances legal rights and obligations are created *ex nihilo*.

To counter what is portrayed as a potentially nihilistic account of the law, Dworkin offers his own theory of adjudication which maintains that there are, besides explicit rules and principles of law, implicit principles which, when properly described, fill in the gaps left by explicit law. In this way, judges are never really left without law, even as they have to exercise their judicial talents to discover what that law is.

Dworkin gives symbolic expression to this form of judicial reasoning in his depiction of Hercules, a superhuman philosophical judge who has the capacity to survey the totality of settled law and work out in advance just those principles which can both supply consistency to settled law, and help resolve novel cases.¹⁴ For Hercules to succeed in his task, he will have to be able to furnish not simply a legal, but also a moral and political, theory which together act to explain and justify the recognized rules and principles of settled law. Such a depth theory need not explain and justify all past judicial acts, but must account for the greater part of these activities while at the same time providing the best moral justification for these activities. In order to furnish this moral justification of settled law, Dworkin allows that Hercules will also have to generate a theory of mistakes which would identify those former judicial acts which are now regretted in light of the best available defense of the entire network of existing law.

¹⁴ We are first introduced to Hercules and his alter-ego, the literal, rule-applying judge, Herbert, in the article, "Hard Cases," appearing in Taking Rights Seriously. In this article Dworkin attempts his first comprehensive theory of the law. Hercules and Herbert reappear in Law's Empire as representatives of two different interpretative attitudes.

This procedure of explaining and justifying settled law constitutes what Dworkin calls the "constructive approach" to adjudication, a term he also uses to describe the generation of his moral and political theory. Although presented as a corrective to the conceptual predicament legal positivism arguably encounters in its characterization of hard cases, Dworkin's initial attempt to devise a comprehensive theory of the law has been criticized as failing to move much beyond the analytic conventions of positivism.¹⁵ For instance, Joseph Raz has pointed out that the positivist's understanding of judicial discretion does not entail the idea that judges render their decisions on the basis of whim or caprice. "Courts are never allowed to act arbitrarily," Raz explains, "[for] even when discretion is not limited or guided in any specific direction the courts are still legally bound to act as they think is best according to their beliefs and values."¹⁶ Furthermore, Raz contends that Dworkin himself capitalizes on the positivist rule of recognition when he portrays adjudication as a matter of constructing a justification for settled law. Identifying what constitutes settled law, after all, presupposes that something like the positivist test for law must be part of a judge's arsenal of legal concepts.

Another critic, Philip Soper, claims that legal positivism and Dworkin's theory of the law can be reconciled once it is realized that Dworkin's theory is culturally specific.¹⁷ Because Anglo-American law does contain general normative principles in

¹⁵ For a more detailed account of critical reactions to Dworkin's depiction of legal positivism, see *infra*, ch. 10, pp. 464-71.

¹⁶ Joseph Raz, "Legal Principles and the Limits of Law," Ronald Dworkin and Contemporary Jurisprudence, *op. cit.*, p. 76.

¹⁷ See E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," Ronald Dworkin and Contemporary Jurisprudence, *op. cit.*, pp. 3-27.

its constitutional provisions, as well as in statutes and precedents, the constructive approach to adjudication which Dworkin endorses can be treated by legal positivism as an appropriate expression of judicial discretion for that jurisdiction. In other words, a positivist can maintain that the moral and political arguments to which judges must attend in disposing of cases in British and American law are already identified as relevant by the rules of recognition in those countries.

These particular criticisms are pertinent insofar as they show that Dworkin's account of legal positivism is not only questionable, but, when amended, not that far removed from his own theory of the law. However, they fail to capture what is the philosophically most challenging aspect of Dworkin's theory of law. By asserting that there exists a logical possibility of resolving all legal disputes with reference to an appropriate set of principles, Dworkin could be understood as merely laying out an ideal: law cannot be arbitrary but must be the expression of the labours of reason. But it is not the case that Dworkin simply proclaims such an ideal in the abstract. Instead, he wishes to make the more controversial argument that this is, in the main, a proper description of the workings of the Anglo-American judicial system. Thus, although Dworkin is more than willing to criticize particular decisions in American and British law, he nonetheless contends that the legal systems of these two countries reflect the principled character of law. His argument on this score contains two interrelated theses.

First, Dworkin maintains that in reaching beyond the explicit law to underlying principles, judges are not engaging in discretionary decision-making but are constructing judgements about what the law is. These judgements may well be contentious, but it must

be recognized where the controversy lies. Constructive judgements about the law are delivered as reports of the political morality embedded in the legal practices of a society. Judges are not, therefore, merely instructed to render intelligible the express normative components of existing laws and precedents, but are under obligation to search for a set of foundational principles that inform the law as a whole. However, lest he be accused of reintroducing the idea of judicial capriciousness in the guise of a formal search for a foundational political morality, Dworkin proposes that liberal political societies are actually constituted around moral and political principles. This represents the second part of his thesis about the role of constructive arguments in adjudication. Because liberal political societies are constituted by principles, the controversies that surround judicial decisions in hard cases are really about whether the decision correctly represents the constitutive political morality of the society.

This latter claim has strategic political implications and shows how much Dworkin's philosophical defence of his right answer thesis is motivated by political concerns. For if one accepted his description of legal positivism and its associated thesis of judicial discretion, then one could quite legitimately argue that judicial discretion serves as a vehicle for the *parti pris* of a judge. And it is this kind of argument which has been made in the last few decades by American conservative critics of a number of landmark liberal rulings of the Warren Supreme Court. These conservative critics maintain that such rulings reflected the political prejudices of a liberal court employing highly tendentious interpretations of constitutionally enshrined civil rights, in particular, those rights associated with the due process clause found in the Fifth and Fourteenth

Amendments of the American Constitution. The conservative critics' reaction in these circumstances has been to call for the adoption of a program of judicial restraint where judges would restrict themselves to narrow and literal interpretations of existing law.¹⁸

On Dworkin's view, however, these controversial rulings were not a case of discretionary rulings motivated by *parti pris*. Instead, they were legally appropriate judgements flowing out of the very principles of law found in American constitutional and judicial practices. Dworkin's critique of the positivist version of discretion thus has the political effect of neutralizing the argument of conservative critics of liberal Supreme Court judgements. The conservative judicial agenda is irrelevant, Dworkin maintains, because the personal political beliefs of judges cannot, in themselves, dictate the outcome of properly rendered court judgements. Hence, in his early legal writings at least, Dworkin gives the impression of trying to depoliticize the law by depicting adjudication as a theoretical exercise where appropriately interpreted political and moral principles embedded in existing law are matched to novel situations.

Such a depoliticization of the law can only succeed, however, if it can be shown that there is a constitutive morality embedded in existing law which extends to controversial rulings. Dworkin is thus put in a position where, if he wants to maintain that adjudication is unmoved by politics, then he must somehow valorize existing law in

¹⁸ The political assault on the Warren Supreme Court was most notably promoted by Richard Nixon during his presidential terms, and played a key role in debates over his and subsequent Republican Supreme Court nominations. A standard argument employed by political conservatives in these debates was that the Supreme Court nominees should express a willingness to exercise judicial restraint when interpreting the provisions of the Constitution. Amongst jurisprudential writers, two significant supporters of the judicial restraint or "strict constructionist" model of adjudication are Alexander Bickel, The Supreme Court and the Idea of Progress (New Haven: Yale University Press, 1978), and Robert Bork, Tradition and Morality in Constitutional Law (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1984).

terms that would exactly recommend the liberal rulings assailed by conservative critics. In other words, Dworkin must work out a political and moral theory from assumptions already somehow reflected in American legal practices which could provide a justification for the controversial rulings. Constructing such a theory, Dworkin allows, involves making controversial arguments, and in this sense, judges must rely on their convictions about fundamental moral and political principles. But such convictions can only have genuine force in legal judgements if they are defended by intelligible moral and political arguments, and can be demonstrated to be consistent with the political morality underlying a society's public institutions and practices.

In one of his best known full-length articles specifically devoted to this problem of theory construction, Dworkin spells out the general requirements for producing a moral and political theory that is both prescriptively appropriate and an accurate description of a society's underlying political morality.¹⁹ According to Dworkin, a theory that is both normatively and descriptively satisfactory must meet four conditions: it must state a set of political positions which people actually hold; it must be sufficiently tied to the last clear political settlement of that country; it must state the constitutive principles in sufficient detail so as to allow a conceptual distinction between them and competing political moralities; it must meet the test of theoretical competence, i.e. a theory must exhibit parsimony in the number of explanatory factors it employs while still

¹⁹ See Ronald Dworkin, "Liberalism," Public and Private Morality, Stuart Hampshire, ed. (Cambridge: Cambridge University Press, 1978), pp. 113-143. Reprinted in A Matter of Principle, pp. 181-204.

aspiring to comprehensive explanations.²⁰

Having set out these four conditions of authenticity, completeness, distinctiveness, and general theoretical competence, Dworkin outlines a theory of liberalism which would support the following political principles: a commitment, in the economic sphere, to a reduction of inequalities through welfare measures financed by a system of progressive taxes, and to an interventionist role for government pragmatically geared to supplement private economic decision-making; a commitment to racial equality, including a commitment to positive government measures to overcome systematic discrimination; an opposition to government regulation of public speech or matters of sexual conduct; a general opposition to extending criminal law into matters which are morally controversial; a commitment to procedural constraints in the application of law which would have the effect of strengthening the presumption of innocence.²¹

These are readily identifiable liberal positions, but they are notoriously difficult to reconcile in one comprehensive theory. The difficulty is patent, for the positions contain what appear to be contradictory principles. For instance, the priority of liberty is protected in cases which pertain to private morality, but is denied to private economic decisions in the interests of equality. Or, again, the priority of equality is proclaimed at the same time as unequal treatment is countenanced through affirmative action programs. How is it possible to maintain all these positions at once without contradiction?

Dworkin considers one common solution only to reject it. This is simply to say

²⁰ Dworkin, "Liberalism," *op. cit.*, p. 121.

²¹ *Ibid.*, pp. 121-23.

that the constitutive political morality of liberalism contains both the ideals of liberty and equality, and, when these ideals come into conflict in specific policy issues, compromises are required. Dworkin declares that there is an elementary philosophical reason why this is an unsatisfactory characterization of the constitutive morality of liberalism. The reason is that liberty is not a quantifiable commodity such that one could say that in one political compromise, rather more or less liberty is being preserved than would be the case in an alternative compromise. Because liberty is not measurable in this sense, Dworkin concludes that a political morality which claims to balance considerations of liberty and equality simply cannot perform its stipulated role.

With such a disqualification of any fundamental weighing of liberty, Dworkin turns to examine equality as the most likely candidate to play the part of liberalism's constitutive ideal. And here one discovers Dworkin's principal political argument. Dworkin insists that no real measure of compromise needs to be made between the professed liberal ideals of liberty and equality because, for liberalism properly understood, there is no conflict between liberty and equality in the first place. Rather, at the very heart of liberalism is a core value of equality from which ideas about specific liberties are derived.

It is important to understand exactly what Dworkin tries to establish in his argument about the constitutive morality of liberalism. Previously, it had been pointed out that Dworkin's legal philosophy has very definite political implications insofar as it is meant to undermine conservative critics of the Warren Court. But if Dworkin is to convince these critics that they are wrong and that the controversial Warren Court

decisions were truly in line with the constitutive political morality of the United States, then he must be prepared to engage the conservative critique on a common conceptual terrain. Or to put it in a different way, Dworkin must convince the conservative critics that both supporters and detractors of the Warren Court are arguing on a common ground. It is only if they are arguing on a common ground that it is possible for Dworkin to venture his controversial right answer thesis and expect a fair hearing.

To gain such a common ground Dworkin refers to the idea of a "contested concept" as a way of dealing with the problem of philosophical disagreement.²² The term "contested concept" is meant to indicate that there are concepts whose very abstractness makes possible different interpretations of their substantive content. Thus, when Dworkin proposes that the core ideal of liberalism is the concept of equality, it is an abstract concept to which he refers. In one of the first of his many formulations of this abstract concept, Dworkin describes the liberal ideal of equality as consisting of a first order duty of government to "treat all those in its charge *as equals*, that is, entitled to its equal concern and respect."²³ Dworkin thinks that in this suitably abstract form, the concept of equality invites different conceptions of its content ranging from radical to conservative. The common ground is the abstract concept itself, while the varying conceptions serve as alternative interpretations of the concept. If it is accepted that

²² Dworkin borrows the notion of a "contested concept" from W.B. Gallie, "Essentially Contested Concepts," Proceedings of the Aristotelian Society, Vol 56 (1965), pp. 167-68. The idea of "contested concepts" has now made its way into much of the contemporary literature in the social sciences. For a brief overview of the career of this idea, see A. MacIntyre, "The Essential Contestability of Some Social Concepts," Ethics, Vol. 84 (1973), pp. 1-9; and J. Gray, "On the Contestability of Social and Political Concepts," Political Theory, Vol. 5 (1977), pp. 331-348.

²³ Dworkin, "Liberalism," *op. cit.*, p. 125.

there can in this way be differing conceptions of a concept, then Dworkin is assured that liberal and conservatives are not simply arguing at cross-purposes but are actually submitting differing conceptions of the concept of equality which lies at the heart of the American liberal political culture. But more than this, Dworkin also supposes it possible to demonstrate that one of the conceptions of this concept of equality is a truer or more adequate explanation and justification of contemporary American liberalism. Much of Dworkin's writings on law and politics are an exercise in elaborating and defending just such a conception.

3. Taking Rights Seriously

Before examining Dworkin's conception of liberal equality in any detail, it is first necessary to grasp how he arrives at the proposition that equality is the central concept embedded in American liberal politics. Dworkin's chain of reasoning here can only be reconstructed by considering several of his articles. Nonetheless, his general strategy for demonstrating the central role which equality plays in liberalism is very instructive, for it exemplifies what is involved in the constructive approach which he promotes as the model for public reasoning about morality. Because the constructive approach must begin with an identifiable political context, Dworkin notes that in the American political culture it is plainly recognized that rights play a significant role both in legislative and judicial practices. With this observation in mind, Dworkin poses a hypothetical question: if we are to take rights seriously, as American legal and institutional practices suggest we should, then what kind of political theory can support a strong view of individual rights?

In one of his seminal political articles, "Taking Rights Seriously," Dworkin supplies a provisional answer by engaging in a rudimentary conceptual analysis of the term, "rights". Thus, he argues that were one to maintain any strong sense of rights, it would be necessary to acknowledge that the claim to individual rights must have a point or purpose. That point or purpose would be lost if one were to conceive of a right as some sort of individual entitlement that could be overridden by government whenever an issue of general welfare is indicated. If there is a point to claims of rights, therefore, it must be that they are conceptually distinct from claims of general welfare and must enjoy some form of priority in government deliberations of policy or in judicial rulings.

Of course the point of their priority must itself be established, and in this early essay, Dworkin only indicates the conceptual conditions which provide intelligibility to the suggestion that rights must be taken seriously: "It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence".²⁴ Significantly, this statement makes no argument for rights but merely speaks in the subjunctive mood. Moreover, Dworkin allows that even if the values of individual dignity or equality require that rights must have some kind of priority, this only implies the minimal political thesis that the burden of proof lies with the government when it contemplates overriding a specific civil right.

There is a reason that Dworkin entertains only this minimal thesis rather than

²⁴ Taking Rights Seriously, p. 199.

some categorical injunction to treat rights as absolutely inviolable. The reason is that Dworkin resists identifying any extant set of legal and political rights with some kind of metaphysical absolute right. Dworkin's point of departure instead is just those rights which are sanctioned by the constitutive morality of a political community. After all, it is precisely these rights which become the centre of controversy when courts must rule whether governments are justified in acting in a manner that abridges them.

In saying that the burden of proof is upon government to justify its actions in these cases, Dworkin identifies three general grounds which could support the government in ignoring rights claims. The government might show that a right is not really at issue in the case at hand. Or else it could show that while the specific right is indeed implicated, a competing right holding greater weight in this particular situation justifies the government's action. Finally, a government might try to show that if a particular right was defined in such a way as to cover the case at hand, then the cost to society would be so great as to exonerate the assault on dignity or equality which would be involved in the denial of the right. In other words, the government must always be prepared to scrupulously justify what individuals may challenge as coercive behaviour on its part.

In this essay Dworkin makes those conceptual distinctions which would have to obtain if one were to take rights seriously. But these conceptual distinctions fall short of identifying the character of rights which makes them so special that one would want to take them seriously in the first place. Rights are important, in this minimal characterization, because without them there is always a potential danger that state

decisions taken in the interests of a majority will discriminate against some minorities. But Dworkin has not established in any clear way why majoritarian interests should not prevail other than by appeal to the goods of dignity or equal concern and respect. Without providing independent reasons for accepting these latter goods as primary, Dworkin can only reiterate the conceptual connections between a strong concept of rights and their resistance to overriding claims of general interest.

It is only in a series of subsequent essays, and in particular, in an essay examining Rawls's theory of justice, that Dworkin tries to develop a deontic theory which would match established civil rights to moral rights conceived in a quasi-naturalistic fashion. It is worth examining in some detail Dworkin's revision of Rawls's neo-contractual view of justice, for it is here we find Dworkin's first explicitly philosophical argument for regarding equality as the foundational value of liberalism.

4. Constructing a Theory of Justice

As mentioned in the previous chapter, Rawls's theory of justice admits of two interpretations.²⁵ By far the most common interpretation is to see Rawls's contractors as rationally self-interested individuals choosing those principles of justice which have the potential for maximizing their life prospects. The moral force of this conception of justice, therefore, derives from the notion of instrumental rationality which Rawls's "original condition" models. Dworkin disagrees, however, that Rawls's contract can supply a moral justification for his two principles of justice in this manner. His objection

²⁵ See *supra*, ch. 1, pp. 46-49.

is straightforward. A hypothetical contract cannot supply reasons for accepting its terms as morally obligatory in the same way that agreement to a real contract would. The problem, Dworkin observes, is that Rawls asks that individuals consent to live by principles agreed upon in the hypothetical situation of a contrived ignorance where they might not assent to such principles if fully aware of their own character and interests.

Furthermore, Dworkin notes that even if it is conceded that Rawls's original position is designed to illustrate what is morally relevant in any deliberation about principles of justice, additional reasons must be furnished if we are to accept the moral force of a purely hypothetical contract. For Rawls's contract still begs the question of why the original position is an appropriate vehicle for thinking about principles of justice. Significantly, according to Dworkin, Rawls cannot simply stipulate that his original position, with its "veil of ignorance," establishes the conditions of fair bargaining about the fundamental principles of justice, because such a stipulation about fairness would then presuppose some aspect of the concept of justice it was designed to produce. Therefore, if Rawls's argument is to be made coherent, a deeper theory is required which could justify accepting his social contract as an appropriate vehicle for reasoning about justice.

To get at this deeper theory, Dworkin examines Rawls's technique of reflective equilibrium as a method of moral argument. Rawls, it may be recalled, proposes that moral arguments consist of arriving at an equilibrium between our own sincerely held moral convictions, and some rational set of principles which could support those convictions. Dworkin admits that Rawls's notion of reflective equilibrium is a suitable description of what is involved in moral reasoning about justice. He tries, however, to

draw out what he thinks to be key epistemological and ontological features of this method.

Observing that Rawls's method of reflective equilibrium requires that convictions and principles cohere, Dworkin asks how this notion of coherence is to be understood. He suggests two models of moral theory which might account for the role coherence plays in Rawls's thought. The first he calls the "natural model". On this natural model, Rawls's two principles of justice are taken to be descriptions of an objective moral reality. Such principles are not artificial creations, therefore, but are discovered by a moral faculty possessed by at least some individuals. The exercise of this moral faculty produces specific moral intuitions which are felt to be true. With the assumption that these specific intuitions are correct, though partial, perceptions of an objective moral reality, the goal of moral reasoning is to provide an exhaustive set of abstract principles which would provide a complete account of that moral reality. Dworkin tries to illustrate this understanding of natural moral reasoning through an analogy with natural science where concrete moral intuitions are likened to observational data in need of an explanatory theory.

These intuitions are clues to the existence of more abstract and fundamental moral principles, as physical observations are clues to the existence and nature of fundamental physical laws. Moral reasoning or philosophy is a process of reconstructing the fundamental principles by assembling concrete judgements in the right order, as a natural historian reconstructs the shape of the whole animal from the fragments of its bones that he has found.²⁶

Thus, according to Dworkin, the natural model requires coherence in a moral

²⁶ Taking Rights Seriously, p. 160.

arguments for specific ontological reasons. Because it is assumed that concrete moral intuitions *represent* objective data about the moral world, it is incumbent upon a moral theorist to fit all these data together by fashioning a coherent set of justificatory principles that can explain their interconnections. And, should any concrete moral intuitions stand in relations of contradiction, the natural model of moral reasoning prohibits the rejection of one of the contradictory intuitions in the interests of consistency. Instead, the natural model holds it as an article of faith that some set of principles can reconcile all moral intuitions, even if one's present reasoning capacity has failed to discover such a set of principles.

Dworkin fails to give any specific examples of the natural model of moral reasoning. But, despite his somewhat confusing analogy with the natural sciences, it is clear that he has in mind something like Plato's theory of the forms. After all, Plato employs the analogy of perception to explain how moral reality or the *agathon* can be directly observed by the philosophically attuned mind, even though it can only be imperfectly represented or expressed in the phenomenal world.

If Plato is Dworkin's inspiration for the natural model of moral reasoning, then this model is better described as a correspondence rather than a coherence theory of moral truth.²⁷ Notwithstanding this terminological problem, Dworkin's rationale for introducing the natural model of moral reasoning is relatively clear. It is meant to function as a contrast to his preferred account of moral reasoning which he calls the "constructive model". Like the natural model it too requires "coherence" among

²⁷ See *supra*, pp. 59-60.

principles, but for different reasons. In the constructive model, moral intuitions about justice are not assumed to represent objective moral facts, but rather stand as specifications for principles that a moral reasoner must construct. Again, Dworkin supplies an analogy to illustrate what this model of reasoning involves.

[The model] treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fits a pile of bones he happened to find together. The 'constructive' model does not assume, as the natural model does, that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. It does not assume that the animal it matches to the bone actually exists. It makes the different, and in some ways more complex, assumption that men and women have a responsibility to fit the particular judgements on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.²⁸

What immediately marks out the constructive model as distinct from the natural model is the different role which coherence plays in it. Because the natural model supposes that moral intuitions refer to an objective moral reality, coherence among all such intuitions is presumed to be testimony that the objective moral world to which these intuitions correspond is itself without contradiction. But the practical moral price to pay for this theoretical attitude, Dworkin suggests, is that one must be willing to defer on final decisions about the true character of the moral world to some unspecified future when a fully adequate moral theory might be devised which could reconcile all intuitions.

The constructive model, on the other hand, demands that a reconciliation between moral intuitions and justificatory principles proceed apace because decisions about the

²⁸ Taking Rights Seriously, p. 160.

application of moral principles in the real world cannot await some distant reconciliation. Such a desideratum means that coherence must be achieved in the here and now, even at the price of abandoning or compromising some moral intuitions the better to fit the remaining intuitions with a coherent set of moral principles. The core of the constructive approach, therefore, involves a moral responsibility to always act on a coherent set of principles rather than wait for a transparent vision of the *agathon*.

But why this particular responsibility to act on coherent principles? Surely individuals can and do act on their moral intuitions without bringing these intuitions under a theory that renders them congruous with each other. In his discussion of Rawls's theory of justice, Dworkin appears to concede this point when he asserts that the constructive method is appropriate to *public officials* who must contend with conflicting moral convictions about principles of justice. By singling out public officials as the agents for whom constructive moral reasoning is most suited, he in effect distinguishes political from private morality. Thus, the implication is that in our private moral lives we can act on our moral convictions in a way that is denied to public officials when deliberating on laws that establish common principles of justice or other moral values.

However, while Dworkin sees the constructive method, in the first instance, as a procedure for formulating the principles of political morality, he maintains that the shape of such a political morality depends upon the representative personal moral intuitions which individuals happen to hold. This leads him to draw two very important conclusions about the practical political requirements that underlie any successful application of the constructive approach.

First, because public officials must find a basis for principles of justice in the moral convictions of representative individuals in society, these convictions cannot vary too greatly. Otherwise, no coherent set of principles of justice can be adduced for a society deeply divided over basic moral questions. Thus, as Dworkin describes it, this requirement necessitates a world of limited moral pluralism: 'The constructive model looks at these intuitions from a more public standpoint; it is a model that someone might propose for the governance of a community each of whose members has strong convictions that differ, though not too greatly, from the convictions of others.'²⁹

Secondly, public officials must themselves display a moral neutrality among competing conceptions of the good which might inform different moral intuitions about justice. On this view, public officials employing the constructive approach must treat the sincere moral convictions of individuals in their society as given and proceed to find a *modus vivendi* that can bring together the most profound of these convictions into a scheme of principles which define justice. Therefore, the constructive approach does not require the moral ontology associated with the natural model because it employs a different rationale for enjoining consistency among moral convictions.

That rationale centres on the public role principles of justice must play in the morally pluralistic world described by Dworkin. Because public officials are charged with the task of finding a *modus vivendi* which can unite people's personal moral convictions, the requirement of constructing consistent principles of justice flows from the practical political need for standards of law that can be publicly accessible. As Dworkin explains

²⁹ *Ibid.*, p. 163.

it, the reason for enjoining public consistency in principles of justice is that such a practice acts as a safeguard against political arbitrariness:

[I]t is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they will do and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases.³⁰

Dworkin offers one additional reason which recommends the constructive model as a device for reasoning about justice. The constructive model, he claims, is "well-suited to group considerations of problems of justice, that is, to developing a theory that can be said to be a theory of a community rather than of particular individuals, and this is an enterprise that is important, for example, in adjudication".³¹ To support this contention about the affinity between the constructive approach and a community-based view of justice, Dworkin refers to the capacity of such an approach to reach principles of justice by canvassing the moral convictions of a group as large or small as one might wish. How this makes the constructive approach apposite to a community view of justice, however, is not immediately evident. Rather it would seem that the approach itself requires a very specific view of community. To understand this last point it is necessary to look more closely at what Dworkin emphasizes as the distinctive features of the constructive approach.

Dworkin asserts that it would be *unfair* for public officials to invoke and administer any set of principles defining justice that did not enjoy the property of

³⁰ *Ibid.*, p. 162.

³¹ *Ibid.*, p. 163.

consistency. But why does fairness demand consistency? The tacit answer that suffuses all of Dworkin's early writings on political morality is that the opposite of consistency is not inconsistency but arbitrariness. Why should the opposite of consistency, however, be arbitrariness? Because, according to Dworkin, the application of inconsistent principles of justice undermines the test of public debate about standards of law, for they can ultimately only be defended with reference to unique insights about the rightness of those principles. Lacking pellucid certainty, such claims to unique insight may then simply mask prejudice or self-interest.

Dworkin's apprehension over the possibility that inconsistent public standards of justice might disguise the prejudices or self-interest of those who rule is certainly understandable. What his concern over consistency points to is the principle of the "rule of law" which has occupied a central place in the history of political and jurisprudential theory. On the modern understanding of this principle, it is assumed that in a well-ordered state laws must be both known and applied equally to all citizens. The principle of the rule of law is thus meant to stand in contrast to the political and moral uncertainties occasioned by personal rule.

The principle of the rule of law does provide a powerful presumption in favour of public standards of law. But this does not necessarily imply, as Dworkin concludes, that the principles of justice underlying the law must be consistent or implemented consistently. For as Hegel points out in his analysis of the tragic conflict faced by *Antigone*, the demands of justice can be competitive if two or more genuine moral goods

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are at stake.³² Inconsistency in the application of principles of justice, therefore, might simply reflect the fact that authentic moral conflicts can sometimes admit of more than one right answer.

Dworkin's argument for consistency, therefore, requires a further assumption about the nature of public moral reasoning if it is to be coherent. That further assumption can in fact be inferred from Dworkin's discussion of the need for public officials to display neutrality in the face of competing private moralities when constructing principles of justice. Such an instruction is tantamount to saying that a public conception of justice requires a general agnosticism about what constitutes moral value. The reason for requiring such public agnosticism, to reiterate Dworkin's point, is that unique intuitions about moral goods can appear arbitrary to those who do not share in them.

It is for this reason that Dworkin proposes that intuitions drawn from a person's private moral convictions must be prohibited as foundational arguments for principles of justice. Once this prohibition is made, the only route Dworkin sees available for constructing principles of justice is a consensual theory where the standard of consensus is consistency. But this move is more problematic than Dworkin realizes. For it seems to imply that not only must public officials behave in an agnostic fashion towards moral intuitions, but so too must members of the community for which public principles of justice are constructed. After all, the constructive approach is designed to unite the most profound moral convictions which members of a society hold, and this suggests that one of those convictions must include a willingness to postpone final judgements about moral

³² See Hegel, The Phenomenology of Mind, *op. cit.*, pp. 484-99.

matters in public debate. Thus in the end, his discussion of an appropriate mode of reasoning about political morality leads Dworkin effectively to offer up a portrait of a distinctively liberal understanding of morality. On this liberal view, a community can entertain a wide range of private moralities, but only on condition that they remain private moralities. But such a liberal view can obtain only if citizens of the community believe that there is value in displaying tolerance towards each others' moral convictions.

It is the principle of personal tolerance, therefore, which makes possible the kind of public moral agnosticism required by the constructive approach. But how can the principle of tolerance be assured in a community if citizens subscribe to different private moralities? Here one sees the importance of Dworkin's assertion that the constructive approach is appropriate to a community exhibiting only a limited moral pluralism. For with anything other than a limited moral pluralism, mutual tolerance and a genuinely consensual basis for a public morality would be inconceivable.

However, in making the possibility of mutual tolerance contingent on a particular range of moral dispositions amongst citizens of a community, Dworkin's constructive approach to fashioning public standards of justice begs some serious questions. For example, if citizens have sufficiently similar moral convictions so that they are in general agreement over the value of mutual tolerance, what need is there for a special form of public moral reasoning about principles of justice? For in this instance, public and private morality would, for all intents and purposes, be identical.

Of course one could understand Dworkin to mean that the precondition for effective tolerance is not an identity of basic moral views, but a shared sense that

whatever one's personal moral convictions are, they cannot be made to model a public morality to be enforced on others. But this merely raises the paradox of tolerance discussed in the previous chapter.³³ For if the basis of personal tolerance is an agnosticism about ultimate moral truths, then any normative arguments about the moral value of tolerance is undermined by that very agnosticism. On the other hand, if the basis for tolerance is prudential, in the sense that without it no civic co-operation is possible, then the rules of justice that derive from this principle have only an instrumental rather than a categorical moral value. Moreover, this instrumental view of the basis of justice must find a way of proscribing those private moralities which are indifferent to the advantage of tolerance. Thus, just as Locke's principle of tolerance contains its own precept of intolerance against Catholics, Dworkin's constructive approach to moral reasoning has, by implication, a built-in disinclination to attend to any moral principles other than those which reflect liberal convictions about the importance of tolerance.³⁴

Notwithstanding this particular problem of establishing the connection between the moral value of tolerance and principles of justice, there are other reasons to question whether his constructive approach can furnish an unambiguous public morality for what is manifestly a liberal world of limited moral plurality. To see this further problem, it is necessary to follow Dworkin in his application of the constructive method to the question of justice as outlined by Rawls's contract.

³³ See *supra*, chapter 1, p. 19.

³⁴ For a fuller discussion of this problem of the liberal partiality of Dworkin's moral theory, see *infra*, ch. 2, pp. 160-62, 189-94; ch. 7, pp. 361-74; ch. 10, pp. 483-98; and ch. 11.

5. Rawls's Contract and the Right to Equality

It is the constructive approach, Dworkin maintains, which best captures the moral sense behind Rawls's method of reflective equilibrium. It does so partly because it is a form of practical moral reasoning which elicits principles that can be understood and be made public to everyone. Moreover, it produces principles which are suitably fitted to the moral convictions that people happen to hold, and, therefore, which do not require the dubious moral ontology associated with the natural model.

Even if Dworkin's characterization of the constructive approach is accepted, however, we are still left with the question of how the constructive approach can provide the Rawlsian contractual argument with a moral foundation? Recall Dworkin's statement that Rawls failed to explain the rightness of using the original position as a conceptual vehicle for arguing about principles of justice. In order to demonstrate the efficacy of his constructive approach, Dworkin must show how it supplies the missing premise in Rawls's argument. Dworkin attempts to do so by claiming that the contract cannot be the starting point for an argument about principles of justice but only an ingredient in such an argument: "It must be seen as a kind of halfway point in a larger argument, as itself the product of a deeper political theory that argues for the two principles **through** rather than **from** the contract."³⁵

Dworkin subsequently tries to show what this deeper theory is by distinguishing among three fundamental types of political theory which might be able to supply a warrant for using the device of a contract to argue for principles of justice. These

³⁵ Taking Rights Seriously, p. 169.

different theories are distinguished by the way they relate to one of three elementary moral concepts: goals, rights and duties. There are a variety of possible linkages between goals, rights and duties in a particular political theory. And, in any particular theory, one or the other of these elementary concepts can be taken to be fundamental.

From these elementary propositions Dworkin derives a classification of basic theories according to which of the three concepts is considered fundamental. Thus, a *goal-based* theory takes some goal to be fundamental within the theory; a *rights-based* theory takes some right as basic; and a *duty-based* theory takes some duty to be primary. For instance, utilitarianism can be regarded as an example of a goal-based theory, Kant's categorical imperative a representative of a duty-based theory, and Thomas Paine's theory of revolution a model of a rights-based theory.

Of these three basic types of political theories, the rights-based and duty-based theories install the individual at the centre of the theory. While goal-based theories might place an emphasis on individuals, it is only in a contingent fashion. For example, individuals are important to utilitarianism because they are the ones who experience utilities. But their theoretical function ultimately is to provide a measure for determining the degree to which the independent goal of utility maximization has been achieved. A duty-based theory, on the other hand, concentrates on the individual because it is interested in the moral quality of his or her acts, regardless of their consequences. A rights-based theory is likewise concerned with the individual, although for different reasons. A rights-based political theory is centred on the individual because it promotes the value of independence and individual choice.

While duty-based and rights-based political theories have different reasons for attending to the individual and his or her acts, they share, however, a common characteristic. Both furnish political prescriptions which make no appeal to individual self-interest. This is rather straightforward in a duty-based theory in which individuals are simply commanded to follow a code of duty. In a rights-based theory, on the other hand, questions of self-interest are deemed irrelevant because if a genuine right is asserted, the theory demands compliance regardless of personal costs.

Dworkin introduces these various distinctions among goal-, duty-, and rights-based theories in order to clarify the moral character of Rawls's contractarian argument. Quite simply, he asks which of these three types of political theory explains the propriety of using a contractarian device to argue for principles of justice. His reply is that it can only be a rights-based theory. In what for him is a characteristic style of argument, Dworkin tries to demonstrate this proposition through a theoretical process of elimination.

In this process of elimination, Dworkin isolates what he thinks is an essential feature of the contract situation which is in need of moral justification. The contract can only be a contract, he notes, if everyone agrees to it. The converse of this simple observation is that everyone potentially has a veto over the establishment of the contract. But why should individuals have such a pre-emptive veto? Neither a goal-based nor a duty-based theory, Dworkin contends, can adequately explain this provision of a veto.

In a goal-based theory, some individual or collective goal is deemed fundamental in that theory. One may, of course, employ a contractarian device to demonstrate how

individuals would choose such a goal under certain bargaining circumstances. But such a demonstration is supererogatory because the goal has already been established by the theory, and the contract adds nothing to the final result. This would also mean that the hypothetical veto an individual would possess in such a contracting situation would not be of any consequence because it could only be employed to secure that goal which had previously been identified as appropriate. The same is true, Dworkin maintains, for duty-based theories. If a theory holds that some duty is fundamental, a contract, whose original conditions enjoin the parties to discover precisely that duty, would be redundant. But the same does not hold true, Dworkin thinks, for a rights-based theory. In a rights-based theory, it would make sense for there to be a veto which individuals could employ when bargaining over the terms of a contract. In such circumstances, the veto is an expression of some fundamental right which all contractors have an interest in protecting. Thus, a rights-based theory both explains the propriety of the veto, and allows one to distinguish between the fundamental right which this veto itself represents, and the subsequent principles of justice which are chosen through its exercise in contractual bargaining.

Dworkin concludes, therefore, that Rawls's contractarian theory of justice must presuppose a deeper theory predicated on rights. But this still tells us nothing about the character of such rights. To show what fundamental right figures in Rawls's theory of justice, Dworkin turns his attention to the formal characteristics of his contractual argument. Rawls's contract, it will be remembered, was generated under special conditions of a veil of ignorance which powerfully constrained the range of choices

among contracting individuals. Because individuals are hypothetically ignorant of their own personal interests, they are compelled to try to arrive at an ordering of principles of justice that would not be prejudicial to any of the actual interests they might hold. This, at least, is how the original position poses the question to the contracting parties. And the question predisposes an individual to seek some set of abstract interests which could hold true no matter where his or her actual interests lie.

However, Dworkin thinks that there is still a more fundamental question to be asked of the contract itself. Why must the original position be accepted as fair starting point for bargaining over principles of justice? Or to put it in the language of individual interest, what abstract interest in justice must individuals have that would possibly justify them accepting the way that the specific question of justice is posed in the original position? The answer to the prior question of an abstract interest in justice, Dworkin suggests, will yield the basic right of the deep theory supporting Rawls's contract.

Dworkin examines two possible candidates, the right to liberty and the right to equality, that might embody the most basic individual interest to be secured in a scheme of justice. The reason for selecting liberty or equality as basic interests informing a scheme of justice is that they represent the two most familiar and fundamental values of liberal political morality. Thus, Dworkin assumes that whichever of these two basic interests best explains why Rawls's contract is an appropriate moral device also serves to define the fundamental moral character of liberalism.

Having established the stakes in this theoretical contest, Dworkin undertakes to explain why the right to liberty cannot function as the most basic interest which justifies

using Rawls's original position as an argument for principles of justice. If a right to liberty is taken to mean an absence of constraint, then it is true that all individuals in the original position might have a general interest in liberty because general liberty will likely improve their chances at achieving any of their particular goals. At the same time, general liberty could impede at least some one's goals, and this fact, Dworkin thinks, provides a strong reason for doubting that liberty can be the most basic right underlying Rawls's contract. Because one does not know, under the veil of ignorance, whether one's actual interests are of a kind which might be frustrated by the free acts of others, proposing as fundamental a moral theory sanctioning a right to general liberty is a risky affair.

This observation leads Dworkin to conclude that there must be a more basic interest governing which particular liberties are appropriate, regardless of one's actual interests. This more basic interest, Dworkin suggests, must be an interest in equality. And, indeed, the condition of equality is what characterizes the individuals in the original position, for all are equally ignorant of their actual interests. This type of equality is essential to the original position, because if any one individual had knowledge of his or her actual interests, he or she could secure a position of advantage by bargaining for particular principles of justice designed to advance those interests. In order for the contract to be fair, therefore, one must presuppose that it is modelled around a fundamental right to equality.

However, this right to equality is not, Dworkin advises, an egalitarian right governing the distribution of all resources. Rather, it is a moral right of a distinct variety

enjoining an equal concern and respect for all individuals in the design and administration of institutions that govern them. According to Dworkin, it is on the basis of this fundamental right to equality that Rawls uses a contract to argue for his two principles of justice. At the same time, Dworkin concedes that a number of other principles could also be advanced as more satisfactory realizations of this abstract right to equality, e.g., arguments from meritocracy, strict equality of condition, or average utility. But the case still remains that if such alternative principles are to prove more adequate than Rawls's own principles, it is because they conform to the right to equality as adumbrated by Rawls's original position.

Does Dworkin present a sound argument for concluding that a rights-based theory centring on an abstract right to equality must necessarily underpin Rawls's contractarian theory of justice? On the face of it, it would seem not. To understand why, let us look more closely at the fundamental right which Dworkin says the contract represents. Individuals, Dworkin claims, have a right to equal concern and respect in the design and administration of the political institutions that govern them. But equal concern and respect from whom? From those designing and administering the political institutions. In the Rawlsian contract, of course, it is the individual contractors who are designing, if not administering, the political institutions. How can an individual contractor show concern and respect for his or her fellow contractors in designing these institutions? The obvious answer is by considering their interests equally when deciding upon the basic institutions of justice.

However, an individual contractor cannot possibly know any of these interests,

but can only suppose that each fellow contractor has some specific interests. Indeed, the original position is designed so that all contractors must assume that they or any of their fellows can occupy any of the available social positions, and, therefore, possess any of the representative social interests in their community. In these circumstances of radical uncertainty, a contractor must be prepared to select institutions which would not prejudice anyone's interests because those interests might prove to be his or hers. Hence, in the original position described by Rawls, it may be true that a contractor must show everybody equal concern and respect in designing principles of justice, but this is so only in a derivative sense. A contractor's principal interest is in safeguarding his or her own interests, and this has only a contingent bearing on everyone else's interests.

The right to equality, therefore, cannot be directly inferred from the formal bargaining characteristics of Rawls's contract. But what about Dworkin's argument that general liberty cannot be regarded as a first principle of justice because it might prove to be prejudicial to at least some one's interests? It may well be true that some individuals will be harmed by a principle of general liberty, but this fact alone does not provide sufficient grounds for supposing that equality must take priority over liberty. For to assert such a priority would mean that the moral concerns of the contractors are not assessed equally, because it is presumed that the interests of those who might be injured by general liberty must be given greater weight than the interests of those advantaged by liberty.

This leaves Dworkin with a dilemma. To affirm the priority of equality means denying the interests of those who value general liberty, and this means countenancing

the unequal treatment of individuals. This dilemma simply underscores the fact that, traditionally, liberalism has been understood to embrace the conflicting values of equality and liberty. Rawls at least recognizes this conflict. Thus, his contract is conceived to show that justice consists of a conjunction of the values of both liberty and equality. And, significantly, Rawls describes this conjunction through a set of priority rules which clearly express the independent moral appeal of these values. Therefore, Dworkin's attempt to deduce a more fundamental political principle from the design of Rawls's contract fails, in the end, to adequately account for his dual allegiance to the principles of individual choice and moral equality.³⁶

Dworkin more or less confirms this conclusion when, in a subsequent exchange with Jan Narveson over the philosophical warrant for assuming that equality is the fundamental value of liberalism, he ignores his conceptual analysis of Rawls's contract.³⁷ Instead, Dworkin admits that the prescriptive principle of equality cannot be defended in any direct way. He tries, nonetheless, to justify employing equality as a regulative concept in his moral and political theory by offering what amounts to a disjunctive syllogism. Thus, he suggests that what gives coherence to a moral claim about the priority of equality is a more fundamental premise still. This more fundamental premise consists of an assertion that it is important what happens in people's lives.

³⁶ As a matter of fact, Rawls has explicitly repudiated Dworkin's characterization of his theory as a rights-based theory predicated on an abstract concept of equality. See Rawls, "Justice as Fairness: Political not Metaphysical," *op. cit.*, p. 236n19.

³⁷ See Ronald Dworkin, "In Defense of Equality: Comment on Narveson," Social Philosophy and Politics, Vol. 1, Issue 1 (Autumn, 1983), pp. 31-35. It must be noted, however, that Dworkin reexamines the moral force of Rawls's contract when he explicitly addresses the question of the moral foundations of his own conception of liberalism. On this reevaluation of Rawls's contract, see *infra*, ch. 11, pp. 520-22.

Dworkin then asks in what way this latter premise can be denied as an element of any attractive moral theory. Arguing that it is probably impossible to repudiate such a fundamental moral premise, Dworkin concludes that this conditional fact furnishes support for his contention that an abstract concept of equality lies at the heart of liberal political morality.

While this form of syllogistic reasoning in which Dworkin engages is common as an eristic device, it hardly establishes any conclusive proof for entertaining a particular view of the moral character of liberalism. Because this argument derives its rhetorical force from a wager that the moral truth of some ostensible fundamental value cannot be denied, Dworkin in effect shifts the burden of establishing the criteria for an attractive moral theory to his critics. This strategy of shifting the burden of proof reappears throughout Dworkin's moral and political writings. It invariably signifies those occasions where, unable to extricate himself from compelling criticisms, Dworkin tries to turn the tables on his critics and demand from them a better theory than the one he offers. In trying to deflect criticism in this fashion, however, Dworkin merely reinforces suspicions concerning the problematic character of his own theory.

The principal problem noted thus far is that he is unable to ground his assertion that liberalism is constituted around a commitment to an abstract principle of equality. Dworkin does return to this primary theoretical issue in his most recent and elaborate analysis of the nature of morality and ethics. Discussion of his most current argument on the moral foundations of equality will be deferred to the last chapter, however, for its sense and cogency depend on a number of specific ideas which emerge when Dworkin

tries to show how the abstract concept of equality applies to familiar questions of liberal justice. These more specific ideas comprise what Dworkin calls conceptions of the concept. Thus, in his various articles on equality in distribution, equality and liberty in affirmative action, and in his anti-utilitarian arguments for freedom of speech, freedom of moral conduct, and liberal due process in criminal justice, Dworkin hopes to supply a determinate content to the concept of equality. It is to these conceptions that we must now turn in the following chapters to complete this account of Dworkin's method of moral reasoning.

Chapter Three

Dworkin on Rights and Utilities

1. Introduction

In the preceding chapter it was shown that Dworkin's jurisprudential project involves a particular method of reasoning about the political morality presumed to constitute a society. Employing this constructive method, Dworkin surmises that the constitutive political morality of Anglo-American liberal societies is centred on an abstract first order principle entailing a commitment to equality. This abstract egalitarian principle yields a commonplace though still abstract injunction that a government must treat all its citizens as equals. This latter injunction Dworkin calls a "concept of equality," for which he concedes there may be differing conceptions.

It was argued in the previous chapter that Dworkin's early efforts to formally justify the view that an abstract "concept of equality" characterizes the moral essence of liberalism were inconclusive. However, when he tries to derive explicit prescriptive implications from the abstract concept of equality, Dworkin does not begin with the assumption that equality is the defining feature of liberalism. Instead, he attempts to make the more complex argument that a concern for equality can be inferred from certain legal and political practices common to liberal societies. By using this inferred premise as a provisional hypothesis, Dworkin tries to show that a certain concrete conception of equality represents the most attractive moral ideal which these practices ostensibly embody, or, alternatively, which they have the potential to realize.

Such a concrete conception cannot, however, simply be deduced from the provisional hypothesis about the constitutive role equality plays in liberalism. Rather, it must be drawn out and defended by arguments whose soundness, in the final analysis, can only be determined through comparison with other arguments supporting alternative conceptions of the abstract concept of equality. Dworkin thus invites us to regard the activity of political and moral theory as an ongoing colloquy organized around a theme accepted as relevant, even if only provisionally so, by its participants.

As a participant in a distinctively liberal colloquy, Dworkin has provided a sophisticated and powerful elaboration of his own conception of equality in a series of essays written on contemporary moral and political controversies surrounding the identification and application of individual rights.¹ More recently, Dworkin has attempted to present a sustained theoretical account of this conception of equality as it applies to questions of distributive justice.²

What is common to all of these essays is Dworkin's contention that liberty and equality are not competing values in liberalism, at least not at the level of first-order principles. This is not, however, an easy theoretical position to maintain, for the conventional view is that equality and liberty are contradictory values whose

¹ These essays include: "Reverse Discrimination," and "What Rights Do We Have?" in Taking Rights Seriously, pp. 223-39, 266-78; "Bakke's Case: Are Quotas Unfair?", "What Did Bakke Really Decide?", "How To Read the Civil Rights Act," and "Do We Have A Right To Pornography?" in A Matter of Principle, pp. 293-303, 304-15, 316-31, 335-72.

² See Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare," Philosophy and Public Affairs, Vol. 10, No. 3 (Summer, 1981), pp. 185-246; "What is Equality? Part 2: Equality of Resources," Philosophy and Public Affairs, Vol. 10, No. 4 (Fall, 1981), pp. 283-345; "What is Equality? Part 3: The Place of Liberty," Iowa Law Review Vol. 73, No. 1 (October, 1987), pp. 1-54; "What is Equality? Part 4: Political Equality," University of San Francisco Law Review, Vol. 22, No. 1, (Fall, 1987), pp. 1-30. See also, "In Defense of Equality: Comment on Narveson," Social Philosophy and Politics, *op. cit.*

reconciliation in theory and practice requires compromises. Dworkin's reply is that no fundamental theoretical compromise between these values is required because equality is the sovereign moral principle of liberalism from which specific liberties derive their normative support.

Dworkin's assertion about the theoretical compatibility between an abstract concept of equality and concrete liberties could be interpreted as stating only a trivial truth. This would be the case, for example, if the abstract concept of equality was represented in such a way that all provisions for liberty by definition satisfied the egalitarian injunction to treat all citizens equally. A formal theory of justice which emphasizes the universality of rules is an illustration of just such a trivial rendering of the egalitarian principle. Thus, granting to every individual an express right to own and freely dispose of property amounts to a formal reconciliation of liberty and equality because the rule applies to all in equal measure. Yet, this hardly qualifies as a genuine reconciliation of equality and liberty because not every person is in a position to enjoy the right to own and freely dispose of property.

Dworkin is certainly aware that such a formal description of equality trivializes its normative force, and he gives every appearance of trying to resist such an easy stipulative device in order to secure a link between it and specific liberties. But, in opposing a purely definitional reconciliation of equality and liberty, Dworkin appears to encounter, in his prescriptive political arguments, the very contradictions between these values which he denies in theory. For example, Dworkin argues that reverse discrimination in affirmative action programs is morally and legally justified while

discrimination in segregation laws is not. Or, again, he maintains that laws prohibiting pornography are morally and legally illicit, while the state regulation of business to secure the fundamental interests of employees is acceptable. On the face of it, Dworkin seems caught in those elementary and familiar contradictions of left liberalism where economic liberty is sacrificed to equality, while moral liberty is fortified even at the expense of equality, or where racial equality is affirmed, even as racial categories in admissions policies or job placements are condoned.

Understandably, there are many who think that Dworkin's several political arguments are simply incongruous. For instance, it seems that exclusions based on affirmative action programs for blacks are essentially similar to those based on segregation because in both cases racial classifications are employed in the assignment of opportunities and rights. Or again, a parallel is suggested in the liberties demanded by pornographers and their customers, and the liberties asserted by owners of property. By applying what appear to be different principles of justice to these ostensibly symmetrical moral circumstances, Dworkin lays himself open to the charge of inconsistency.

Of course, there is one obvious avenue open for Dworkin if he wishes to escape such a charge, and that is to propose a theory of justice which would rank different liberties in their order of importance to human flourishing. With such a theory at hand, Dworkin could then defend affirmative action, anti-discrimination rights, the right to pornography, and the legal and moral capacity of the state to regulate business, according to which liberties are at stake and how important they are to human flourishing.

Dworkin refrains from following this approach, however, because it would require both a supposition about what constitutes the human good, and a theoretical measurement for estimating the contribution various liberties make to that good. For reasons noted in the previous chapter, Dworkin is persuaded that such presuppositions do not belong in a properly conceived liberal theory. Thus, following upon the deontological precept that the right must be considered separately from, and antecedently to, the good, Dworkin proposes a different solution to the problem of distinguishing which liberties are conformable to the abstract egalitarian principle. This different solution amounts to a procedural mechanism which can sort out acceptable from unacceptable exclusions of liberties while remaining committed to the fundamental moral proposition that governments must treat their citizens as equals.

To understand Dworkin's attempt to work out a procedural theory whereby certain liberties can be distinguished and shown to be implicit in a properly devised conception of equality, it is necessary first to follow the several distinctions he draws between policies and principles, between utilitarian and ideal arguments of policy, between abstract and concrete rights, and finally, between personal and external preferences. This chapter, therefore, will detail the manner in which Dworkin first developed these four sets of distinctions to generate a theory of rights that is morally compatible with the abstract egalitarian principle.

2. Equal Treatment and Individual Rights

In the previous chapter it was noted that Dworkin presents his theory of rights as an element of a larger theoretical "package" whose explanatory and normative power depends upon the internal coherence which all elements display. Dworkin insists, therefore, that any justification for individual rights is contingent on the other conceptual ingredients of the larger theory. More specifically, he contends that if it is accepted that some form of utilitarianism should prevail as the rationale for political decision-making in liberal democratic societies, then the moral status of rights must be established against this political background. His theoretical argument for rights is thus cast in the subjunctive mood, and is initially developed in a highly abstract fashion.

Dworkin's first step in constructing a theory of rights in this abstract and qualified manner is to refine an old juridical distinction between arguments of policy and arguments of principle. Dworkin defines arguments of principle as those which justify a political decision on the grounds that it secures some individual or group right. Arguments of policy, on the other hand, justify a political decision on the grounds that it advances or protects some collective goal of the society as a whole.³ This contrast, Dworkin suggests, allows one to distinguish the role of the courts from that of legislatures. Thus, he asserts that while legislatures can make decisions on the basis of either arguments of principle or policy, courts are limited to making decisions on the basis of arguments of principle.

According to Dworkin, this distinction helps supply an answer to the familiar

³ Taking Rights Seriously, p. 82.

democratic demand that popularly elected legislatures should make laws while appointed courts should only apply the law. Such a strict separation of jurisdictional duties is usually argued for on two grounds. First, an unelected court is not directly accountable to the people, and, therefore, must refrain from making law. Secondly, if a court does effectively make new law in its rulings, it would have the practical consequence of retroactively conferring duties on the losing party in litigation. In the interests of fairness, therefore, courts should always play a subsidiary role to legislatures.

Dworkin agrees that determining collective goals is properly the business of legislatures where the process of political pluralism ensures that some form of social consensus will prevail. But he is not persuaded that "subsidiary role" is the proper characterization of a court's function in a democratic society. Instead, he observes that restricting courts to arguments of principle goes some way to meeting the democratic objections against what could be deemed an activist court. By restricting themselves to arguments of principle, courts do not substitute their judgement about collective goals for that of legislatures.

However, because arguments of principle deal with rights, securing social consensus, which is an appropriate concern for legislatures, is not a pressing issue for courts. Indeed, with questions of principles it is arguable that an appointed court, insulated from the demands of political majorities, is better placed to ascertain and protect rights of individuals. Thus, restricting courts to arguments of principle does not make them subsidiary to legislatures. On the contrary, their rulings, if sufficiently bold, can be just as consequential for society as the decisions of legislatures.

As for the objection that courts which are too bold in their rulings violate the norms of fairness by conferring retroactive duties on individuals, Dworkin thinks this misconstrues the nature of judicial decisions based on principles. For a judicial discovery of a right, he insists, rests on the assumption that the right existed before the litigation proceeded, even if that right had not hitherto been clearly articulated. A court ruling on such a previously unarticulated right might indeed be controversial, but not necessarily less so than if a legislature had created a novel statutory right.

However, Dworkin does concede that there is an obvious difference between controversial judicial rulings and controversial legislative decisions. If a legislature creates a new statutory right, individuals would then be on explicit notice of their legal obligations. When a court determines the right in the course of deciding a hard case, on the other hand, a defendant might fairly complain of ignorance about legal duties that are nowhere made explicit. Faced with this manifest problem, Dworkin is content to make the passive observation that in hard cases it is inevitable that either the plaintiff or the defendant will be surprised to some extent depending on the ruling, and, therefore, that surprise is no real argument against a court trying to determine what the right is.⁴

Although this remark about the inevitability of surprise in judicial findings in hard cases is unlikely to assuage critics of judicial activism, the distinction which Dworkin tries to draw between arguments of principle and arguments of policy serves a crucial role in his general theory of rights. Thus, in his view, in order to determine which concrete liberties individuals can claim as rights, it is imperative to establish whether the

⁴ See *ibid.*, pp. 85-6.

liberties can be defended by arguments of principle. Consequently, in the several political controversies he canvasses, Dworkin thinks it can be demonstrated that the apparent contradictions in the liberal positions he favours are really illustrations of legitimate differences between those liberties which impinge on matters of principle and those which are merely policy concerns. In order to understand how such a demonstration is possible, however, it is first necessary to examine three other conceptual distinctions which contribute to Dworkin's overall analytic scheme.

Dworkin's contrast between policies and principles allows him to accentuate the unique role of courts in securing individual rights. But it also enables him to illustrate the different kinds of decisions which legislatures ordinarily make. Legislatures, it was previously noted, can make decisions based either on arguments of principle or arguments of policy. If they are decisions based on principle, then they establish rights. And these rights are circumscribed by the same moral criteria to which courts must appeal in their rulings. If they are decisions based on arguments of policy, on the other hand, these moral criteria do not apply because policy decisions refer to collective goals not individual rights.

Policy decisions, however, can themselves be distinguished according to the kind of goal promoted. Utilitarian arguments of policy are those which promote the goal of maximizing utilities or preference satisfactions among citizens. Ideal arguments of policy are different because they are not concerned with utilities or preferences, but have the different goal of moving the community closer to an ideal state of affairs. An ideal policy, for instance, might promote the goal of a community possessing high culture, not

on the grounds that high culture will improve the overall level of utilities or preference satisfactions, but because it serves the ideal of intellectual and aesthetic edification.

Although ideal and utilitarian arguments of policy are different from arguments of principle because they refer to collective goals, if they should conflict with arguments of principle, the latter must prevail. The manner in which arguments of principle constrain policy arguments varies, however, according to the ideal or utilitarian complexion of the policy. To follow Dworkin's intricate argument about the limiting power which principles exercise over policy arguments, we must first attend to his basic distinction between abstract and concrete rights.⁵

Arguments of principle invoke rights. And rights act as trumps in those cases where policy goals might be prejudicial to an individual who bears the right. But how are rights to be determined? Dworkin's answer is not straightforward. Rather, he begins by converting the abstract egalitarian principle into a fundamental political right: "Citizens governed by the liberal conception of equality each have a right to equal concern and respect."⁶ This is an abstract right, however, which has no legal purchase until concrete rights are derived from it. Although this abstract right has no specific legal implications, Dworkin nonetheless thinks that it exercises a crucial moral function in liberal theory. As he describes it, the right to equal concern and respect is

a right so fundamental that it is not captured by the general characterization of rights as trumps over collective goals, except as a limiting case, because it is the source both of

⁵ The following discussion is drawn from one of Dworkin's most important articles on rights, "What Rights Do We Have?" Taking Rights Seriously, pp. 266-78.

⁶ *Ibid.*, p. 273.

the general authority of collective goals and of the special limitations on their authority that justify more particular rights⁷

The abstract right to equal concern and respect both authorizes the pursuit of policies in the interest of collective goals, and serves to limit that pursuit. Presently, we will see how Dworkin understands the first part of this dual role which the abstract right of equality plays. But it is the second, limiting function that needs be addressed first. What exactly does the abstract right confine when it limits the pursuit of collective goals? It is obvious that at this level of abstraction it cannot limit collective goals in the name of any concrete rights for these have yet to be derived. Dworkin's answer, paradoxically, is that the abstract right restricts the moral capacity of the state to constrain liberty: "A government which respects the liberal conception of equality may properly constrain liberty only on certain very limited types of justification."⁸

Why this appears to be a surprising answer is that Dworkin is insistent that "there is no general right to liberty at all."⁹ It seems incongruous to maintain that liberalism does not encompass a general right to liberty, and, at the same time, declare that the most fundamental right of citizens acts to safeguard their liberties against unwarranted government restrictions. However, what has the air of a paradox diminishes, although it never completely disappears, once it is realized that Dworkin does not stray too far from a conventional understanding of liberalism.

⁷ *Ibid.*, p. 368.

⁸ *Ibid.*, p. 274.

⁹ *Ibid.*, p. 269.

Customarily, liberal thinkers have tried to draw a line between the private and the public realm. On this view, the public realm, framed by the state's coercive power, consists of laws which circumscribe an individuals's liberties. In the private realm, on the other hand, these liberties are presumed to be limited only by prevailing customs, mores, and morals. As pointed out in the previous chapter, the Lockean tradition of liberalism insists not only on a sharp separation between the private and public realms, but also upon a strict confinement of the coercive power of the state. For Lockean liberals, therefore, the greatest threat to individual liberty comes not from power relations that might exist in the private realm, but from the state itself.

In stating that the central normative preoccupation of liberal political morality consists of determining when the state is justified in restricting liberties, Dworkin appears to reaffirm this historic liberal concern for marking and delimiting the public realm. Thus, even as he harbours reservations about imputing a fundamental theoretical value to liberty, Dworkin remains committed to the core liberal conviction that individual liberty constitutes the regulative ideal by which state actions are judged.

But how can he regard individual liberty as a regulative ideal without making it rather than equality the fundamental premise of his political theory? Dworkin provides an answer, though typically, this answer begins with a proposition stated in the subjunctive.

If we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that

this particular constraint defeats.¹⁰

Basic liberties derive their value from some other moral property which they secure. But what is this more fundamental moral property to which everyone has a right? Or, as Dworkin asks, what injury or insult do individuals suffer when they are denied their basic liberties? His eventual reply is that the moral indignity suffered by individuals refused their basic liberties is one of disrespect. In particular, when their liberties are denied or restricted, individuals are no longer treated as "human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived."¹¹

With this statement Dworkin closes his theoretical circle. If basic liberties are important because their political protection ensures that individuals will be treated with the esteem due to autonomous agents, then this means that the right to specific liberties flows from the more abstract right to equal concern and respect. The values of equality and liberty are not at odds, therefore, because the former furnishes the moral grounds for asserting the latter.

But one can object that this is a "terminological" victory.¹² For what Dworkin has managed to demonstrate by his definitional manoeuvres is only that any moral supposition about the importance of autonomy is contradictory without reference to those liberties that make autonomy possible in the first place. By further stipulating that liberalism is predicated on the idea that all citizens must be treated as autonomous agents,

¹⁰ *Ibid.*, p. 271.

¹¹ *Ibid.*, p. 272.

¹² A possibility raised by Dworkin himself. See *ibid.*

Dworkin is able to claim that concrete liberties are grounded in the abstract concept of equality. But this merely establishes a formal relationship between the values of equality and liberty, the truth of which is essentially trivial. It has yet to be seen whether Dworkin can furnish a politically more robust conception of equality which, at the same time, does not conflict with the individual liberties he appears to treasure. Before examining Dworkin's concrete application of his conception of equality, however, the balance of his analytic scheme needs to be detailed. For what still must be explained is precisely how arguments of principle yield individual rights which limit the pursuit of collective goals either through utilitarian or ideal policies.

Ideal arguments of policy are vulnerable to arguments of principle in a rather direct way. If an ideal argument of policy counsels the restraint of certain liberties in pursuit of an ideal goal, such as the promotion of high culture, for example, then the moral priority of the abstract right of equal treatment is relatively easy to establish. The first order principle enjoining equal concern and respect commits the government to a general policy stance where no particular form of life is held to be inherently more valuable than any other. This stipulation of neutrality, therefore, recommends that any policy based on an ideal argument, itself not directly connected to the abstract egalitarian principle, must be defeated if it can be shown that people's preferences or rights are genuinely disserved by the policy. Thus, for example, if people are indifferent or opposed to high culture, and if ideal policies promoting high culture serve to restrain any of their liberties, the principle of equal treatment recommends abandoning the policy.

Dworkin recognizes that the logic of this argument supports Bentham's famous utilitarian admonition that "pushpin is as good as poetry." But, as it turns out, he is unwilling to surrender all arguments for an activist state responsible for cultural matters.¹³ On the contrary, Dworkin regards the state's promotion of art as integral to a liberal society insofar as art sustains a vocabulary rich with distinctions about value. The state's patronage of art thus serves a liberal society in the long run by conserving this vocabulary and the possibilities for expression which citizens may take from it. Yet, in line with the governing principle of equal treatment, Dworkin would restrict state support for art to maintaining those administrative policies and structures which permit different types of artistic expression to flourish, e.g. grants, subsidies, tax exemptions, etc. In no instance, however, should the state favour, through its policies, any particular artistic content. In this way, Dworkin is convinced that a state can be dedicated to an ideal policy of cultural edification without violating any individual's basic right to equal treatment.

In general, Dworkin's attitude to ideal arguments of policy is that such policies are ordinarily permissible unless they conflict with majority preferences or otherwise invade an individual's fundamental right to equal concern and respect.¹⁴ Utilitarian arguments of policy are also subject to constraints imposed by the abstract egalitarian principle, although in this case the constraints operate in a much more complex fashion.

¹³ On this issue of state support for cultural activities, see Ronald Dworkin, "Can a Liberal State Support Art?", *A Matter of Principle*, pp. 221-33.

¹⁴ However, if a policy devoted to an ideal goal happens to find support in an argument of principle, it can prevail over majority preferences. For the significance of this possibility, see the discussion of affirmative action policies at *infra*, pp. 124-44.

The complexity arises from Dworkin's final conceptual distinction between *personal* and *external* preferences. It is this last distinction which forms the most critical ingredient in Dworkin's procedural argument for sorting out acceptable from unacceptable exclusions of liberties. It also is one of Dworkin's most controversial conceptual distinctions, and for this reason, rather more attention must be given it.

To explain Dworkin's rationale for drawing a contrast between personal and external preferences, it is necessary to examine more closely his understanding of the moral force of the abstract egalitarian principle. Previously it had been remarked that Dworkin regards the abstract right to equal concern and respect as the most basic right which both authorizes policies in pursuit of collective goals and sets limits on those policies. Some of these limits have now been identified. But how does the egalitarian principle authorize policies promoting collective goals? Dworkin's answer turns on his interpretation of the moral character of utilitarianism. And his reasoning in this case is informed by the constructive method he adopts.

Starting with the assumption that utilitarianism of some sort comprises the policy-making context of liberalism, Dworkin proposes to discover its moral warrant through the test of coherence. As Dworkin understands it, the test of coherence requires that the moral principles underlying utilitarianism must be in some way conformable to the abstract egalitarian principle. At the same time, the test of coherence shows why individual rights can act as trumps against policies devised according to utilitarian calculations.

The reason why this congruence of fundamental principles is required ultimately

has to do with the practical nature of the constructive model of moral reasoning. Only if the various institutional practices or political ideals of a society can be justified by principles that are coherent, Dworkin thinks, can they command moral allegiance. For instance, a theory of rights predicated on a concept of equality can have no practical force in a theocratic society where most people believe that the unique theological insights of their governors are both the necessary and sufficient conditions for sound policies. For Dworkin, this example underscores the need to show that his theory of rights and utilitarianism share a common normative concern reflective of liberal political morality as a whole.

With this problem in mind, Dworkin attempts to find what could be considered the moral essence of utilitarianism. That essence, he eventually concludes, is located in the utilitarian methodological axiom requiring each person's preferences to be counted equally in calculations of aggregate or average utilities. According to Dworkin, this methodological rule implies that utilitarianism "not only respects, but embodies, the right of each citizen to be treated as the equal of any other."¹⁵ Utilitarianism and Dworkin's theory of rights thus occupy the same normative space because both presuppose the same abstract egalitarian principle.

But what is common at this abstract level can nonetheless diverge when the utilitarian methodological stipulation is realized in practical calculations. When utilitarian policies depart from the moral thrust of the abstract principle of equality, a theory of rights can serve to correct them so that equality is not compromised. For this reason,

¹⁵ Taking Rights Seriously, p. 234.

Dworkin often refers to his notion of rights as "anti-utilitarian" in the sense that they deter governments from pursuing policies that could routinely be justified on grounds of general interest. But perhaps a more adequate description of his theory of rights is that it serves to correct or eliminate the "corruptions" of an unrefined utilitarianism and hence capture the moral thrust of the egalitarian principle supposedly immanent within utilitarianism.¹⁶

The reason why utilitarianism requires the kind of correction a theory of rights supplies, Dworkin argues, is that as a decision-procedure, it normally seeks to discover those policies most likely to satisfy the maximum number of citizen preferences. Utilitarianism thus takes citizen preferences as a given and attends to them only in terms of their quantity and intensity. But, in taking these preferences as simple data, utilitarian theory fails to acknowledge that there is a morally significant difference between personal and external preferences. Dworkin defines personal preferences as those which individuals have for a particular distribution of goods or opportunities for themselves. He defines external preferences as those which individuals have for the assignment of goods or opportunities to others.¹⁷ If external preferences are somehow not disqualified in utilitarian calculations, Dworkin insists, then the attitudes which individuals might hold

¹⁶ It should be noted, however, that Dworkin is reluctant to endorse utilitarianism, even if it is "corrected" by a theory of rights, as a uniquely appropriate model for political decision-making in liberal societies. He nonetheless continues to employ utilitarian arguments as a foil for his theory of rights because he thinks they do as a matter of fact figure prominently in liberal political decision-making. His theoretical argument, it is worth repeating, is cast in the subjunctive mood. Thus, if it is agreed that utilitarian reasoning plays an important role in liberalism, then the question of its egalitarian credentials becomes important. As for Dworkin's own qualifications about the appropriateness of utilitarianism as a model of reasoning about political policies, see Taking Rights Seriously, pp. 357, 364-68, and A Matter of Principle, pp. 181-204, 359-72.

¹⁷ See Taking Rights Seriously, pp. 234-39, 275-78, and A Matter of Principle, pp. 361-65.

of other people and their aspirations could work to "adulterate" policy-making.

But how do external preferences serve to "contaminate" the utilitarian calculus? Dworkin contends that external preferences can distort a utilitarian calculation in two ways. First, a citizen's own personal preferences may be discounted in the overall utilitarian calculation if enough people judge that person unworthy, and, for that reason, register a preference for assigning fewer goods or opportunities to him or her. Discrimination against blacks typically follows this type of preference formation when it is held that they are worthy of less concern than whites. In this instance, if such external preferences reflecting discriminatory judgements about worth are included in utilitarian policy calculations, then blacks risk not being be accorded the equal concern that is called for by the abstract egalitarian principle.

Another type of distortion occurs when enough people prefer that some other citizens be assigned fewer goods or opportunities because of a conviction that their aspirations or conception of the good life are not worthy of respect. An example of this latter external preference would be the moralistic passions of those who disapprove of homosexuality on the grounds that a homosexual conception of sexuality is debauched. In this instance, if the external moralistic preferences are counted in utilitarian policy-making decisions, homosexuals will stand to suffer because their own views about how to live a good life have been deemed unworthy of respect.¹⁸

¹⁸ It should be noted that when speaking of illegitimate external preferences, Dworkin does not restrict his analysis to unfavourable judgements about other persons or their conceptions of the good life. In the interests of consistency, he is equally prepared to refuse altruistic preferences as a basis for utilitarian calculations. On the inadmissibility of altruistic preferences in the formulation of public policy, see Taking Rights Seriously, p. 235-236, A Matter of Principle, pp. 363-364, and the argument developed at *infra*, pp. 178-90.

Dworkin's argument about the necessity for a regime of legal rights to offset the potential biases in the simple aggregation of preferences certainly has a *prima facie* moral appeal. But it is still not clear why external preferences are damaging to the utilitarian calculus as a decision-making procedure. After all, it would seem that utilitarianism demands only that we count people's preferences equally, not that we make judgements about the probity of those preferences. Dworkin's general argument thus remains incomplete until it is shown exactly how counting external preferences undermines the moral substructure upon which utilitarianism rests.

Dworkin clarifies the moral import of his theoretical distinction between external and personal preferences by analyzing several specific civil rights issues. In these topical political inquiries he begins always with the assumption that the abstract egalitarian principle leads to the discovery of concrete rights which serve to regulate policy goals. This abstract principle, as already indicated, enjoins a government to treat all its citizens with equal concern and respect. In a more recent essay, Dworkin has given what can be regarded as a canonical formulation of the principle: "[G]overnment must act to make the lives of those it governs better lives, and it must show equal concern for the life of each."¹⁹ While this rephrased principle gives a more positive rendering of a state's moral obligations to its citizens, it is still not apparent what the maxim recommends in the matter-of-fact world of politics.

Dworkin's response is to say that there is no algorithm by which one can reckon any particular legal rights solely from the abstract principle. Explicit legal rights can only

¹⁹ "What is Equality? Part 3: The Place of Liberty," *op. cit.*, p. 7.

be established through arguments in which the distinctions between policies and principles, ideal and utilitarian arguments of policy, and external and personal preferences, are brought to bear on well-defined political controversies. Two such controversies to which he devotes considerable attention are the legal and political disputes over affirmative action programs for blacks, and the censorship of pornographic materials. Dworkin's treatment of both of these political disputes requires extended commentary because it is here that his central arguments about the distinctive character and efficacy of rights are brought into sharp relief.

3. Affirmative Action and Civil Rights

Dworkin first raised the several conceptual distinctions discussed above in a rigorous fashion in his examination of a court case where reverse discrimination was at stake.²⁰ The case involved a white student, Marco DeFunis, Jr., who was rejected in his application to the University of Washington Law School, Seattle, in 1971, even though his LSAT scores and undergraduate college grades were higher than those of some of the minority students enrolled with the help of the school's affirmative action program.

DeFunis argued that the law school's admissions policy violated his right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. A lower state court upheld DeFunis's petition and ordered that he be admitted to the law school for the 1974 term. The University in turn challenged this

²⁰ See "Reverse Discrimination," Taking Rights Seriously, pp. 223-39.

ruling before the Supreme Court of Washington and won a reversal on the grounds that its admission policy was consistent with the equal protection provision of the Fourteenth Amendment. Defunis appealed this decision to the United States Supreme Court, and, although the court finally ruled the case to be moot, his legal petition became one of the first significant tests of the constitutional validity of affirmative action programs.²¹

One of the arguments used by Defunis's lawyers came from a 1945 U.S. Supreme Court decision, *Sweatt v. Painter*. In the latter case, a black man named Herman Sweatt was refused admission to the University of Texas Law School because state law provided that only whites could attend. In its decision, the Court agreed that Sweatt's right to the equal protection of the laws guaranteed under the Fourteenth Amendment was infringed by the state and university's colour bar.²² The attorneys for DeFunis maintained that the two cases were bound together by the same principle - racial classifications used for the assignment of goods or opportunities run afoul of the equal rights clause contained in the Fourteenth Amendment.²³

²¹ For the details of this ruling, see *DeFunis v. Odegaard*, 94 S. Ct. 1704 (1974).

²² For details of this ruling, see *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848 (1950).

²³ The actual trial histories of these two cases do not contain precise constitutional parallels, even though in both cases the equal protection clause of the Fourteenth Amendment provided the principal legal argument used by the plaintiffs. That Amendment reads, in part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *The Constitution of the United States of America*.

The court decision in *Sweatt v. Painter* applied a previous Supreme Court ruling which held that the Fourteenth Amendment could be satisfied by provisions for "separate but equal" educational facilities. The "separate but equal" rule had been used by the Texas courts to reject Sweatt's legal plea because the state had agreed to set up a separate law school for blacks within six months. The U.S. Supreme Court, however, ruled that such a hastily established law school could not qualify as an institution equal to the white school, and reversed the lower court's decision. While this was a significant civil rights case, it was not until a decade later in *Brown v. School Board* that the U.S. Supreme Court abandoned entirely the "separate but equal" principle, thereby signalling the beginning of the end of state supported segregation. For details on these cases, see W. Augustus Low, ed., Encyclopedia of Black America (New York:

Dworkin rejects the argument that *Sweatt* and *DeFunis* must stand or fall together. In doing so, he suggests that the appropriate way to look at these cases is to draw a distinction between the different arguments of policy which could be used to justify racial classifications in admissions policies. When using this strategy to examine the merits of the *DeFunis* claim, Dworkin begins with a flat assertion: "DeFunis plainly has no constitutional right that the state provide him with a legal education of a certain quality."²⁴ He adds that were the state to have no law school at all, or a law school with such exacting standards that DeFunis would not have been admitted on his own intellectual merits, then no one could claim that his rights were violated.

Dworkin's stipulation that a state need not provide for any law school, or, alternatively, only for an elite law school, might seem squarely at odds with his regulative principle that a government must seek to make the lives of those it governs better lives. Is Dworkin's view on the responsibility of government in this instance not an example of how a formal rendering of the egalitarian principle ends up being trivial? After all, it would seem to amount to the same thing as saying that should a government choose not to provide social assistance to any of its citizens, then those citizens are still

McGraw-Hill Book Co., 1981), pp. 254-55.

The court decision in *DeFunis* was certainly less consequential by comparison. While the U.S. Supreme Court proceedings were under way, DeFunis was admitted to the University of Washington Law School as a result of the original trial court ruling. When the law school indicated it was prepared to allow DeFunis to graduate regardless of how the litigation itself was resolved, the Supreme Court concluded the case to be moot and rejected the appeal on those grounds. But Justice Douglas wrote a dissenting opinion where he argued the court should have upheld DeFunis's claim on its merits, although he did not rule out the possibility that some other admissions policy, with the same practical effect, could be regarded constitutional. As it turned out, it was not until *Regents of California v. Allan Bakke* was heard in 1977 that the Supreme Court was compelled to rule on the substantive merits of affirmative action in education. The *Bakke* case, and Dworkin's assessment of it, are discussed more fully at *infra*, pp. 136-41.

²⁴ Taking Rights Seriously, p. 225.

being treated equally.

This objection, at least as stated here, does not quite speak directly to Dworkin's point about the responsibility of the state to treat its citizens equally. For he does readily concede that the state does have the responsibility of providing some basic level of education for all citizens as a condition that will improve their lives. But this does not imply a citizen's right to anything beyond that basic level of education. Thus, DeFunis has no constitutional right to the specific legal education he claims, for the way in which a state decides to provide legal education, Dworkin argues, is a matter of policy.

By identifying the provision of legal education as a policy matter, Dworkin insists that one attend to the distinction between equality as the grounds for deciding on a policy, and equality as the grounds for claiming an individual right. To get at this distinction, Dworkin attempts to clarify the meaning of the term "equal rights". First, he notes that equal rights can be taken to mean the "right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden."²⁵ This first right could support claims to equal access to the same basic educational opportunities or material resources. But equal rights, he observes, could also be taken to mean "the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else."²⁶ On this second interpretation, equal rights is compatible with differential treatment. For instance, should a parent need to decide whether to give medicine to a

²⁵ *Ibid.*, p. 227.

²⁶ *Ibid.*

fatally ill child or to its sibling merely discomfited by the same disease, the latter interpretation of the principle of equal rights recommends only that the parent show equal concern for both children in reaching the decision. This example illustrates that the right to treatment as an equal does not, in all circumstances, entail a right to equal treatment.

Using the contrast provided by these two interpretations of "equal rights", Dworkin is ready to argue against the claim of DeFunis and for the claim of Sweatt. In his application to law school DeFunis can only demand a right to treatment as an equal. If the state does choose to provide legal education for some of its citizens, applicants must all be treated with the same concern and respect. But this does not guarantee that they will all receive equal treatment in their applications.

The admissions standard employed by the University of Washington, Dworkin argues, did satisfy the test of equal concern and respect. For even though the standard included some provisions favouring minority applicants, this does not automatically serve to disqualify it as a violation of equality rights. Rather, it all depends, Dworkin remarks, on what policy reasons are offered to support the special provisions for minority students. He adds that a law school might choose, for perfectly justified policy reasons, to employ any number of different criteria as a basis for admission. Thus, Defunis does not have a right, Dworkin argues, that only intelligence be used as the standard for admission. But he does have a right "to treatment as an equal in the decision as to which admissions standards should be used."²⁷ This right, however, entails only that racial or ethnic classifications not be used for the purpose of excluding certain categories of individuals

²⁷ *Ibid.*, p. 227.

from admission to law school. Thus, it is not an equal right to a place in law school, but a right not to suffer from explicit discrimination in policy deliberations about which admissions standard is appropriate.

It is this interpretation of the term "equal rights", Dworkin contends, which absolves the admissions policy of the University of Washington from any charges of discrimination. Because the University of Washington law school decided, for ostensibly good policy reasons, that racial or ethnic background should constitute one of several criteria that made up its admissions standards, then, barring unequal application of these standards, one could say all applicants enjoyed a right to treatment as an equal. The fact that DeFunis failed to gain admissions on these particular standards is no different in moral terms than had he failed to win admission because the school used another standard requiring exacting intellectual accomplishments. In either case, Dworkin suggests, if it can be argued that the admission standard is appropriate to the academic undertaking of a law school, then no objection on the basis of equal rights is available. For whatever standard of admission is chosen, that standard will end up disadvantaging some candidates.

Of course this merely pushes back to another level the problem of determining when equality rights have been infringed. For Dworkin openly acknowledges that racial or ethnic classifications may only be used in admissions standards if they can be justified on policy grounds. But then what justifies the policy? Dworkin's general answer is that an admissions standard can potentially be justified on the grounds that, however it disadvantages the failing applicants, its underlying policy goal nonetheless benefits the

whole of the community. Dworkin imagines two types of policy arguments which might lead to this judgement about community benefits derived from affirmative action in college admissions. On the one hand, a plausible utilitarian argument can be made that increasing the number of black lawyers in the community will ease racial tensions to the point that the collective welfare of the whole community is significantly improved. Alternatively, an ideal argument could be constructed to the effect that, regardless of the consequences an affirmative action programme will have on the welfare of everyone in a community, it is nonetheless the right policy to pursue because it will make the community more equal, and, therefore, more just. Either the utilitarian or the ideal argument of policy can be used to support the admissions standard of the University of Washington, Dworkin concludes, because neither involves an infringement of an individual's right to be treated as an equal.

There is, however, an objection that can be made to this line of reasoning. If Defunis has no individual right to a legal education and must reconcile himself to the policy goals entrained by the admissions standards of the University of Washington, cannot the same be said of Sweatt? In other words, cannot the officials of the University of Texas similarly mount utilitarian or ideal arguments for their exclusive admissions standards? To meet this objection Dworkin invokes his final and controversial distinction between external and personal preferences.

To begin with, Dworkin rather casually denies that an ideal argument is available

for the segregationist policy of the University of Texas.²⁸ But he does concede that there are plausible utilitarian arguments that could support such a policy. It is possible, Dworkin says, that the University of Texas admissions committee, although composed of unprejudiced individuals, nonetheless recognized that prejudices in the community were such that the economy could not accommodate any more black lawyers than those that could be provided by a separate black law school. In this instance, the commercial needs of the state, or the business needs of white law firms, or the fund-raising needs of the law school itself, would have outweighed any social benefits that might have arisen from an integrated educational system. Significantly, framed in this way, the exclusionary admissions policy of the University of Texas is defended by a policy argument which makes no moral judgement about the moral worth of blacks or their right to equal concern. Rather, it merely relies on a utilitarian calculation about community benefits to be derived from retaining an all-white law school. Does this argument differ in any way from the utilitarian argument Dworkin deems to be acceptable for the University of Washington?

Dworkin contends that the hypothetical utilitarian argument of policy imputed to the University of Texas must give way to Sweatt's right to enjoy treatment as an equal for reasons that are not available to DeFunis. To make this point, Dworkin first examines the general character of utilitarian arguments. Acknowledging that the hedonistic

²⁸ In the article "Reverse Discrimination," Dworkin simply asserts that an ideal argument of policy cannot be made for a segregationist admissions standard. In later articles, and especially in response to criticisms made by H.L.A. Hart, Dworkin takes more time to establish why ideal arguments for segregation cannot be countenanced. On this point see A Matter of Principle, pp. 365-372, and the argument presented at *infra*, pp. 157-61.

postulate informing Bentham's utilitarianism is dubious, Dworkin settles on preference utilitarianism as the morally most intelligible representative of that political theory. In preference utilitarianism, policy choices are assessed according to how many citizen preferences each policy would fulfil, counting also for the intensity of the preferences. As Dworkin describes it, the concept of welfare embodied in this type of political theory implies that a "policy makes the community better off in a utilitarian sense if it satisfies the collection of preferences better than alternative policies would, even though it dissatisfies the preferences of some."²⁹

Dworkin admits that preference utilitarianism does meet the general requirements of the abstract egalitarian principle. By canvassing everyone's preferences equally, preference utilitarianism formally ensures that each citizen is treated as an equal. Thus, whatever policy is recommended by this decision-making process should, at least at first sight, be regarded as just. But Dworkin suggests we look again. Preference utilitarianism, he cautions, may in fact mask a serious moral dilemma in its overtly neutral aggregative procedures. The reason is that preference utilitarianism ordinarily does not appraise the motivational traits behind citizen preferences. A closer inspection of these motives would show that they can result in either personal or external preferences.

The distinction between these two types of preferences is critical, according to Dworkin, for if external preferences are counted alongside personal preferences in utilitarian calculations, then the egalitarian force of utilitarianism will be thwarted

²⁹ Taking Rights Seriously, p. 233.

because

...the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life. If external preferences tip the balance, then the fact that a policy makes a community better off in a utilitarian sense would *not* provide a justification compatible with the right of those it disadvantages to be treated as equals.³⁰

It is important to realize exactly what Dworkin is saying here. Beginning with what he considers to be an uncontroversial moral supposition that a government should treat its citizens as equals, he maintains that counting external preferences "corrupts" utilitarianism as a *decision-making procedure*. Significantly, Dworkin does not condemn counting external preferences for any independent moral reasons. Thus, he does not denounce external preferences because they are evil or otherwise morally reprehensible. Instead, he wishes to discount external preferences for reasons internal to the logic of utilitarianism. What is the internal reason that disqualifies anything but personal preferences from utilitarian calculations? Dworkin thinks that counting external preferences is a form of "double counting", something which utilitarianism is methodologically prohibited from doing.³¹

It is easy to understand how utilitarianism precludes double counting in a

³⁰ *Ibid.*, p. 235.

³¹ Dworkin first presents the "double counting" argument in his article, "Reverse Discrimination," *op. cit.*, pp. 235-36, and subsequently defends different versions of it against critics, only to abandon it in his latest essays on distributive justice. It is worth examining this argument in some detail because, even as Dworkin moves away from it in later essays, he does not forsake the premise which it embodies. The premise is that it is possible to construct a theory of justice, which, starting from a relatively uncontroversial proposition about equality, can end up employing strictly procedural devices for distinguishing licit from illicit state actions.

straightforward voting procedure. If preferences are recorded through votes, and whites are awarded two votes for every black vote, then white preferences would be counted twice. This clearly offends the utilitarian principle that everyone counts for one and one only, just as it violates Dworkin's abstract right to equal treatment. But how does this apply to the counting of external preferences? Dworkin furnishes an analogy meant to support his contention that counting external preferences is a form of double counting. Suppose that a policy choice has to be made in a community where the alternatives are building a swimming pool or a theatre. Suppose further that many citizens, who themselves are non-swimmers, nonetheless prefer building a pool because they approve of sports and esteem athletes, or, alternatively, because they consider the theatre immoral. Were a policy decision to be made counting the external preferences of these non-swimmers, Dworkin is certain that the utilitarian procedure would be fundamentally flawed.

If the altruistic preferences are counted, so as to reinforce the personal preferences of swimmers, the result will be a form of double counting: each swimmer will have the benefit not only of his own preference, but also the preference of someone else who takes pleasure in his success. If the moralistic preferences are counted, the effect will be the same: actors and audiences will suffer because their preferences are held in lower respect by citizens whose personal preferences are not themselves engaged.³²

Dworkin is careful to add that external preferences are not always independent of personal preferences in the way he has just suggested. External preferences of either an altruistic or moralistic kind can be grafted on to personal preferences so as to

³² Taking Rights Seriously, p. 235.

reinforce those personal preferences. One can be a swimmer and also have an external preference favouring the fortunes of other swimmers or the misfortune of theatre-goers. Or a white law student may have a personal preference to associate only with other white law students rather than blacks. In this latter instance of what he calls an "associational" preference, Dworkin is assured that although it may be experienced as a personal preference, it is ultimately parasitic on an external preference: "...except in very rare cases, a white student prefers the company of other whites because he has racist, social and political convictions, or because he has contempt for blacks as a group."³³

External preferences, and those personal preferences which are derivative from external preferences, must, therefore, be treated as a suspect class in the formulation of utilitarian-based policies. Dworkin allows that any proof of disadvantage flowing from prejudice or moralistic preferences must somehow be established in concrete cases. For this he suggests a counterfactual test: "Utilitarian arguments that justify a disadvantage to members of a race against whom prejudice runs will always be unfair arguments, unless it can be shown that the same disadvantage would have been justified in the absence of the prejudice."³⁴ Yet, even as Dworkin proposes a counterfactual test, he admits that in some situations the test is redundant:

In any community in which prejudice against a particular minority is strong, then the personal preferences upon which a utilitarian argument must fix will be saturated with that prejudice; it follows that in such a community no utilitarian argument purporting to justify a disadvantage to

³³ *Ibid.*, p. 236.

³⁴ *Ibid.*, p. 237.

that minority can be fair.³⁵

It should now be apparent how Dworkin would reconstitute utilitarianism so as to make it consistent with the abstract egalitarian principle. Rights play the key corrective role. Because the admissions policy of the University of Texas was ultimately decided on the basis of external preferences, either directly or indirectly, Sweatt could legitimately appeal to his right to treatment as an equal. In this instance, the right trumps the utilitarian-based admissions policy. The University of Washington, on the other hand, relied on no such external preferences for its admissions policy. Although its policy included racial classifications as one criterion, these classifications were undertaken not with the view that one race was unworthy of concern or respect, but because of a decision that overall social welfare would be improved by it in a utilitarian or an ideal sense. DeFunis can invoke no right to trump these policy arguments.

The arguments which Dworkin first marshalled to defend affirmative action in the *Defunis* case were again deployed in a more expressly legal fashion in his discussion of the notorious *Bakke* case. This case, which went to the U.S. Supreme Court in 1977, concerned the admissions policy of the medical school of the University of California at Davis. That admissions policy included a quota-type affirmative action program in which sixteen places at the medical school were set aside for applicants from "minority" groups. Designed to increase the number of black students attending the school, this plan allowed the admissions committee to use criteria other than academic test scores to assess applicants for the sixteen positions.

³⁵ *Ibid.*

Allan Bakke, a white student, was rejected in his application to the medical school, even though his test scores were relatively high. Because the university could provide no assurances that he would not have been accepted to the medical school if the affirmative action program was not in place, Bakke claimed that his rights had been violated by the program. His explicit legal argument was that the Davis school's admissions plan breached both a statutory right guaranteed under the 1964 Civil Rights Act,³⁶ and the constitutional right to the equal protection of the laws contained in the Fourteenth Amendment.³⁷

³⁶ The Civil Rights Act of 1964 provides that no one shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program receiving federal aid on the ground of race. Because the University of California medical school received federal funding, Bakke's lawyers argued that its admissions policies were subject to the Civil Rights Act. On this jurisdictional issue, see *A Matter of Principle*, p. 305.

³⁷ The trial history of this case has often been cited as an example of wise judicial statesmanship. The California Supreme Court upheld Bakke's suit, declaring that admissions policies which employ race as a criterion are unconstitutional. The court thus directed the medical school to admit Bakke. The University of California appealed this ruling to the U.S. Supreme Court. The United States Supreme Court concurred with the California court that Bakke must be admitted to the medical school, but disagreed with the lower court that race as a factor in admissions policies is absolutely prohibited on constitutional grounds.

The divisions within the U.S. Supreme Court made the *Bakke* decision appear indecisive to some, and a shrewd compromise to others. Four justices accepted Bakke's contention that the Civil Rights Act forbids racial classifications of any sort, and, therefore, felt it unnecessary to consider the constitutional argument. The remaining five justices ruled that the reach of the Civil Rights Act was dependent on a prior interpretation of the constitutional rights embodied in the Fourteenth Amendment. Four of these five judges went on to find that the Fourteenth Amendment did not furnish Bakke with any right against affirmative action programs.

In these circumstances, it was the ruling of the fifth judge, Justice Powell, which determined the outcome of the case. Justice Powell held that the Fourteenth Amendment did prohibit explicit quotas based on race unless the school could demonstrate that such administrative policies were necessary to achieve goals of compelling importance. This held the door open to considering at least some types of affirmative action programs constitutional. In the case of the Davis Medical School, Justice Powell held that it had not met a strict burden of proof in showing its program was necessary to meet a compelling goal. But, while Powell ruled that this particular quota-type plan was unconstitutional, he did not extend this constitutional judgement to other more flexible kinds of affirmative action programs such as those that take race into account on an individual-by-individual basis. Thus, in this judicial balancing act, Justice Powell seemed to give something to both sides in the dispute. For the details of the case, see *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Dworkin's initial reaction to Bakke's court challenge was to offer a reprise of his argument against DeFunis. According to Dworkin, Bakke could avail himself of three principles in his fight against the medical school's admissions policy: the right to be judged on merit; the right to be judged as an individual; and the right not to be judged on the basis of race. But reflection, he tells us, suggests the first two are really not moral principles. Merit is an evaluative category shaped by the justifiable needs of a distinct practice or institution. If race comes to be regarded as an important part of those justifiable needs, this is, in itself, no different from identifying age or academic credentials as a part of those needs.

Likewise, the right to treatment as an individual is not a principle which offers any strong objection to an affirmative action program. Any admissions policy, after all, depends upon classifications whereby individuals fall into statistical groups. Thus, candidates who fail to gain admission to medical school because they fall into that statistical group of applicants whose test results fall below an arbitrary cut-off point also can say that they have not been treated as individuals. But this merely confirms the point that classifications will inevitably disappoint a certain statistical group of individuals, not that they have not been treated as equals.

Only the last right not to be judged on the basis of race, Dworkin contends, can plausibly defeat an affirmative action program. But he depicts this last principle in a way that is meant to thwart Bakke's claim: "Every citizen has a constitutional right that he not suffer disadvantage, at least in the competition for any public benefit, because the race or religion or sect or region or other natural or artificial group to which he belongs

is the object of prejudice or contempt."³⁸ Because the admissions procedures at the Davis school could not be said to reflect attitudes of prejudice toward or contempt for whites, it invades no individual's constitutional right. It is reasonable that Bakke should feel disappointed by the outcome of the program, Dworkin adds, and it is entirely appropriate to extend sympathy to him, just as much as to those applicants who failed to gain entry strictly on academic grounds. But as the policy carried no stigma toward any racial group, no right comes into play.

In light of this argument, Dworkin ends up offering a critical assessment of Justice Powell's Solomonic judgement. To begin with, Dworkin contends that Powell's distinction between a quota-type and a flexible affirmative action plan rests on a specious argument. Because both tend to produce the same result, it is practically impossible to say how a flexible plan will operate so that it does not surreptitiously become a quota plan. Moreover, requiring that all affirmative action plans meet a strict burden of proof in demonstrating their compelling necessity would involve the court in an illicit venture into a policy field. Dworkin maintains that affirmative action policy should be justified on a less stringent test. Thus, according to Dworkin, if there is clear evidence that systematic racial discrimination has disadvantaged a minority group, that evidence is sufficient to justify an affirmative action program. Any stricter judicial scrutiny will mean that courts will have to offer their own judgements on the most efficacious means of alleviating systematic discrimination, and this would draw courts into policy decisions which are not their responsibility.

³⁸ A Matter of Principle, p. 300.

It would appear from his judgement, however, that Justice Powell actually believed his demand that all racial classifications be subject to strict scrutiny by the courts allayed this latter problem of judicial policy-making. Powell maintained that benign quotas designed to redress systematic discrimination and malicious racial classifications promoting discrimination must both be subject to the same exacting judicial test. Powell insisted upon this point because he presumed that any distinction between benign and malicious racial classifications would invariably have to rest upon subjective and standardless judgements about what constitutes a relevant minority group, or which classifications carry a stigma. One way to avoid this subjective exercise, where yesterday's minority becomes today's majority, or vice versa, is to stick to a principle whereby all racial classifications have to justify themselves on the same standard. It is for this reason that Powell insisted that a test of strict judicial scrutiny be employed in all cases where racial classifications are used in the assignment of benefits or burdens.

However, as Dworkin points out, this involves Powell in a contradiction. For in promoting flexible affirmative action plans, the Justice presupposes the moral and legal validity of a judgement about minority groups and felt stigma which earlier he characterized as necessarily subjective and standardless. This leaves Powell's overall judgement about affirmative action programs precariously incoherent. For, as Dworkin notes, by ruling that flexible racial classifications are constitutionally admissible, Powell does not have the moral or legal wherewithal to distinguish between flexible programs designed to restrict Jewish applicants in the name of educational diversity, and flexible programs designed to encourage black applicants in the name of redressing systematic

discrimination. In these circumstances Dworkin is confident that the only principle which can consistently make this distinction is his own conception of the right to treatment as an equal which would disqualify classifications motivated by racial contempt.

Dworkin's reflections on the moral and legal status of affirmative action programs show that his rights-base theory of justice, although controversial, falls squarely in the tradition of liberalism. In chapter one it was observed that historically liberal rights were asserted against a world of ranks, orders and hierarchies. The emphatic avowal of equal rights was undertaken precisely to signify a new vision of justice where orders, ranks and other such distinctions would no longer regulate the distribution of liberties and other legal goods and opportunities. At the same time, the affirmation of equal rights stand as a constant reminder that orders, ranks and distinctions continue to hold sway in the social world.

Dworkin's analysis of the legal foundation for affirmative action reflects both of these aspects of liberalism. Thus, he recognizes that securing equal rights must include the elimination of those inequalities constructed around racial, ethnic or gender differences. But there is a curious feature in his argument. Intent on having the state refrain from making judgements about what is good for individuals, or, conversely, what is bad for them, Dworkin seeks a purely procedural argument for determining which social hierarchies are illiberal. One consequence of this procedural strategy is that Dworkin's only recourse for censuring a world of orders, ranks, and distinctions is to empty the notion of individual desert of almost all moral meaning. True, he acknowledges that individuals *deserve* to be treated as equals, which, for Dworkin,

means that they deserve to be accorded equal concern and respect when the state makes its decisions about the distribution of benefits and burdens. But, otherwise, they can make no strong claim for a particular distribution of social benefits on the basis of desert. Thus, neither DeFunis, Sweatt, nor Bakke, deserve, in any strict sense of the term, places in a law or medical school. For the distribution of this benefit is ultimately resolved by a policy decision which takes into account the present or future interests of the whole society.

By displacing the individual desert as a criterion for justifying claims to rights or benefits, Dworkin is able to establish a theoretical basis for criticizing certain social inequalities. Because no one has an antecedent claim to any social position or occupation, and because the use of the state's power to counter the effects of systemic discrimination can be justified on policy grounds, Dworkin can claim that his theory effectively undermines a world conceived in terms of natural ranks, orders and distinctions. Thus, it would appear that his understanding of liberalism contains a politically robust conception of equality after all. But this substantive egalitarianism also seems to be purchased at a price that Lockean liberals, at least, might find exorbitant. For in denying that individual merit should regulate the distribution of social benefits and burdens, Dworkin appears to take an instrumental view of human powers and capacities.

This is particularly the case with his argument for affirmative action where it is suggested that political decisions about the distribution of educational or occupational opportunities should take into account the consequences of different distributions for overall social welfare. The opportunities for exercising their powers and capacities which

individuals happen to acquire through these policy calculations, therefore, are to be regarded not as an individual right earned either by status or effort, but as a political endowment governed solely by what is judged to be the prevailing social interest.

On the face of it, this privileging of social interests over individual claims to rights and opportunities seems to contradict the fundamental moral thrust of the deontological project. In chapter one, it was noted that deontological liberals typically reproach utilitarianism for allowing the sacrifice of individual interests to improve aggregate or average social utility. Whether Dworkin's approval of affirmative action programs really does signify a marked departure from his general deontological convictions is something that will be examined later in this chapter.³⁹ But there is a more immediate question that must first be addressed.

Dworkin has developed an elaborate conceptual scheme to show that affirmative action programs are consistent with the abstract right to equal concern and respect. But even if it is conceded that his analytic scheme contributes valuable arguments in support of affirmative action, it is unclear how it can also furnish positive rights for individuals. Considering that he promises a rights-based theory of liberalism, it is imperative that he show how the abstract right to equal concern and respect applies to the more familiar controversies over individual rights which are routinely assumed to be a feature of liberal politics.

The issue of the censorship of pornography, for example, is one which periodically disturbs the liberal consensus over individual rights. The question of whether

³⁹ See *infra*, pp. 193-98.

to censor pornography seems to bring into play contending rights: the right to read, view or listen to material or ideas which others may find offensive, and from which they claim a right to be free. Significantly, in censorship questions it is not always evident whether systematic discrimination is at work. Hence, the various conceptual distinctions which Dworkin uses to distinguish affirmative action from overtly racist social and institutional practices would seem to find less fertile ground in political disputes over pornography. What can the abstract principle of equal respect and concern suggest in this latter case? Can Dworkin dedicate his analytic scheme to the question of censorship in a way that is consistent with his endorsement of the practical restriction of certain people's choices through affirmative action? Dworkin attempts to do precisely that in an essay on pornography where, among other things, he refines the conceptual and prescriptive force of his distinction between personal and external preferences. It is this intricate argument which must still be considered before Dworkin's overall conception of the right to equal concern and respect is subjected to critical scrutiny.

4. Freedom of Speech: The Case of Pornography

Dworkin's theoretically most sophisticated reflections on the question of censorship can be found in his lengthy discussion of the *Williams Report* which makes up the greater part of his essay, "Do We Have a Right to Pornography?"⁴⁰ The first

⁴⁰ In *A Matter of Principle*, pp. 335-72. Dworkin had covered similar ground in an earlier article, "Liberty and Moralism," *Taking Rights Seriously*, pp. 240-58. However, it is in the more recent article that he applies his fully developed conceptual distinctions. The *Williams Report* which prompted the latter essay was commissioned by the British government seeking advice on censorship. The authors of the *Williams Report* recommended a radical revision to British censorship laws that would support a much more tolerant attitude towards pornography. At the same time, the *Report* counselled the prohibition of certain

part of the essay takes the form of a critique of the various arguments employed by the authors of the *Williams Report*. The critique is funded by Dworkin's conviction that a liberal morality recommends a permissive attitude towards pornography.⁴¹ The crucial theoretical question for him thus becomes one of how best to justify this permissive attitude. The *Williams Report* advances a certain kind of justification of liberal tolerance, along with advice about acceptable limitations to such tolerance. In criticizing the justification of tolerance found in the *Williams Report*, Dworkin employs a characteristic style of argument. He identifies, and arranges in order of explanatory power, several moral and political arguments from the *Williams Report*, only to report that they are inadequate to the task of supporting the principle of toleration for which they were designed. Through this process of elimination he finally arrives at his own rights-based argument as the remaining credible solution to the question of toleration. It is useful to review at least part of Dworkin's appraisal of the *Williams Report*, for it will be argued

kinds of pornography such as live sex shows, and recommended the restriction of other types of pornography through a legal regime that included restrictions on advertising, a limitation on the sale of pornography to specialty shops, and a scheme for previewing and licensing films. For full details of the Commission's deliberations, see Home Office, Report of the Committee on Obscenity and Film Censorship, Cmnd 7772 (London: HMSO, 1979).

⁴¹ It is worth noting that Dworkin simply assumes that liberals favour a tolerant attitude to pornography. Indeed, he begins his inquiry by asking how far a liberal is prepared to defend the principle that people ought to have the right to do the wrong thing. The first example he raises when discussing this putative right is the issue of speech inciting racial hatred. Pornography is subsequently treated as a special instance of the larger question of freedom of speech. One could object, however, that Dworkin is simply making American constitutional experience paradigmatic of liberal political theory when he claims that liberal political morality entails the widest possible tolerance of speech. For instance, while he acknowledges that British law treats speech used to incite racial hatred differently and more harshly than American law, Dworkin proceeds as if freedom of speech, as it is protected by the First Amendment of the U.S. Constitution, is virtually an unassailable right. See *A Matter of Principle*, p. 335. But surely one can argue that British law, or Canadian law for that matter, which limits hate propaganda is likewise drawn from and justified by liberal moral convictions. It would seem, therefore, that Dworkin's political nationality governs his approach to the question of how liberal political morality is to be characterized in the first place.

later in this chapter that the objections which Dworkin raises against the "Williams strategy"⁴² can also be applied to Dworkin's own arguments.

Dworkin begins his analysis with his distinction between goal-based and rights-based arguments in political theory.⁴³ He speculates that either type of argument can be used to defend a permissive attitude towards pornography. A goal-based argument could maintain that even if pornography is bad for the community as a whole, the consequences of trying to censor it would in the long run be even worse if it works to suppress other potentially valuable speech. Alternatively, a rights-based argument could maintain that, even if pornography makes the community worse off in the long run, it is nonetheless wrong to censor it because such censorship would violate individual moral or political rights.

Dworkin identifies the Williams strategy as primarily a goal-based argument whose central prescriptive premise is an amended version of J.S. Mill's "harm principle."⁴⁴ While Mill's harm principle has an intuitive appeal, it is evident that its prescriptive power evaporates in any but the most trivial political controversies. The problem is that if harm is construed in a narrow sense, the principle has the potential of excluding numerous desirable state policies. On the other hand, if the principle is

⁴² Dworkin contends that the *Williams Report* is informed by an overall analytic strategy which serves to organize particular arguments and conceptual distinctions. See *ibid.*, p. 338.

⁴³ On this distinction, see *supra*, ch. 2, pp. 93-95.

⁴⁴ It is worth recalling that Mill thought one simple principle was sufficient to distinguish those occasions when society was entitled to meddle with individual liberty: "That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Company, 1978), p. 9.

construed too widely, it becomes a licence to prohibit too many actions. Because the political world invariably is made up of varying opinions about what constitutes harm, it is questionable whether the harm principle itself ever be made into an objective conceptual device capable of playing its prescriptive role.

The authors of the *Williams Report* are sensitive to this problem, and choose to interpret the practical warrant of the harm principle as something which flows from Mill's argument about the general value of free expression. Although they reject Mill's optimistic estimation about the proximate victory of truth in a free market place of ideas, the authors of the *Report* nonetheless subscribe to the more basic idea they purport to find in Mill.

The more basic idea, to which Mill attached the market-place model [is] that we do not know in advance what social, moral or intellectual developments will turn out to be possible, necessary, or desirable for human beings and for their future, and free expression, intellectual and artistic...is essential to human development, as a process which does not merely happen...but so far as possible is rationally understood. It is essential to it, moreover, not just as a means to it, but as a part of it. Since human beings are not just subject to their history but aspire to be conscious of it, the development of human individuals, of society and humanity in general, is a process itself properly constituted in part by free expression and the exchange of human communication.⁴⁵

Even if freedom of expression is crucial to discovering the best conditions for human flourishing, however, there is still an argument available for suppressing pornography. Quite simply, pornographers have a hard time defending their wares as

⁴⁵ *William's Report*, p. 55.

expressions about desirable human development. Recognizing that pornography remains vulnerable to prohibition on this account of the value of free expression, the authors of the *Williams Report* supplement their Millsian precept with a prudential argument based on the notion of the "slippery slope". The concept of the slippery slope suggests that it is virtually impossible to devise a scheme of censorship or prohibition which can accurately pick out worthless pornography from potentially valuable artistic expressions. Any amount of censorship involves the hazard of restraining forms of expression which otherwise might contribute to human flourishing. The notion of the slippery slope should, therefore, reinforce a general presumption against the activity of censorship.

Although recognizing the danger of the slippery slope, the Williams strategy does not contemplate an absolute rejection of censorship, but suggests instead that proposals for censorship must demonstrate that a grave and probable harm would ensue from the unrestricted retailing of pornographic materials. Using such a test of grave and probable harm, the authors of the *William's Report* defend a variety of restrictions on pornography ranging from outright prohibition of activities such as live sex shows, to regulations on advertising and the location of businesses merchandising pornography. In these recommendations, the authors of the *Williams Report* attempt to tailor their restrictions in such a way as to avoid inhibiting potentially valuable modes of expression.

While Dworkin is not entirely unsympathetic to the various restrictions on pornography envisaged in the *Williams Report*, he is convinced, nonetheless, that the goal-based argument utilized in the *Report* cannot sustain the proposed restrictions in other than an arbitrary fashion. The problem is that in employing a goal-based strategy

for defending a right to pornography, that right is conditional on how the goal itself is interpreted. The *Williams* goal is to protect those conditions in society which allow individuals to make reflective decisions about their lives and flourish in the lives they have chosen. But the goal thus defined, Dworkin objects, cannot unequivocally recommend the policies of the *Report*. The reason is that there are people, perhaps a large majority, who find pornography offensive, and who can reasonably claim that the mere knowledge of the existence of pornography in their society adversely affects their ability to lead the self-reflective and flourishing lives they wish for themselves and their children. In these circumstances, how can one use a goal-based strategy to consistently deny the reasonable preferences of those who would wish to restrict pornography?

Dworkin suggests that once the problem is stated in this way, the most cogent inference is that the goal-based strategy embraced by the *Williams Report* commits the government only to a posture of scepticism about the conditions most favourable to human flourishing. After all, the *Williams* strategy employs precisely this kind of sceptical position in order to resist ruling out in advance any argument proposing that pornography might be a redeemable activity illustrating possible types of human flourishing. But by the same token, a consistent sceptic cannot rule out in advance arguments to the contrary. In the end, therefore, it would seem that such scepticism invariably must leave a government neutral between prohibitive and permissive policies.

The authors of the *Williams Report* are able to rescue governments from the deadlock of scepticism only by giving the benefit of the doubt to arguments for permissiveness on the contingent grounds that the long run prospects for human

flourishing are more likely to be fulfilled if the widest possible speech is tolerated. Yet, as Dworkin points out: "This argument has the weakness of providing contingent reasons for convictions that we do not hold contingently."⁴⁶

Because our convictions about free speech are normally not held tentatively or on the basis of hypotheses about long-term interests, Dworkin thinks a rights-based argument provides a much more secure anchor for these convictions than does the Williams strategy. In deploying this argument, Dworkin retails his conventional stock in trade. An abstract principle is applied to a particular controversy in order to yield, through a number of subsidiary arguments, more tangible rights. This time, however, Dworkin restates his abstract egalitarian principle as an abstract right he calls the "right to moral independence."

People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.⁴⁷

The justification of a permissive attitude to pornography based on the right to moral independence has the advantage over a goal-based argument because it does not have to appeal to any notion of what makes a community better off in the long run. Rather, such a rights-based argument rests on the different claim that a government violates the right to moral independence whenever it pursues restrictive policies towards pornography on the grounds that pornography portrays morally unsuitable attitudes

⁴⁶ A Matter of Principle, p. 352.

⁴⁷ *Ibid.*, p. 353.

towards sex, or that the character of pornographers is reprehensible. Dworkin considers this a particularly powerful defence of toleration because it constrains precisely those policies which ordinarily would be justified by the preferences of that majority which takes moral offence at the idea of pornography.

At the same time, Dworkin also believes the rights-based argument leaves enough room to permit more or less the same kinds of regulations which the *Williams Report* counselled. For instance, Dworkin states that if it were discovered that the private consumption of pornography significantly increased the dangers of crimes of sexual violence⁴⁸, or had a damaging effect on the economy by encouraging absenteeism, as breakfast television is sometimes said to do, then a government does have good policy reasons for regulating pornography. But it has good reasons only so long as those regulations do not include any of the offending attitudes about the moral worth of pornography or the moral character of pornographers. Such carefully constructed policies must both affirm the right to moral independence while determining what best promotes general welfare.

Leaving the door open to the regulation of pornography in this way, however, returns us to the problem of the slippery slope. For if a government is justified in censoring certain activities on the grounds of social harm, as long as such censorship is

⁴⁸ Dworkin claims that he is willing to entertain this hypothesis only for purposes of clarifying the practical import of his rights-based theory. But he had previously indicated his acceptance of one of the conclusions of the *Williams Report* which stated that no convincing evidence existed linking the consumption of pornography to increased violence against women. See *ibid.*, p. 344. Dworkin's rather hasty consent to this proposition might make his own rights-based argument for tolerance vulnerable to another powerful critique of principle if it could be shown that pornography encouraged violence against women. On the possibility of undermining Dworkin's defence of a permissive attitude to pornography employing his own analytic distinctions, see the discussion at *infra*, pp. 170-74.

not intended to cast moral aspersions on those who engage in the activity, then this appears to licence all sorts of censorship. And, indeed, Dworkin goes so far as to imagine that a plausible argument could be made that all emotionally charged literature, including Shakespeare and the Bible, might lead to crime, and, therefore, should be subjected to censorship. But even in the face of this disturbing hypothesis, Dworkin is assured that a method can be deduced which would allow a government to employ a policy restricting pornographic material while permitting Shakespeare and the Bible to freely circulate. Dworkin thinks that such a method warranting the selective state regulation of potentially harmful speech must include a judgement about the social value of the suspect speech. Thus, if a government makes a judgement that pornography does not contribute enough of literary value, in the sense of increasing our knowledge of potentially fruitful lives, measured against the cost of its manifest social damage, then a policy of restriction can be justified.

It is interesting that, in raising the issue of the social value of speech, Dworkin now seems to abandon one leg of his customary argument against policies informed by external preferences. Recall that Dworkin would exclude all policies based on censorious judgements about both the moral worth of an individual's beliefs and convictions, and of his or her character. But when he speaks of censoring pornography, the first of these judgements is no longer excluded. It pays to attend to Dworkin's own words on this matter: "The judgement in question--that pornography does not in fact contribute enough of literary value, or that it is not sufficiently informative or imaginative about the different ways in which people might express themselves or find value in their lives, to

justify accepting the damage of crime as the cost of its publication--is not the judgement that those who do enjoy pornography have worse character on that account."⁴⁹

There are different ways of interpreting what Dworkin is trying to say. Perhaps he means to say that the government's judgement on the literary value of pornography measured against its social cost is *not* a judgement about its moral worth, or about the moral character of pornographers, but a different kind of controversial judgement about aesthetic value or the value of an activity capable of generating diverse views about human flourishing. But if it is an aesthetic judgement, Dworkin's own reasoning would prohibit the state making any substantive judgement about what constitutes art. If it is a judgement about the potential for generating human diversity, it is hard to see how this is not a judgement about the moral worth of pornography because Dworkin seems to accept diversity as a, perhaps unstated, moral value.⁵⁰ Thus, the decision to censor invariably must contain a negative judgement about the moral convictions of those who produce or consume pornography.

Still, Dworkin remains confident that this kind of policy judgement does not violate the right to moral independence so long as it involves no reproachful judgement about the moral *character* of producers or consumers of pornography. But it remains unclear how one can be certain these policies are motivated by the now abbreviated correct reason. In the earlier discussion of affirmative action, it was pointed out that even if policies were confined to a weighing of personal preferences, the danger remains that

⁴⁹ A Matter of Principle, p. 355.

⁵⁰ On the question of an unstated moral proposition animating Dworkin's analytic scheme, see the discussion concerning his neutrality principle at *infra*, pp. 194-98.

some personal preferences like associational preferences might be laced with illicit external preferences. What assurances can there be that government deliberations about restrictions on pornography are not similarly infected with clandestine moral judgements about pornographers?

Dworkin is aware of this problem when he admits that people's motives for restricting pornography may arise from mixed attitudes. The way he characterizes these mixed attitudes, however, leads to a persistent ambiguity in his subsequent arguments. Objections to obscenity, Dworkin asserts, may be founded on a person's legitimate personal desire to cultivate a particular attitude towards sex, and to encourage that attitude in his or her children. Alternatively, these same objections can be informed by moralistic judgements about the character of pornographers. But Dworkin recognizes that even the first, self-regarding motive, coincidentally involves the second motive: "...for someone's sense of what he wants his own attitudes to sex to be...are not only influenced by, but constitute, his moral opinions in the broad sense."⁵¹ Dworkin goes so far as to say that this is a basic conceptual problem because the vocabulary we use to identify and distinguish motives is incapable of discriminating between those motives embodying a moral condemnation of contrary views, and those that do not.⁵²

There is reason to wonder, however, whether Dworkin stops short of pursuing this point to its logical conclusion. If our motives for preferring a particular course of action inextricably involve a moral point of view, that moral point of view would

⁵¹ A Matter of Principle, p. 356.

⁵² *Ibid.*

normally be held in such a way as to exclude rival points of view. As Dworkin earlier stated it, we typically do not hold our moral convictions contingently but believe them to be categorically true. Thus if I regard a particular type or range of sexual conduct expressive of morally admirable qualities, I will also judge deviations from this norm morally unacceptable. It is hard to see how I could do otherwise unless I adopted the sceptical view towards what constitutes human flourishing in the first place. But that would only mean that I would have then adopted the tenets of a liberal morality which counsels neutrality in the face of morally controversial actions, or, at least, which counsels that I hold to my moral convictions in a provisional fashion. Dworkin's argument, therefore, seems to lead to the conclusion that only such "liberal" subjects are fitted for a world where liberal morality can have its sway.

Of course one could say that this is no genuine objection to Dworkin's argument because he is not in the first instance concerned with the constitution of individual motives but with how governments take those motives into account when designing policies having legal implications for our moral beliefs. It is governments, not citizens, which are charged with being studiously neutral among different moral points of view when fashioning their policies. Yet, it is not obvious whether this important qualification does rescue Dworkin from an inconsistency. To grasp the nature of the problem one must observe more closely how Dworkin would justify restrictive policies on obscenity from a rights-based perspective.

According to Dworkin, two avenues lay open to the policy maker when confronted with the question of regulating pornography. It might be decided that the

attitudes of the majority favouring regulation are so mixed that it is impossible, when reaching a policy settlement, to separate out authentic personal preferences. In this situation, the best defence against mixed attitudes is to forbid all regulation, just as in the case of *Sweatt* the most prudent course was to strike down the admissions policy of the University of Texas on the presumption that it was contaminated by racism. However, Dworkin also entertains a second possibility. The case of mixed attitudes might be taken as placing a special burden on policy-makers and the courts when deriving concrete rights from the abstract right of moral independence. This second avenue leaves a government with the option of regulating pornography, with the proviso that if the mixed attitudes of the majority form part of the justification for the regulatory policy, then "...no one should suffer *serious damage* through legal restraint..."⁵³

Dworkin considers this latter alternative a plausible response to the problem of mixed motives: "This second option, which defines a concrete right tailored to the problem of mixed preferences, is not a relaxation or compromise of the abstract right, but rather a (no doubt controversial) application of it to that special situation."⁵⁴ Although Dworkin had criticized the *Williams Report* for permitting what could be challenged as arbitrary trade-offs or compromises between the interests of pornographers and their opponents, he is assured that his own formulation does not suffer the same defect. True, the resulting concrete right that he derives will be hedged in by a scheme of regulation. But if the scheme is sensibly designed so as to inflict no "serious damage"

⁵³ *Ibid.*, p. 357.

⁵⁴ *Ibid.*

to consumers of pornography, Dworkin is content to say that their right to moral independence has not been jeopardized. In support of this contention, Dworkin briefly considers the kinds of damages which would result from a stripped down version of the *Williams Report* recommendations. He resolves that such a regulatory regime might cause inconveniences, added expenses, and embarrassment for consumers of pornography. Yet, none of these damages are serious enough, he concludes, to eliminate the regulatory practices.

Once regulations are permitted in this fashion, however, it is still tempting to say that a government is no longer neutral in this moral controversy but is engaged in weighing and balancing the moralistic preferences of pornographers and their opponents. The successful regulatory scheme is then not so much a plausible concrete adaptation of the abstract right to moral independence as it is an acceptable compromise to pornographers and their opponents, all of whom are liberal enough not to insist on their moral points of view too strongly. On the other hand, if Dworkin's argument does function in such a way as to avoid compromises over substantial values, it is because he elided his customary distinction between the moral worth of an act and the moral character of an actor.

Dworkin would doubtless protest that this argument misconstrues his point. Time and again he reminds us that the process of making an abstract right successively more concrete is not simply a matter of deduction but involves a "fresh step in political theory."⁵⁵ To illustrate how this fresh step in theory provides a support for the concrete

⁵⁵ *Ibid.*

right to consume pornography within the limits of a sensible regulatory scheme, Dworkin returns once again to the theoretical distinction he drew between personal and external preferences, but this time, shorn of his earlier argument about double counting.

In this crucial discussion of the problem of external preferences, Dworkin attempts to set out what he means by saying that governments must be neutral amongst citizens's moralistic preferences. Assuming once again that utilitarianism figures as the most influential background justification for government policies, Dworkin tries to show how a genuinely "neutral" utilitarian would deal with external preferences, or personal preferences contaminated by moralistic judgements about other people.⁵⁶ To this end, he imagines a state consisting of a large number of people who especially love one of the citizens named Sarah. These Sarah-lovers not only strongly prefer that her own preferences count for twice as much in ordinary utilitarian calculations, but they would also be grievously disappointed if their wishes went unfulfilled. Dworkin nonetheless concludes that in this special situation a truly neutral utilitarianism would have to exclude the preferences of the Sarah-lovers if it wishes to avoid a fateful contradiction. For if these preferences were not eliminated, then utilitarianism would itself be "self-undermining because it gives a critical weight, in deciding which distribution best promotes utility, to the views of those who hold the profoundly un-neutral (some would say anti-utilitarian) theory that the preferences of some should count for more than those

⁵⁶ It should be noted that throughout his essay on pornography Dworkin remonstrated only with the Williams strategy which rested on no utilitarian argument but relied instead on a modified Millian principle about conditions favourable to human flourishing. While the theoretical argument which Dworkin subsequently constructs is meant to show how the right to moral independence trumps unrestricted utilitarian calculations, he nonetheless intimates that a similar kind of argument can be mounted against Williams. On this qualification, see *ibid.*, pp. 414-15n16.

of others."⁵⁷

Dworkin notes that an obvious objection can be made to this line of reasoning. It is plausible to say that utilitarianism is not required to give any special weight to, or endorse the truth of, the theory that Sarah deserves to have her preferences counted twice. Rather, utilitarianism merely is constrained to count the *fact* that Sarah-lovers hold to this theory when it makes its calculations about appropriate policies. This would simply be another way of saying that the utilitarian methodological principle of counting everyone as one and only one is satisfied when everyone's preferences are recorded without any distinctions. Dworkin thinks there is a good reason for wondering whether this simple response masks a deeper contradiction. If utilitarianism does count the Sarah-lovers's preferences, he suggests, it would be tantamount to endorsing the view that some people are more important than others. An unrestricted utilitarianism would then end up undermining its own claim to supply a true account of what constitutes political morality. To avoid this dilemma, Dworkin concludes that utilitarianism has only one choice: "Utilitarianism must claim...truth for itself, and therefore must claim the falsity of any theory that contradicts it."⁵⁸

In an attempt to strengthen this last point, Dworkin offers a more recognizable political analogy. If a community includes a Nazi who prefers that "Aryans" have more of their preferences and Jews less of their preferences satisfied on account of the different moral status of their respective "races", a genuinely neutral utilitarianism would have no

⁵⁷ *Ibid.*, p. 361.

⁵⁸ *Ibid.*

choice but to dismiss the Nazi preference. The reason, Dworkin surmises, is that utilitarianism and Nazism, at this level, represent incompatible views of justice itself.

Political preferences, like the Nazi's preference, are on the same level--purport to occupy the same space--as the utilitarian theory itself. Therefore, though utilitarian theory must be neutral between personal preferences like the preference for pinball and poetry, it cannot, without contradiction, be neutral between itself and Nazism. It cannot accept at once a duty to defeat the false theory that some people's preferences should count for more than other people's and a duty to strive to fulfil the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences.⁵⁹

In supplying this more fully developed conceptual argument about the principle of justice intrinsic to utilitarianism, Dworkin has moved away from his earlier and simpler objections to double counting. But his prescriptive conclusion remains the same. Utilitarianism can secure itself from the dangers of counting Nazi preferences by recognizing an overarching right to moral, and, by extension, political independence. And, of course, it is this same fundamental right to moral independence which acts as a shield against counting moralistic preferences when censoring pornography is at issue. But, Dworkin thinks that the right to moral independence cannot disallow all regulations of pornography. Pornography is a special case, he admits, because "the danger of unfairness lies on both sides rather than one."⁶⁰ Without regulations some people will have a legitimate reason to complain that they have lost a measure of control over the environment they feel necessary to their own self-development. Rigid restrictions will

⁵⁹ *Ibid.*, p. 363.

⁶⁰ *Ibid.*, p. 365.

have the same effect on consumers of pornography. The best recourse in this situation is to fashion the concrete right to pornography in a manner which still allows for a policy of restriction. Once again, Dworkin thinks this involves no compromise of principle: "Allowing restrictions on public display is in one sense a compromise; but it is a compromise recommended by the right of moral independence, not a compromise of that right."⁶¹

However, if the right to moral independence really is not compromised by the regulations which Dworkin envisages, it may simply be because he assumes that citizens of a liberal state are sufficiently tolerant to accept the policy accommodation represented by those regulations. This point becomes clear if Dworkin's Nazi example is reexamined. In a contest with a rival political theory such as Nazism, Dworkin states, utilitarianism must "claim" truth for itself. Only in this way, he thinks, can Nazi political preferences be excluded from policy deliberations. But, should Nazi's constitute the majority in a state, it is obvious that such a claim on the part of utilitarianism would be irrelevant because the governing conception of justice would then presumably be inspired by the ideology of Nazism.

Therefore, it seems that utilitarianism can only claim truth for itself in a practical sense if the majority of citizens in state subscribe to this political theory, or to what Dworkin believes to be its underlying egalitarian principle. In this sense, Dworkin may be right in saying that the fundamental right to moral independence enjoined by the abstract egalitarian principle is not compromised by the state's regulations of speech and

⁶¹ *Ibid.*

expression. But he is right only to the extent that he presupposes that the state is comprised primarily of liberals who may have different views on a limited number of moral or political issues, but who are ready to accommodate each other in policy settlements whenever these differences are at stake. As to those who hold non-liberal moral or political views, no compromises are necessary because their views are effectively excluded from policy considerations by the dominant political morality. Thus, paradoxically, Dworkin appears to present the very illiberal argument that "might makes right" in order to support the truth claim of liberal political morality.⁶²

This apparent paradox in Dworkin's liberalism is evident in what ostensibly is one of his most radical liberal political arguments in defence of civil disobedience. In defending the right to civil disobedience, it would appear that Dworkin welcomes the kind of political debate among rival political moralities which his remarks on the truth claim of liberalism seem to exclude. But, as it turns out, his defence of civil disobedience is qualified in such a way that certain liberal truths remain immune from criticism. His argument on this score is worth a brief examination because it reveals the tenuous theoretical status of one of the fundamental conceptual distinctions he uses to construct his rights-based theory of liberalism.

5. The Right to Civil Disobedience

On the face of it, Dworkin's argument for the right to civil disobedience implies an extremely progressive view of politics. Dworkin suggests that when it is unclear what

⁶² This paradox is explored in more detail at *infra*, pp. 190-93.

actions a law recommends or prohibits, or when it is unclear whether a law conforms to objective moral or political rights, liberal political morality supports the widest possible respect for the right to civil disobedience. In the case of counselling draft resistance, or draft resistance itself, for example, he urges the view that because such dissenting behaviour is motivated by a plausible appeal to the fundamental liberal right of moral independence, prosecutions should be stayed or else courts should use their discretionary sentencing power to impose minimal penalties.⁶³ Although Dworkin supports an exceptionally tolerant moral and legal attitude to civil disobedience, he is prepared to qualify this attitude in cases where dissent is directed against straight-forward policy issues. Citizens who disagree with a policy decision, he states, should restrict themselves to normal democratic and legal channels of protest. Because those who engage in extra-legal dissent against policy decisions cannot make appeals to independent moral or political principles to support their activities, no moral right to civil disobedience exists. On the basis of this distinction, Dworkin concludes that protesters who break the law in their public opposition to American nuclear weapons policy, for example, cannot defend their actions on the grounds of a moral or political right to civil disobedience.⁶⁴

This qualification to the right of civil disobedience begs a very important question, which, when asked, provokes a general apprehension about Dworkin's

⁶³ See "Civil Disobedience," Taking Rights Seriously, pp. 206-22.

⁶⁴ See "Civil Disobedience and Nuclear Protest," A Matter of Principle, pp. 104-16. It should be noted that, although Dworkin insists that there is no moral right available to justify extra-legal opposition to American nuclear policy, he is still prepared to advise courts to use a lenient sentencing policy in cases involving nuclear protestors.

ecumenical liberal theory. By distinguishing arguments of principle from arguments of policy, Dworkin thinks he has a way of indicating when questions of individual rights bear on political disputes. The contrast between principles and policies is thus the first step in demonstrating when individuals are justified in challenging, through the courts or in the streets, existing laws or administrative practices. But the crucial term of art--the principle/policy distinction--upon which Dworkin's carefully crafted arguments depend may itself be extremely problematic. A closer scrutiny of what Dworkin would have assigned to the realm of policy, for example, might reveal an arbitrary moral and political structure in his argument. His previously cited article on civil disobedience and nuclear protest illustrates this problem.

Dworkin describes nuclear weapons protestors as a minority who oppose their own views on sound policy to those of elected decision-makers, and of the majority who presumably support their leaders's decisions. In this instance, where the dispute is over a policy, dissenters cannot hope to find moral support for the illegal measures they employ to force a substitution of their own views for those of the democratically chosen authorities. Indeed, Dworkin suggests that if minority dissenters try to force their views they would be acting from reprehensible elitist convictions. Yet, he allows that minorities who participate in civil disobedience for reasons that engage plausible fundamental moral or political rights cannot similarly be condemned as elitist, because there is at least the potential that their principled arguments are right. Civil rights activists who defied segregationist laws, Dworkin suggests, clearly fall in this latter category.

Dworkin thinks he is able to make this contrast between justified and unjustified

civil disobedience by imputing different fundamental concerns to nuclear dissenters and anti-segregationists. However, once his distinction between principles and policies is challenged, Dworkin's arguments become less perspicacious. Why, for instance, is Dworkin so convinced that no argument of principle can be raised against American nuclear weapons policy?

Once asked, the question invites speculations about the theoretical status of the demarcation between principles and policies. One can then make a plausible argument that in relegating the nuclear weapons debate to a strictly delimited policy field, Dworkin in effect has spirited in quite a different distinction between domestic and foreign policy. Thus domestic issues, because they are subject to the explicit and latent principles used in judicial review, become *inter alia* questions of principle, or at least capable of being trumped by suitably construed principles. Foreign policy issues, on the other hand, because they normally escape the reach of constitutional law, automatically become policy questions *simpliciter*. One could then say that Dworkin designs his argument in order to rationalize a Hobbesian view of politics: within a world defined by a social contract are rights and obligations, while without is a state of nature dictating political prudence.

This last example illustrates something of the general problem of drawing an unambiguous line between principles and policies. Dworkin assumes that there is such a clear and distinct line available to liberal theory. Political controversies can then be ordered along these distinctions and resolved, at least theoretically, by the admonition that principles have moral precedence over policies. But it is just as likely that political

controversies involve fundamental disputes over whether something is a principle or a policy concern. If the latter is an accurate description of what goes on in the political world, then it is hard to see how Dworkin's whole theoretical enterprise can get started, for the enterprise seems to presuppose at least a provisional agreement on what constitutes principles.

If the principle/policy distinction does prove refractory to any precise demonstration, then Dworkin's theory is susceptible to precisely the kind of criticism he makes of the positivist's understanding of judicial discretion. Whatever principles are invoked to fortify a legal right are arbitrarily chosen for the assignment. Dworkin does, however, have a rejoinder to this line of criticism. His theoretical contention is that the more tangible principles that do prescribe the range of acceptable policies themselves flow from the abstract egalitarian principle. Whether this reply really answers the criticism of arbitrariness can only be determined by assessing the theoretical cogency of Dworkin's conception of the abstract egalitarian principle.

6. Abstract Equality and the Principle of Neutrality

Throughout his various discussions of the content of liberal morality, Dworkin undertakes to render the abstract principle of equality successively more concrete by an appealingly simple proposition. That proposition is that a government, when assigning goods or duties to citizens, must exhibit complete impartiality towards each citizen's moral beliefs and aspirations if it is to treat them as equals. While such an official policy of neutrality would seem to imply that the government must assume a sceptical attitude

to all questions of moral truth, Dworkin insists that this is not so. Rather, he suggests that the principle of state neutrality is morally required by a political theory predicated on equality: "Liberalism cannot be based on scepticism. Its constitutive morality provides that human beings must be treated as equals, not because there is no right and wrong in political morality, but because that is what is right."⁶⁵

This is Dworkin's way of saying that liberal political morality is informed by the moral assumption that it is right to treat individuals as equals. But is this the only moral assumption in his political theory? Previously in this chapter it was suggested that when governments do make policy decisions along the lines suggested by Dworkin, the neutrality provision may in fact become transformed into a procedure for weighing moral preferences on a scale which itself has an unstated moral dimension. And, significantly, that unstated moral assumption may be something other than the stipulative maxim about equality. The best way to get at this point is to subject Dworkin's political theory to an immanent critique in which the various conceptual distinctions he employs to generate arguments for concrete rights are examined for internal consistency. To prepare the ground for this critique, it will be useful to explore the trenchant criticisms made by Michael Sandel and Rae Langton of two of Dworkin's specific political arguments.

Michael Sandel, in a discussion of Dworkin's argument in favour of affirmative action, proposes that he is guilty of an unwarranted personification of society.⁶⁶ It is this personification which allows Dworkin to say that an individual's talents or natural assets,

⁶⁵ A Matter of Principle, p. 203.

⁶⁶ See SanJel, Liberalism and the Limits of Justice, *op. cit.*, pp. 135-47.

because they are not earned in any sense of the word, belong not to him or her but to society itself. If talents are thus "owned" by society, then no individual can claim merit for his or her talents, and can have no legitimate claim to any particular rewards like a place in a medical or law school. Instead, it is the political representatives of a society who are entitled to employ these talents in whatever way is thought to benefit society. Sandel's complaint is that Dworkin's dispossession of the person has not been matched by any theoretical clarification of the ontological character of the society or community which is said to possess in common all individual talents. To put it simply, Dworkin has not shown why a community has any privileged claim to an individual's talents or natural assets.

It should be stressed that Sandel's criticism is cast at an ontological, not a political level. Sandel himself is not opposed to affirmative action programs, but merely wishes to reveal how Dworkin's argument leads to an unacceptable disappearance of the person. Individuals bereft of any moral claims to desert thus become objects whose talents are arbitrarily enlisted in the common endeavours of a community.

While Sandel's critique of Dworkin's ontological position is powerful, there is at least some justification in Dworkin's initial response that his own argument makes no ontological claims about what constitutes a personality or whether talents and assets are in the moral possession of the individual or society.⁶⁷ Whether talents or assets are said to belong to a person, Dworkin insists, is irrelevant to the question of what a person is

⁶⁷ See Dworkin, "A Reply," *Ronald Dworkin and Contemporary Jurisprudence*, *op. cit.*, pp. 291-294. Dworkin explicitly returns to Sandel's critique in his most recent article on liberal ethics, "Foundations of Liberal Equality," *op. cit.* For a discussion of this latter, more fully developed response to Sandel, see *infra*, chapter 11, pp. 562-70.

entitled to in virtue of those talents or assets. If ownership of something is said to provide some particular entitlement, it is only because of a theory to that effect. And, any such theory of entitlement must be able to defend itself under a more general argument for rights. Dworkin reminds Sandel that, in his own articles on affirmative action, he did consider a number of alternative arguments for a meritocratic theory of entitlements, only to find them internally inconsistent. Dworkin concludes that nothing in his own theory suggests that just because individuals are denied an entitlement to specific rewards because of their talents, they are for that reason denied the kind of respect that is merited by their moral worth. To tie moral worth directly to specific entitlements, Dworkin intimates, is to confuse ontological and political arguments.

It is clear that Dworkin does manage to exculpate his theoretical approach at least in part from Sandel's criticisms. Dworkin is right to say that a bare assertion about a person's possession of talents justifies no particular entitlement because it begs the question of what is involved in entitlements. But he may have dismissed too easily Sandel's point that a person's moral worth is intimately tied to a notion of entitlements. For, to say, as Dworkin does, that denying rewards or status is not equivalent to denying moral worth is also a question-begging exercise. After all, this merely raises the question of how moral worth is to be indemnified. Dworkin's answer that the moral worth of an individual is shown respect when a government does not discriminate against his or her character and aspirations is not altogether satisfactory. For this merely pushes back the question of what rewards are suitable to what talents to potentially interminable policy debates over community benefits. But while all this happens, individuals do not proceed

to make claims about desert contingently, but rather do so in the moral language of rights.

There is a sense in which Dworkin merely finesses the whole question of desert by shuffling back and forth between arguments of principle and arguments of policy. On the other hand, if Dworkin does succeed in escaping the problem, it is because he imports into his argument an assumption about what it is about the human character that merits attention to desert-claims. What this assumption consists of can only be made clear once the whole of Dworkin's political argument is subjected to critical scrutiny.⁶⁸

Whereas Sandel's approach to the question of affirmative action is meant to raise questions about the ontological implications of Dworkin's theory, Rae Langton's essay on Dworkin and pornography is restricted to a consideration of his logic-in-use in a particular civil rights context. Langton grants that Dworkin does have a powerful argument for showing when rights come into play in policy deliberations. But she also thinks it is possible to use Dworkin's reasoning against his own conclusions, in the process, showing how an argument of either principle or policy can support the strict control of pornography.

To fashion an argument of principle in favour of censoring pornography, Langton

⁶⁸ At this point, however, it is interesting to note that, even in his original defence against Sandel's ontological critique, Dworkin was willing to acknowledge that it raised an important political question left unaddressed in his argument for affirmative action. Thus, conceding that Sandel was correct to emphasize that some determinate notion of community is necessary to support his contention about the justness of affirmative action, Dworkin offered what he regarded as an ethical definition of a liberal community: "...no one should be asked to sacrifice in the name of the community unless he can see his own efforts reflected in the virtues of that community and so take pride in these virtues." "Reply," *op. cit.*, p. 294. This, of course, begs the question of what make up the virtues of a liberal community. For details of Dworkin's more substantive views of the ethical constitution of a liberal community, see *infra*, ch. 7, pp. 361-74, ch. 9, pp. 436-52, and ch. 11, pp. 561-70.

starts with the assumption that a permissive policy can be based on the utilitarian argument that most people want access to pornographic material.⁶⁹ But, following Dworkin's counsel, once a utilitarian argument is advanced, the question of rights must be addressed. Langton proceeds to ask whether the moral right to independence of women would be violated by a permissive policy. It is worth recalling that Dworkin himself briefly considered this question when he referred to claims that pornography leads to acts of violence against women. However, he concluded that since no strong evidence of a causal connection was available, the more pertinent question is whether individuals justifiably feel pornography restricts their own ability to pursue what they think is a desirable life.

Langton disagrees with this move. By narrowing his consideration of the harm of pornography, or of its restriction, to some discernable feature about the insult a person might feel to his or her own life aspirations, Dworkin misses the obvious connection between pornography and systemic discrimination. To press her point, Langton draws on a feminist argument that fits Dworkin's own two-step test for determining if a right is at stake in a policy issue. The first stage of the argument is to establish the social fact that women experience unequal treatment in society. This is hardly a controversial proposition and can easily be supported by the most cursory examination of economic

⁶⁹ This departs from Dworkin's formal argument since he had started from the premise that an argument of principle in defence of pornography is necessary because there is reason to believe that majority preferences would probably call for prohibition. However, Langton suggests that empirical evidence might bear out her own assumption, and even if it did not, she tentatively argues that when Dworkin would have policy-makers factor out external moralistic preferences, it is the personal preferences of consumers of pornography which tip the scales in favour of a permissive policy. This "laundered" utilitarian argument, she concludes, is still ultimately utilitarian in spirit. See Rae Langton, "Whose Right? Ronald Dworkin, Women and Pornographers," *Philosophy and Public Affairs*, Vol. 19, no. 4 (Fall, 1990), pp. 352-53.

indicators. Another token of this systemic inequality, Langton remarks, is the range of sexual offenses committed by one class of individuals, men, against another class, women.

It is the second stage of the argument, however, which is decisive in supporting a rights-based claim against pornography consistent with Dworkin's analytic scheme. The second stage requires some form of proof that pornography does as a matter of fact contribute significantly to systemic inequality. Langton thinks that feminists do indeed provide a plausible hypothesis that pornography influences the behaviour and attitudes of men in a way that contributes to the systematic sexual abuse of women. If this hypothesis is accepted, even as a conditional argument, Dworkin's own analysis would call for a closer look at pornography because an important harm is indicated.

Any policy that would prohibit pornography, however, still has to be appraised according to a test of the preferences that would figure in its justification. It is in this matter of investigating preferences that Langton makes a crucial observation about Dworkin's own theoretical protocols. It might not be possible to demonstrate conclusively that there is a causal connection between pornography and sexual battery. But a very plausible argument can nonetheless be made that pornography reinforces a pernicious masculine ideology which legitimizes and perpetuates the subordinate status of women. And, because pornography typically portrays women in exploitative and degrading situations, a *prima facie* argument can certainly be made that it contains a direct assault on a woman's moral worth.⁷⁰ If this is the case, then Dworkin's own analysis proposes

⁷⁰ Or as another Dworkin famously declared: "...pornography is violence against women." Andrea Dworkin, Pornography: Men Possessing Women (New York: Perigee Books, 1989), p. 25.

that we check the character of the preferences which would justify a permissive policy towards pornography. There may well be consumers of pornography who harbour no objectionable attitudes to the moral worth of women, and, therefore, whose own personal preferences cannot be disqualified from policy deliberations. But others may prefer pornography because it fortifies their opinions about the morally subordinate nature of women. In these circumstances where motives are mixed, what do Dworkin's principles recommend?

Langton sees in this situation an analogy to the line of reasoning Dworkin adopted in his discussion of the *Sweatt* case. Because there was an antecedent likelihood that the admissions policy of the University of Texas was contaminated by racist preferences, Sweatt had to receive the benefit of the doubt that his right to moral independence had been invaded. In other words, Langton alleges that Dworkin works with an implicit principle about the burden of proof when civil rights are at stake.⁷¹ If there is any reasonable expectation that moral harm is intended by, or underlies, a certain policy, the presumption must be that the policy infringes upon an important moral or political right. Extending this same principle to the issue of pornography, Langton concludes that Dworkin's analysis can support a woman's right to be treated as an equal, which means, among other things, a right to insist that pornography be banned.

Langton supplements this argument of principle with a different argument of policy. It is possible, again using Dworkin's own theoretical distinctions, to construct an ideal policy that would prohibit pornography in the interests of promoting sexual

⁷¹ "Whose Right?" *op. cit.*, pp. 342-343.

equality. Because this is an ideal and not a utilitarian policy argument, and because it is advanced in the name of the abstract egalitarian principle, it offends no one's right to moral or political independence. The parallel in this instance, Langton suggests, is the reasoning which Dworkin employs in the *DeFunis* case where affirmative action programs were judged not to imply any moral approbation of failing candidates. Likewise, as an ideal policy, the prohibitive scheme mentioned by Langton relies on no moral estimate about the character of pornographers or their customers, and, therefore, is by Dworkin's own theoretical test immune to any counter-claim about individual rights.

Langton's analysis is intended to show that Dworkin can be used as an ally both for defenders of permissive policies towards pornography and for opponents to such policies. One might conclude from this demonstration that Dworkin's own theory is too ambiguous to actually support the political positions he claims for it. Alternatively, one could simply say that in the case of pornography the fault lies not with Dworkin's theory but with the way in which he constructs his particular argument. A more careful application of Dworkin's own principles would in this case support the feminist position and make Langton the better expositor of these principles. If we are to resolve the question of whether Langton or Dworkin has the better of it on the issue of pornography, it can only be after a closer examination of the key distinction between personal and external preferences which carries the analytic load in all of Dworkin's rights-based arguments.

7. The External/Personal Preference Distinction

At the beginning of this chapter it was said that Dworkin has tried to elaborate a procedural theory which can sort out which liberties, or their legal embodiment as rights, are required by a liberal theory predicated on the abstract principle of equality.⁷² It is a procedural theory in the sense that its basic premise about the need for governments to treat citizens with equal concern and respect is regarded as uncontroversial if not axiomatic. Moreover, the various conceptual distinctions which Dworkin subsequently introduces, especially the personal/external preference distinction, are presented as correlates of the abstract egalitarian principle which in no way comprise independent substantive values. Yet, upon these slender conceptual threads Dworkin thinks it is possible to mount arguments in support of a number of substantive rights and policies. What Dworkin has in mind, therefore, is a procedural theory that can generate well-grounded answers to political controversies germane to liberal societies.

Dworkin's general strategy in devising this procedural theory is to construct a concept of rights whose role is pre-emptive. In what might be his most succinct formulation of this theory, Dworkin states that

⁷² In the critical literature it has become commonplace to attribute to Dworkin an ambitious though ultimately unrealizable procedural theory of justice. See for example, H.L.A. Hart, "Between Utility and Rights," Columbia Law Journal, Vol. 79, no. 5 (June, 1979), p. 88; Lawrence G. Sager, "Rights Scepticism and Process-Based Responses," New York University Law Review, Vol. 56, nos. 2-3 (May-June, 1981), p. 432; and John H. Ely, "Professor Dworkin's External/Personal Preference Distinction," Duke Law Journal, no. 5 (November, 1983), p. 972. Dworkin himself, in response to Ely's criticisms, has been content to accept that his work consists of a procedural theory, though he resists the inference that a pure procedural theory of law must be indifferent to the outputs of fairly constituted legislative enactments: "Judicial review should attend to process not in order to avoid substantive political questions, like the question of what rights people have, but rather in virtue of the correct answer to those questions." A Matter of Principle, p. 58.

The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.⁷³

In other words, Dworkin wants to find a way of defending majoritarian democracy while protecting minorities from the prejudices of majorities. His solution is to banish certain preferences from policy-making which could be said to reflect majoritarian prejudices. But does the external/personal preference distinction execute its assigned task in an unambiguous manner? There are three ways to confront this question. First, can the distinction actually be made in a non-trivial or non-question-begging fashion? Secondly, if the distinction has even a qualified theoretical validity, is it in any way relevant to moral or political theory? Finally, if the distinction is relevant, is it sufficient on its own to bear the weight of Dworkin's procedural argument about justice.

The first question asks us to consider whether a conceptual distinction between external and personal preferences is coherent. A close inspection of Dworkin's distinction shows that it closely resembles one which John Stuart Mill tried to establish between self-regarding and other-regarding actions. It is true that Dworkin does not think Mill's harm principle is helpful in providing criteria which would justify when a state could regulate human conduct. The problem with Mill's harm principle, Dworkin says, is that it is

⁷³ Taking Rights Seriously, p. 277.

insufficiently discriminatory to confirm what signifies genuine harm. But, Mill was also aware of this problem and tried to qualify the harm principle with a proposal that only genuinely other-regarding actions should invite state concern. Dworkin's own distinction between external and personal preferences can be viewed as an amended version of Mill's recommendation. It is an amended variant because, unlike Mill, Dworkin does not rely strictly on a simple consequentialist interpretation of external preferences. Rather, he is concerned with their internal structure.⁷⁴

But, even this modification of Mill's consequentialist definition of other-regarding actions may not be able to save Dworkin's facsimile from the familiar criticism that there is no conceptual means of distinguishing self-regarding from other-regarding actions in anything other than trivial situations. For instance, in the previous discussion of permissive policies towards pornography it was remarked that any moral attitude a person might hold regarding those things he or she consider essential to his or her own well-being invariably involves a moral judgement about divergent views over those same things. It is hard then to see how a consistent line can be drawn between preferences which one has only for oneself and preferences which include others.

Several critics have expressed similar reservations about the coherence of Dworkin's binary distinction between preferences. For example, C. Edwin Baker thinks the distinction is murky and gives the following illustration: "If I prefer that A rather

⁷⁴ Although, it must be admitted that Dworkin is not always consistent on this matter. Thus, his initial generic description of external preferences as those preferences concerned with the assignment of goods and liberties to others is wholly consequentialist. But, when Dworkin emphasizes only the morally evaluative character of preferences directed to others, it is not so much the consequences but the internal structure of the preference that becomes important. On the significance of this distinction see the argument developed at *infra*, pp. 180-83.

than B get a new car because A will then give me some benefit--e.g., as my friend A may come and visit me, or A may be happier and thus a more pleasant friend, or A may bring the car to my garage to be serviced, thereby increasing my income--my preference relates *both* to the *assignment of goods to others* and to *my own enjoyment of goods* and opportunities."⁷⁵ Joseph Raz gives a different example to illustrate the difficulty involved in Dworkin's distinction: "Some say that the preference for deciding all matters affecting me by myself is an external preference, for it entails a preference for not being governed by others. But if so, then the preference to own the Taj Mahal is also external as it entails a preference that it not be owned by others."⁷⁶ Lawrence Sager offers yet another example that undermines Dworkin's rudimentary distinction. Invoking the example of a hypothetical island state in which the "lowlanders vote to impress the hilldwelling population into more or less permanent servitude manning water pumps," Sager concludes that such slavery, "enforced to the clear self-interests of the lowlanders, can hardly be said to rest on the external preferences of that group."⁷⁷

While these criticisms are informative, they need not be altogether fatal to Dworkin's overall project. For he could reply that it is possible to reprove those instances where detestable consequences arise from ostensibly self-regarding actions using other principles of justice that do not depend solely on the exclusion of external

⁷⁵ C. Edwin Baker, "Counting Preferences in Collective Choice Situations," *UCLA Law Review*, Vol 25, no. 2 (1978), p. 383n8.

⁷⁶ Joseph Raz, "Liberalism, Scepticism, and Democracy," *Iowa Law Review*, Vol. 74, no. 4 (May, 1989), p. 774n21.

⁷⁷ Sager, "Rights Scepticism and Process-Eased Responses," *op. cit.*, p. 433.

preferences. But for the rest, the external/personal preference distinction is still a useful principle to distinguish and exclude from policy deliberations that class of actions which are implicated in moral judgements about others. However, even in this restricted sense the distinction may involve problems of a different order, for it would artificially narrow the range of moral attitudes deemed appropriate to policy deliberations. The gravity of this latter problem becomes apparent when one contemplates the other two ways of addressing the relevance of Dworkin's distinction.

If it is admitted that a conceptual discrimination among preferences has some intelligibility, it still remains questionable whether Dworkin's particular rendering of this distinction has any genuine relevance to political or moral theory. H. L. A. Hart has made one of the strongest arguments rejecting the relevance of Dworkin's distinction to political theory. His most general objection is to Dworkin's contention that concrete political rights accrue to individuals according to whatever external preferences or prejudices are current in a society. Hart thinks this leads to a paradox where the less intolerant a society, the fewer rights are necessary: "So far as this argument for rights is concerned, with the progressive liberalization of society from which prejudices against, say homosexual behaviour or the expression of heterodox opinions have faded away, rights to these liberties will (like the State in Karl Marx) wither away."⁷⁸

This may not be quite the problem Hart thinks it is. What is wrong, after all, in saying that a society is so tolerant that no one has the occasion to claim a right against fanatical or bigoted behaviour? And if it proves to be the case that the society is not as

⁷⁸ Hart, "Between Utility and Rights," *op. cit.*, p. 90.

tolerant as imagined, Dworkin's argument for rights still obtains. But Hart may still have a point in this general objection when it comes to estimating the likelihood that any particular right is required in a society. To grasp this problem it is necessary to attend to Hart's other criticisms of Dworkin's external/personal preference distinction.

Hart's most potent argument is directed against Dworkin's supposition that counting external preferences is a form of double-counting. According to Hart, counting external preferences, as in the case of those who prefer swimming pools for the benefit not of themselves but bona fide swimmers, is in no way a form of double counting analogous to giving one class of individuals two votes. For, as Hart intimates, not counting the external preferences of the altruistic non-swimmer is itself contrary to the spirit of utilitarianism.

No one's preference is counted twice...it is only the case that the proposal for the allocation of some good to the swimmer is supported by the preferences of both the swimmer and (say) his disinterested non-swimmer neighbour. Each of the two preferences is counted only as one; and surely *not* to count the neighbour's disinterested preference on this issue would be to fail to treat the two as equals. It would be 'undercounting' and presumably as bad as double counting.⁷⁹

Hart attempts to corroborate this argument with an example drawn from British political experience. He suggests that when the English law on homosexuality was reformed in 1967, it was possible only because the liberal external preferences of heterosexual reformers prevailed over those of conservatives. Yet, it would seem that Dworkin's own theory would condemn this progressive policy of toleration as mistakenly

⁷⁹ *Ibid.*, p. 92. For a similar type of criticism, see Joseph Raz, "Professor Dworkin's Theory of Rights," *Political Studies*, Vol. XXVI, no. 1 (1978), p. 131.

based on the altruism of heterosexuals. The only way for Dworkin to avoid this conclusion, in Hart's estimation, is to further narrow the range of improper preferences.

However, even if Dworkin's conception of the suspect class of external preferences is confined to those which would deny someone liberty on the basis of a misbegotten assessment about that person's moral worth, Hart still thinks no procedural argument is available to sort out illegitimate preferences. First of all, this amended procedural rule no longer excludes preferences simply because they are external.

The objection is no longer that the utilitarian argument or a majority vote is, like double counting, unfair as a procedure because it counts in 'external preference', but that a particular *upshot* of the procedure where the balance is tipped by a *particular kind* of external preference, one which denies liberty and is assumed to express contempt, fails to treat persons as equals. But this is a vice not of the mere externality of the preferences that have tipped the balance but of their content: that is, their liberty-denying and respect-denying content.⁸⁰

It would seem, therefore, that what Dworkin really wishes to exclude from consideration in policy decisions are not external but substantive preferences--preferences which, in denying others liberties, are intricately in another kind of preference for showing others less respect or concern. It is in this adaptation of Dworkin's double counting argument that Hart claims to find the main weakness in his whole "anti-utilitarian" theory of rights. Enforcing majority views does not, Hart suggests, automatically imply any dubious judgement about the moral worth of a frustrated minority.

⁸⁰ "Between Utility and Rights," *op. cit.*, p. 93.

What is fundamentally wrong is the suggested interpretation of denials of freedom as denials of equal concern or respect. This surely is mistaken. It is least credible where the denial is the upshot of a utilitarian decision procedure or majority vote in which the defeated minority's preference or vote for the liberty has been weighed equally with others and outweighed by numbers. Then the message need not be, as Dworkin interprets it, 'You and your views are inferior, not entitled to equal consideration, concern or respect', but 'You and your supporters are too few. You, like anyone else, are counted for one but no more than one. Increase your numbers and then your views may win out.'⁸¹

Hart imagines that Dworkin's response to this line of criticism would be to fall back on the argument that any imposition of external preferences would be tantamount to a judgement that those who suffer by the imposition of such values are inferior and not worthy of equal concern and respect. For this reason, a government must commit itself to neutrality among all schemes of values if it is to treat everyone equally. Hart agrees that the stance of neutrality may be a noble liberal principle, but it is not a logical extension of the egalitarian principle instructing a government to show equal concern and respect for its citizens. The neutrality postulate, on its own, is only an invitation for governments to treat their citizens in the same way:

....both the liberal prescription for governments, 'impose no scheme of values on any one', and its opposite, 'impose this particular conception of the good life on all', although they are universal prescriptions, seem to have nothing specifically to do with equality or the value of equal concern and respect any more than have the prescriptions 'kill no one', and 'kill everyone', though of course conformity with such universal prescriptions will involve

⁸¹ *Ibid.*, pp. 93-94.

treating all alike in the relevant respect.⁸²

From these various observations Hart concludes that a "vacuous use is being made of the notion of equality....",⁸³ which can be repaired only by recourse to a different theory indicating why certain liberties are so essential in the first place.

There is no doubt that Hart has presented a telling critique of Dworkin's external/personal preference distinction. It is a sign of how significant Hart's critique has been that Dworkin subsequently abandoned his double counting argument in favour of a conceptual argument about the logical incompatibility of utilitarianism and rival distributive theories such as those proposed by Nazis. But, even though Dworkin shifted his ground, he has raised quite powerful counterarguments to Hart's other objections. It is well worth noting some of these counterarguments, for they do supply good reasons for continuing to accept some form of the external/personal preference distinction as relevant to political theory.

Hart's last point about the moral irrelevance of universal injunctions is less devastating to Dworkin's argument than it might first seem. Dworkin provides a thoughtful rebuttal to Hart's admonition about the emptiness of his conception of equality by acknowledging that a formal denial of a liberty to everyone is a kind of equal treatment. But, he continues, it is equality only in the spirit of Anatole France's wry observation that the laws of France are egalitarian because they forbid both rich and poor

⁸² *Ibid.*, p. 95.

⁸³ *Ibid.*

alike from sleeping under bridges.⁸⁴ Dworkin is well aware that formal equality cast in this way is only equality in the ironic sense. His response is that one must distinguish the contrasting values a bare liberty would have for different persons. His prosaic but pertinent example is the hypothetical banning of all Marxist literature. Because such a ban is applied to all alike, one could argue that no one is being discriminated against more than anyone else. But if we take into account the value of expressing oneself in a Marxist vocabulary, a different picture emerges. Those who would be persuaded by Marxism will suffer the legal ban more greatly than those who are anti-Marxists. Thus, the value of a right is an important consideration in assessing the fairness of laws that ostensibly apply equally to everybody.⁸⁵

But, if such an assessment is possible, one must be able to devise a measurement by which to gauge the value of a right for each person. Dworkin suggests that the "natural metric" for rights, or more broadly, for opportunities, is to be found in their consequences. That is, a person holds a right or opportunity valuable in light of the consequences she or he thinks may flow from it. This, however, would seem to lead Dworkin into territory which he previously disdained because it invariably would involve judgements about which consequences themselves should be judged more valuable. But Dworkin seems to have a way out of this dilemma in his discussion of Marxist literature. He suggests that if free speech is to be judged integral to democracy, and, therefore, valuable for this reason, it is only because of a commonly held assumption that it

⁸⁴ A Matter of Principle, p. 63.

⁸⁵ Dworkin claims to draw the distinction between a right and the value of that right from Rawls's Theory of Justice, See *ibid.* p. 402n37.

essential to be able to participate in the political process. This familiar assumption can thus serve as a common metric for value because it signifies an expectation that each person *will* receive equal respect, and the interests of each *will* receive equal concern, not only in the choice of political officials, but in the decisions these officials make. In these circumstances, it is evident that banning Marxist literature will have the effect of denying to Marxists, but not anti-Marxists, equal concern and respect. By invoking the abstract egalitarian principle in this way, Dworkin appears to close the circle and avoid relying on any independent moral reason for protecting the substantive right of free speech. There is cause, however, to think that Dworkin could not have produced this substantive result without the help of at least one more assumption, as will presently become evident.

If Dworkin has at least a plausible way of defending his conception of equality against Hart's charge of vacuity, he also has a way of averting the criticism that his theory of rights would condemn progressive policy decisions arrived at through the counting of altruistic preferences. Hart chided Dworkin for the implication that his theory would have for the 1967 relaxation of English laws against homosexuality. There is, however, an important sense in which Hart has misunderstood the thrust of Dworkin's rights-based argument. Dworkin has persistently denied that his own theory undermines a politics informed by preferences for the welfare of others. He is quite happy to acknowledge that progressive politics would not have any practical purchase were it not for the fact that there are people fighting for causes that involve the well-being of others. But, regardless of how the political process furnishes a result, the justice of a cause lies

not in the fact that a number of people think it just, but that it is just in the objective sense that can be demonstrated by an argument drawn from liberal political morality.

One way to understand what Dworkin is saying is to recall that his rights-based theory presupposes a judicial apparatus charged with determining what laws are constitutional. The permissive law on homosexuality may well have been reached as a result of the altruistic preferences of heterosexuals. If this law is challenged in the courts by a frustrated moralist who claims his or her own right to moral independence has been breached, the court must decide the issue on the basis of what a correct interpretation of liberal political morality requires. If that interpretation supports the law, the political process has merely been vindicated for doing the right thing in its own democratic manner.

While this answer might assuage fears that Dworkin's theory makes problematic the democratic process, it is still not free of difficulties. A court, after all, must still employ Dworkin's test for determining when a right is at stake, and that test does involve an estimation of the preferences leading up to a decision. Because Dworkin maintains that both altruistic and spiteful preferences for the interests of others must be factored out of political decisions if they are to be judged consistent with the abstract egalitarian principle, courts must decide whether the altruistic preferences of heterosexuals for the fate of homosexuals have proved to be the decisive element in a policy decision favouring sexual tolerance. If so, then it would seem that courts would have to declare such a policy invalid because it is informed by prohibited external preferences. It would appear, therefore, that Hart's apprehensions about the potential for progressive legislation, such

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as the 1967 British law on sexual tolerance, to be checked by Dworkin's prescriptive theory of rights were well-founded after all.

However, Dworkin believes he has another line of defence available to save the British policy towards sexual tolerance. Thus, he claims that it is at least plausible to assume that reform-minded British heterosexuals were motivated to press for a policy of sexual tolerance not so much by altruism as by an ideal argument to which they attached great significance. Moreover, he imagines that the ideal argument to which these enlightened heterosexuals subscribed itself represented the egalitarian right to moral independence. If this were the case, the policy preferences of the liberally-minded heterosexuals fell into no suspect class and could not be used in a legal argument to disqualify the policy decision itself.

Once again, Dworkin seems to rescue himself from an apparent contradiction, though rather more is implied in this manoeuvre than might first appear. A number of critics have pointed out that many of the political decisions which Dworkin favours are antecedently likely to have been reached through the courtesy of altruistic preferences. For example, the New York state law regulating hours of work in bakeries, which was struck down, though later regretted, by the Supreme Court in the *Lochner* case⁸⁶, is one such instance where humanitarian motives were unquestionably at work in the

⁸⁶ In this famous constitutional case, a New York state law passed in 1897, putting a limit on the number of hours bakers could work at a stretch, was challenged by a bakery owner who argued that those in his employ had voluntarily signed contracts for lengthy working hours. The U.S. Supreme Court agreed with the employer and declared the New York law a violation of contractual liberties protected by the U.S. Constitution. In later cases, however, the Court regretted the *Lochner* decision and chose not to be bound by the precedent it established. For details of the original ruling, see *Lochner v. New York State*, 198 U.S. 45 (1905).

formulation of policy.⁸⁷ On the face of it, therefore, such legislation would have been impugned by Dworkin's theory of rights because it was motivated by altruistic external preferences. Dworkin can, of course, claim that the labour-protective legislation was justified on the basis of an ideal argument of policy which it could reasonably be supposed that at least some of the legislators entertained. This, however, leads to new problems. Dworkin would have to assume that an ideal argument about promoting economic equality through progressive labour legislation would be a sufficiently close match to the abstract egalitarian argument to justify its power to prevail in a situation where the motives of legislators were mixed. But, could not an equally plausible argument be made that the abstract egalitarian principle recommends an ideal argument of policy where contracts fairly entered into exhaust the right to moral independence?⁸⁸

To defeat this latter ideal argument of policy, Dworkin would have to either remit a more substantive theory of distributive justice, or prove that the ideal argument about fair contracts is a rationalization of an illegitimate external preference. But it is in no way obvious that Dworkin can provide a more substantive theory of distributive justice from the scant conceptual devices of his procedural approach.⁸⁹ As for the second strategy of discounting certain ideal arguments as rationalizations for illicit external preferences,

⁸⁷ Several critics use the *Lochner* case as a paradigmatic example of where Dworkin's prescriptive theory, built around the external/personal preference distinction, breaks down. See, for instance, Donald H. Regan, "Glosses on Dworkin: Rights, Principles, and Policies," Ronald Dworkin and Contemporary Jurisprudence, Marshall Cohen, ed. (Totowa, N.J.: Rothman and Allanheld, 1984), p. 152n18, Sager, *op. cit.*, p. 434, and Ely, *op. cit.*, p. 966.

⁸⁸ Which is what the court initially decided in *Lochner*.

⁸⁹ Though as will be seen in the next three chapters, he does attempt a procedural theory of distributive justice.

Dworkin would need to have recourse to a sophisticated theory about ideology which he cannot derive from his initial premises about what equality enjoins. For that initial premise merely stipulates that the egalitarian principle is an abstract concept for which there are contending conceptions. If Dworkin wishes to maintain that a certain conception of equality is ideologically motivated, therefore, he would have to show how political arguments over principles can be legitimizing exercises intended to defend particular social interests.

It should by now be clear that this lack of a substantive theory of ideology is not simply a problem for Dworkin's assessment of the *Lochner* decision. For example, when he compared the *DeFunis* and the *Sweatt* cases, he asserted that an ideal argument was available for affirmative action but not for segregation. But surely one could argue that there could be a *prima facie* plausible ideal argument, in Dworkin's sense of the term, for segregation. Thus, if only the formal structure of an ideal argument of policy is considered, a consistent and sophisticated argument about a separate but equal division of social goods could conceivably be made to fit with the abstract egalitarian principle and ostensibly avoid disapproving convictions about the moral worth of any race. Or, as previously indicated, a plausible ideal argument can be made to support the prohibition of pornography without thereby involving a moral condemnation of consumers of pornography. In these circumstances, it would appear that stronger arguments are needed to support both the rights and the policies which Dworkin would wish to secure.

There is, however, one last repair that can be made to Dworkin's overall theoretical strategy. Dworkin notes in passing that there is a reason to resist the

blandishments of just any argument that presents itself as an ideal: "The liberal conception of equality sharply delimits the extent to which ideal arguments of policy may be used to justify any constraint on liberty. Such arguments cannot be used if the idea in question is itself controversial within the community."⁹⁰ Because he simply asserts this limitation without ever demonstrating how it is implied by the abstract egalitarian principle, one can object that Dworkin has hardly made his case.⁹¹ Nevertheless, Dworkin's exclusion of controversial ideals points to an interesting feature of his preferred liberal theory.

This feature can best be illustrated by returning to his argument about how the general truth claim of utilitarian theory must necessarily exclude the truth claims of competing political theories. Dworkin declares that the demands of Sarah-lovers or Nazis that the best regime should count or discount certain people's preferences in special ways must be rejected because it stands in contradiction to the central truth claim of utilitarianism. It is essential to realize that Dworkin is making a logical argument here to supplement his earlier contention about the inadmissibility of double counting. In one sense this is an unexceptional logical point if it is taken to mean that a political system committed to a certain decision-making procedure is perforce committed to the protocols of that procedure. The procedure itself then governs what rules should ordinarily be

⁹⁰ Taking Rights Seriously, p. 274.

⁹¹ See, for example, Joseph Raz, who states that Dworkin's point is far from obvious. Raz proceeds to give the interesting example of an ideal political argument modelled after Huxley's Brave New World. Even if this ideal were not widely endorsed by most or by all, it is still compatible with the principle of a government showing everyone equal concern and respect. One could not then appeal to any moral right to resist the implementation of such a scheme. "Professor Dworkin's Theory of Rights," *op. cit.*, p. 130.

taken in reaching decisions. In this sense utilitarianism as a decision-making procedure does model what counts as acceptable preferences.

But what if the theoretical protocols of utilitarianism are challenged? This, after all, is what Dworkin says Sarah-lovers and Nazis are doing. Why must the utilitarian protocols be retained? Previously, it was suggested that Dworkin's answer ultimately is a contingent one. Thus, if the majority of individuals in a state are committed to utilitarianism as a decision-making procedure, then that is sufficient to defend it against contending political ideals.

This reply, however, seems ill-suited to the liberal view of politics. For, as Dworkin has repeatedly asserted, a liberal state must be neutral among competing moral viewpoints. This would seem to imply that a liberal state must be prepared to be sceptical about the ultimate validity of the political theory it officially sponsors through its decision-making procedures. Dworkin recognizes the dilemma, and states that a political theory, even one that entertains a scepticism about final answers, has no choice but to "claim truth for itself, and so exempt itself from any scepticism it endorses."⁹²

Dworkin does not mean to say by this that the truth claim of utilitarianism is entirely ungrounded. Rather, the burden of his argument is that utilitarianism as a decision-making procedure embodies, or is consistent with, the truth-claim of the abstract egalitarian principle, which itself is accepted as a regulative political principle by the majority of the members in society. However, it is just this claim that someone else with an external preference embodying a different ideal conception of equality might wish to

⁹² A Matter of Principle, p. 350.

contest.

For example, someone could dispute the claim that utilitarianism has anything to do with equality except derivatively. On this argument, utilitarianism is interpreted exclusively as a teleological doctrine whose goal is to bring about a valuable state of affairs in which individuals are counted equally only because they are the contingent bearers of utilities.⁹³ If this characterization of utilitarianism is accepted, then a competing political theory could be presented as being more congruent with the truth-claim of the abstract egalitarian principle. How can Dworkin refuse this competing conception a fair hearing and be consistent with his own liberalism?

A practical illumination of this conundrum can be found in what at first sight appears to be one of Dworkin's strongest arguments for free speech. When explaining how one could defend the freedom of unpopular speech like Marxism, Dworkin insists that a distinction be drawn between a right and the value of that right. Banning Marxist speech would then diminish the value of a right in a discriminatory way and that would offend the abstract egalitarian principle.

But what exactly is implied in Dworkin's argument for tolerating Marxist speech? Marxism, after all, contests, among other things, the core distributive assumptions underlying utilitarianism in the name of an alternative conception of equality. Moreover, Marxists contend that, given the force of ideological misrepresentations of social relations in a liberal-capitalist state, a successful political transformation aimed at realizing their conception of equality requires illiberal measures. Can liberalism tolerate this direct

⁹³ For an argument of this sort, see Bernard Williams, Moral Luck (Cambridge: Cambridge University Press, 1981), p. 4.

political challenge to its legitimacy?

Doubtless Dworkin would reply that as an ideal theory Marxism is controversial in a liberal community and thus cannot be employed as an argument to justify the restriction of anyone else's liberties. This is not to say that Marxist theory itself must be suppressed because it is not congruent with a demonstrably liberal way of life. Dworkin is certainly not about to say that liberals must be intolerant to speech that is in turn intolerant to liberalism. Rather, his point is simply that because Marxism as an ideal argument remains controversial, a liberal government is prohibited from pursuing policies which would give it effect. Other than that limitation, Dworkin would defend the right of Marxists to say and think what they wish as part of their right to moral and political independence.

Dworkin's liberal solution, however, resolves only part of the problem. A Marxist, faithful to the truth of Marxist theory, will argue that the truth of the class struggle necessitates the suppression of the ideas or ideology of the partisans of liberalism. Dworkin's obvious response is to say that the right to moral and political independence must guarantee everyone's right to free speech, capitalist apologist and Marxist alike. But this answer serves to thwart that very strategy which Marxists regard as essential to the realization of their ideal of equality.

Dworkin's interpretation of the abstract right to equality in this way works to reproduce a liberal society by precluding any alternative interpretation of how equality bears on questions of moral and political independence. And perhaps this is all Dworkin can say in light of his theory of the truth claims of a political theory. For the logic of his

own argument impedes any further questions about the veridical status of a political theory. Left only with the responsibility to ensure coherence among some set of core moral and political convictions said to characterize a society, Dworkin's theorist must be content with the conclusion that the truth claim of a political theory is ultimately dependent on the current political morality of a society. But this is another way of saying that a theoretical representation of liberal political morality is a *de jure* rationalization of a *de facto* political settlement called liberalism.

Yet, even on these problematic grounds it is a rationalization beset with an internal problem because within contemporary liberal societies there are, as Dworkin admits, conflicting views on what should be regarded as a constitutive political morality. How does Dworkin then refract this liberal settlement through the prism of his theory in such a way that he gets the kind of answers he seeks to the carefully delimited problems he poses? At various points in this chapter it has been suggested that Dworkin entertains an unstated assumption about the liberal moral personality which does the principal work in his political theory. We are now in a position to see what that assumption is.

It is the manner in which Dworkin's rights-based theory models appropriate political behaviour that reveals his unstated assumption about the kind of human character suitable to the liberal world. On the face of it, Dworkin seems to present the liberal subject as one who is, or should be, purely self-regarding. Indeed, several critics suggest that Dworkin's theory yields a normative picture of an atomistic world where ideally individuals would be mutually indifferent to one another. For example, Edwin Baker states that "[Dworkin's] approach...is biased towards an atomistic, goods-oriented world

in contrast to a society where emphasis is placed on interpersonal relations."⁹⁴ In a similar vein Ely writes: "In his relentlessly atomistic scheme, each person can properly function only as a wholly egoistic util-cluster, registering his or her own measure of pain, but never allowing that pleasure or pain to be influenced one way or other by the pleasure or pain of others."⁹⁵

These characterizations, however, are not quite accurate. Dworkin repeatedly denies that his theory occludes anything but self-regarding actions. How individuals engage in politics or in the moral world in general is a different matter from how courts must judge the appropriateness of government policies. As Dworkin once emphatically put it, his own liberal theory speaks to the principles of political and legal organization, not the kind of lives people must lead.

Liberalism does not rest on any special theory of personality, nor does it deny that most human beings will think that what is good for them is that they be active in a society. Liberalism is not self-contradictory: the liberal conception is a principle of political organization that is required by justice, not a way of life for individuals, and liberals, as such, are indifferent as to whether people choose to speak out on political matters, or to lead eccentric lives, or otherwise to behave as liberals are supposed to prefer.⁹⁶

While it may be true that Dworkin's theory is directed, in the first place, to institutional questions of justice, his inference that this entrains no theory of personality

⁹⁴ "Counting Preferences in Collective Choice Situations," *op. cit.*, p. 383n8.

⁹⁵ "Professor Dworkin's External/Personal Preference Distinction," *op. cit.*, p. 973.

⁹⁶ A Matter of Principle, p. 203. It is important to note that Dworkin does come to change his views on the matter of the relationship between liberal political principles and personal ethics. The consequences for his political theory which this changed attitude produces is discussed at *infra*, ch. 11.

or prescription about a way of life is stated rather too strongly. A theory of rights meant to guard against a political world where moralistic preferences might prevail is tantamount to saying that citizen's should not entertain these moralistic preferences. A regime of rights thus stands as a simulacrum of an ideal liberal world where individuals hold all their moral attitudes contingently, ready to abandon them if it is shown that they offend someone else's right to moral or political independence. Ideally, preferences should be of a liberal variety.

But what would it mean to hold only liberal preferences? The answer to this question discloses Dworkin's key assumption about human agency in a liberal world. It is true that the kinds of preferences which Dworkin's theory endorses as a basis of policy-making are not all simply personal preferences, but include preferences derived from properly contrived ideal arguments of policy. So, for example, a preference for political speech is perfectly acceptable regardless of the insult others might feel because of that speech, though the preference to expose oneself in a public park is less deserving of equal concern and respect. The preference for economic justice again is acceptable regardless of counterclaims about the sanctity of contracts. Or, the preference for integration is acceptable regardless of opposing claims about the merits of segregation.

A careful inspection of these arguments reveals that Dworkin is working with a ranking of human values. Indeed, it is hard to see how he could do otherwise. Significantly, that ranking involves an ideal portrait of the human personality. In all of the substantive political positions he adopts, Dworkin presents us with a normative image of human agents as rational choosers of their own ends. And the ends that they should

choose are those conducive to their own self-development. This is why a right to free speech in political matters is accorded so much greater importance than an unrestricted right to pornography. Or why economic justice is regarded as so much more important than any putative right of contract.

Once a ranking of values is made on the basis of a rational assessment of prospects for self-development, it must *pro tanto* comprise a theory of the good. And it is also a recognizable theory of the good, for it resembles in outline John Stuart Mill's goal-based liberal theory which champions those conditions favourable to human flourishing. Thus, despite his claim that his theory of rights is procedural, or deontic, it is crucially dependent on the prior assumption that individual self-development is the moral good which the state must strive to protect and nourish. It is this concept of the good which does much of its prescriptive work behind the scenes, permitting Dworkin to devise a rights-based argument in such a way as to exclude rival claims about justice.

Whether Dworkin has the theoretical wherewithal to defend his view of liberal political morality as serving the fundamental goal of individual self-development is something that can only be determined once his entire political and moral theory is examined. To this point, however, there do seem to be internal problems in that theory. For, as argued in this chapter, his political and moral theory can only perform its task of distinguishing the rights and entitlements due to individuals through the use of what on the surface appear to be ad hoc arguments, such as the one barring controversial ideals from policy deliberations. Whether these arguments are ad hoc or in fact do find a firm support in the abstract egalitarian principle is something that shall be addressed

in the next four chapters. For what is still missing in Dworkin's argument is a notion both of the distributive community and the nature of just distributions which a rational chooser would select to further his or her self-development.

Chapter Four

Distributive Justice I: Equality of Welfare

1. Introduction

In the previous chapter it was argued that Dworkin assumes for liberal theory a particular albeit slender conception of the good - i.e., individual self-development is a morally desirable goal.¹ It must be acknowledged, however, that Dworkin's interpretation of liberal political morality does not rest on any explicit statement about the state's responsibility for nurturing each individual's potential for self-development. Rather, his liberalism appears to depend on the quite different principle of state neutrality in the face of competing conceptions of the good. The principle of liberal neutrality, strictly speaking, does not support a developmental account of liberalism for it makes no moral presumptions about which set of values individuals should elect to pursue. If the principle of neutrality were taken to be the constitutive part of Dworkin's liberalism, then his staunch promotion of equality would simply amount to a confirmation of the state's responsibility to ensure everyone's equal right to pursue his or her preferences and plans within the limits of some reasonably devised legal scheme embodying the principle of mutual respect.

¹ The aim of individual self-development has a recognizable moral patrimony in liberal thought. It is customary to identify the introduction of a developmental strain in liberalism with the writings of John Stuart Mill, and, more explicitly, with those of T.H. Green. For a succinct contemporary analysis of the developmental version of liberalism undertaken by someone who assumes both a critical and proprietorial attitude towards this political ideal, see C.B. Macpherson, Democratic Theory: Essays in Retrieval (Oxford: University of Oxford Press, 1973), esp. pp. 24-38. For a criticism of developmental liberalism and its characteristic emphasis on securing positive liberty, see the famous essay by Isaiah Berlin, "Two Concepts of Liberty," *op. cit.*

But this turns out not to be Dworkin's position. To begin with, in his application of the principle of neutrality to contemporary political controversies Dworkin is inclined to reach conclusions that favour individual self-development over other competing values. And, significantly, in his later writings Dworkin has himself come to revise the theoretical status of the neutrality principle. For instance, in one of his early seminal articles, "Liberalism," Dworkin is precise about the crucial and central role of the neutrality principle in a liberal ethic: "[Liberalism's] constitutive morality is a theory of equality which requires official neutrality amongst theories of what is valuable in life."² But, in a more recent article, Dworkin acknowledges that he has abandoned his earlier view of the neutrality principle as the defining characteristic of liberalism, claiming that such a view amounted to "mistaking a theorem for an axiom."³ Thus, in his later writings, not only is state neutrality in moral matters regarded as a derivative liberal principle by Dworkin, but with each successive formulation of his abstract egalitarian principle he charges the state with a discernably more active concern for the well-being of its citizens.⁴

In the light of these qualifications to the neutrality principle, what emerges in Dworkin's depiction of liberal political morality is the image of a positive state executing

² Matter of Principle, p. 203.

³ "Foundations of Liberal Equality," *op. cit.*, p. 7n2.

⁴ Compare, for instance, the two following descriptions of the liberal state, the first suggesting an impartial even-handedness in the treatment of citizens, the second affirming a more substantial duty to demonstrate solicitude for the well-being of all citizens. "Government must not only treat people with concern and respect, but with equal concern and respect." Taking Rights Seriously, pp. 272-73. "[G]overnment must act to make the lives of citizens better, and must act with equal concern for the life of each member." "What is Equality? Part 4: Political Equality," *op. cit.*, p. 1.

policies that give concrete meaning to the abstract principle of equality in such a way as to improve the lives of its citizens. And, as was pointed out in the previous chapter, these policies imply that a state is justified in reaching decisions about what sorts of activities are most likely to make each individual's life better. Hence, for Dworkin, the right to free speech on matters touching upon moral or political convictions is regarded as more important than the unrestricted freedom to consume pornography, or the worth of economic independence is deemed more significant than the right of contract.

Employing this scale of values, Dworkin unmistakably cultivates the developmental tradition of liberalism. But in cultivating this tradition, Dworkin also encounters a fundamental theoretical dilemma. The dilemma is inscribed in the very heart of his project of finding a procedural theory of justice which rests on a minimum number of uncontroversial premises, but which can at the same time yield substantive rights consistent with the moral goal of individual self-development. Thus, Dworkin is intent on demonstrating that a theory of justice of powerful prescriptive range can be fashioned from an abstract principle of equality to which all liberals can consent, even if they entertain differing interpretations of its specific content or of its application. And, in his own effort to fill out the content of the abstract egalitarian principle, Dworkin wishes to retain the procedural character of his argument in order to satisfy his critics that there is, if not an a priori deduction available to secure commonplace liberal political principles, at least a set of hypothetical but non-arbitrary deductions that do serve to show the connection between these liberal political principles and the idea of abstract equality.

However, if the commonplace liberal convictions he attempts to support in this manner are to stand without contradiction in a political theory, he may be compelled to model more substantive moral and political assumptions into his abstract egalitarian principle from the start, and this would defeat the procedural goal of commencing a political argument with an uncontested general principle. Whether the implicit assumption of the good of self-development built into his abstract egalitarian principle surmounts this dilemma by supplying sufficiently strong grounds for reaching the substantive political results Dworkin seeks, yet at the same time remaining general enough to be regarded as an uncontroversial moral good, remains to be determined.

The substantive political result which Dworkin hopes to accomplish in his overall argument is a compelling theoretical defence of a liberal state robust enough to supply not only a series of legal rights which would bar discriminatory treatment, but also, in a positive vein, to effect an equal distribution of society's resources and to create conditions favouring genuine political participation of all citizens. These latter obligations on the part of the state imply the need for an explicit theory of distributive justice and a well-developed theory of democracy, both of which Dworkin suggests can be inferred from the abstract egalitarian principle. In the next three chapters, Dworkin's theory of distributive justice will be explored in light of the procedural dilemma just outlined. Before embarking on this examination, however, a few general remarks about the place of a theory of distributive justice in Dworkin's overall theoretical project are in order.

Any theory of distributive justice must address three interrelated questions: what is it that requires distribution; what is the principle by which just distributions are

generated; and what is the relevant community to which distributive justice applies? Dworkin responds to the first two questions by inspecting different candidates for an egalitarian distributive theory.⁵ As for the question of the relevant distributive community, Dworkin's answer is supplied in his discussion of the conception of democracy most congenial to the abstract egalitarian principle,⁶ and in his explicit reflections on the distinctive nature of a liberal community.⁷

The order in which Dworkin examines these several questions clearly discloses his ecumenical liberal orientation. For instance, he addresses the question of what constitutes just distributions prior to the question of the pertinent distributive community. In developing his argument in this fashion, Dworkin presupposes that the relevant agents for the purposes of distribution are rational, self-regarding individuals, for whom the community, which embodies the sphere and scope of just distributions, figures as a coincidental, though not altogether morally inconsequential, location of political rights and loyalties. Contrast this approach to Aristotle's deliberation on distributive justice where knowledge of the particular type of community is considered to be essential in determining appropriate distributional principles. For Aristotle, it is the make-up of the community which both reflects and shapes the character of its citizens and the distributive claims they press. For Dworkin, on the other hand, it is suitably *abstracted* individuals,

⁵ "What is Equality? Parts 1, 2 & 3" *op. cit.* See also "In Defence of Equality: Comment on Narveson," *op. cit.*, and "Liberalism," and "Why Liberals Should Care about Equality?" in A Matter of Principle, pp. 181-204, 205-13.

⁶ "What is Equality? Part 4: Political Equality," *op. cit.* See also "Equality, Democracy and Constitution: We The People In Court," Alberta Law Review, Vol. XXVIII, no. 2 (1990), pp. 324-46.

⁷ "Liberal Community," California Law Review, Vol. 77, no. 3 (May, 1989), pp. 479-504.

and the patterns of just distributions that they might ideally conceive, which define the relevant features of a distributive community. Moreover, Dworkin is concerned to demonstrate that an egalitarian distributive ethic does not imperil the conventional freedoms which historically have been associated with liberalism. Thus, not only does he confer a methodological priority on reconciling what are deemed to be morally compatible individual interests for the purposes of devising a scheme of distributive justice, but he likewise tries to ensure that the political community to which these liberal individuals belong is bound by claims of individual liberties. Although the underlying assumptions and the order of his argument thus dispose Dworkin to reach rather conventional liberal conclusions about distributive justice and political community, his overall theoretical enterprise is nevertheless noteworthy both for its sophistication and its valuable insights into the problem of rendering equality into a serviceable legal and political principle.

Dworkin's inquiry into distributive justice begins with his stock theoretical announcement that it is necessary to "distinguish various conceptions of equality, in order to decide which of these conceptions (or which combination) states an attractive political ideal, if any does."⁸ His search for a distributive rule which best meets the moral desiderata of the abstract egalitarian principle focuses primarily on the two alternatives of welfare equality and resource equality. The principle of equality of welfare, Dworkin explains, "treats people as equals when it distributes or transfers resources among them

⁸ "Equality of Welfare," *op. cit.*, p. 185.

until no further transfer would leave them more equal in welfare."⁹ A scheme of equality of resources, on the other hand, "treats them as equals when it distributes or transfers so that no further transfer would leave their share of the total resources more equal."¹⁰

The best way to understand precisely what Dworkin sees at stake in this comparison of equality of welfare and equality of resources is to observe the way he disposes of two other candidates for a principle of distributive equality. He briefly considers only to reject equality of result as an acceptable egalitarian distributive policy because it would require a government to continually redistribute resources in order to eliminate any emergent inequalities. This, Dworkin remonstrates, "would be to devote *unequal* resources to different lives."¹¹ The reason is that an absolute levelling of resources neglects the way in which individual decisions about both consumption and production either augment or subtract from the total share of social wealth. For example, an individual who elects to forego immediate consumption of resources in order to devote them to productive purposes may end up increasing the total stock of goods or services available to society. Because that person's fruitful decisions about work and leisure actually add more to the total stock of available social resources, Dworkin thinks one can legitimately say that these economic decisions in fact cost others less in terms of aggregate resources. In such circumstances, it would be unfair to constantly redistribute

⁹ *Ibid.*, p. 186.

¹⁰ *Ibid.*

¹¹ "Why Liberals Should Care about Equality?" *op. cit.*, p. 206.

resources away from the person who is ambitious and productive. This latter estimate of fairness illustrates what Dworkin takes to be a core insight into the nature of egalitarian distributions: "treating people as equals requires that each be permitted to use, for the projects to which he devotes his life, no more than an equal share of the resources available to all, and we cannot compute how much any person has consumed, on balance, without taking into account the resources he has contributed as well as those he has taken from the economy."¹²

Because distributive equality requires some kind of accounting taken over a lifetime, both of individual contributions to, and withdrawals from, the total stock of social wealth, Dworkin concludes that it inclines liberals to accept the idea of the market as the best method of allocating resources. For an ideal market responds to choices about labour, consumption and leisure in such a way as to fix the value of these choices in terms of their costs to others as reflected in market wages and prices. And, Dworkin concludes, this is arguably a reliable way of measuring how an individual's economic decisions add to or subtract from aggregate social wealth.

But there are instances, he acknowledges, where the market betrays an egalitarian distributive ethic. In the real world people experience unequal capacities to make the kind of investment, consumption and leisure decisions by which they can maximize the use of the share of resources to which they are entitled. Some of these inequalities are traceable to family advantage, or education, or racial or sexual discrimination, or other forms of bad luck. If individuals end up with fewer resources in a market economy on

¹² *Ibid.*

account of these disadvantages, a theory of equality must condemn the outcome as unjust.

It would be unjust even if another familiar distributive ethic, equality of opportunity, is selected as the governing principle for market allocations. For, no matter how scrupulously a government acts to ensure that everyone has the same advantages of education and other opportunities deemed essential to a successful competition for the use of resources, some will remain disadvantaged in raw skill or intelligence or other capacities which the market tends to reward. Because natural or accidental inequalities of talents and skills can never be completely erased, Dworkin thinks that a genuinely egalitarian liberal would seek to correct market distributions where those distributions are seen to reward people "just because they have different inherent capacities to produce what others want, or are differently favoured by chance."¹³

This, in rough outline, is how Dworkin envisages the aim of an egalitarian theory of distributive justice. An egalitarian distributive scheme must be "ambition-sensitive", in the sense of accurately responding to an individual's decisions about how his or her preferences and plans of life are to be satisfied, yet it must also be "endowment-insensitive" in that it must not penalize individuals for those natural and inadvertent personal circumstances which impair their life-prospects.¹⁴ On Dworkin's conception of it, this distributive scheme would embrace the marketplace as the principal allocative mechanism for investment, labour and goods, but would also support compensatory redistributions to those who are disadvantaged by nature or chance. It should be evident

¹³ *Ibid.*, p. 207.

¹⁴ "Equality of Resources," p. 311.

that in all essential details this egalitarian distributive principle supports the establishment of a conventional liberal-welfare state. But the more detailed theoretical argument in favour of this type of political and economic arrangement is only made in the course of a confrontation with one other candidate for an egalitarian theory of distribution - equality of welfare. Dworkin devotes considerable effort to show that a welfare egalitarian theory is ultimately inconsistent, largely because he thinks its incoherence points to the need for a theoretically more adequate resource-based concept of equality. Because Dworkin's critique of welfare-based theories of distribution has this intended bearing on his own resource-based theory, it is worth examining in some detail.

2. The Problem of Measurement

A distributive theory of justice which embraces equality of welfare presupposes that what requires equal apportionment are states of welfare. But deciding upon what constitutes welfare, and upon what provides the most opportune means of calculating when individuals enjoy equivalent welfare levels, are notoriously elusive questions. In addressing these questions Dworkin tries to show that what he considers the most promising theory of equality of welfare is unintelligible without a prior theory of equality of resources. Before turning to his argument, it will be useful to briefly review some general objections to welfare theories of distribution which Dworkin both borrows and expands upon.

Amartya Sen coined the term "welfarism" to refer to those distributive theories

in which just distributions are defined as a stipulated function of individual welfare.¹⁵ Utilitarianism is one conventional welfarist approach where just distributions are identified with the maximization of utilities. Equality of welfare is another such approach which, instead of recommending the maximization of aggregate or average utilities, promotes the equalization of individual utilities. Although welfare theories differ on their chosen conception of a suitable welfare function, they all are subject to a number of theoretical and moral vulnerabilities. Two of these are the well-known problems of commensurability and cogency which concern the theoretical difficulties involved in identifying the appropriate unit of value making up welfare. Another pair of shortcomings to which welfarism is susceptible are the problems of moral culpability and moral responsibility. These latter involve the challenge of distinguishing which utility-producing desires should and which should not be incorporated into a welfare function. Each of these problems requires some explanation.¹⁶

The problem of commensurability refers to the conceptual difficulty in discovering a measure of utility which allows one to unambiguously compare welfare levels among

¹⁵ Amartya Sen, "Utilitarianism and Welfarism," The Journal of Philosophy, Vol. 76, no. 9 (September, 1979), p. 464.

¹⁶ The theoretical issues of commensurability, cogency, moral culpability, and responsibility, which are here singled out as problems to which welfarist theories are prone, do not exhaust the range of conceptual difficulties associated with that distributional approach. These four particular problems are emphasized, however, because in one way or another they inform Dworkin's critique of equality of welfare, and because they in turn present dilemmas for Dworkin's own theory of equality of resources. A different rendering and ordering of some of these problems can be found in John Roemer, "Equality of Talent," Economics and Philosophy, Vol. 1, no. 2, (October, 1985), pp. 152-53. For a defence of at least one version of a welfarist theory against these and other conceptual objections, see Richard J. Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity of Welfare," Philosophy and Public Affairs, Vol. 19, No. 2 (Spring, 1990), pp. 158-94. For a good overview of typical criticisms, and a principled defence, of utilitarianism as a welfare metric, see James Griffin, "Modern Utilitarianism," in Contemporary Political Theory, Philip Petit, ed. (New York: Macmillan Publishing Company, 1991), pp. 73-100.

different individuals. This is particularly a complication with conscious state definitions of welfare where some characteristic of sentience such as happiness or pleasure is taken to represent utility. The problem with these sentience-based definitions of utility is quite simply that people may have different assessments of what gives value to life so that no one single measure of utility is adequate to the purpose of making interpersonal comparisons of welfare. While the issue of commensurability has long been debated, Amartya Sen has recently helped to clarify the nature of the problem by arguing that welfare should be considered as a vector of characteristics including such things as success, pleasure, satisfaction, ethical feelings, etc.¹⁷ Sen's point is that it is a theoretically arbitrary pretention to reduce welfare to a single homogeneous measure. However, if Sen's plural notion of utility is accepted as a more reliable indicator of welfare, it may be impossible to reasonably compare the welfare states of an individual over time, or the welfare states between individuals, because such states arguably still represent fundamentally incomparable combinations of utility-producing personal valuations.

The problem of cogency, on the other hand, applies to those welfare functions which take the satisfaction of preferences, either felt or revealed, as the gauge of utility. While preference satisfaction has become the most widely used measure of utility in current welfarist theories, there are a number of reasons for regarding individual preferences as unreliable indicators of welfare. Jon Elster, for example, gives many different examples of how individual preferences are not determined autonomously but

¹⁷ See Amartya Sen, "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory," *Philosophy and Public Affairs*, Vol. 6 (1977), pp. 317-44.

are themselves shaped by the available alternatives.¹⁸ In certain morally reprehensible situations, this can give rise to preferences formed by a process of cognitive dissonance, as is the case with the slave who learns to prefer his or her slavery. This extreme example merely serves to underscore why endogenously formed preferences should be treated as a suspect class of welfare indicators, for one can never be certain if the individual whose preferences they are would endorse them in circumstances more favourable to genuine self-reflection. But if endogenously formed preferences are to be distrusted in welfare calculations, this raises the perplexing dilemma of finding an acceptable way of distinguishing truly autonomous from conditioned preferences.

Yet another problem confronting welfarist theories is that of morally culpable preferences. John Rawls makes much of this issue in his critique of utilitarianism. According to Rawls, a utilitarian distributive theory which is committed to maximizing utilities has no internal conceptual means for distinguishing between the morally culpable preferences of those who derive pleasure from discriminating against or otherwise humiliating others, and socially beneficial or indifferent preferences. The result is that, without suitable emendations drawn from a more comprehensive moral theory, utilitarianism is constrained to include morally offensive preferences in its calculus of fair distributions, something which offends our normal convictions about the requirements of justice.¹⁹

The final problem facing welfarist theories has to do with deciding upon moral

¹⁸ Jon Elster, *Sour Grapes* (Cambridge: Cambridge University Press, 1983), pp. 109-66.

¹⁹ Rawls, *A Theory of Justice*, pp. 30-31.

responsibility for preferences. Again, Rawls supplies a model illustration of this difficulty in his discussion of expensive tastes. "Imagine two persons," Rawls says, "one satisfied with a diet of milk, bread and beans, while the other is distraught without expensive wines and exotic dishes. In short, one has expensive tastes, the other does not."²⁰ A welfarist theory of distribution will be compelled to treat expensive and modest tastes on a par when calculating a fair allocative scheme, and, depending on which welfare function is chosen as the measure of just distributions, this might necessitate transferring more resources to the bearer of expensive tastes. Rawls thinks that the expensive tastes problem epitomizes a central problem in utilitarianism, and, by extension, in all welfare theories, because in these theories individuals are regarded as "passive carriers of desires" who are deemed not to bear responsibility for their preferences. Rawls claims that his own resource-based theory of distributive equality, where what is equalized is a set of primary goods, circumvents the dilemma of subsidizing expensive tastes. It does so because the primary goods approach assumes that individuals are responsible for their own ends, and therefore must themselves be prepared to pay the costs for developing expensive tastes.²¹

While the four problems outlined above undercut all versions of welfarism, including equality of welfare, it should also be added that the latter does enjoy a certain intuitive appeal as an egalitarian distributive principle. One reason is that it avoids the problem of commodity fetishism which can so easily attach to resource theories of

²⁰ John Rawls, "Social Unity and Primary Goods," *op. cit.*, p. 168.

²¹ *Ibid.*, p. 168.

distribution. If resources are taken to be the only items which need to be distributed equally, one can protest that this acts to reify resources into objects which are thought to have value quite apart from the purposes to which they can be put to use. Thus, if a distributive rule requires that all available automobiles be allotted equally among citizens, regardless of whether everyone needed or desired one, this would amount to making a fetish of the resource of automobiles just to satisfy a distributional principle. This problem is averted in a theory of equality of welfare because that theory asks that we attend to the instrumental value any resource has for a person's welfare, and this may come nearer to matching our intuitive sense of what justice requires.

Equality of welfare may also fit our intuitive sense of justice more perspicaciously in those situations where resources must be distributed to individuals with appreciably different levels of welfare. The infirm and the handicapped invariably need more resources to enjoy welfare levels approaching those of healthy people, and while a theory of equality of resources does not appear to be able, on its own, to justify distributing greater resources to the physically disadvantaged, a theory of equality of welfare seems to recommend exactly that kind of distribution. There are, therefore, strong reasons for not abandoning welfare as the best measure of an egalitarian distributive ethic. Yet Dworkin does in the end forsake welfarist theories in favour of a resource-based theory of equality. It is time to inspect his reasons for this theoretical move.

3. Equality of Success and Reasonable Regret

As observed previously, a theory of equality of welfare must contain both a well-defined concept of what constitutes welfare and a measure for determining when people

enjoy equal levels of welfare. Dworkin canvasses three possible conceptions of welfare--conscious-state theories, objective theories, and success theories--in order to see whether any can meet the requirements of definitional clarity and interpersonal comparability.

Conscious-state theories pick out some aspect of a person's conscious life as the relevant mark of welfare. Dworkin eliminates this candidate for a theory of equality of welfare because it directly raises the problem of commensurability. Even if the broad category of enjoyment is employed as a measure on this conception of welfare, it remains the case that some people pursue activities that they think are valuable rather than simply enjoyable, or they experience activities as enjoyable *because* of a prior judgment of their value. In these circumstances, interpersonal comparisons of enjoyment levels will yield uncertain results.

Objective theories of welfare take as their measure of welfare some objectively determined standard other than individuals's subjective judgements and values. While this approach avoids the problem of weighing potentially incommensurate, subjective judgements of value, it poses a quite different problem for a liberal egalitarian theory. Because the objective approach requires the state to distinguish one category of well-being as the morally germane criterion of welfare, this egalitarian distributive scheme offends the liberal principle of neutrality in the face of competing conceptions of the good.

It is the class of success theories of welfare which Dworkin finally regards as most likely to provide a theoretically satisfactory welfare egalitarian distributive ethic. Success theories of welfare rate people's welfare by measuring their success in fulfilling

their preferences, goals or ambitions. Equality of success would recommend distributions and transfers of resources until no further transfer could serve to decrease the extent to which people differ in success. Dworkin notes, however, that there are two straightforward objections which can be made to this distributive scheme.

The first objection concerns the problem of morally culpable preferences. Dworkin raises this issue by discussing the effect of incorporating in welfare calculations all political preferences, including those which are commonly regarded as morally reprehensible in liberal societies. For instance, if all political preferences were included in measurements of individual success, then racial bigots who failed to have their preferences for segregation satisfied would be entitled to extra compensatory resources under a stringent success theory of welfare equality. Indeed, all those who hold political preferences not endorsed by the majority would experience disappointments, and could, therefore, establish *prima facie* claims for compensation under an equal success theory. Such transfers to recompense those who are disappointed in their political preferences strikes an egalitarian as an odd arrangement, Dworkin argues, because, "a good society is one which treats the conception of equality that society endorses, not simply as a preference some people might have, and therefore as a source of fulfilment others might be denied who should then be compensated in other ways, but as a matter of justice that should be accepted by everyone because it is right."²² Thus, a success theory of welfare which adopts equality as its test of fair distributions must paradoxically exclude all

²² "Equality of Welfare," p. 199. Dworkin is here reprising the kind of argument he made against allowing Nazis or Sarah-lovers from having their external preferences counted in utilitarian calculations which was summarized in chapter 3.

political preferences from calculations of welfare, not simply those that are morally culpable, or else it is obliged to forsake its governing egalitarian tenet.

While Dworkin thinks that a theory of equality of success can deal with morally culpable preferences like those of the racial bigot by a controversial though theoretically consistent definitional prohibition of all external political preferences, his objection to including what he calls impersonal preferences in welfare calculations discloses a more fundamental problem implicit in this welfare metric. Dworkin defines impersonal preferences as those a person holds about a state of affairs in the world which has no direct or tangible bearing on his or her own well-being. To illustrate the dilemma raised by admitting impersonal preferences into welfare calculations, Dworkin invites us to consider the disinterested preference of an individual who keenly desires that life be discovered on Mars. A strict theory of equality of success would recommend the distribution of extra resources to that person to compensate for the disappointment in discovering Mars arid of life. Again, Dworkin claims that it is counter-intuitive for an egalitarian liberal to have resources transferred from those who have more easily fulfilled hopes about how the world turns out to those whose hopes are fanciful or unrealistic.²³

Dworkin's example would appear to illuminate what had previously been described as the problem of an individual's moral responsibility for his or her preferences. It is, after all, conceivable that an individual who entertains fanciful or unrealistic preferences about how the world turns out could choose to abandon them. In such circumstances, that individual must be deemed to be responsible for his or her

²³ *Ibid.*, pp. 201-2.

impractical preferences and should be prepared to bear the cost in welfare of persisting in having them. It would seem, therefore, that raising the question of individual responsibility for impersonal preferences in this way would solve the problem of distributing resources unfairly. For surely a theory of equality of welfare could simply stipulate in advance that only reasonable impersonal preferences can count in welfare calculations of success in order to avoid the manifest unfairness of redistributing resources to those disappointed in their capricious impersonal preferences.

Dworkin, however, thinks that this solution is ultimately unavailable for an equal success theory of distribution because if only unreasonable impersonal preferences are to be excluded from welfare computations, an independent theory will still be needed to define what is to count as a reasonable impersonal preference, and when it is reasonable to compensate for one which has failed to gain satisfaction. Such an independent theory, he further argues, would invariably instate a resource theory of equality in the midst of a nominally welfarist theory. To grasp this rather obscure point it is best to look first at how Dworkin treats what appears to be the theoretically least objectionable version of equality of success - equality of personal success. It is crucial to try to closely follow Dworkin's discussion of this most austere version of equality of success because not only does it contain his most significant theoretical critique of welfare theories of distribution, but also because that critique inadvertently points to certain conceptual limitations in his own preferred theory of equality of resources.

Dworkin describes equality of personal success as a distributive rule which would restrict welfare calculations only to those preferences which are unambiguously personal

in nature. Such a theoretical move, however, assumes a distinctive theory of philosophical psychology. Dworkin approvingly describes this theory as one which "supposes that people are active agents who distinguish between success and failure in making the choices and decisions open to them personally, on the one hand, and their overall approval of the world in general, on the other, and seek to make their own lives as valuable as possible according to their own conception of what makes a life better or worse, while recognizing, perhaps, moral constraints on the pursuit of that goal and competing goals taken from their impersonal preferences."²⁴ Dworkin acknowledges that this is an idealized portrait of human behaviour, but insists that it is a better model "against which to describe and interpret what people are than the leading and perhaps more familiar alternatives."²⁵ But nowhere does he explain why this is a more accurate paradigm of human behaviour than that offered by alternative theories. This lacuna is worth emphasizing because what Dworkin ends up defending as a reasonable theory of philosophical psychology is precisely that liberal theory of personality which in the previous chapter had been shown to render his argument for rights suspiciously circular.²⁶ To understand more clearly how this theory of philosophical psychology contributes to a circular political argument, one must observe the way in which Dworkin employs its distinctions among preferences for purposes of evaluating just and unjust equity claims.

²⁴ *Ibid.*, p. 204.

²⁵ *Ibid.*, p. 205.

²⁶ See *supra*, ch. 3, pp. 157-62.

The ideal portrait of individual preference formation which Dworkin has drawn builds on a familiar liberal distinction between the private and the public realms. Personal preferences for that which is of purely private value is, on Dworkin's welfarist version of this distinction, a legitimate concern of distributive justice. Preferences of a political or impersonal nature summon a definition of a public good, and are, on this description of welfarism, outside of the scope of a theory of distributive justice. But this amounts to saying that while we can reasonably attend to our own personal welfare, we are prohibited, when pressing claims of distributive justice, from promoting a conception of public welfare which is anything other than an aggregation of individual private preferences. And, not only does Dworkin offer this as a normative ideal, but he also suggests that the theory of philosophical psychology of which he approves supports precisely such a discrimination among equity claims. For, according to Dworkin, that theory implies that individuals normally do distinguish between their purely personal and their impersonal preferences, with the latter functioning primarily as a set of scruples guiding a person's private actions rather than informing his or her public or political judgements.

It should be evident that Dworkin's theoretical description of preference formation, and the corresponding legitimate individual equity claims it ostensibly sustains, entails two fundamental conceptual restrictions on a theory of justice. In the first place, it specifies in an arbitrary fashion the relevant ontological features of individuals, and the society of which they are a part, that can figure in a welfare-based theory of justice. And this stipulation in turn acts to limit the prescriptive range of such

a theory of justice. For example, if this conception of an egalitarian welfare theory were applied to a capitalist market economy, individuals would be free to demand more equitable wage differentials because this is something which could reasonably be said to form part of a person's private preferences. But those same individuals would be inhibited from challenging the market economy itself as an alienating or otherwise socially impoverishing distributive mechanism because such challenges would involve forbidden political or impersonal preferences. Thus, once the object of distributive justice is conceived of as something other than individual welfare, it is automatically ruled out of court by the ontological assumptions which narrow the prescriptive range of this theory of justice.

These same ontological assumptions also work in the other direction, restricting the manner in which individuals are able to envisage their own identities as political actors. For, by implying that we can separate out our purely personal from our political and impersonal preferences, Dworkin's ontological assumptions encourage the view that the social aspect of our lives, or, more strongly still, the socially constituted component of our personalities, can somehow be bracketed out of a conception of individual welfare open to deliberations on just allocations of public goods. For example, if I am part of a community for which a particular language is regarded as a crucial public good, and this view becomes an intrinsic feature of my own personality and preferences, I must nonetheless be prepared, for purposes of distributive justice, to disregard this deeply-held preference when acting politically.

It is thus an unmistakeably liberal-individualist conception of distributive justice

which is underwritten by Dworkin's version of a theory of equal personal success. By suitably limiting the type of preferences which can be considered for just distributions, Dworkin has ensured that the results will conform to the liberal convictions he seeks to defend in theory. But, it is precisely in this way that his philosophical psychology supports the construction of a wholly circular political argument, for that psychology does not function as an independently verified premise leading to Dworkin's chosen liberal convictions but rather is presupposed by them.²⁷

Ironically, Dworkin is attentive to the hazard of circular arguments in other respects, yet he is unable to recognize his own participation in one. Instead it is a different problem of circularity which he comments upon when he finally submits the conception of equal personal success to critical scrutiny. This other dilemma of circularity is worth examining closely because Dworkin's treatment of it as purely a methodological inconvenience reveals how little disposed he is to notice the deeper ontological implications of his own critique.

Dworkin asserts that a theory of equality of personal success, although superior to alternative welfare egalitarian measures, is itself conceptually indeterminate in a fundamental way. The problem lies with the manner in which this theory decides upon equitable distributions. Equality of personal success requires that the resources of a community be distributed so as to leave people as equal as possible in the success they enjoy in making their lives valuable according to their own estimation of what is

²⁷ For an extended discussion of this problem of circularity, see the argument developed at *infra*, ch. 11., pp. 572-76.

valuable. But there is a theoretical predicament in this distributional goal. The predicament is that people make their choices about what sorts of ambitions and life-plans they want to pursue against a background knowledge of the *kinds* and *quantities* of resources available to them. A theory of equality of success, however, presupposes that these choices have already been made, and proposes to distribute resources in such a way as to equalize everyone's success at realizing his or her goals and ambitions. There is a danger of a fatal circle in this formula, Dworkin points out, for "if someone needs a sense of what wealth and opportunities will be available to him under a certain life before he chooses it, then a scheme for distribution of wealth cannot simply measure what a person should receive by figuring the expense of the life he has chosen."²⁸

While Dworkin is apprised of this conceptual dilemma, he assumes that at the level of ideal theory the problem can be surmounted through a thought-experiment involving incremental adjustments among different resource distributions. For example, suppose all resources were initially divided equally among all members of society. If it is subsequently discovered that some people are more satisfied than others with the way their personal preferences are realized with their resource shares, equality of success would recommend taking a parcel of resources away from these individuals and giving it to others on a trial-and-error basis until it is determined that everyone reported a roughly equal level of personal success. In this way Dworkin suggests one can avert the fatal circle where equality of success cannot be identified independently of a notion of resource distribution, and a particular resource distribution cannot be identified

²⁸ "Equality of Welfare," p. 205.

independently of a measure of equal success.

Dworkin's "solution" to the problem of conceptual indeterminacy in a theory of equality of success is not, however, theoretically complete. The reason is that he had conceded that individuals cannot make any prudent decisions about their discrete ambitions and life-plans without some prior knowledge both of the quantity *and* type of resources available to them. But when he proposes a solution to this conceptual impasse, Dworkin addresses only the issue of *quantity* by suggesting an initial equal allotment of resources to be followed by experimental redistributions aimed at balancing individual success. This still leaves out of account the *type* of resources available for distribution. Why this latter consideration is important for a theory of equality is that the kinds of resources available play a crucial role in determining how people form preferences. For example, in an idealized warrior society the principal social resource available for distribution is the opportunity to win honour in battle. In an idealized priestly society the principal social resource open to division is the opportunity to pursue a life of prayer and contemplation. In either case, the type of resource available powerfully shapes an individual's decision about what is valuable in life. Trying to stipulate a theory of equality of success without referring to these social determinants of value, embodied in the very resources available for distribution, may be an incoherent enterprise.

There is, however, a conventional liberal response to this difficulty, a response of which Dworkin avails himself. That response is to define resources morally relevant for distribution in as general terms as possible. Hence, health, talents and capacities, and wealth are often taken to represent generic resources which are certain to figure in any

individual's discrete preferences and goals in life. It is through a careful consideration of the shares of these all-purpose resources to which they are entitled, Dworkin argues, that individuals can judiciously fashion their own personal aspirations.²⁹

But this liberal answer is itself question-begging. Is it true that individuals can reasonably design their personal goals and values merely by contemplating the quantity of generic resources open to them without any further information about the unique social significance of these goods? Or is it not more realistic to say that individuals need detailed knowledge of the social constitution of a particular set of resources, and of the practical possibilities for their employment, before they can even begin to deliberate on the usefulness of such resources to their discrete ambitions and life-plans? And to engage in such latter deliberation, is it not necessary that individuals already come equipped with some self-knowledge about their own identities reflected in their ambitions and life-plans? But such self-knowledge in turn implies that individuals must be familiar with the social significance of their ambitions and life-plans, and of the socially constituted resources that can be dedicated to them. This is just another way of saying that choices are always embedded in a context which includes culturally and historically specific social values. An individual's choices may end up confirming or challenging these social valuations, but such individual conformity or dissent invariably gains its intelligibility from the context in which the choices are made.

There are strong reasons, therefore, for thinking that the distinction between private and public valuations presupposed by Dworkin's model of individual choice is

²⁹ *Ibid.*

ultimately incoherent. What is obviously missing in Dworkin's depiction of individuals forming preferences is not only a more developed description of the type of resources available, but also an account both of the way in which the identities of individuals as choosers are constituted, and of the nature of the society to which these individual choosers belong. Without a satisfactory theory of personality or a substantive social theory, Dworkin's theoretical project can, paradoxically, lead to some rather illiberal results.

For instance, if generic resources like money, health and talents are meant to function as convenient conceptual markers for existing socially constituted resources, and if Dworkin's argument is that we do form our preferences in light of these extant resources, then this can amount to a highly conservative view of human behaviour because it potentially paints a picture of individuals as passive consumers, adapting their preferences to whatever society happens to make available for distribution.

On the other hand, to the extent that Dworkin abstracts from an important feature of the social determination of value--the tendency for existing social, economic, and political institutions to differentially shape individual preferences and goals--he is prevented from addressing a crucial set of questions about just distributions. For example, as critics of patriarchal society routinely contend, men and women are socialized with different conceptions of what kinds of personal success they can expect to enjoy, and develop their preferences accordingly. In this instance, a theory of equality of success, even if it began, on Dworkin's hypothesis, with an equal division of resources, would reproduce social inequalities between men and women. The reason is

that in a patriarchal society, men are brought up to expect certain kinds of personal successes denied to women. A theory of equality of success, therefore, would end up redistributing the initially equal allotment of resources in such a way as to reflect the different and unequal aspirations of men and women. In other words, this theory justifies giving women less in the long run because they have fewer personal ambitions to satisfy. This outcome is certainly counter-intuitive for a liberal egalitarian, and highlights the problem of seeking just distributions merely by examining individual choices without regard for the institutions in which these choices are embedded. Thus, without some further theoretical stipulation about how one can ascertain what constitutes cogent personal preferences, a theory of equal personal success can function to rationalize any social structure.

One could of course object that these cautionary tales about the political image of passive consumers of utilities, or the often inauspicious social influences at work in preference formation, are beside the point because Dworkin finally rejects even equality of personal success as a coherent theory of distributive equality. But, the several questions about individual identity and social structures which remain unaddressed in his account of equality of personal success are important to note because Dworkin retains many of the same problematic assumptions about individual preference formation in his favoured theory of equality of resources.

Although Dworkin is reluctant to address in any substantial way the issue of the cogency of personal preferences, with all the implications this has for philosophical psychology and social theory, he does nonetheless make some very insightful

observations about how the employment of subjective identifications of preference satisfaction as an index of utility is destined to raise an insuperable commensurability problem. Indeed Dworkin's whole discussion of egalitarian welfare theories is designed for one theoretical purpose: to demonstrate that equality of personal success is ultimately undermined as a distributive rule because there can be no unambiguous or neutral measure of success by which different people's welfare levels can be compared. Because this part of Dworkin's critique is pivotal to his subsequent advocacy of a resource-based theory of equality, it is essential to summarize it carefully.

The task of finding a comparable measure of welfare is fundamental to a theory of equality of success. However, if it is subjective estimations of personal success which must be equalized, how can one be certain that different people are reporting the same thing when speaking of their personal success? Different people, after all, place different value on the importance of satisfying their discrete preferences and ambitions. Dworkin thinks that this apprehension over comparing subjective evaluations is sufficient to rule out relative success as an accurate metric for interpersonal comparisons of welfare. But, this only leads him to contemplate whether a more reliable index of welfare can be obtained by focusing on what he calls "overall success". Dworkin takes this latter measure to signify an individual's assessment of how successful he or she has been in leading a valuable life as a whole. While such an approach to comparing welfare levels circumvents the difficulty involved in trying to relate the significance of different people's views of their discrete personal plans and projects, it still does not escape the deeper problem of commensurating subjective judgements of value.

To illustrate the point, Dworkin asks us to imagine two people, Jack and Jill, who have equal amounts of resources, and, from the perspective of an impartial observer, appear to experience roughly equal levels of success in their personal projects. A theory of overall success would nonetheless ask each to rate his or her own success in leading a valuable life as a whole, and, relying upon these assessments, would redistribute resources to the one reporting the lesser amount of overall success. Dworkin notes that whichever way we pose the question of overall success, the replies which different people might make do not necessarily point to common experiences. For example, if we simply asked Jack and Jill how satisfied overall they were with their lives, there is no assurance that both would employ a similar scale of judgement. Jack could have a sanguine personality and report a high level of satisfaction with what happens to be a very ordinary life, while Jill, a devotee of Nietzsche, might describe her equally unexceptional life as practically worthless. Equality of overall success would in this case recommend a transfer of resources from Jack to Jill, even though nothing in their objective circumstances is different.

A more sophisticated strategy, where each is asked to supply a comparative evaluation of his or her life, produces an even more equivocal solution. For instance, if asked how far removed their lives are from the best lives they could imagine, Jack, who possess an elevated estimation of his own potential, reports that his present life is far less satisfactory than it could be with more resources, while Jill, entertaining a humbler view of herself and her talents, counts her life as not far removed from what it ideally could be. If these same people are then asked how much better their lives are than the worse

lives they could imagine, Jack, proud at least of what he has so far accomplished, rates his life much better than the worse one he can imagine, while Jill, modest to the last, regards her life as not much better than the worst. In this case, resources would be transferred from Jack to Jill, or vice versa, depending on which of the two questions is taken to represent the authoritative index of welfare levels. This means that equality of overall success in this particular example cannot pick out one scheme of distribution as uniquely fair except by arbitrarily selecting a baseline for comparisons.

But, what is even more problematic for the theory of equality of overall success, Dworkin observes, is that in all of the imagined scenarios no true comparison of welfare levels is actually being reported because the differences which are noted between the two people are "differences in their beliefs but not differences in their lives."³⁰ Given this complication, Dworkin concludes that the only way to distinguish between mere beliefs about a life and a more objective account of that same life, while still relying on subjective evaluations of success, is to refer to a standard of comparison free of unreasonable individual life expectations. This induces him to submit the idea of "reasonable regret" as just such a neutral standard.

Differences in people's judgements about how well their lives are going overall are differences in their lives, rather than simply differences in their beliefs, only when they are differences, not in fantasy or conviction, but in fulfilment, which is....a matter of measuring personal success or failure against some standard of what *should* have been, not merely of what *might* have been. The important, and presently pertinent, comparison seems to me this. People have lives of less overall success if they have more reasonably to regret that they do not have or have not done.³¹

³⁰ *Ibid.*, p. 216.

³¹ *Ibid.*

Yet, paradoxically, this theoretical move, conceived to make overall personal success a plausible welfare measure, proves to be self-defeating. The reason is that notion of "reasonable regret" can have no relevance without a theory of fair shares. Dworkin's point is that in order for anyone to say that he or she reasonably regrets a life because it falls short of what it should have been, one must already have in mind some idea of the fair shares of resources to which one is entitled, and which would have made that life more satisfying. Thus, I cannot sensibly say that I regret not having the kind of life afforded to someone with Methuselah's life span, or someone granted supernatural physical or mental powers, because these are not really resources to which anyone is reasonably entitled. But, I can sensibly assert that I regret not having the normal powers or life span most people have. In this case, however, what I am doing is appealing to a theory of fair shares or entitlements. And this fact, Dworkin declares, makes a theory of equality of overall success internally inconsistent.

Any proposed theory of equality of success that does not make reasonable regret (or some similar idea) pivotal in this way is irrelevant to a sensible theory of equality of distribution....But any proposed account that does make this idea pivotal must include within its description of overall success, assumptions about what a fair share of distribution would be, and that means equality of overall success cannot be used to justify or constitute a theory of fair distribution.³²

Once again, what we encounter is the problem of a fatal circle. A theory of equality of overall success cannot identify an equal distribution without itself invoking an independent theory of what counts as an equal distribution. But this time no theoretical solution to the problem of circularity is available. This is the case, Dworkin contends,

³² *Ibid.*, p. 217.

because any trial-and-error thought-experiment, matching different satisfaction levels to different resource shares, would continually raise the question of reasonable regret in a way that would involve an infinite regress.

This is Dworkin's central argument against using equality of overall success as an egalitarian distributive theory. And, it is an argument which informs his analysis of other familiar problems found in welfarist theories. For example, when he broaches the problem of expensive tastes, Dworkin suggests that under a theory of equality of welfare the most plausible way to avoid the plainly inequitable transfer of resources from those whose tastes are modest to those whose tastes are costly is to stipulate that deliberately cultivated expensive tastes fall outside of calculations of distributive justice. But, the only way to justify this particular exclusion of expensive tastes from distributive policies devised to produce equal welfare is again to refer to an independent theory of fair shares.

To press this point against those who think expensive tastes can be excluded from welfare calculations without recourse to a theory of fair shares, Dworkin offers the following scenario. Suppose that in a society dedicated to equality of welfare, one of its members, Jude, has relatively simple and easily satisfied preferences. For this reason he receives less resources than others just because his wants are so inexpensively fulfilled. But, by happenstance, Jude develops an interest in bullfighting and subsequently finds his life less than satisfactory because his initial resource share is inadequate to fund his new interest. It is furthermore assumed that if resources were transferred to Jude to allow him to pursue his new-found interest in bullfighting and reestablish his welfare equity with other members of his society, he would still have fewer resources than others

because his remaining wants continue to be simple. By contrast, Louis, whose tastes more nearly approximate those of most other members of the same society, and who therefore initially has the same resource share as these others (and more than Jude), also happens to develop a new preference for expensive foods. With this new preference, Louis, like Jude, finds himself at welfare disadvantage given his original allotment of resources. How would a theory of equality of welfare treat these two cases?

If strictly applied, a welfare egalitarian theory would counsel redistributions both to Jude and Louis up to the point where their welfare levels equal those of others in their society. But Dworkin thinks our normal moral intuitions would be offended by giving extra resources to compensate for Louis's newly acquired expensive tastes, though not by recompensing Jude for his. And the only way to explain this difference is to refer to their different initial resource holdings. Since Jude had less than an equal amount of resources in the first place, any transfers to him in the service of his new wants appears fair. But the same cannot be said of Louis who had started out with an equal amount of resources. Those like Louis who deliberately develop precious tastes can make no rightful claim for more resources in order to satisfy these appetites because this would necessitate reducing the amount of resources available to others, and this would plainly trespass on the fair shares these others can expect from a society dedicated to equality. If the notion of fair shares is to be meaningful, however, it must be supported by a full-fledged theory of what constitutes an equitable distribution of resources. Hence, once again Dworkin thinks that equality of welfare points beyond itself to a theory of equality of resources.³³

³³ *Ibid.*, p. 238.

Even the matter of equitable compensation for those suffering handicaps, Dworkin suggests, can better be addressed by a theory of equality of resources. Although egalitarian welfarist theories might appear to be more solicitous of the well-being of the handicapped, there are a number of counter-intuitive results which can emerge in the application of these theories. For example, Dworkin refers to the hypothetical distributive problem caused by the dissimilar personalities of the Dickens's characters, Scrooge and Tiny Tim. While Tiny Tim is favoured with an extraordinarily sunny disposition, Scrooge is burdened by his misanthropic convictions. Because Tiny Tim reports greater levels of enjoyment or success in his life than does Scrooge, a theory of equality of welfare would not recommend transferring any extra resources to Tiny Tim to assist him in dealing with his handicap. But our normal moral instincts about the handicapped is that they are entitled to additional resources just because of their afflictions. Hence, a theory of equality of welfare fails in this instance to produce results consistent with our moral intuitions.

A theory of equality of welfare likewise fails to resolve satisfactorily yet another distributive problem associated with handicaps. Dworkin cites the hypothetical example of a severely handicapped person who would experience only marginal increases in his or her welfare with more resources, and who never could expect to experience anything approaching a welfare level equal to that of healthy individual; no matter how many additional resources were made available to him or her. A theory of equality of welfare, nevertheless, would recommend a radical transfer of resources to the handicapped individual in order to improve his or her welfare, even though this would drastically

reduce everyone else's welfare levels. There is no way, Dworkin claims, for a such a distributive theory to avoid this manifestly problematic allocation except by arbitrarily limiting transfers, and again this further illustrates its critical theoretical limitations. Fortified by these several accounts of the perplexing difficulties generated by welfare egalitarian theories, Dworkin concludes that this justifies looking for a better distributive ethic in some version of equality of resources.

4. How Reasonable is the Idea of Reasonable Regret?

A number of critics doubt that Dworkin has in fact demonstrated equality of welfare to be an incoherent distributive theory in the first place. The common objection is that Dworkin is mistaken in his assumption that any plausible method of comparing peoples's subjective assessments of welfare must include a standard of reasonable regret implying a theory of fair shares. For instance, James Griffin remonstrates that while Dworkin is correct in saying that subjective accounts of utility levels must be inspected for their reasonableness, this only suggests that a notion of "satisfaction of informed desires" should constitute the unit by which utilities are identified and compared. If a suitable notion of informed desires were constructed for purposes of welfare comparisons, Jack and Jill's unreasonable assessments of their own lives would be ruled out from the start. Dworkin is therefore wrong, Griffin claims, to introduce the idea of fair shares to correct the deficiencies of incongruous subjective identifications of welfare levels, for there is no implicit connection between the idea of fair shares and the reasonableness of people's desires. What Dworkin has done, Griffin contends, is to

"confuse 'rational' in the sense in which his argument does successfully show rationality to be an essential part of any notion of well-being--viz. 'purged of false belief and the like'--and 'rational' in the inflated sense that he provides no ground for--viz. 'also purged of unfairness'." ³⁴

In a similar vein, Richard Arneson argues that a theory of "equal opportunity for welfare" escapes the moral and conceptual dilemmas which Dworkin thinks inhere in all welfarist theories. What Arneson means by equality of opportunity for welfare is a distributive theory whereby all individuals are entitled to equivalent opportunities to pursue their "hypothetical ideally considered preferences." Hypothetical ideally considered preferences are those an individual would have if "he were to engage in ideally extended deliberation about his preferences with full pertinent information, while thinking clearly and making no reasoning errors." ³⁵ In Arneson's scheme of distributive justice, unequal resource holdings would be justified if everyone had the same opportunity to form any particular array of hypothetical ideally considered preferences. Inequalities in this case would then merely reflect voluntary choices individuals made over the employment of their resources. But precisely for that reason, any redistribution of resources between Jack to Jill simply in virtue of their different fanciful assessments about the value of their lives would be denied by a theory of equality of opportunity of welfare because in all relevant respects both have had an equal opportunity to cultivate

³⁴ James Griffin, "Modern Utilitarianism," *op. cit.*, pp. 92-96.

³⁵ Richard J. Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare," *op. cit.*, p. 163. See also Richard Arneson, "Equality and Equal Opportunity for Welfare," Philosophical Studies, Vol. 56, no. 1 (1989), pp. 77-93.

their own welfare by making informed preferences. And, because their assessments of their own lives fall short of being fully deliberative and informed, they can easily be discounted in this theory of justice. Because a theory of equality of opportunity for welfare sets out to pare away the irrational aspects of individual desires, Arneson is confident the "Dworkinian charge that preference satisfaction fails to register what matters in people's fulfilment is unfounded."³⁶

Arneson is also assured that his version of a welfarist distributive theory answers the problem of acquired expensive tastes without recourse to a prior theory of fair shares. Equality of opportunity for welfare demands that we look at the hypothetically rational preferences of individuals. This requires, among other things, that we attend to the circumstances under which actual preferences are formed. Thus, in Dworkin's example of Jude and Louis both developing expensive preferences, if it can be shown that they had equal opportunities to develop a reasonable set of preferences to begin with, then any new preferences they might acquire that turn out to be expensive deserve no special compensation because either could have chosen differently. But, if preference changes are the result of unchosen circumstances such as accidents, then equality of opportunity for welfare does recommend attending to the new preference with a view to equalizing welfare.³⁷

Arneson's point in this discussion is to show how the ostensible moral difference between Jude and Louis can be explained without any mention of equality of resources.

³⁶ Arneson, "Liberalism, Distributive Subjectivism, and Equal Opportunity for Welfare," p. 183.

³⁷ *Ibid.*, pp. 183-85.

The pertinent distinction between Jude and Louis is the voluntariness of their respective preference schedules. Thus, if we are moved to compensate Jude and not Louis for his new tastes, as Dworkin claims we are, it is because we have good reasons for thinking that Jude's original uncomplicated tastes were not freely chosen but were the product of his "stingy resource holdings."³⁸ Because Jude manifestly did not have equal opportunities for cultivating the kinds of informed preferences which would maximize his well-being, his new desire for studying bull-fighting can be regarded as a belated step in that direction and therefore deserving of compensation. On the other hand, because Louis's opportunities for forming clearheaded preferences were more favourable to begin with, his recent conversion to expensive tastes summons no similar egalitarian concern. The key difference between Jude and Louis, according to Arneson, is where we locate respective responsibility for their preferences. And, it is this issue of personal responsibility for preference formation taken as a component of a theory of equal opportunity for welfare which supplies a better answer to the problems of expensive tastes and handicaps than does Dworkin's resource-based theory of equality.³⁹

Arneson's point about the way in which an individual's responsibility for his or her preferences should govern an egalitarian's decision whether or not to redress certain kinds of inequalities appears on first sight to be very suggestive. Yet, it is not clear that either his argument for employing equality of opportunity for welfare as a distributive ethic, or Griffin's contention that a scrupulously defined concept of informed desires can

³⁸ *Ibid.*, p. 184.

³⁹ Richard J. Arneson, "Equality and Equal Opportunity for Welfare," *op. cit.*, pp. 77-93.

serve the purpose of comparing welfare levels, meet Dworkin's perceptive observation about the fateful methodological circle inscribed in the heart of welfare egalitarian theories. In responding to Dworkin's theoretical critique of welfarist theories of equality, what both Griffin and Arneson resort to is a conception of welfarism where only cogent preferences are allowed to figure in calculations of distributive justice. And, both assume that there is a simple neutral standard by which cogent preferences can be identified. However, neither is able in the end to describe such a standard without surreptitiously stipulating some notion of fair shares of resources to which everyone is entitled.

For example, when Griffin states that employing the utility measure of "satisfaction of informed desires" escapes the problem of commensurating subjective judgements of value, he in turn freights the term "informed desires" with moral qualifiers resonant of a theory of fair resource shares. The same is true in a more straightforward fashion in Arneson's formulation of equality of opportunity for welfare. The way in which Arneson describes equality of opportunity is virtually indistinguishable from a theory of equality of resources. For what is equality of opportunity for welfare except equality of resources such as money or education which create the opportunities to make informed preferences conducive to individual welfare. Indeed, Arneson slips into manifestly resourcist language precisely where he thinks he repairs Dworkin's faulty treatment of expensive tastes.

Arneson, it has already been remarked, thinks that the way an egalitarian should attend to the question of compensating expensive tastes is to examine whether the acquisition of the taste was voluntary. On this strategy of assessment, Arneson would

reimburse Jude for his newly acquired preference for bullfighting because an egalitarian could safely assume that Jude's initial *stingy resource holdings* acted to diminish his opportunity for cultivating informed preferences. But this solution obviously makes use of a theory of fair shares. For it is only on the assumption that Jude initially received less than his fair share of resources that Arneson concludes that his original preference schedule is somehow involuntary, and, for this reason, that Jude deserves a compensatory redistribution of resources to establish equity in his opportunity for welfare.

The problem with both Griffin's and Arneson's bid to devise a neutral standard by which cogent preferences can be distinguished is that both end up retaining what is essentially a liberal-individualist conception of preference formation. And, because they are anxious to elicit a morally neutral standard for what comprises cogent preferences, they are not able to avoid falling into circular arguments of their own. The reason is that both want to restrict preferences suitable for consideration in a theory of distributive justice to those which can be designated as reasonable. At the same time, neither wants to define what is "reasonable" in terms of objective moral goods because from the liberal perspective which they share it is individuals who must decide for themselves what is to be regarded as good. Unable to say that some preferences are reasonable because they contribute to a demonstrably good end, and others unreasonable because they do not, Griffin and Arneson are compelled to seek a criterion for what constitutes reasonableness in the process by which preferences are formed. Thus, because they feel obliged to canvass only subjective perceptions of value, their sole recourse in defining what constitutes reasonable preferences is to equate reasonable with that which is fairly

contracted. But this means that ultimately their procedural argument for distinguishing reasonable from unreasonable preferences summons a theory of fair shares and hence is circular in just the way Dworkin suggests welfarist theories must be. If Dworkin is right, however, that all welfare theories of equality are circular because they presuppose a resource theory of equality, can such a resource theory itself avoid the same problem of circularity? In the next chapter Dworkin's extended argument in favour of a particular version of equality of resources will be subjected to this critical question.

Chapter Five

Distributive Justice II: Equality of Resources

1. Introduction

Equality of resources is an attractive theory of distribution for a liberal society, according to Dworkin, because it responds in an estimable fashion to two distinct requirements of the abstract egalitarian principle. Equality of resources allows for distributions which are ambition-sensitive, that is, which faithfully mirror individual decisions about what is valuable in life. At the same time, equality of resources attempts to secure distributions which are endowment-insensitive, that is, distributions which do not reflect arbitrary and unfair differences in the circumstances in which individuals find themselves. And, unlike welfare theories of equality, equality of resources does not itself presuppose an independent measure for determining when these two requirements are fulfilled. In other words, it is a procedural theory which, starting from what is presumed to be a set of uncontroversial premises about both the minimum formal requirements for equal distributions and the nature of market transactions, produces substantive distributive principles. The best way to understand what Dworkin means when he says that a procedural theory of resource equity is capable of furnishing determinate distributional principles is to trace his own fanciful illustration of how an equitable distributive scheme can be adduced from the exchange requirements of a hypothetical state of nature.

2. The Auction

Dworkin asks us to imagine a desert island upon which the survivors of a shipwreck alight. These survivors prove not to be retrograde *hommes naturels*, but instead are civic-minded liberals ready to reach a consensus on an equitable way of distributing all available resources to which, given the circumstances of inadvertent immigration, no single individual can make a prior claim. Indeed, Dworkin is assured that the fact that the island resources were unowned before this accidental settlement establishes a strong argument in favour of choosing equality as the distributive rule. But this still leaves the problem of determining what constitutes an equal distribution. Equality of result and equality of welfare are rejected as inadequate distributional rules because both fail to gauge the effects on others of the decisions and actions which an individual makes over a lifetime.

In light of the failings of these distributive theories, Dworkin proposes equality of resources as the best allocative scheme because it can be constructed in such a way as to evaluate the impact which the economic decisions of any one individual has on others. This need to take into account the consequences for others of individual production and consumption decisions leads Dworkin to suggest market transactions as the most credible means of measuring interpersonal equality over a lifetime. However, market transactions are to be regarded as accurate registers of interpersonal equality in this island economy only if something called the "envy test" is satisfied. The envy test is an economist's term of art designed to give operational meaning to equal or symmetric

treatment.¹ Dworkin introduces it as a metric for determining when resources are equally divided. As he describes it: "No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle."²

The envy test would seem to be an especially suitable criterion for estimating equal distributions on the desert island because, as it turns out, its resources are so heterogeneous that they cannot be arranged into identical allotments. But how is the envy test to be discharged? It is possible, Dworkin concedes, that the envy test could be satisfied through a protracted, trial-and-error mechanical division of available resources. In such a mechanical division, an adjudicator would compose and recompose bundles of assorted goods until a set of bundles is discovered, which, when allocated equally to all immigrants, passes the envy test. But Dworkin notices that this type of mechanical division has the propensity for being both arbitrary and unfair. It can be arbitrary because there may be many different sets of bundles that can be constructed, each of which could pass the envy test. The choice of one set of bundles for allocation will then ultimately be the result of the adjudicator's arbitrary decision. It can likewise be unfair because, although no one envies anyone else's bundle within the set chosen for distribution, a person could still imagine a different set of bundles which, had it been selected as the basis for distribution, would have satisfied more perspicuously his or her unique tastes

¹ On the conventional economic understanding of the concept of the envy test, and Dworkin's theoretical appropriation of it, see Hal R. Varian, "Dworkin on Equality of Resources," Economics and Philosophy, Vol. 1, no. 1 (April, 1985), pp. 110-25

² "Equality of Resources," p. 285.

and preferences.

Because of the potential problems of arbitrariness and unfairness in a strictly mechanical division of resources, Dworkin is persuaded that market institutions are essential to equitable distributions. But Dworkin's market is carefully circumscribed. This market, sketched in his whimsical *mise en scene*, begins with an equal allotment of valueless counters which individuals can use as currency to bid on whatever resources are chosen to be alienable. The actual bidding then takes place in an auction where a specially designated auctioneer divides the miscellaneous island goods into roughly comparable bundles. Both the composition of the bundles and their set of relative prices are continually readjusted by the auctioneer until the market clears. To ensure that this type of auction responds as faithfully as possible to each individual's unique preferences and ambitions, Dworkin suggests that every individual should have the right to request that the resources be placed on the market in specific configurations. Moreover, anyone should also be able to demand that the auction, even if it initially clears the market, be run over again with different sets of prices and different combinations of resources. Were such an unlikely open-ended auction held, Dworkin is assured that eventually everyone would be satisfied that no further running of the auction could yield a more advantageous personal result and would eventually accept a finite distribution as equitable.

Dworkin supposes that a successful final clearance of the market in these special circumstances meets the envy test because everyone will have had an equal voice in determining both the composition of the bundles and their actual distribution through auction bids. The market institution of the auction should thus be viewed as a particularly

promising device for producing a non-arbitrary and fair distribution. It permits individuals, starting from an initially equal division of purchasing-power, to conscript available resources at market determined prices for their own unique tastes and life-plans. Whatever bundle of resources individuals end up with at the conclusion of the auction must be deemed to be fairly distributed because everyone had the same opportunity to bid on all resources. And, of course, once the initial auction has been completed, there is every reason to allow market transactions to continue as individuals proceed to make decisions on how to put their resources to work either for purposes of consumption or production.

It is crucial to realize that Dworkin appears to approve of market distributions not because they are more efficient, or better at producing prosperity or overall utility. Nor does he ostensibly defend markets because they are the necessary condition of individual liberty. In fact Dworkin expressly notes such conventional justifications concede the point that markets are antagonistic to anything but the most formal conceptions of equality. Yet, in spite of this he insists on the nominally paradoxical position that "the idea of an economic market....must be at the centre of any attractive theory of equality of resources."³ Because Dworkin is convinced that the paradox in embracing the market for egalitarian purposes is more apparent than real, it is worth quoting at some length his justification of the market.

The market character of the auction is not simply a convenient or ad hoc device for resolving technical problems that arise for equality of resources in very simple exercises like our desert island case. It is an

³ *Ibid.*, p. 284.

institutionalized form of the process of discovery and adaptation that is at the centre of the ethics of that ideal. Equality of resources supposes that the resources devoted to each person's life should be equal. That goal needs a measure. The market proposes what in fact the envy test assumes, that the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others. It insists that the cost, measured in that way, figure in each person's sense of what is rightly his and in each person's judgement of what life he should lead, given that command of justice.⁴

Thus market prices, according to Dworkin, contain a normative element particularly suited to an egalitarian theory of justice. Insofar as prices are determined by the undirected forces of supply and demand in circumstances of initial equality, they operate as non-arbitrary measures of the social costs of our preferences. Consequently, an individual's rightful claim to resources, under a scheme of equality of resources, can be no more than those resources he or she chooses to appropriate at existing market prices.

Although the design of Dworkin's argument in favour of the market is understandable, it still remains questionable whether identifying the relative costs of resources through market transactions really does provide a non-arbitrary measure of equitable distributions. The obvious difficulty in Dworkin's position is that market distributions seem to have the same potential for being arbitrary and unfair as do those made by an independent arbitrator. The pertinent point is this. Dworkin introduces the idea of a market after arguing that trial-and-error experiments in the distribution of island resources by an adjudicator has the propensity for being both arbitrary and unfair. For, even if a particular distribution made in this fashion meets the envy test, it is possible

⁴ *Ibid.*, p. 289.

that this distribution is only one of many which satisfy that criterion. Because the adjudicator's choice in these circumstances is ultimately arbitrary, it may leave some individuals wishing a different distributive set had been selected, even if they do not envy anyone else's bundle of resources in the set actually chosen for distribution.

How would a market repair this potential for arbitrariness and unfairness? The obvious answer is that the market allows everyone the same opportunity to make his or her preference for any particular resource known through the simple device of auction bids (or presumably through their price-taking behaviour in real markets.) But of course markets do not ensure that every preference an individual has will be satisfied. Rather, markets merely reveal the cost of any individual's preference for a resource as a function of the aggregate demand for that resource and its available supply. Dworkin realizes that this market determination of prices can prove lucky for some and unlucky for others. For instance, a widely shared preference for some particular resource can make it cheap because there happens to be economies of scale in its production, or expensive because it proves to be in scarce supply. Dworkin is insistent, however, that this particular characteristic of the market, where some are lucky and others unlucky in the costs of their preferences, is not sufficient for doubting its fairness as distributional devices. In fact, he makes the strong claim that "the contingent facts of raw material and the distribute [sic] of tastes are not grounds on which someone might challenge a distribution as unequal."⁵

Dworkin's determination to treat resources and preferences as contingent facts is

⁵ *Ibid.*, p. 289.

instructive because it shows that in defending market distributions as equitable, his principal theoretical concern is to avoid a circular argument where equality of resources would end up presupposing a theory of equality of welfare. Dworkin is explicit on this point when he suggests that if we are allowed to ask whether a certain distribution of preferences is fair, the only way we could answer is by seeing how that distribution affected equality of welfare. After all, those whose preferences are unfavourably affected by a particular distribution of tastes will experience less welfare on that account. But in this case they can appeal for redress only under a theory of equality of welfare. To circumvent this circular reasoning, where equality of resources is compelled to seek a measure for fairness in a theory of equality of welfare, Dworkin maintains that the type of resources available for distribution and the array of existing preferences must of necessity be treated as a contingent fact in a theory of equality of resources.⁶

However, if we are forced for methodological reasons intrinsic to Dworkin's distributive theory to treat the preferences and resources brought to the market as contingent facts, then these facts can be regarded as no different, from the moral point of view, than the contingent fact of an adjudicator's choice of a distributional set. Thus, the unlucky individual who finds his or her preference for a particular resource expensive because it is widely shared and scarce may indeed freely decide that sacrificing other resources for it is not warranted. But that ill-starred individual can at the same time plausibly complain that it is an arbitrary and unfair conjunction of circumstances which has made the desired resource prohibitive. Therefore, it would seem that if there is a

⁶ *Ibid.*

difference between market distributions and those made by an independent adjudicator, it is a difference other than one of justice and fairness.

What the example of the unlucky consumer illustrates is a particular consequence of a more general pattern in market transactions. Markets do not just respond to preferences, but also model those same preferences in virtue of the contingencies of actual supply and demand. Yet, if markets are uncritically endorsed as instruments uniquely capable of effecting equitable distributions, then questions concerning the cogency of individual preferences, or the social constitution of resources, will invariably be left unanswered in a theory of justice. And, as was argued previously with respect to equality of welfare, a distributive theory which abstracts from these questions risks becoming either radically incoherent or latently conservative. If, however, the market is embraced as a distributional device for reasons other than distributive justice, the problem of theoretical incoherence may be mitigated. It remains to be seen, once Dworkin's complete theory of equality of resources is sketched, whether in fact he is implicitly operating with a different, more fundamental rationalization of the market than its ability to realize the stated value of equality.

3. Market Corrections

i. Handicaps

While Dworkin appears to be inhibited by his own conceptual scheme from asking whether a particular set of choices made possible by the market is fair, or whether markets model as well as respond to preferences, he is prepared to acknowledge that

resource distributions occasioned by market transactions can betray an egalitarian ethic if they reflect arbitrary differences in health and in talents. Dworkin raises this particular problem of potential unfairness in market transactions when he turns to the question of the distribution of labour in productive enterprises. Significantly, Dworkin omits any meaningful discussion of the organization of labour in production, or of individual control over the conditions of work, and concentrates instead on the income and leisure consequences of the division of labour. The division of labour may appear to have the potential for unfairness, Dworkin observes, because once market transactions have begun in the island economy, some will earn more than others depending upon the occupation chosen. However, this fact alone is not fatal to equality, he continues, because in the ideal circumstances being imagined the choice between more or less remunerative occupations reflects individual preferences for different trade-offs between leisure and income.

In assuming that income and leisure are the only two resources involved in occupational choices which are relevant to questions of distributive justice, Dworkin appropriates the methodological conventions characteristic of one version of welfare economic theory. In order for Dworkin to claim that the lifetime resource holdings of those who pursue more remunerative occupations are equal to those who settle for less well-paying jobs, he must assume that "the production of goods has a fixed cost in labour time."⁷ That means that in every occupation, the value of an hour's worth of production is equivalent. Thus, under this assumption, the difference between high-income and low-

⁷ David Mapel, Social Justice Reconsidered, *op. cit.*, p. 43.

income occupations is due solely to the amount of time spent in work. The more remunerative the occupation, the more time is spent at work, and, hence, the less leisure time is available. The reverse is obviously true for lower-paying occupations. In such circumstances, individuals could choose different income-leisure ratios and still be regarded as enjoying equal resource levels.

It is important to realize, however, that this very assumption which authorizes Dworkin to say that individuals with income differentials can still be judged to have equal resources prevent him from exploring other important normative questions about the organization of labour in productive enterprises. The value of collective control over the conditions of work, for example, cannot be equated to other resources such as income or leisure in a symmetrical fashion. Leisure and income are arguably commensurable resources because they are consumed individually, and, hence, their relative value is determined by individual preferences. But collective control over work is a collective good which is not "consumed" by any one individual. It is, therefore, intractable to the kind of analysis of relative value to which other resources can be submitted. Again, this demonstrates how a methodological, and ultimately ontological, assumption, limits the prescriptive range of Dworkin's theory of justice. For, in supposing that the pertinent question for the just distribution of labour is the fairness involved in trade-offs between income and leisure, Dworkin works within a resolutely liberal-individualist framework.

But even within this framework Dworkin recognizes that certain of its assumptions are problematic. For instance, the envy-free distributions produced in his specially conceived labour and consumption market can obtain only if it is thought that everyone

has the same natural assets and differs merely in preferences for unique goods and for trade-offs between leisure and income. But what happens if people are not so equally situated? Dworkin acknowledges that the preferences individuals entertain and the choices they make are powerfully conditioned by circumstances such as poor health, handicaps, or talent differences over which they often have no control. And, he concedes that this presents complications for the envy-free distributions which his ideal market is designed to elicit. For example, handicaps may prevent individuals from pursuing ambitions and life-plans they might ordinarily have enjoyed had they been healthy, and this can lead to their envying the resource holdings of the unafflicted. Or, those with fewer natural talents but with ambitions equal to the more talented may end up with relatively less resources in a market economy, and again the resulting distributions will not be envy-free.

To deal with these contingencies which do presumably offend a theory of equality of resources, Dworkin proposes that an egalitarian should first attend to the distinction between "option luck" and "brute luck". On Dworkin's description of this distinction, option luck is a "matter of how deliberate and calculated gambles turn out," while brute luck is a "matter of how risks fall out that are not in that sense deliberate gambles."⁸ It is inevitable that at some time or other, individuals will encounter both option and brute luck. For example a profitable stock market investment is clearly a matter of option luck, while an injury caused by a falling meteorite is unmistakably a case of brute luck. But, in other instances, the ascription of option and brute luck is harder to determine. Can we

⁸ "Equality of Resources," p. 293.

say without hesitation, for example, that the cancer contracted by a smoker in the course of an otherwise normal life is a case of option or brute luck?

While the answer may be ambiguous in this and other similar cases, Dworkin thinks that the idea of insurance provides a link between brute and option luck because, insofar as it is available, individuals can take calculated gambles to purchase or reject insurance against specific kinds of brute bad luck. What recommends the idea of insurance to equality of resources, Dworkin contends, is that an insurance market, suitably tailored for the hypothetical desert island, can function as an eminently fair device for picking out which aspects of an individual's circumstances are to be regarded as the result of brute bad luck. And, in this role, an insurance market helps to secure the goal of discovering equitable distributions which are both ambition-sensitive and endowment-insensitive. To understand the full weight which this idea of insurance carries in Dworkin's theory of equality of resources, it is necessary to attend to his description of the various types of relationships between risks, responsibilities, and costs which obtain in the island economy.

Individuals who assume risks and prosper in the employment of their resources can be said to enjoy a certain amount of option luck while others who assume the same risks and fail can be said to suffer from option luck. In any developed economy there will invariably be wealth differentials among these fortunate and unfortunate individuals, as well as those who are risk-averse and take no gambles. Does equality of resources require a levelling of these differentials through income redistributions? Dworkin thinks it does not for the simple reason that equality of resources obliges everyone to pay the

"true cost" of the lives they have chosen. For both successful and unsuccessful risk-takers, the price of a gain or the cost of a loss is the expense of the resources gambled at the odds in force at the time of the risk. And, for those who are risk-averse, the true cost of their lives is measured by the relinquishing of any chance of gaining through the gambles others are willing to take. In none of these cases is a redistribution called for because it can be said that each person chose, with full knowledge of the relevant costs, his or her life.

But what if brute bad luck intervened so as to produce wealth differentials that are in no way attributable to different people's preferences for taking risks? If blindness, for example, inadvertently struck an individual, could it be said that the luckless individual chose his or her life with its accompanying costs? While it is at least feasible to say that a theory of distributive justice should not be concerned with option luck, the case of brute bad luck is obviously different because in the latter case informed choice based on foreknowledge of the costs of a handicapped life is absent.

According to Dworkin, however, there is a way of linking option and brute luck by using the idea of insurance. If insurance against blindness were offered at the initial island auction, then the resource implications of its actual occurrence, although still a case of brute bad luck, would, for purposes of distributive justice, simply be a function of the option luck of those who had chosen to insure at any of the different available coverage levels. In this situation, the wealth differentials which befall those unfortunate enough to be afflicted with blindness reflect the different attitudes towards risk, or the different evaluations of the worth of a sightless life, which individuals bring to the

insurance market. And, these differentials pose no problem to a theory of equality of resources if it is assumed that everyone has the same antecedent risk of suffering from a catastrophe like blindness, and, if everyone knows what the odds of this risk are and has the same opportunity to insure against the risk at any coverage level.

Of course these latter assumptions, Dworkin admits, are problematic in any plausible world. Some people are born handicapped, or develop handicaps before they are capable of appraising their real costs or solvent enough to insure against them. Moreover, handicaps are not normally distributed randomly among the general population but are strongly correlated with genetic predispositions, a fact which typically leads insurers to vary premiums according to genetic risk. Yet, even if these several objections hold against the practical possibility of using insurance as an egalitarian warranty for the afflicted, Dworkin thinks that a hypothetical market in insurance can provide a useful counterfactual guide through which a theory of equality of resources might face the problems of handicaps in the real world.

In order for the idea of an insurance market to serve as a counterfactual guide for resource distributions in the real world, however, it is necessary that some sense can be made of an improbable question: "If (contrary to fact) everyone had at the appropriate age the same risk of developing physical or mental handicaps in the future (which assumes that no one has developed them yet) but that the total number of these handicaps remained what it is now, how much insurance coverage against these handicaps would the average member of the community purchase?"⁹ If one could say with any degree of

⁹ *Ibid.*, p. 297.

certainty that a particular level of insurance against a specified range of handicaps is what an average person would have purchased in the hypothetical circumstances imagined, then that level could be taken as the just amount of compensation appropriate for those who develop such handicaps in the real world. And, such compensation could itself be drawn from a fund made up of tax revenues designed to match the fund that would have been amassed through the collection of insurance premiums.

Significantly, Dworkin admits that his assumption that one could specify an average level of insurance coverage is a simplifying measure undertaken to avoid the potentially insuperable problem of deciding what level of coverage each handicapped person would really have purchased in such a hypothetical market. After all, people decide on how much resources to spend on insurance by considering what type of life they hope to lead. It is only by contemplating the prospects of losing a particular way of life because of handicaps that an individual can make a rational calculation about the amount of insurance he or she would be prepared to purchase to mitigate against the loss. Persons handicapped at birth or early in life, however, would be unable to make those kinds of calculations simply because they could not reach any intelligible decision about the type of life they would have enjoyed without a handicap, and, therefore, about the level of insurance coverage they should purchase against the possibility of suffering the very handicap they happen to have.

The assumption of an average level of insurance coverage which could be attributed to persons assessing risks against handicaps behind a modified "veil of ignorance" is thus deliberately conceived to avert the dilemma involved in trying to

design too personalized an insurance scheme. The trouble with this averaging approach, however, is that it glosses over problems of identifying what is to count as a handicap, as well as what constitutes representative risk behaviour. Different individuals will, as a matter of course, identify and assess the risks of handicaps in different ways according to what they perceive to be important in their lives. Yet, because it is impossible to run the hypothetical insurance market for handicaps in a way that asks individuals to make these judgements, one must settle for what is practically conceivable. And, it is at least plausible, Dworkin says, that an insurance market could be "structured through categories designating the risks against which most people would insure in a general way."¹⁰

Although this improvised solution to designating an average insurance level involves speculative and controvertible judgements about what constitutes representative risk behaviour, Dworkin maintains that it provides the most promising, even if second best, alternative to the problem of dealing with handicaps under a scheme of equality of resources. It is a second best alternative for at least two reasons. On the one hand, the insurance approach invariably will provide fewer compensatory resources for the handicapped than would any thoroughgoing effort to equalize their circumstances. On the other hand, by electing to model compensation levels according to a judgement about what average coverage amounts would be purchased under conditions of equal risk, this approach is less sensitive to individual assessments of value than would be the case if each person were allowed to actually make his or her own decision about insurance.

¹⁰ *Ibid.*, p. 299.

However, in spite of these shortcomings, Dworkin concludes that the hypothetical insurance market does have the advantage of providing a fair and serviceable procedural mechanism for devising a tax and compensation scheme for handicaps which answers to the twin egalitarian requirements of ambition-sensitive and endowment insensitive distributions.

To press the point of fairness and serviceability, Dworkin compares the insurance solution to handicaps with that recommended both by equality of welfare, and by a different version of equality of resources. The difficulty with equality of welfare, as previously mentioned, is that it furnishes no upper limit to the amount of compensation given to the handicapped, provided that such compensation continues to improve, however incrementally, the welfare of the recipient. And, while this might at first sight appear more generous than what would be provided in the hypothetical insurance scheme with its averaging assumption, Dworkin notes that a distributive scheme without a determinate upper limit to compensation would be compelled to invoke strictly political considerations in trying to decide on an actual compensation amount. And, this is something that might prove to be a greater moral threat for the handicapped than what a defensible hypothetical insurance market would offer in the way of compensation.¹¹

On the other hand, if we employed a theory of equality of resources which started out with the assumption that a person's physical and mental powers must count as part of his or her resources, a different solution is available for an egalitarian response to the problem of handicaps. Quite simply, one could say that anybody born handicapped starts

¹¹ *Ibid.*, p. 300.

out with fewer resources than others and should be allowed to catch up, by way of transfers of material resources, before what remains is auctioned off in the equal market which the desert island is meant to describe. However, Dworkin notes that there are problems with this version of equality of resources. For one thing, it encounters a difficulty similar to that found in the redistributive recommendation of equality of welfare. Because no amount of initial resource compensation will make someone born blind or mentally incompetent equal in physical or mental resources to the unafflicted, this argument for equality likewise provides no upper limit to the initial compensation, and again only an arbitrary political decision will decide the fate of the handicapped in such circumstances.

But there is as well an even more fundamental theoretical indeterminacy in the way this variant of equality of resources poses the problem of compensation in the first place. In order that the handicapped be given the opportunity, through compensatory distributions, to enjoy resources approximating those which individuals with normal powers ostensibly possess, some standard of "normal powers" must be stipulated. For reasons parallel to those Dworkin gave for doubting that the idea of "reasonable regret" can be fixed independently of a theory of equality of resources, so too is it unlikely that a benchmark for normal powers can be unambiguously identified without a theory of equality of welfare. Indeed, Dworkin notes that this latter problem is one of the reasons why the hypothetical insurance market is superior as an egalitarian distributive device: "The hypothetical insurance approach does not require any stipulation of "normal" powers, because it allows the hypothetical market to determine which infirmities are

compensable."¹² In other words, rather than engage in an infinite regress of questions to determine a benchmark for normal powers that could serve to identify what qualifies as handicaps, and that could function as a measure for appropriate compensations, a hypothetical insurance market has the virtue of asking what is ostensibly a non-circular question: in a world of equal risk, what handicaps are individuals willing to insure against and at what coverage levels?

If indeed sense can be made of this question, then perhaps Dworkin is right in his claim that the hypothetical insurance market is an eminently fair device for picking out what is to count as compensative infirmities in a distributive theory devoted to equality of resources. For on the surface, at least, the hypothetical insurance market, just as the initial auction, has the quality of procedural fairness in the sense that no external moral judgements about what constitute unfair disadvantages are required because markets enable those judgements to emerge simply through people's decisions about what is valuable in their own lives.

A closer scrutiny of the hypothetical insurance market, however, should lead one to wonder whether it can secure equitable distributions for infirmities in just the way Dworkin thinks. To see why questions of justice are not necessarily exhausted by an auction corrected by a hypothetical insurance market, we only need to attend to a third reason Dworkin gives for rejecting that version of equality of resources which would treat physical and mental powers as resources liable to redistribution. Dworkin flatly states that "[t]hough powers are resources, they should not be considered resources

¹² *Ibid.*, p. 300n.

whose ownership is to be determined through politics in accordance with some interpretation of equality of resources."¹³

Dworkin's concern is obvious. He is responding to a familiar objection to egalitarian distributive theories made by Robert Nozick. In discussing the fate of an individual's entitlement to his or her own body, Nozick observes that a thoroughgoing application of a patterned distributive rule could lead to the coerced transfers of body parts. For instance, a blind person might have a *prima facie* equity claim for at least one eye from a sighted person by appealing to Rawls's distributive rule which sanctions all redistributions maximizing the position of the worst-off.¹⁴

By simply stipulating that people's physical and mental powers are not to be treated in the same way as other resources for purposes of distributive justice, Dworkin does succeed in parrying Nozick's reproach. But the problem, as Jan Narveson has

¹³ *Ibid.*, p. 301.

¹⁴ Nozick, *Anarchy, State and Utopia*, p. 206. It should be noted that Rawls's maximin principle is, strictly speaking, immune to this line of criticism because Rawls is explicit in limiting the range of redistributions that can be justified by his principle to what he calls "social primary goods" which include only such resources as wealth, income, opportunities, powers, rights, and the social bases of self-respect. Nozick's more general point, however, appears to be germane to those theories of equality which assume that brute bad luck is not deserved, and, therefore, that those who suffer it must be compensated out of the resources of the more fortunate. But, even while Nozick succeeds in identifying a morally troubling implication of egalitarian distributive theories when it comes to defining resources open to redistribution, it should be added that his entitlement theory is also subject to moral ambiguities on this score. Nozick is convinced that his own concept of entitlement, based on the notion of self-ownership, acts to prohibit compulsory transfers of body parts in the name of egalitarian or utilitarian justice. Yet, the idea of self-ownership also implies that individuals who possess their own bodies are also free to alienate those bodies in whole or in part. Nozick's theory would thus appear to support a free market in organs so long as buyers and sellers engage in non-coerced contracts. But, if the commonly expressed indignation to contemporary reports of an underground trade in human organs is any indication, a free market in body parts, no less than coerced transfers, offends our moral convictions. If this is the case, then it is not necessarily the coercive nature of the transfers allegedly sanctioned by egalitarian distributive theories which is the issue, but a certain moral view of the sanctity of the body that transcends all distributive questions.

noted, is that Dworkin fails to supply an independent reason for this moral constraint.¹⁵ And, when Dworkin attempts to rectify this shortcoming in his own theory, he merely underscores an ambiguity which pervades his whole effort to fashion a resource theory of equality with a reliable prescriptive range. This ambiguity is evident in Dworkin's reply to Narveson, where he acknowledges that an egalitarian theory "must distinguish between treating people as equals....and changing them into different people who are, as changed, equal."¹⁶ The latter kind of egalitarianism is prohibited, Dworkin says, by the abstract egalitarian principle which states "that the interests of *people* matter."¹⁷ In other words, a genuinely egalitarian distributive theory must respect the separateness of persons and treat them as ends-in-themselves rather than as ends for others.

But, in order to sustain this position, Dworkin must be prepared to make a prior distinction between what constitutes the essential attributes of a person and what is an incidental characteristic which can be treated as an alienable resource. Only such a distinction could allow Dworkin to say with theoretical assurance that certain parts of a person's body are essential attributes of that individual and cannot be transferred to another in the interests of equality without changing the identity of the donor. The trouble, Dworkin admits, is that a theory of equality cannot supply this distinction by itself because the distinction requires a full moral exploration of the concept of the person.

¹⁵ Narveson, "On Dworkinian Equality," Social Philosophy and Policy, Vol. 1, Issue 1 (Autumn, 1983), p. 16.

¹⁶ Dworkin, "Comment on Narveson," *op. cit.*, p. 39.

¹⁷ *Ibid.*

However, if a theory of equality cannot furnish an answer to the question of how to demarcate the essential attributes of a person, and if in turn the notion of a person is itself a contested moral concept, then it is perfectly understandable that there might be different political conceptions of where the line should be drawn to satisfy egalitarian concerns. Thus, for example, it is at least plausible for an egalitarian to insist that blood, which is arguably not an attribute by which a person gains his or her unique identity, be regularly donated according to some fair lottery. But, if such an argument can be mounted for compulsory blood donations, why not for kidney or eye donations? Herein lies the problem with contemplating treating human bodies as resources for purposes of egalitarian justice. Once it is contended that some body parts are not essential attributes of the person and hence liable to redistribution, it is difficult to resist using analogous arguments to expand the list.

For this reason, Dworkin suggests, it is only prudent to prohibit all such transfers and rely on some intuitive sense that it is important to protect the person for our justification of such a ban. Moreover, because of that prudential calculation to prohibit transfers of body parts, proponents of egalitarian justice should see in the idea of modelling redistributions according to the results of a hypothetical insurance market the best method of remedying the undeserved inequalities to which handicaps give rise. For, when all is said and done, body parts such as eyes can be regarded as both integral to a person *and* as resources which allow that person to fulfil his or her ambitions. Because our physical and mental powers have this characteristic of being both part of us and of functioning as resources to further our ends, Dworkin states, an egalitarian solution to

the inequalities that derive from differences in these powers "must try to accommodate both of these facts."¹⁸ The virtue of the hypothetical insurance market, he concludes, is that it supplies just such an accommodation.

This latter argument in favour of a hypothetical insurance market for handicaps, however, engenders a new set of difficulties. Dworkin concedes that his prohibition of transfers in body parts rests on no firm moral foundations but is a pragmatic theoretical response to the indeterminacy involved in distinguishing what is essential to the person from what is contingent. While he is able to use this admission as grounds for a prudential argument in favour of the hypothetical insurance market approach to compensating handicaps, this only serves to highlight a more fundamental problem located within his theory of equality. The problem is this. If the insurance approach is accepted as a satisfactory way of dealing with contingent accidents like handicaps, why are other contingencies like the accidental array of preferences and resources brought to the market not eligible for similar treatment? Dworkin has, after all, acknowledged that the contingencies of an existing schedule of preferences or supply of resources can adversely affect the welfare of the unlucky consumers by making certain resources in the island economy expensive. Why not treat these expensive preferences in a manner analogous to handicaps? Is it not possible to establish a hypothetical insurance market against the possibility of finding oneself with preferences that turn out expensive, with compensation determined by using the same averaging assumptions about risk found in the handicap scheme?

¹⁸ *Ibid.*

Dworkin is aware that a correspondence between handicaps and expensive tastes might be proposed, but he denies that there is in fact a similarity to be found in these two states. There is, he asserts, a fundamental difference between a person who suffers a handicap and one who finds his or her tastes expensive. Someone born with a serious handicap, Dworkin declares, "faces his life with what we concede to be fewer resources, just on that account, than others do."¹⁹ But in the case of expensive tastes, Dworkin maintains that it is hopeless to say that a person who happens to have tastes which prove costly has fewer resources at his or her command because "we cannot state (without falling back on some version of equality of welfare) what equality in the distribution of tastes and preferences would be."²⁰

Unfortunately, this explanation of the difference between handicaps and expensive tastes is not quite as transparent as Dworkin seems to think. To begin with, there is no clear indication why the handicapped are said to have fewer resources rather than a diminished capacity to secure welfare. This latter distinction is important because if handicaps are regarded as causes of welfare deficiencies, then there would seem to be no unequivocal way of distinguishing them from expensive tastes which are, on Dworkin's own account, sources of welfare inequalities.²¹

¹⁹ "Equality of Resources," p. 302.

²⁰ *Ibid.*

²¹ As a matter of fact, Dworkin does acknowledge that handicaps are sources of welfare deficiencies. This can be gathered when he directly addresses the question of what distinguishes handicaps from expensive tastes: "Does this decision [to insure against handicaps but not expensive tastes] place too much weight on the distinction between handicaps, which the immigrants treat in this compensatory way, and accidents touching on preferences and ambitions (like the accident of what material resources are in fact available, and of how many people share a particular person's taste)? The latter will *also affect welfare*, but are not matters for compensation under our scheme." [emphasis mine] "Equality of Resources," p. 301.

Dworkin recognizes that this poses a dilemma for his theory of equality of resources because if handicaps and expensive tastes are considered as simply different manifestations of the more general problem of welfare inequity, then the only way to determine appropriate compensation levels for these misfortunes is to invoke a theory of equality of welfare.²² Thus, in order to avoid the fatal circle involved in the assimilation of handicaps to expensive tastes, Dworkin introduces his final master distinction between a person and his or her circumstances: "The distinction required by equality of resources is the distinction between the beliefs and attitudes that define what a successful life would be like, which the ideal assigns to the person, and those features of body or mind or personality that provide means or impediments to that success, which the ideal assigns to the person's circumstances."²³

What can be made of this contrast between a person and his or her circumstances? Does it correspond to Dworkin's previous distinction between preferences and resources? In a perceptive analysis of Dworkin's argument for equality of resources, Larry Alexander and Maimon Schwarzschild suggest that the distinction between a person and his or her circumstances is subtly different from the distinction between preferences and resources. What Dworkin is actually seeking in his new formulation, they claim, is a way of discriminating among welfare deficiencies according to the source of the deficiencies: "The crucial distinction for Dworkin is between those causes of low welfare yields from a given bundle of resources that are, in some sense, *external to the person* - for example,

²² *Ibid.*, p. 302.

²³ *Ibid.*

excessive medical needs--and those causes that are, in some sense, *constitutive of the person*--for example, expensive tastes."²⁴

Moreover, this distinction between external and internal sources of welfare deficiencies suggests that what is key to determining when redistributions are required by equality of resources is the notion of personal responsibility. Insofar as equality of resources requires individuals, starting from an initial condition of equality, to pay the cost of their discrete preferences, measured in terms of what others have to give up in order that those preference can be satisfied, then if the cost of any of these preferences turns out to be expensive, this is of no particular concern to egalitarians. The reason is quite simply that individuals must be deemed to be responsible for their preferences, and hence responsible for their costs. But, on the other hand, differences in individuals' circumstances which affect their success in realizing their goals and ambitions in life is a concern for egalitarians because these differences are not something for which individuals can be deemed responsible.

According to Alexander and Schwarzschild, therefore, the distinction between a person and his or her circumstances which Dworkin makes is itself dictated by his goal of finding an ambition-sensitive and endowment-insensitive distributive scheme, which, in turn, is implicitly predicated on the degree of responsibility which can be attributed to individuals for their preferences. But it is still not clear that the distinction will yield the results he seeks. The problem is that if the notion of personal responsibility is central to Dworkin's understanding of distributive justice, it is a concept which remains largely

²⁴ Larry Alexander and Maimon Schwarzschild, "Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources," Philosophy and Public Affairs, Vol. 16, n. 1 (Winter, 1987), p. 99.

unexamined in his theory.

It would appear that part of the reason that Dworkin is reluctant to make personal responsibility the explicit grounds for distinguishing what characteristics of a person should summon redistributive concern is that this opens up the philosophically controversial question of where to assign responsibility for individual actions. For example, are individuals always responsible for their preferences, or can it be said that their preferences are sometimes determined by circumstances beyond their control such as family background or education? Indeed, it is philosophically conceivable that assertions about people's responsibility for their preferences, or their aims and goals in life, can always be countered by a deterministic explanation of individual behaviour. To avoid the complications which this essentially philosophical question poses to the procedural character of his argument, Dworkin tries to disguise the problem by proposing what he thinks is a purely technical distinction between a person and his or her circumstances.

The result is that the line between internal and external sources of welfare deficiencies, which the person/circumstances distinction is meant to capture, may prove to be arbitrarily drawn. For example, some of the expensive preferences which an individual happens to have may be viewed as either part of the person, in the sense of contributing to his or her definition of a successful life, or as part of the person's circumstances, in the sense of acting as impediments to achieving success in a freely chosen plan of life. Since this difficulty in drawing a clear line would appear to occasion the same kind of conceptual indeterminacy which previously was noted to be a

distinguishing feature of handicaps, why not employ a similar prudential argument for including expensive tastes in the hypothetical insurance market?²⁵

ii. Cravings

As it turns out, Dworkin concedes at least part of the point when he asserts that certain kinds of preferences, which can be classified as cravings or obsessions, are in principle suitable for insurance inspired redistributions. In assuming that people might have cravings which they regret or despise, Dworkin allows that an "insurance market is available....because we can imagine people who have a craving not having it, without thereby imagining them to have a different conception of what they want from life than what in fact they do want."²⁶ In this rather tangled formulation, Dworkin appears to be distinguishing chosen from unchosen preferences, with the conceptual boundary consisting of the ability to imagine an individual free of a compulsive preference still being the "same" individual. Such a thought experiment can thus establish that a craving is part of an individual's circumstances rather than his or her person. And, if those preferences which are identified as cravings in this thought experiment prove to be expensive tastes, then a theory of equality of resources would be committed to

²⁵ Commenting on this problem, G.A. Cohen has argued that Dworkin's simultaneous use of the notion of choice and the more opaque distinction between a person and his or her circumstances has contradictory consequences for his distributive theory. Thus, according to Cohen, the more choice or its absence is highlighted as the critical moral variable determining when distributions are fair, the more plausible his theory appears. But when he reverts to the preference/resource or person/circumstance distinction, the theory becomes more ambiguous and more apt to miss cases of unchosen misfortune which deserve compensation in an egalitarian theory of distribution. See. G. A. Cohen, "On the Currency of Egalitarian Justice," Ethics, Vol. 99, (July, 1989), pp. 927-34

²⁶ "Equality of Resources," p. 303.

compensating for them. On the other hand, if the expensive preferences are not cravings but freely chosen, they continue to be of no concern for egalitarians.

The question of how one practically makes this kind of distinction among people's preferences is, however, rather perplexing, for it seems to involve precisely the type of philosophical inquiry about personal responsibility which Dworkin would like to avoid. But, perhaps philosophical speculation can be avoided. Indeed, Dworkin expects it can because he thinks that the insurance device itself can furnish the test of which preferences should be treated as cravings within the general regime designed for handicaps. Just as with handicaps, individuals can be asked whether they would purchase insurance against cravings and at what premium level, assuming that they all shared the same antecedent risk of contracting a craving. The hypothetical insurance market result would thus not only pick out those kinds of preferences which most would classify as cravings, but it would also identify the equitable levels of compensation for them.

Is this a sound argument? Can the hypothetical insurance market unambiguously identify those obsessive preferences as well as handicaps which are deserving of compensations under a regime dedicated to equality of resources? There are two lines of criticism that can be made of Dworkin's insurance market argument which cast doubt on the coherence of his egalitarian enterprise. The first line of criticism is suggested by Alexander and Schwarzschild who think that Dworkin is inconsistent in his treatment of expensive tastes. They claim that if this inconsistency were to be removed, his theory of equality of resources would unavoidably imply a theory of equality of welfare. Their central point is that Dworkin's separation of cravings from other expensive preferences

is a theoretically inadequate response to the question of which preferences are eligible for redistributive concern. It is plain that Dworkin wishes to make people who deliberately cultivate expensive tastes responsible for their costs, and this in itself is not objectionable. But there are other preferences which turn out to be expensive not because of an individual's calculated pursuit of a precious resource in a market defined by equal opportunities.

To illustrate the point, Alexander and Schwarzschild consider what could be called market ransom as an example of an unfairly contracted expensive preference. In the case of market ransom, a resource might become costly for an individual who genuinely needs it because the aggregate demand of others, although representing a relatively inconsequential taste such as an aesthetic preference, nonetheless ends up inflating its price. There seems to be something intuitively unfair, Alexander and Schwarzschild argue, in allowing individuals to bear the welfare penalties associated with such inflated resource costs. On Dworkin's egalitarian scheme, there would seem to be no other way of deterring the consequences of market ransom other than to allow individuals to insure against that possibility.

However, Alexander and Schwarzschild continue, if this concession is made, and if Dworkin is to be consistent in his attitude of moral neutrality towards preferences, there is nothing to really distinguish between the preference to be free of handicaps and cravings on the one hand, and the preference not to have to bear the cost of any expensive tastes on the other. This is so because the preferences individuals might have to overcome the welfare deficiencies associated with all their unfortunate personal

legacies must be regarded as equivalent if a principle of neutrality is embraced as a motivating force in equality of resources. Hence, if preferences for welfare equity in the face of handicaps are to be protected in an insurance market, then all expensive preferences must also be made eligible for the same treatment. But, if all expensive preferences are to be awarded compensatory resources, this ultimately means that equality of resources reduces to equality of welfare because equalizing the value of preferences can only proceed, as Dworkin himself has noted, with some prior notion of equal welfare. Thus, Alexander and Schwarzschild conclude that Dworkin's resource theory, ostensibly designed to avoid the problem of circularity, cannot in the end escape from this predicament.²⁷

There is, moreover, a second line of criticism of Dworkin's insurance market approach which leads more directly to this same conclusion. The hypothetical insurance market, Dworkin claims, has the virtue of being able to pick out which aspects of an individual's personality are open to redistributive concerns simply by asking the island inhabitants what they are willing to insure against. This alleged virtue is less than it seems, however, because Dworkin also acknowledges that the insurance market cannot really be run in the case of handicaps because the counterfactual conditions of equal antecedent risk and equal opportunity to insure at any coverage level for all handicaps do not obtain in any plausible world. Nor do these conditions obtain, by extension, for that class of preferences which Dworkin calls cravings. In fact, an argument can be made that even if the averaging assumptions of the hypothetical insurance market for handicaps

²⁷ Alexander and Schwarzschild, *op. cit.*, pp. 90-103.

is plausible, the same cannot be said for an insurance market for cravings because no sense can be made of the way the insurance question is posed to identify cravings. To see why, we must look at the insurance market more closely.

The counterfactual insurance question for cravings asks individuals, all of whom improbably have no cravings but who do know their own ambitions and life plans, to decide which cravings they would insure against, and at what level. In the circumstances described by the counterfactual question, there appears to be no way for an individual to decide what should count as a craving other than to say that all preferences that stand in the way of success in realizing his or her goals and ambitions must comprise cravings. But so broad a category as success-inhibiting preferences would then necessarily imply that an insurance market for cravings reduces to a theory of equality of welfare.

As a matter of fact, Dworkin implicitly acknowledges that this is the case when he remarks that the impossibility of furnishing a person-by-person answer to the counterfactual question with respect to handicaps necessitates the employment of an averaging assumption. As it turns out, because individuals cannot practically answer the question of which handicaps they would insure against, nor the coverage levels they would choose, officials have to substitute their own judgements about what an average person would do in the imagined counterfactual circumstances. But how can an official make such judgements except by invoking a concept of average welfare loss occasioned by some representative class of handicaps, and, by extension, of cravings? Thus, it appears that Dworkin himself takes the fatal step which closes the circle.

There is, however, a response which Dworkin is prepared to make to this line of

criticism. That response emerges when he revises his insurance market approach to correct for resource discrepancies which arise because of differences in talents that individuals possess. It is only after this latter argument is appraised that any definite conclusion can be reached about the fate of Dworkin's theory of equality of resources.

iii. Talents

Differences in natural talents jeopardize equality of resources in a manner comparable to handicaps. The relatively untalented may share the same ambitions and life-plans as their more talented counterparts. Yet, they likely will end up with fewer resources over their lifetime in a market economy because with their meagre natural endowments they cannot command the same price in a competitive labour market as those who happen to be more talented. And, because the natural talent one possesses is a matter of genetic luck, the different earning-capacity attributable to talent as opposed to ambition falls within an individual's unchosen circumstances. Thus, the same distinction between a person and his or her circumstances which recommends redistributions to compensate for handicaps also suggests that income inequalities which arise from differences in natural talents must also be redressed.

Dworkin notes that one straightforward way of dealing with income inequalities traceable to differences in natural talents is to stipulate that an individual's labour should itself be treated as a resource. This would mean that in the imaginary auction on the desert island, each individual's labour would be regarded as a resource, to be disposed of through competitive bids, just as other material resources are. The naturally talented,

whose labour is extraordinarily productive, would face two alternatives in this kind of auction. Either they can allow the right to their labour to be purchased by another, in which case they will, for all intents and purposes, be enslaved, or else they can purchase the right to their own labour. Because their labour is so productive, however, competition for the right to that labour will be fierce and the naturally talented will be compelled to offer a high bid to secure it for themselves. This would mean that the talented will lose more of their initial resources to retain control of their labour, and this will serve to reduce if not eliminate the income discrepancies attributable to talents.

Dworkin concludes that this relative adjustment of resources would result in the "slavery of the talented."²⁸ For, whichever alternative is pursued, the talented will end up envying the less talented in this auction setting because, paradoxically, the less talented, requiring fewer initial resources to gain the right to their labour, have more choices in the trade-off between occupation and leisure than their talented counterparts. If the envy test condemns inequalities in wealth that flow from unchosen circumstances, it must likewise condemn inequality of resources like leisure which can also flow from unchosen circumstances. It is for this reason, Dworkin argues, that rather than include talents among the resources to be auctioned, a theory of equality of resources must find some other way to neutralize their role in market distributions that occur over an individual's lifetime.

The obvious candidate for neutralizing the distributive bias associated with natural talents is an insurance market of the sort envisioned for handicaps. However, Dworkin

²⁸ "Equality of Resources," p. 311.

contends that there is an important difference between handicaps and talents which needs to be taken into account if an insurance solution is to be made available for the latter. The crucial difference is that the portion of income traceable to talents is less easily distinguishable from that portion due to ambitions than is the corresponding case in handicaps. What makes this distinction so difficult to arrive at is that ordinarily talents and ambitions exercise a reciprocal effect on each other. Individuals may form their ambitions in light of the natural talents they happen to have, or, as is more likely the case, nurture and develop those talents which they think will bring them success in the life they believe to be important. Without being able to distinguish in any precise fashion what component of an individual's lifetime resources reflect his or her ambitions, and what component reflects his or her talents, posing an insurance solution to a problem of resource inequalities attributable solely to something called "natural talents" is fraught with difficulties.

Of course, it should be recalled that Dworkin encountered a similar difficulty with deciding on how to identify handicaps eligible for compensation under equality of resources. In the case of handicaps, the problem is that afflicted individuals are not necessarily in a position to determine what sorts of ambitions and life-plans they would have had in the absence of their handicaps, and, therefore, what level of resources they would have insured for if risks for handicaps were equal. In other words, a person's ambitions and life-plans are very much contingent on the bodily and mental resources he or she happens to enjoy.

Dworkin is assured, however, that this particular indeterminacy is manageable

because it is possible to make reliable generalizations about the kinds of handicaps which would obstruct all ambitions and life-plans. And, it is this generalization which sanctions the use of an averaging assumption about the type of handicap insurance a typical individual would be deemed to have purchased in the hypothetical insurance market. But, the same kind of generalization is not possible for talents because of the reciprocal influence of talents and ambitions. For, as Dworkin notes, if we used the counterfactual assumption that no one knows what talents he or she possesses, and then proceed to ask which talent deficiency it would be reasonable to insure against, we would have "stipulated away too much of his personality to leave any intelligible base for speculation about his ambitions, even in a general or average way."²⁹

If talents cannot be unambiguously distinguished from ambitions, there still is a way, according to Dworkin, to use the idea of the insurance market to ascertain the direction and relative scale of redistributions which differences in talents call for. The insurance problem for talents, however, must be posed in a slightly different fashion than was the case for handicaps. In this instance, the counterfactual question begins with the assumption that individuals know what talents they possess but are radically uncertain about what income those talents can produce. Can the concept of an insurance market capture an average income level for which a typical individual would seek insurance protection in such circumstances?

To make this question vivid, Dworkin returns to the desert island and imagines a scenario where, prior to the auction, information about each individual's tastes,

²⁹ *Ibid.*, p. 316.

ambitions, talents, and attitudes toward risk, as well as information about raw materials and available technology, are fed to a computer. With this data the remarkable computer is able to predict the outcome of the auction and the projected income structure once production and trade begin. A hypothetical question is then posed to the computer. The question begins with the assumption that each island inhabitant knows the projected income structure, that is the number of people earning each level of income in the developed island economy, but is otherwise ignorant of all other details of the computer's data base save his or her own tastes, ambitions and talents. It is further assumed that there exists a competitive insurance market such that any individual can purchase an insurance policy against failing to have an opportunity to earn any specified level of income within the projected income structure. Should the selected policy pay out once this modified "veil of ignorance" is lifted, the policy holder will receive the difference between the income he or she does in fact have an opportunity to earn and the chosen coverage level. Insurance premiums themselves will vary with the level of coverage chosen, and will be paid in regular intervals from the policy holder's future earnings after the auction. The hypothetical insurance question which the computer is asked is how much insurance would the inhabitants on average buy at what specified level, and at what cost?

By constructing the insurance question in this fanciful way, Dworkin thinks that the conceptual predicament of separating out talents from ambitions can be surmounted because the question is amenable to the types of analysis economists routinely devote to

problems of decision-making under uncertainty.³⁰ To illustrate how the question is, in principle, answerable, Dworkin describes two kinds of decisions made under uncertainty: an insurance problem and a gambling problem. An insurance problem is posed when a "small cost purchases reimbursement for an unlikely but serious loss," while a gambling problem is posed when a "small cost purchases a small chance of a large gain."³¹ A financially advantageous bet in either the insurance or the gambling case would imply that the cost of the bet is less than the amount of return if the bet pays off, discounted by the improbability of the bet succeeding.

One might assume that a rational person would be risk-neutral and only accept financially advantageous bets. But if everyone was risk-neutral in this way, there could be no insurance or gambling since commercial insurance companies or bookmakers can only make a profit if they are able to offer financially disadvantageous bets. This particular dilemma, however, is not fatal to the insurance problem, because, as Dworkin observes, "almost no one is risk-neutral over the full range of his utility curve: for almost everyone the marginal utility of money declines over at least part of the graph that pictures how his welfare behaves as a function of his income."³² For instance, even though buying house insurance is by definition a financially disadvantageous bet, otherwise no insurer would make such policies available, it is still a reasonable bet to take if, as is ordinarily the case for a certain income range, the marginal utility loss of

³⁰ *Ibid.*, p. 317.

³¹ *Ibid.*, p. 318.

³² *Ibid.*

an uncompensated fire is greater than the utility cost of the premium. While financially disadvantageous bets can be reasonable risk-taking behaviour for insurance purposes, the same cannot be said for gambling because there can be no sound comparison of the marginal utility loss of an unsuccessful bet and the utility prospects of an unlikely wager gain. This distinction is important because when it comes to assessing the predictive power of the hypothetical insurance market for talents, it is necessary to know whether purchasing such insurance would be tantamount to making what has been described as an insurance bet or a gambling bet.

On first sight it would appear that the availability of insurance coverage for any income level would tempt a typical gambling bet in which everyone would insure for the highest possible income level. And, it would also appear to be a very advantageous bet inasmuch as it is certain that almost all policy holders would not in fact have the talents necessary to earn the highest income level, and would therefore stand to collect on their bet. But, just because the odds of winning this bet are so high, an insurance company would only offer such a coverage level at the cost of very high premiums, which means that the policy payout will be relatively negligible for the majority lacking in the talents to earn the highest income level. However, for the few individuals who turn out to have the talents necessary to earn the highest income level, losing such a steep bet means that they must indeed earn that income in order to pay the premiums for the policy on which they cannot collect. This transforms the insurance bet into a highly disadvantageous gambling bet because what is being wagered is a small chance of suffering a great loss in return for the high probability of winning a small gain. Given

the small chance of an enormous welfare loss on this immoderate and financially disadvantageous wager, Dworkin concludes that "almost no one would have a utility curve that would make that bet sensible in welfare terms."³³

But, if insurance coverage at the highest income level appears to be a financially disadvantageous and senseless gambling bet, does this mean that insurance at all coverage levels would be equally unreasonable? Dworkin does not think this is the case, at least if it can be assumed that everyone shares a similar utility curve in which there is a declining marginal utility of income beyond a certain point. For, if this condition held, as the income level chosen for insurance coverage declines, the bet becomes both less financially disadvantageous and a better welfare prospect. The reason it becomes a less financially disadvantageous bet is that as the chosen income level drops, the more likely it will be that any particular individual will have the talents necessary to earn that income, and this will lead to a drop in the insurance premium. As the cost of premiums decline, the character of the bet approaches a reasonable insurance bet in which the utility loss of an uncashable insurance premium is less than the marginal utility loss of finding oneself with subpar talents, and, therefore, with an income lower than what the premium would insure for.

It is crucial to realize that in claiming that taking out insurance for a lower level of income is a reasonable bet in welfare terms, Dworkin is presuming a normal utility curve. For example, assume that a utility curve indicates that the marginal utility of money begins to decline relatively steeply after \$50,000. On this account of the

³³ *Ibid.*, p. 321.

relationship between money and welfare, a drop of income from \$70,000 to \$50,000 is financially greater than a drop of income from \$50,000 to \$40,000, but the latter represents a greater marginal utility loss because in welfare terms that lower income contributes more to marginal utility than the higher income. In these circumstances, it makes the most sense to take an insurance bet against failing to have that income whose marginal utility loss would be the greater. And, of course, the lower the income level chosen for insurance, the lower the premium, which means that even if things turn out so that the policy holder actually can earn the insured coverage level, the relatively low cost of the premium represents no great welfare loss.

Thus far, the hypothetical insurance scheme for talents has been described as an instrument for discovering an average level of income for which individuals would be willing to insure in highly contrived conditions where there is radical uncertainty as to what income individuals can actually earn with the talents they know they possess. When Dworkin is led to consider a practical simulation of this insurance scheme through tax and redistribution strategies, he alters some of its features to make it a more tractable model for conventional liberal welfare economic policies. For example, rather than have everyone pay the same premium for the average coverage level which the insurance market has identified, Dworkin suggests that the insurance premium be fixed as an increasing percentage of the income the policy holder turns out to earn. This change, Dworkin argues, would actually make insurance bets more attractive for most people, again assuming a declining marginal utility over a range of income.

At the same time, Dworkin claims that insurance companies will have a strong

financial incentive to find ways of reducing the "moral hazard" associated with insuring against income loss. In insurance terms, moral hazard refers to the propensity of a policy holder to cheat in order to derive policy benefits. In the insurance scheme being contemplated, the moral hazard is the likelihood that some individuals may attempt to disguise their talents, or deliberately choose not to cultivate them, in order to qualify for the income benefits for which they had insured.

A common response to the problem of moral hazard in the insurance industry is to insist on co-insurance as part of a policy. Co-insurance in the hypothetical plan for talent insurance would mean that individuals who qualify for compensation must be prepared to accept an amount less than their purchased coverage level, with the difference representing what the policy holders assume in the way of coinsurance risk. In this way, co-insurance is supposed to reduce the attractiveness of cheating to derive benefits. Another familiar device can also be used both to reduce moral hazard and to simplify the administration of the insurance plan itself. If policy holders were assigned the burden of proof in demonstrating that they lacked the talents necessary to produce the income level for which they insured, with progressively stricter burdens of proof applicable for higher income levels, then insurance firms would not need extensive or intrusive information gathering techniques, and, at the same time, the propensity for policy holders to engage in fraud would be lessened.

These several revisions to the original insurance scheme serve to show how it can be translated into a practical tax and redistribution scheme. Quite simply, the hypothetical insurance market justifies using a graduated income tax to fund a familiar range of

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income-enhancing programs and policies such as minimum wage laws, unemployment insurance, welfare entitlements, or guaranteed annual income plans, as well as state run health and disability insurance programs. Moreover, the hypothetical insurance market can also be used to justify conventional safeguards against welfare abuse such as means tests or other reporting requirements, or work incentive programs designed to model what co-insurance would produce in a hypothetical insurance market.

Although such general policy implications are obvious, Dworkin admits that the hypothetical insurance cannot in itself establish with any degree of precision what average level of insurance coverage a typical individual would buy, but can only indicate a relative income range which it is reasonable to assume would be a sound insurance bet. In spite of this theoretical indeterminacy, he is nonetheless convinced that the general force of the argument supports an insurable income "well above the level of income presently used to trigger transfer payments for unemployment or minimum wage levels in either Britain or the United States."³⁴

While his theoretical argument conceivably promotes a more generous welfare state than exists either in the U.S. or Britain, Dworkin is ready to concede that emulating the results of a hypothetical insurance market through taxation and redistributive policies can only approximate what equality of resources would recommend in ideal circumstances. A progressive tax system, because it merely attends to the fact of income differences, will invariably end up penalizing some individuals who prospered not because of their fortuitous estate, but because of their ambition and effort. And, for

³⁴ *Ibid.*

the same reason, welfare redistributions, no matter how much care is taken to discourage fraud, will end up subsidizing some individuals who are disadvantaged not by circumstance but by choice. Progressive taxation and welfare redistributions should thus be regarded as a second-best practical alternative in the absence of a fully realizable ideal of equality of resources.

That fully realizable ideal, it must also be noted, itself is not reflected in the hypothetical insurance scheme. Rather, the insurance scheme should be seen as a second-best conceptual solution to the problem of distinguishing what in fairness can be attributed to a person as opposed to his or her circumstances. It is, after all, the difficulty in separating out a person's talents from his or her ambitions and life-plans, or in determining what ambitions and plans an individual would have had in the absence of handicaps or cravings, which prompts Dworkin to use the hypothetical insurance calculations to estimate fair income distributions. But this estimation, because it does not actually entail individuals deciding for themselves what levels of insurance they would purchase, cannot respond in any precise fashion to the effect that different ambitions, as opposed to differences in health or talents, have on individual incomes. Instead, the estimations which are produced by the hypothetical insurance market are conceived as a theoretical compromise which captures, however imperfectly, the twin aims of equality of resources.

It is worth quoting Dworkin at some length on the difficulty of a practical application of the ideal because his admission of a conflict between these two aims inadvertently reveals more about the nature of his egalitarian enterprise than he is willing

to admit.

[W]e must....recognize that the requirements of equality (in the real world at least) pull in opposite directions. On the one hand we must, on pain of violating equality, allow the distribution of resources at any particular moment to be (as we might say) ambition-sensitive. It must, that is, reflect the cost or benefit to others of choices people make so that, for example, those who choose to invest rather than consume, or to consume less expensively rather than more, or to work in more rather than less profitable ways, must be permitted to retain the gains that flow from these decisions in an equal auction followed by free trade. But on the other hand, we must not allow the distribution of resources at any moment to be endowment-sensitive, that is, to be affected by differences in ability of the sort that produce income differences in a laissez-faire economy among people with the same ambitions.³⁵

Dworkin's acknowledgment that there is a fundamental conflict inscribed within a scheme of equality of resources is important because it prompts the question of what normative status can be assigned to the compromise represented by the insurance market, and its practical analogue, redistributive taxation. There are at least three different ways of responding to this normative question, and significantly, each response has different implications for how the moral ideal of equality of resources is viewed.

4. Insurance and Equality

One response to the question of the normative status of an insurance scheme for redistributions is to say that any attempt to implement or institutionalize the ideal of equality of resources will never completely satisfy both criteria of equal distributions because there can be no conceptual or practical translation of these criteria which will be sufficiently discriminatory to perfectly reconcile their different aims. Therefore,

³⁵ *Ibid.*, p. 311.

because any attempt to institutionalize the ideal will produce distortions in one or the other of its moral aims, we must be content with the best available compromise, recognizing all the while that this is a compromise effected within a theory of equality, not a compromise between that theory and some other moral values. This answer leaves the normative force of the egalitarian ideal intact, even though it concedes the point that practical adjustments are required if the ideal is to be approximated in the real world.

An argument along these lines is supplied by Joseph Carens in his investigation of the difficulties encountered in institutionalizing what he calls "compensatory justice".³⁶ The intrinsic impracticality of the measures necessary to put an ideal of compensatory justice into practice, Carens argues, means that its normative force is open to dispute: "If an ideal seems inherently unrealizable, if it cannot be institutionalized even in theory, it loses a good deal of its attraction."³⁷ However, this observation does not lead Carens to reject out of hand Dworkin's practical imitation of an ideal distribution because he is inclined to accept the basic moral objectives associated with compensatory justice. He proposes, therefore, that in the absence of a realizable ideal, a system of progressive taxation and redistribution is the best we can expect: "A change in distribution that moves people closer to what the ideal of compensatory justice requires is desirable, even if the changes move some people further away from what the ideal

³⁶ Joseph Carens, "Compensatory Justice and Social Institutions," Economics and Philosophy, Vol. 1, no. 1 (1985), pp. 39-67. By compensatory justice Carens means any distributive theory which insists that just distributions must reflect the efforts and sacrifices individuals make in their work. According to Carens, Dworkin's equality of resources represents a liberal variant of compensatory justice.

³⁷ *Ibid.*, p. 64.

requires."³⁸

In a similar vein, Will Kymlicka concludes that the "hypothetical calculations Dworkin's theory requires are so complex, and their institutional implementation so difficult, that its theoretical advantage cannot be translated into practice."³⁹ Kymlicka is more agnostic than Carens about the best practical fulfilment of an egalitarian distributive ethic, but he is persuaded that the moral objectives which Dworkin stipulates in his theory of equality are attractive, even though there might be "a more appropriate apparatus for implementing these ideas than the mixture of auctions, insurance schemes and taxes which Dworkin employs."⁴⁰

For both Carens and Kymlicka, the chief drawback in Dworkin's version of equality of resources is the inability of the theory to provide for an effective transcription of its normative ideals in the circumstances of the real world. There is, however, a second way of responding to the question of the normative status of Dworkin's various proposals for realizing equality of resources which casts doubt on the conceptual clarity of the ideal. This second response implies that Dworkin has misconceived what is at stake in defining equality, and, in consequence, his theory as a whole suffers from a fundamental confusion over what metric can best capture egalitarian intuitions. On this view, it is not so much the institutional implications of Dworkin's theory which are a matter of concern as it is an internal inconsistency within the theory which makes it

³⁸ *Ibid.*, p. 66.

³⁹ Will Kymlicka, Contemporary Political Philosophy: An Introduction (Oxford: Clarendon Press, 1990), p. 84.

⁴⁰ *Ibid.*

unable to sustain its own stated intention of equalizing resources.

John Roemer is one critic who proposes that there is a crucial conceptual indeterminacy within Dworkin's theory which is destined to lead it to conclusions that are counter-intuitive to anyone committed to resource equality. Using a series of complex theorems about decision-making under conditions of uncertainty, Roemer is able to show that Dworkin's hypothetical insurance market in talents, depending on which way it identifies the internal resources a person is said to possess, can end up either enslaving the talented or, more damaging still for a resource egalitarian, making the initially resource-poor even worse off in welfare terms.⁴¹

What makes Dworkin's theory of distributive justice vulnerable to this latter outcome, Roemer argues, is that by allowing certain personal characteristics like talents to be treated as resources for which individuals cannot be held responsible, there is no consistent way for him to refuse treating all aspects of personality as resources. Thus, for example, the ambition a person may display can also be regarded as a resource, if it is assumed that the ambition was not chosen by the individual but rather contracted as a result of that person's education or family circumstances. The same can be said of the characteristic effort a person expends in work, or the propensity to risk that he or she displays.

If it is true that all these characteristics cannot be consistently distinguished from talents, then they must be regarded as part of a person's circumstances rather than as attributes of a person. But if these different characteristics are also included in the

⁴¹ John E. Roemer, "Equality of Talent," *op. cit.*, pp. 151-81.

insurance market, the result will be that those who, through no fault of their own, have impoverished ambitions, or are psychologically unable to maximize effort, or have aversions to taking risks, will continue to have fewer resources even if everyone is guaranteed at least the average income selected by the insurance estimate. The only plausible way that this perverse outcome can be removed, Roemer suggests, is if a mechanism is constructed "that allocates resources to equalize welfare."⁴² Thus, paradoxically, a consistent and thorough-going theory of resource equality reduces to a theory of equality of welfare. And if Dworkin is correct in his observation that a theory of equality of welfare is self-defeating, then by extension his own theory of resource equality is necessarily incoherent.

What Roemer has shown in his critique of Dworkin's theory of resource equality is that its central normative goal of making economic distributions respond to individual ambitions while compensating for resource inequalities begs a critical question. That question is where does one draw the line between ambitions, or more generally preferences, and resources? Because Dworkin refrains from exploring all the implications of this question, his theory of equality is fated to be incomplete, or, as Roemer concludes, indistinguishable from a theory of equality of welfare.

David Mapel is another critic who thinks that Dworkin's theory is fatally undermined by its own internal inconsistencies.⁴³ Mapel's principal contention is that the hypothetical insurance market is an incoherent project because it presupposes the very

⁴² *Ibid.*, p.176. Roemer offers a complex proof for this theorem in a subsequent article, "Equality of Resources Implies Equality of Welfare," Quarterly Journal of Economics, 101 (1986), pp. 751-84.

⁴³ Mapel, Social Justice Reconsidered, *op. cit.*, pp. 39-55.

thing it is meant to justify: a fair income structure in a society governed by equality of resources. Mapel arrives at this conclusion by first noting that the initial auction, in which it is assumed that everyone has equal talents and differ only in preferences for work, consumption items, and leisure, is itself a radically indeterminate device for calculating lifetime resource equality. The reason is that without complete prescience about the outcome of the auction, and about the subsequent distribution of preferences and resources in the post-auction economy, no one can make a rational bid based on the true social cost of a resource. It is not enough for Dworkin to say that the true social cost of any resource is *revealed* in the successful bid which purchases it, because this still does not tell us the value of the resource over the lifetime of its owner. And without this kind of foreknowledge, Dworkin's auction simulation of equality of resources is infeasible.

To illustrate Mapel's point, one can imagine a person successfully bidding on a piece of land with the intent of growing tomatoes for sale in the post-auction economy. This individual happens to have the necessary talent to be a productive farmer, and willingly forsakes leisure time in order to prosper. Unfortunately, the collective preferences of the island inhabitants turn out to be such that there is little demand for tomatoes. Our unlucky farmer, having consumed a significant portion of his or her initial equal share of resources on a productive resource that in the course of a lifetime leaves him or her relatively poor, will naturally envy the resource-holdings of those who prospered in their chosen occupations. Significantly, the life-time differences in the overall resource packages of the unlucky farmer and those of the successful entrepreneurs

cannot be attributed to a difference in ambition or effort. Rather, as things fell out, it was only a matter of choosing wrongly for the unlucky farmer and this seems patently unfair.

Dworkin could of course respond to this example by saying it merely reflects the option luck of the farmer who gambled on making a gain and lost. But this response misconceives the nature of the problem. Dworkin uses the idea of option luck to defend inequalities that arise because some individuals choose to risk their resources in hopes of gain, knowing full well that the price of the gamble is a possibility of a loss. He would allow these types of gambles in his island economy because if a distribution is to be ambition-sensitive and endowment-insensitive, everyone should have a choice in how his or her resources will be utilized, including the choice to take risks in the prospect of gain. But the problem is that by the very nature of the auction there is no choice whether to gamble or not. Everyone will be compelled to take option-risks because no one is in the position to know in advance what the true social value of any resource is over a lifetime. The resulting resource inequalities will, therefore, always reflect option luck and not simply differences in ambitions and effort. The only way to circumvent this embarrassment for a theory of equality of resources is to assume that each individual possess the foresight to know what each resource in the island would bring by way of productive income, and to proceed to make bidding decisions on that basis. However, if this auction with perfect foresight can be held, the insurance market would be superfluous because the auction would have already produced a fair distribution of

income.⁴⁴

Of course, one could object that the initial auction as described by Dworkin was predicated on the assumption that everyone enjoys equal talents, and the hypothetical insurance market was introduced once this assumption was relaxed to account for the reality of unequal talents. So perfect foresight is not an issue because the insurance market is intended to correct for market imperfections. But this does not relieve the conceptual problem at the heart of Dworkin's theory. In the hypothetical insurance market individuals are asked to take a computer-generated income structure as a basis for making probabilistic calculations about the amount of talent insurance to purchase. The trouble with this scenario, Mapel points out, is that because the projected income structure is, per hypothesis, not the same as what would have obtained in an auction run under conditions of equal talent and perfect foresight, individuals contemplating insurance have no way of telling whether that income structure is a fair representation of the influence of ambition on income earnings, or whether it reflects the purely adventitious influence or talents. And, without this knowledge it would be impossible for individuals to make utility-maximizing insurance bets.

For example, if the computer-generated income structure reveals a bias towards high incomes in the island economy, without indicating whether this was a result of a proportionately high number of ambitious people or a high number of talented people,

⁴⁴ There is, incidentally, another alternative available which is to treat the ability to correctly anticipate market demand as a talent. Then those who do not possess this talent, like the unlucky tomato farmer, would be compensated according to the rate established by the insurance market in talents. But if this solution was undertaken, then incomes would be more or less equalized and the incentive of gain which is the compelling feature of option risks would disappear.

what sound utility-maximizing insurance bet could a person take when contemplating the chances of losing the bet? Mapel concludes that this radical indeterminacy undermines Dworkin's whole project of fairly compensating ambitions while neutralizing the role of talents in income distributions: "Without running the auction...we have no idea whether the income structure we begin with is fair or not. For this reason, then, neither part of Dworkin's description of equality of resources makes sense."⁴⁵

Mapel's point about the fateful ambiguity of the hypothetical insurance market can be made in a slightly different fashion in order to highlight a key assumption of Dworkin's which makes his whole theoretical enterprise vulnerable to the problem of circularity. The element of uncertainty which insurers face in Dworkin's hypothetical insurance market for talents is not unlike the problem which was confronted in the insurance market for handicaps and cravings. In the latter case, individuals, who had not yet developed handicaps or welfare-jeopardizing cravings, are asked to decide on what is to count as a handicap or a craving and insure to an income level that they think would fairly compensate them for foregone welfare satisfactions in the event that they suffered from the handicap or craving.

But, as was pointed out previously, this invariably transforms equality of resources into equality of welfare. The reason is that there is no way an individual can decide upon what will count as a handicap or a craving in his or her life, without actually living that life. Therefore, the only way to stipulate in advance what people would insure against in the way of handicaps or cravings is to assume all welfare-reducing

⁴⁵ Social Justice Reconsidered, p. 52.

circumstances, including all welfare-reducing preferences, would be chosen as insurable categories, and this would mean that the insurance solution amounts to straightforward equality of welfare.

Dworkin circumvents this conclusion only by arbitrarily assuming that one could specify an average range of afflictions that would count as handicaps or cravings, and that one could as well identify an average coverage level for which individuals would be willing to insure. However, this averaging assumption is itself a welfare metric. It simply replaces a conception of absolute equality in welfare with a conception of average equality in welfare. It is relatively easy to see that the same sort of logic is at work in Dworkin's insurance market for talents. Because individuals do not know what rewards their specific talents will bring in the market, a perfectly reasonable presumption is that everyone would want to insure against missing out on the highest possible income level. But this would mean that the insurance scheme tends towards complete income equality, a point Dworkin himself recognizes.⁴⁶ Dworkin circumvents this conclusion by assuming that most people display a declining marginal utility for money beyond a certain point. It is this assumption which makes insurance bets on high income levels poor utility decisions and instead justifies selecting a lower income as the level which triggers compensatory payments to the disadvantaged.

However, Dworkin's marginal utility curve is itself a welfare metric which is imported into the heart of his resource theory of equality. It presupposes that an average utility-to-money ratio can determine what is to count as a just level of compensation.

⁴⁶ "Equality of Resources," p. 319n.

Indeed, Dworkin finally concedes that his resource theory makes use of welfare assumptions, but justifies this on the grounds that the assumptions are non-controversial: "The theory [of equality of resources] does make use of the idea of individual utility levels, for example in the calculations it recommends about how people would behave in certain hypothetical markets. But these calculations use only the rather antiseptic concept of utility...rather than any of the more complex and judgemental conceptions of welfare that are necessary for interpersonal comparisons, whose shortcomings I discussed in [Equality of Welfare]."⁴⁷

One can, no doubt, object that Dworkin's welfare assumptions are more controversial than he thinks, and, therefore, that his theory of equality of resources is subject to the very problem of circularity which he has laboured so mightily to avoid. There is a point, however, in which this line of criticism can quickly exhaust itself without shedding light on a more important problem in Dworkin's formulation of equality of resources. The mere fact that equality of resources makes reference to the welfare implications of resource distributions is not sufficient to condemn it for being a circular argument. Indeed, there is a sense in which Dworkin's repeated allusions to the problem of circularity may have raised expectations about some impossibly stringent requirements for any distributive theory.

A resource theory of equality will of necessity have to make reference to the welfare-producing effects of resources because, if equalizing resources did not improve the welfare of individuals, there would be no point to the exercise. Similarly, a theory

⁴⁷ *Ibid.*, p. 335.

of equality of welfare necessarily must refer to resources, for without any indication of the resources that are distributed under this scheme, no sense can be made of equal welfare. Equality of resources and equality of welfare are in one respect, at least, mutually informing ideals. The intermingling of resourcist and welfarist concepts occasion circular arguments only if they involve reciprocal question-begging. Thus, if a theory of equality of resources requires a notion of equal welfare before it can determine what is to count as equal resources, and if equal welfare cannot be known in advance of what constitutes equal resources, then, indeed, a circular argument is at hand. But, it is at least plausible for Dworkin to contend that his own averaging assumptions about individual welfare, both in the handicap and the talent insurance markets, are innocuous axioms which do not implicate equality of resources in a theory of equality of welfare in this question-begging way.

There is another reason, however, to suspect that Dworkin's theory is profoundly incoherent. It may be the case that Dworkin does not so much misconstrue the proper metric for equality, which is the argument made by Roemer and Mapel, but mistakes the true moral aim underlying his theory of equality of resources. This represents the third and most damaging response to the question of what normative status should be assigned to Dworkin's theoretical compromise of the two aims of resource equality. It suggests that the real problem reflected in the compromise between ambition-sensitive and endowment-insensitive distributions may be that Dworkin's conception of equality of resources is not really an egalitarian conception in the first place.

To understand this last objection to Dworkin's distributive theory, it is necessary to see how he attempts to find theoretical grounds for reconciling equality with liberty. For, in trying to effect this reconciliation, Dworkin introduces a new set of qualifications to his theoretical enterprise which gives one pause to wonder whether equality is actually the moral goal underlying equality of resources. The next chapter details these significant qualifications as Dworkin attempts to show how liberty is conformable to a resourcist distributive scheme.

Chapter Six

Distributive Justice III: The Place of Liberty

1. Introduction

In chapter three it was shown what sorts of arguments Dworkin constructs in order to secure particular civil liberties in a world in which utilitarianism forms the normative background for public decision-making. In the third of his articles on equality, Dworkin returns to the question of civil liberties, but this time with the different aim of finding a place for liberty in a world where public decision-making is governed by a commitment to equality of resources.¹ Dworkin's purpose in this essay is to demonstrate that liberty and equality should be regarded as mutually reinforcing aspects of the same humanist ideal. At the same time, he realizes that such a position is controversial because the conventional view is that liberty and equality are two independent ideals which often come into conflict. Moreover, he agrees that there are good reasons to suspect that any political theory which tries to completely resolve the moral predicaments produced by these two conflicting values is bound to fail.

A cursory inspection of the different versions of liberal theory which do try to achieve such a resolution suggests that they seize upon one of two problematic strategies to reconcile liberty and equality in a single prescriptive theory. One strategy emphasizes either liberty or equality as the principal political value, reducing the other to a decorative but wholly complementary pendant. For instance, libertarians prize liberty

¹ "What is Equality? Part 3: The Place of Liberty," *op. cit.*

above all else. And to the extent that they cherish equality, it is usually only in the shape of a moral assertion denoting the formal equality of everyone to pursue his or her own freely chosen ends within some intuitively acceptable limits of reciprocal respect.² Egalitarians, on the other hand, generally endorse some particular dimension of equality. But they often proceed to recast liberty into an "exercise-concept", understood as both a faculty and a set of conditions which enable individuals to realize the stipulated dimension of equality.³ In either the libertarian or the egalitarian rendition, the argument for linking liberty and equality displays a suspiciously circular character, or else the terms themselves take on a distinctly Pickwickian tone.

The other strategy for managing the moral conflict between liberty and equality is simply to acknowledge that they form part of a pluralistic catalogue of values whose reconciliation in matter-of-fact political decisions requires compromises suitable to the occasion. In this strategy there can be no recourse to first-order precepts by which conflicts of principles can be settled, for liberalism is regarded as nothing more stately than a condominium of values, each eliciting its independent moral appeal. In these circumstances, a conflict between liberty and equality can yield to a seasonable moral arbitration, but not to some irrevocable theoretical resolution. However, what the pluralistic strategy gains on the ledger of practical morality it loses on the ledger of moral certainty, for a seasonable arbitration of the values of liberty and equality can also be reproved for being simply arbitrary.

² See, for example, Robert Nozick, State, Anarchy and Utopia, *op. cit.*

³ See, for example, Charles Taylor, "What's Wrong With Negative Liberty," *op. cit.*

Dworkin is apprised of the shortcomings of both these general strategies. Yet, he insists that a conceptual link can be found between liberty and equality which is neither circular nor vacuous. Indeed, he thinks that for a committed egalitarian such a substantial link is essential to discover because the failure to do so would be tantamount to admitting that liberty must always give way to equality in cases of conflict: "No theory that respects the basic assumptions which define [a liberal] culture could subordinate equality to liberty, conceived as normative ideals, to any degree. Any genuine contest between liberty and equality is a contest liberty must lose."⁴ This rather dramatic statement is meant to highlight the moral costs involved in failing to reconcile liberty and equality in a single prescriptive theory. But, in announcing this profound predicament, Dworkin intimates that a solution is at hand if liberty can be shown to be an integral aspect of the abstract egalitarian principle which is said to animate liberal societies. What form that demonstration is to take leads Dworkin to reconsider the manner in which he originally conceptualized equality of resources.

2. True Opportunity Costs and the Abstraction Principle

Dworkin begins this re-examination of his theory of equality of resources by imagining two different ways of securing liberty while remaining pledged to the overarching principle of equality. One way he calls the interest-based strategy. In this approach, specific liberties such as freedom of speech or freedom of contract are regarded as resources, access to which are presumed to be at least in some people's

⁴ "The Place of Liberty," *op. cit.*, p. 7.

interests. These specific liberties are auctioned off with all other resources in such a way that the market equilibrium described by the envy test also apprehends the range of liberties individuals are interested in securing. Thus, the auction measures the value individuals place on specific liberties according to what they are willing to forego in terms of material resources in order to purchase them.

Linking liberty to equality in this way does have the merit of revealing the costs of specific liberties as a function of aggregated preferences in society. But, Dworkin warns that the interest strategy, in making the political protection of specific liberties contingent on the tastes and preferences of individuals, leaves liberty particularly vulnerable to individual calculations of advantage. He rather gloomily surmises that more people than we are prepared to admit might be willing to trade conventional liberties like freedom of speech for more material equality.

While the fundamental liberties which are so closely associated with liberal societies stand to lose in these kinds of calculations of self-interest, Dworkin is persuaded that an alternative argumentative strategy--what he calls the constitutive or bridge strategy--provides individual liberties with a theoretically more sturdy defence. Dworkin's bridge strategy is not straightforward. Rather, it is a way of reasoning which aims at discovering what could be considered latent presuppositions within an argument. The presuppositions which Dworkin seeks are those that can be said to link the abstract egalitarian principle to his theory of equality of resources. The best way to understand what undoubtedly sounds like an obscure theoretical manoeuvre is to observe how Dworkin poses the problem.

Auctioning liberties, Dworkin has shown, does not secure them perspicuously in a political regime dedicated to equality. But, it is also not a theoretically coherent stratagem because a realistic auction of resources invariably must commence with some baseline of liberties and constraints already in place. What Dworkin means by this is simply that it is inconceivable for some resource to be alienated without any specification as to how the resource may or may not be utilized. After all, a person can make a rational bid for a particular resource only if he or she has prior knowledge of what licit use can be made of the resource. But the problem is that any number of different liberty/constraint baselines can be stipulated before an auction is launched. The auction results will then vary, depending upon which background of liberties and constraints is selected.

This in turn means that the envy test itself cannot recommend any one unique distribution of resources, but picks out different distributions as fair according to which auction baseline is chosen. In the face of this indeterminacy, Dworkin proposes his bridge strategy for identifying an appropriate baseline of liberties and constraints consistent both with the abstract egalitarian principle and the underlying rationale of the theory of equality of resources. This bridge strategy, Dworkin says, allows us to "select the baseline system which gives most plausibility to the claim that an auction from that baseline treats people with equal concern and respect."⁵

How does the bridge strategy elicit the proper baseline of liberties and constraints? Dworkin believes that answer is found in the concept of "true opportunity

⁵ *Ibid.*, p. 25.

costs" which he thinks is presupposed by the envy test in the special conditions of the equal auction. The distinction Dworkin has in mind can roughly be stated as follows. The aim of equality of resources is to ensure that each person has an equal share of resources measured by the cost of the choices he or she makes as part of a plan of life, compared to the choices which others make. The envy test is supposed to produce this result, and, in the process, reveal the true opportunity costs of individual choices. But, as already noted, different auction baselines will affect how individuals determine which choices best serve their plans and preferences, and will, therefore, yield different opportunity costs for those choices. Which opportunity cost is to be deemed the true opportunity cost?

It is evident that the concept of true opportunity cost on its own is itself radically incomplete. Dworkin agrees and summons yet another principle: "an auction is fairer-- that [is] it provides a more genuinely equal distribution--when it offers more discriminating choices and thus is more sensitive to the discrete plans and preferences people in fact have."⁶ Hence, the greater the potential for more discriminating individual choices, the more likely an auction will yield the true opportunity costs of those choices.

This leads Dworkin to conclude that the baseline of the imagined auction must reflect what he calls the "abstraction principle." Again it is worth quoting Dworkin at some length on this latter point.

Equality of resources prefers more abstract to less abstract auctions, not because costs of particular resources will be either higher or lower in more abstract auctions, nor because welfare will be overall greater or

⁶ *Ibid.*, pp. 27-28.

more equal, but rather because the general aim of that conception of equality, which is to make distribution as sensitive as possible to the choices different people make in designing their own plans and projects, is better achieved by the flexibility abstraction provides. That is the case for the principle of abstraction. The principle recognizes that the true opportunity cost of any transferable resource is the price others would pay for it in an auction whose resources were offered in the most abstract form possible, that is, in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences.⁷

In recommending the greatest possible flexibility in matching auction bids to discrete life-plans, the abstraction principle establishes a strong presumption in favour of freedom of choice. Thus, it is ultimately in this manner that Dworkin believes the bridge strategy reconciles liberty to equality.

Perhaps the best way of trying to understand what Dworkin thinks he has demonstrated is to refer to his own prosaic example designed to illuminate the conceptual necessity for the abstraction principle. Imagine the following baseline problem in the island auction. Land to be sold at the initial auction must necessarily first be divided into specific lot sizes. Suppose some group of individuals favour the division of all land into football-sized lots because they are ardent fans of the sport. If land were initially divided in such a fashion, football stadiums would be relatively less expensive to build and the preferences of sports devotees would be more readily accommodated. On the other hand, if land were partitioned into lots as small as anyone wanted, it would be more expensive to assemble the lots needed for a football stadium, although presumably housing costs would then be less. How is the auctioneer to decide on initial land divisions before conducting the auction?

⁷ *Ibid.*, p. 28.

Dworkin thinks that there is something intuitively unfair about the first option of dividing land into football-sized lots. But, he also thinks that the immediate kinds of reasons which one might be tempted to offer to explain this unfairness are not adequate for a theory of equality of resources. For example, one cannot say that overall welfare would be higher with an auction run on the second division rather the first because equality of resources does not attempt to compare welfare levels, or at least not directly. Nor could one say that in the first auction football stadiums are relatively underpriced, and, hence, their true opportunity costs are hidden. For, one could say with equal credibility that football stadiums are relatively overpriced in the second auction, again with the result that their true opportunity costs are distorted.

Dworkin concludes that the best explanation for our intuitive judgement about the unfairness of dividing land into larger lots is that such a division is less sensitive to the exact dimensions of each person's preference for the resource. Smaller lot sizes have the virtue of accommodating individual choices more precisely, and *for this reason*, ensure more pliant correspondences between individual preferences and their true opportunity costs. Hence, equality of resources, understood as a way of revealing the true opportunity costs of an individual's preferences and plans of life, dictates that the abstraction principle be followed in deciding on a liberty/constraint baseline. And, this means practically that people should be allowed the greatest latitude to acquire and use resources as they see fit because this is the only way to accurately determine what are the true opportunity costs of different kinds of consumption and production decisions.

While the abstraction principle establishes a general presumption in favour of

freedom of choice, it is itself insufficiently determinate to generate or classify the kinds of specific liberties which liberals customarily try to defend in the form of rights. Therefore, Dworkin proposes a set of ancillary principles which he thinks can be produced by the bridge strategy both to delineate and rank-order particular liberties. One such ancillary principle is the principle of correction whereby certain limitations on freedom of choice are authorized in the auction baseline to correct or compensate for the external diseconomies that could result from unregulated market transactions. For example, zoning regulations for land would be justified by the correction principle to avert the problem of external diseconomies like pollution which otherwise would be a cost borne by others for an individual proprietor's complete freedom to employ privately-owned resources in any manner he or she chooses.

Another principle which Dworkin claims to discover using the bridge strategy is that of authenticity. Because the auction is meant to measure the true opportunity costs of an individual's preferences and life plans, it is essential that everyone have the chance to engage in those activities which are crucial to forming and revising their convictions, preferences and projects. In other words, it is important that people have the freedom to cultivate what could be called their own authentic preferences so that the auction and subsequent market transactions adequately comply with the requirements of the envy test. The authenticity principle, therefore, endorses such fundamental liberties as freedom of speech, without which individual preferences, tastes and convictions risk being viewed as heteronomously acquired.

Finally, Dworkin suggests that the bridge strategy implies the independence

principle whose purpose is to protect minorities from the disadvantages that might result if prejudices were to inform auction results. Disadvantages occasioned by prejudices can be treated as a special case of handicaps, except that instead of using the logic of the insurance market to compensate for them, a more appropriate solution can be achieved by modifying the baseline system of liberties and constraints so that minority groups are protected from the effects of systematic discrimination.

These are the pertinent contours of Dworkin's theoretical argument that liberty and equality enjoy an affable conceptual tie within a theory of equality of resources. It should be added that Dworkin realizes that his concept of true opportunity costs, and the associated principles of correction, authenticity and independence, are theoretically germane only in a highly contrived ideal world. He subsequently attempts to work out a theory of improvement by which one can assess practical adjustments of liberty to equality in the real world.

3. A Theory of Improvement

Dworkin's theory of improvement involves a complex correlation of three stages of analysis. The ideal stage, described by the equal auction, is one in which equality and liberty cannot conflict by definition because, as Dworkin reiterates, "we cannot identify an egalitarian distribution, even in principle, except by supposing freedom of choice already in place."⁸

But, once we begin relaxing the assumptions which allowed us to speculate about

⁸ *Ibid.*, p. 47.

ideal distributions, we must be prepared to acknowledge that certain technical and political realities prevent the realization of an ideal egalitarian society. This recognition prompts a set of second-order speculations about the most feasible egalitarian distributions that can be achieved in light of the technical possibilities latent in a contemporary society. The speculations carried out in this stage of analysis furnish what Dworkin calls "defensible egalitarian distributions," which, by paying attention to questions of feasibility, aim at reproducing, as closely as possible, the egalitarian distribution identified by the ideal stage of analysis. Dworkin assumes that this kind of analysis will yield not one but a set of defensible distributions which can be rank-ordered either according to their proximity to the ideal, or according to their plausibility as guides in implementing distributive equality.

Lastly, a practical political stage of analysis must be executed in which the feasibility of egalitarian reforms are assessed in the here-and-now. At this real-world stage, the question of which viable political reforms can bring us closest to the most plausible defensible egalitarian distribution directly encounters the problem of putative conflicts between liberty and equality. For, it is in the real world that currently accepted liberties are most likely to obstruct any progress towards equality.

To illustrate this dilemma, Dworkin canvasses a handful of political controversies in which the values of liberty and equality do appear to conflict. Thus, campaign expenditure laws, designed to deter the rich from unduly influencing the outcomes of elections, ostensibly denies them their freedom of expression. Or, the provision of medical services exclusively through the a state health system supposedly impedes

freedom of choice. Or, legislation devised to regulate hours of work in the interests of employee health arguably undermines the liberty of owners to do with their property as they see fit. It would seem that these are all examples of egalitarian-inspired political policies which impair the prospects of liberty, and, therefore, it appears that liberty and equality are less compatible than Dworkin imagines.

Dworkin's response to this objection is to claim that any theory of improvement in the real world requires a metric by which losses of liberty associated with egalitarian policies can be calculated. For such a metric he proposes the "victimization principle" which states that individuals suffer a "loss of power, in virtue of legal constraint, to do or achieve something that one would have had power to do or achieve following a defensible distribution."⁹ In other words, the liberties which individuals enjoy in the real world must not be any less valuable than the liberties they could enjoy in a world structured according to one of the defensible egalitarian distributions. If this victimization principle is applied to the examples noted above, Dworkin thinks that the overt conflict between liberty and equality evaporates.

In any defensible egalitarian distribution, no individual would have the wealth advantages to try to influence elections, and, hence, the nominal liberty which wealthy individuals do forfeit in election expenses legislation is not really a liberty they could claim in a world committed to egalitarian goals. Likewise, if it can be assumed that in a defensible egalitarian distribution a state system of medical care provides as good services as does private medicine, no liberty is lost in the real world if private medicine

⁹ *Ibid.*, p. 48.

is banned, so long as in doing so the state aims at securing the quality of medical care promised in the defensible distribution. And, finally, legislation regulating working hours in the interest of health and safety is no substantial imposition on liberty because in any defensible egalitarian distribution, the kinds of inequalities which compel workers in the real world to accept unhealthy and hazardous working conditions would not prevail, and, therefore, no owner could exact precisely the labour contract he or she desires.

Dworkin recognizes that some individuals will continue to protest that their freedom of choice has been diminished by the egalitarian legislative policies being discussed. Nonetheless, he thinks that for an egalitarian the examples illustrate what any realistic political theory must propose. An egalitarian political theory must contain a metric with which to appraise what counts as an improvement in equality, and that metric must be able to demonstrate that the value of the liberties remaining after egalitarian-inspired legislation is adopted is no less than what would have been available in the way of liberties in a defensible egalitarian distribution. For his part, he is confident that his examples have passed the test because those particular legislative policies were conceived to remove the advantages of wealth, and, for this reason, did not directly impinge on the liberties people would have enjoyed in a more equal world. At the same time, Dworkin is certain that other liberties, like the conventionally understood freedoms of speech, conscience, and assembly, would be secured by the victimization principle because it is unimaginable that any plausible defensible distribution would justify curtailing these liberties. Hence, in the real world, the liberties that would be protected by the

victimization principle appear to be precisely those which are conducive to what was described in the introduction to this chapter as a developmental version of liberalism.

4. Equality or Liberty?

What can be said of Dworkin's bracing theoretical effort to demonstrate a conceptual affinity between liberty and equality which also appears to support a normative ideal of individual self-development? There is no doubt that the design of his argument is imposing and in many ways very suggestive. Among other things, Dworkin's theoretical pledge to assess equal distributions on a person-by-person basis has the virtue of reminding us that any allocation of resources reverberates through a society in complex and often unanticipated ways. Moreover, his theory of distributive justice appears promising because it deliberately avoids appealing to factitious metaphysical assumptions. Thus, his theory is constructed in such a way that equality comes to be seen as an outcome of what, at least on the face of it, are fair procedures, while liberty itself is deemed to be an essential component of these fair procedures. There is, therefore, enough of a surface plausibility to this argument to make it appear that Dworkin has vanquished one of the most perplexing problems of liberal political theory.

However, a careful inspection of the argument shows that he ultimately fails to execute his self-appointed task. Instead, what Dworkin manages to accomplish is a circular argument of the type which he elsewhere suggests is a vexatious feature of the constitutive strategy. Dworkin is well aware of the problem of circularity in theoretical arguments where liberty is rolled into equality *ex hypothesi*. For instance, as he

perceptively observes of the constitutive strategy as it is employed by libertarian theorists: "The main objection to the constitutive strategy....is its apparent circularity: it begins the argument too close to the end. It defines an egalitarian distribution so that liberty is already present in the very definition of equality, and then declares, for that reason, equality and liberty cannot conflict."¹⁰ But the problem is that this is exactly what Dworkin himself does in his bridge strategy. To see how, it is useful to return for a moment to his discussion of how to settle on an appropriate baseline of liberties and constraints which could give effect to the ideal of equality of resources.

As Dworkin describes it, the baseline problem discloses the need for the abstraction principle in order for true opportunity costs to emerge in market transactions. Thus, in the example of the legal shape of real estate, Dworkin is convinced that only when land is sold in the most abstract form--that is, in lots as large or small as individuals fancy--can the true opportunity costs of an individual's preference for property surface. But, in fact, Dworkin's real estate illustration proves rather less than he thinks. This can be seen if we alter the example slightly. Imagine a case where the majority of individuals on the desert island prefer co-operative or public housing, and, therefore, conveniently large lot sizes as the baseline for the auction. Dworkin's abstraction principle explicitly precludes such a starting point. Yet, if the abstraction principle is followed faithfully the cost of co-operative or public housing would be higher than if the lots were initially laid out in larger sizes. Is it fair that the majority will end up having to pay more for co-operative or public housing in order that the minority can

¹⁰ *Ibid.*, p. 25.

enjoy private housing?

Dworkin's response to such a question is that we must all be prepared to pay the price for our preferences according to what others must forego for these preferences to be satisfied. Therefore, because there are at least some people who want private housing, equality requires that we respect their choices as well as those of the majority. It is for this reason that Dworkin concludes that the more abstract the baseline the more neutral it will be in market distributions because it will display more sensitivity to individual choices. But this is patently wrong. The abstraction principle manifestly advantages the private home-buyers over the public housing supporters when land costs are calculated. To say that this reflects the true opportunity costs of individual choices is to invite a fundamental confusion. The abstraction principle merely structures the costs of certain sets of choices relative to others. But this does not ineluctably produce a state of affairs which is fair, which is after all what Dworkin thinks true opportunity costs reveal.

Why Dworkin persists in this confusion can be gathered from the way in which he identifies true opportunity costs with a condition where maximal choices are possible. He simply assumes that such an arrangement allows everyone to tailor his or her own preferences and life-plans in the most propitious manner with due regard for the effects these preferences and plans have for others. But, this ignores the way that the context in which choices are made itself works to structure those choices. The relevant context in Dworkin's argument is the market which enforces a certain type of calculation of costs and benefits. What these calculations actually reveal are market prices which in turn are a function of aggregated preferences and market supply. Dworkin simply assumes that

if the supply side of the equation is made up of suitably fungible goods, then every individual will have the opportunity to pursue his or her own unique preferences. But the point is that aggregated preferences can never be identified independently of what is brought to the market. Thus, there can never be a neutral starting point for market transactions. For, no matter how much care is taken to ensure that resources are fungible, they are always socially constituted by the form in which they appear in the market.¹¹ And, indeed, in certain circumstances, such as the example of public versus private housing, the more fungible the resource the more likely that individual preferences will themselves be modelled by what the market makes available.

It should be noted, however, that the mere fact that markets always structure preferences by virtue of the form that resources take when they are bought and sold is itself not fatal to Dworkin's distributive theory. Rather, it is only when two different senses of the market's "structuring" power are distinguished that one can see the difficulties which the market poses for his egalitarian distributive theory. In a straightforward sense, markets invariably structure choices through the pricing mechanism. Market prices structure choices by indicating the relative costs of different consumption and investment decisions. And, assuming that a rational economic actor will always attempt to maximize his or her economic welfare, this means that, all other things being equal, less costly consumption items will be preferred to those that are more costly, and more profitable investments will be preferred to those with lower rates of

¹¹ Even defenders of markets as neutral devices for the distribution of economic resources concede that markets are intrinsically incapable of being neutral with respect to all preferences. See, for example, A.T. O'Donnell, "The neutrality of the market," *Liberal Neutrality*, Robert E. Goodin and Andrew Reeve, eds. (London: Routledge, 1989), pp. 42-4.

return.

A rational economic actor will, in this sense, have his or her economic decisions structured by the pricing mechanism of the market. And, even when the assumptions about economic rationality are relaxed to account for the manifold reasons that routinely inform consumption and investment decisions, the pricing mechanism still plays an important role in influencing these decisions. This structuring process is in itself not objectionable. For, in many consumption and investment decisions, it may prove to be the best way of commensurating values. When purchasing an automobile, or investing in an annuity, for example, the relative costs or rates of return are obviously useful criteria for assessing value.

However, this leaves out of account the more profound, and problematic, way in which the market and its pricing mechanism structures choices. The choice of the domain over which the pricing mechanism of the market is to hold sway, for example, is powerfully affected in a prospective way by the logic of the market. Indeed, once a market is established, the choice between public and private goods is powerfully biased in favour of the latter. This does not mean that the choice of public goods is unavailable, but only that the pricing mechanism makes this choice more prohibitive than it might otherwise be. The market, one could say, predisposes individuals to respond to the exigencies of their economic circumstances in a manner of a rational economic actor, thus dictating that their choices be made by assessing costs and benefits purely in terms of individual advantage.

Of course one could object that this deeper structuring power of the market is

irrelevant to Dworkin's distributive theory of justice because he employs the market not to model a particular kind of economic rationality but to measure equality. In Dworkin's hands, therefore, the market is a suitable distributive device because it reveals the costs to other people of a person's economic choices. And, indeed, many of the examples Dworkin uses to show the efficacy of the pricing mechanism in revealing the social costs of an individual's choices appear not to involve a presupposition about rational economic behaviour. Thus, should an island inhabitant, for instance, want to outbid all others for a piece of productive land in order to build a tennis court for his or her own amusement, all that Dworkin initially has to say of this situation is that the tennis enthusiast must be prepared to pay the market price for his or her preference. That price will be steep, he insists, because it will reflect what others must forego in the way of income-producing prospects to have the land reserved for a private leisure activity. But other than that, Dworkin is not prepared to place any restrictions on how resources will be socially constituted as consumption or productive goods in the island economy. Or so it seems.

A little reflection suggests that Dworkin operates with an unstated assumption about how resources are to be socially constituted in the market. For consider what would happen if everyone's tastes and preferences in the desert island were both unique and directed to the private enjoyment of a resource. Thus, someone might want land for a private tennis court, another for a swimming pool, a third for an ornamental garden, and so on. In contemplating different private uses for the resource of land, everyone would, of course, have to be prepared to tender a bid according to just how much he or she wanted to satisfy his or her unique preferences. And, the successful bid would

measure what others are willing to forego in order for an individual to satisfy his or her preferences. But, to call the auction price of the land in these circumstances its "social opportunity cost" is a little misleading. For no matter who had the successful bid, the welfare standing of all others in the island would be the same. In other words, for purposes of equality it makes no difference how the land is employed, but only that the one who wants it the most gets it.

However, a close reading of Dworkin's theory of distributive justice suggests that this really is not the conclusion he wishes to draw from the auction. Rather, he introduces the term, "social opportunity cost," to make vivid the contrast between productive and unproductive uses of island resources. In this sense, the tennis player must be prepared to pay a penalty, in the form of a high price, for a piece of land that could otherwise be put to more productive purposes. But why is this distinction between productive and unproductive uses of a resource integral to his theory? The reason is because he assumes that the island economy is an exchange economy which, when modelled on the distributive rules of his "egalitarian" market, will promote economic efficiency, and, therefore, the maximization of wealth.¹²

In order to assume that the island market economy will be conducive to economic efficiency and wealth maximization, Dworkin must distinguish between productive and unproductive uses of resources. Moreover, he must presuppose that there will be enough individuals on the island who behave as rational economic actors, willing to bid on

¹² For example, in one of his more convoluted assertions, Dworkin states: "The circumstances in which the wealth-maximization theory seems intuitively plausible are in fact just the circumstances in which our conception of equality would probably recommend the decision that in fact maximizes wealth." "Equality of Resources," p. 336.

resources for their income-producing potential. Once those assumptions are built into the operation of a market economy, then the normal exchange function of the market models preferences in the deeper sense stipulated above. For, in these circumstances, individuals are predisposed to regard resources as commodities whose efficient exploitation leads to increased wealth. As for those who are disinclined to observe this market logic, they can still bid for resources at market prices if they are prepared to suffer the economic consequences. The paradox in all of this is that while Dworkin entertains an egalitarian theory of distributive justice in the service of the moral ideal of individual self-development, the way in which markets predispose individuals to act as rational maximizers routinely serves to undermine their self-developmental aims.¹³

Notwithstanding this critical paradox, there are also reasons for thinking that the market structures how "rational maximization" is itself to be understood. This can be gathered from Dworkin's discussion of gambles. When proposing the idea of option luck as a way of justifying market inequalities in the post-auction island economy, Dworkin defends risk-taking activities by saying that individuals should have choices in how they employ their resources. Risk-averse individuals can, therefore, choose to carefully husband their resources, in full knowledge that in doing so they are foregoing the possibility of gain which risks can bring. Risk-takers, on the other hand, are justified in retaining what profits their risks occasion because the price of the gain was the possibility of loss. This analysis of the moral warrant of risk-taking, however, is less than satisfactory because it provides too static a picture of economic behaviour. If, instead,

¹³ On the conflict between the image of individuals as rational maximizers and as beings capable of self-development, see C.B. Macpherson, *Democratic Theory*, *op. cit.*, pp. 39-70.

we ask whether allowing risk-taking in the imaginary island economy would imperil the choices of the risk-averse in the long-run, we would undoubtedly come closer to determining the effects of risk-taking on the resources of people over their lifetime, which is what Dworkin understands by equality.

It is likely that this question cannot be answered in Dworkin's island economy because we simply do not have enough information about the number of people who are risk-takers nor their chances of success. But the real world of capitalist economies should provide us with some clues. In any advanced capitalist economy, risk-taking, which is a defining characteristic of capitalist enterprise, predominates. And it tends to do so in a way that excludes, or reduces, the choices of the risk-averse. A clear example of this process can be seen in contemporary debates over supply management versus free trade in agriculture. Proponents of supply management defend their schemes because they reduce the economic risk involved in agricultural production. Proponents of free trade, on the other hand, argue that with an unregulated market, economic rewards would be directly related to risk-taking in a manner conducive to the efficient allocation of resources.

What bears comment in this debate is that the two positions are routinely seen to be mutually exclusive. One cannot have both free markets and supply management, at least not in any significant degree, in the same economy. Indeed, if free markets were allowed to coexist with supply management, there is little doubt that they would in time colonize the latter, and this would mean that the market would end up structuring the choice of economic activity available to prospective farmers. So it is wrong to think that

markets are simply neutral devices that work behind the scenes both to make choices possible and to impartially respond to the preferences individuals display in their price-taking behaviour.¹⁴

There is a sense, however, in which Dworkin's depiction of markets as neutral distributional devices is conceptually required by the moral aim of his theory of equality. Recall that when Dworkin introduced the idea of an equal auction to justify the use of the market as an egalitarian distributional device, he explicitly stated that both preferences and material resources must be taken as given. This conceptual edict is essential to Dworkin's theoretical enterprise because, if the existing array of preferences and material resources are themselves opened up to questions of fairness, then it would be more difficult to discover a non-circular procedural argument in support of a discrete theory of equality. Thus, for example, if one asked whether the distribution of an existing array of preferences was fairly contracted, and, consequently, fairly satisfied in market exchanges, some version of equality of welfare would seem to be needed for an adequate answer. If, however, preferences and material resources are treated simply as contingent facts, market results can be deemed to be fair, at least in the procedural sense of fairness to which Dworkin subscribes.

It should be acknowledged, however, that Dworkin is at least aware that ignoring

¹⁴ For some examples of conventional economic arguments about the structuring power of markets on individual preferences, see David Miller, Market, State and Community (Oxford: Clarendon Press, 1989), ch. 3; John Bennett, "Ethics and Markets," Philosophy and Public Affairs, Vol. 14, no. 2 (Spring, 1985), pp. 195-204; Samuel Bowles and Herbert Gintis, Capitalism and Democracy (London: Routledge & Kegan Paul, 1986), ch. 5; Albert Hirschman, Exit, Voice, and Loyalty (Cambridge, Mass.: Harvard University Press, 1970); John Roemer, Free to Lose: An Introduction to Marxist Economics (Cambridge, Mass.: Harvard University Press, 1988), ch. 10; and Jon Elster, Sour Grapes, *op. cit.*, pp. 109-40.

all questions about the cogency of individual preferences and the social constitution of resources can have undesirable consequences for his theory of equality. Thus, the principles of correction, authenticity, and independence, which he introduces in his discussion of an appropriate liberty/constraint baseline for an equal auction, can be regarded as a defensive manoeuvre on his part designed to ensure that some degree of autonomy can be attributed to preference-formation, and that some attention is paid to the social constitution of resources.

The authenticity principle seems to speak directly to some of the concerns raised above about the way in which markets influence as well as respond to choices. As Dworkin explains: "Personality is not fixed: people's convictions and preferences change and can be influenced or manipulated. A complete account of equality of resources must therefore include, as a baseline feature, some description of the circumstances in which people's personalities will be taken as properly developed so that auction calculations can proceed."¹⁵ But, rather than engage in metaphysical or psychological speculations about what constitutes an authentic personality, Dworkin immediately takes refuge in a procedural, and suspiciously circular, definition of authenticity: "personalities are authentic, for our purposes, when they have been formed under circumstances appropriate to using an auction among personalities so formed as a test of distributive equality."¹⁶ Thus, the appropriate circumstances Dworkin has in mind are state guarantees for conventional liberties like freedom of expression, religious conviction, and

¹⁵ "The Place of Liberty," p. 35.

¹⁶ *Ibid.*

assembly through which individuals can enjoy the widest opportunities to reflect upon and revise their own preferences and plans.

There is no doubt that these liberties are necessary conditions for any viable conception of authenticity, but it is not clear whether they constitute sufficient conditions. What Dworkin asks us to imagine is a situation where individuals, with their guaranteed freedoms, have access to a rich variety of cultural resources which they can use to clarify their own personal preferences and ambitions when deciding on what market choices they will make. But, as Gerald Postema notes, "[e]ven if we grant that rich cultural resources are available to the participants in principle, they will not be realistically meaningful--or perhaps realistically available--to the participants apart from a specification of the range of material resources, opportunities for labour, and the like, that are available to each of them."¹⁷ Postema's point is that we ordinarily form our preferences and ambitions in light of the material and social circumstances in which we find ourselves. Without these significant reference points, individuals may not be able to fashion anything that resembles an authentic preference, even when informed of all relevant cultural possibilities.

If Dworkin's principle of authenticity begs more questions than it answers, his principle of correction shows even more clearly the normative limitations of his theory of equality of resources. The correction principle is intended to deal with what economists call the problem of external diseconomies. These externalities represent the costs borne by others of the actions of an individual. External economies, on the other

¹⁷ Gerald J. Postema, "Liberty in Equality's Empire," *Iowa Law Review*, Vol. 73, no. 1 (October, 1987), p. 86.

hand, represent the benefits to others that flow from any individual's actions. The notion of externalities implies that economic decisions have either social costs or social benefits, and this suggests that economic resources are, in one way or the other, always socially constituted. In singling out external diseconomies for attention in his theory of correction, Dworkin is in effect trying to place limits on certain ways of socially constituting resources. Thus, pollution control laws, for example, serve to inhibit certain uses of resources, which otherwise would have imposed unchosen costs on others.

There is, however, a problem in identifying what comprises the external diseconomies to which Dworkin's correction principle should apply. This problem is not unlike the problem encountered in John Stuart Mill's "harm principle". As noted previously, Mill's harm principle is so broadly conceived that any action could be deemed to have harmful consequences for at least some others. Dworkin is assured, however, that his correction principle is workable in principle, in the sense that it can emulate the results of an even more fantastic auction in which "all motives are transparent, all transactions are predictable, and organizational costs are absent."¹⁸

If such a "super-imaginary pre-auction auction" were possible, the correction principle would not be needed because individuals would have had the necessary foresight and ability to outbid individuals who planned to use resources in ways that would have offended their preferences. Thus, if enough individuals preferred clean air, they would have outbid an industrialist for the use of the land on which he or she planned to build a polluting factory. In such a world of ideal knowledge and costless organization,

¹⁸ *Ibid.*, p. 33.

individuals could engage in perfectly predictable cost-benefit analyses and thereby collectively deter all economic activities they decided were injurious. In the absence of such a world, the correction principle can function as a surrogate for approximating both the distribution and end-use of resources that would have resulted from the flawless cost-benefit calculations of the super-imaginary auction.

The trouble with this formulation is that Dworkin does still not tell us how the correction principle can pick out the violations of equality of resources which need to be remedied through economic regulation. Because we do not have the perfect foresight necessary to the super-imaginary auction, we do not know how resources would be ideally socially constituted. And without that knowledge, we cannot be sure what is to count as external diseconomies in the real world.

But there is another problem in Dworkin's conception of the correction principle. As he describes it, the principle is meant to emulate the results of a perfect cost-benefit analysis of resources, as undertaken by individuals in an imaginary auction. But this doesn't tell us what is to count as a cost or a benefit in the super-imaginary auction. This is important because in the real world, economic regulations are sometimes undertaken in order to prevent some moral cost associated with an economic activity. For example, some environmental regulations such as bans on killing endangered species do not fit into any conventional economic cost-benefit analysis. Nor do they necessarily reflect a utilitarian calculation where people's preferences for protecting wildlife are weighed. Such regulations are, instead, justified on independent moral grounds. They represent a judgement about a collective good that is not reducible to any person's or group's

advantage.

If Dworkin wants to model these types of regulations into his scheme of equality of resources, it is difficult to see how he could do so without abandoning his methodological assumption in which judgements about value are to emerge from individual cost-benefit calculations. But, if he does not model these regulations into his scheme of economic distribution, that scheme loses much of its attractiveness as a moral ideal for it would seem to reinforce a view of a world in which only self-regarding actions matter from the point of view of distributive justice.

To illustrate this dilemma, it is useful to turn to an imaginary debate Dworkin conducts with an impatient egalitarian who is disconcerted over the wealth inequalities which remain even after a scheme of equality of resources is implemented. Dworkin concedes that his egalitarian society would still permit wealth differentials that flow from ambition and effort, as well as from certain social contingencies that could simply be called a matter of luck. Thus, in discussing Robert Nozick's use of the famous Wilt Chamberlain example to justify legitimate acquisitions,¹⁹ Dworkin concedes that equality of resources would not insist on expropriating the basketball star's wealth, but would merely tax that wealth using a graduated tax system that could be deemed equitable for the society of which he is a member. This means that some individuals would remain wealthy in a society dedicated to equality of resources even after taxation and income redistributions.

Dworkin realizes that some egalitarians may object that the "moral costs" to a

¹⁹ See *supra*, ch. 1, pp. 55-56.

society of substantial wealth inequality are too high to be borne.²⁰ His initial response is to say that it remains a contingent question whether a society dedicated to resource equality will produce wealth differentials sufficiently great to induce concern over their moral cost, or whether people would retain the same malformed attitudes towards wealth that obtain in contemporary societies where wealth is usually regarded as the pre-eminent mark of success. But if concerns about moral costs are not abated by these qualifications, Dworkin offers a final remonstrance: "Once we understand the importance, under equality of resources, of the requirement that any theory of distribution must be ambition-sensitive, and understand the wholesale effects of any scheme of distribution and redistribution on the lives which almost everyone in the community will want and be permitted to lead, we must regard with suspicion any flat statement that equality of resources just must be defined in a way that ignores these facts."²¹ In other words, once we accept that markets are necessary to the realization of equality, we cannot condemn the distributions they occasion, unless of course they reflect arbitrary differences in talents or in health. Save for these two exceptions, the market models what is to count as a "moral cost".

Dworkin's willingness to finally leave aside any further consideration of the moral costs of wealth differentials prompts an obvious question. Why is the market such a determining feature in Dworkin's scheme of equality? To summarize his argument one last time, markets are especially conducive to the workings of the abstraction principle,

²⁰ "Equality of Resources," p. 332.

²¹ *Ibid.*, pp. 31-32.

and the abstraction principle in turn allows the true opportunity costs of an individual's choices to emerge. And, as things fall out, true opportunity costs are the most reliable measure of interpersonal equality. But a little reflection shows that this is a circular argument. To begin with, the abstraction principle is merely a restatement of a libertarian rather than an egalitarian principle. Remember that the abstraction principle recommends the most extensive liberties possible on the grounds that only such an arrangement permits distributions to be optimally sensitive to people's choices about their projects and life plans. But this merely states that choices are necessary if choices are to be made. It hardly establishes that a market unambiguously responds to, rather than also structures, individual choices. Nor for that matter does it establish how market transactions reflect equality, except in the derivative sense that we all have equal chances to choose something in the market.

It should be plain by now that what Dworkin has surreptitiously done is to declare liberty to be part of equality by definitional fiat. But in doing so he has also vitiated the avowed egalitarianism of his political project because it is the concept of liberty which performs most of the critical work in the theory of equality of resources. Indeed, if one steps back and examines the general aim of Dworkin's theory of equality of resources, it becomes evident that liberty was built into the definition of equality from the start. Recall that the aim of equality of resources is to achieve distributions which are both ambition-sensitive and endowment-insensitive. But what is an ambition-sensitive distribution other than one which affirms the importance of free choice in pursuing one's projects and life-plans? Endowment-insensitive distribution, on the other hand, is just

another way of saying that some form of material equality is important. Because Dworkin has already conceded that these two aims pull in opposite directions, one can only conclude that the conflict between liberty and equality persists within Dworkin's theory, only with different names. What's more, in the ideal world of distributions described by his theory, the capacity to choose comes to prevail over any substantive notion of equality. Thus, in the end, Dworkin shows himself to be decidedly a partisan of liberty. At the same time, his concept of equality takes on a procrustean quality which is fated to disappoint more staunch egalitarians.²²

Thus, what Dworkin has really accomplished in his distributive theory is a reconciliation of liberty and equality that is purely definitional. And, moreover, this reconciliation paradoxically transforms equality into a formal condition for the realization of liberty. But, the value of liberty itself remains unsupported. Liberty, as previously pointed out, cannot be justified on the grounds that it facilitates the discovery of the true opportunity costs of our choices, for this begs the question of whether the concept of true opportunity costs represents anything other than market prices. Of course, there are ways of defending a principle of maximal liberty which do not rely on the type of procedural argument to which Dworkin subscribes. For instance, one could argue that liberty is essential to autonomy, and autonomy in turn is a necessary precondition of moral agency.

²² Dworkin's persistent use of egalitarian language to justify what are in crucial aspects libertarian distributions leads Kai Nielsen to claim, "Dworkin's egalitarian plateau is as much a part of Nozick's moral repertoire as it is Rawls's." Kai Nielsen, Equality and Liberty: A Defense of Radical Egalitarianism (Totowa, N.J.: Rowman and Allanheld, 1985), p. 307. Similarly, Gerald Postema concludes that "...Equality of Resources is a liberal egalitarian theory, not because it derives support for recognizably liberal principles from a fundamental commitment to intrinsically egalitarian principles, but rather because it weaves together distinctively liberal intuitions with others that seem to be egalitarian into the foundations of a general theory of political morality." "Liberty in Equality's Empire," *op. cit.* p. 81.

Or, alternatively, one could argue that liberty is practically important because individual agents, as a matter of contingent fact, are the only persons who can determine what is of value in their lives. While these arguments have their own intrinsic difficulties, it is nonetheless clear that in both of them liberty is posited as a value because it is instrumental in securing another more fundamental value which is demonstrably not equality.

Without a strong foundational argument in favour of liberty, Dworkin's distributive theory runs the risk of becoming incoherent. For, while it operates in the guise of securing equality, its more fundamental normative aim is to promote the moral value of liberty which is firmly if somewhat surreptitiously ensconced in the alleged neutral workings of the market. And this bifurcation of moral aims can only lead to confusions about the prescriptive range of the theory.

To illustrate this point let us return one last time to Dworkin's example of the intuitive unfairness of dividing land into football-sized lots in the initial auction. Dworkin insists that we must prefer smaller lot sizes because this would enable individuals to make more discriminating choices. But in fact there is a more obvious answer to why football-sized lots would ordinarily be considered an unfair division, although it is an answer Dworkin is unable, for reasons of his own artificial theoretical qualifications, to supply. And this answer has the merit of avoiding some of the counter-intuitive results that his abstraction principle produces. Quite simply, we routinely think housing is more important than sports; hence, we come to a distributive theory already equipped with at least some moral intuitions about what preferences deserve satisfaction. We are, as a

matter of course, not neutral towards all preferences. Nor can the state be impartial in the face of all preferences. Indeed, the posture of impartiality often works to disguise the way in which choices are structured, and the way this structuring predisposes us to value some things over others. This is particularly true of the market. It is no accident that philosophers as different as Aristotle and Marx regarded the market as not just a mechanism for distributing values but also as a medium for producing valuations.

If Dworkin wants to persist in justifying the market as a distributional device, he must be prepared to supply stronger reasons for why the liberties associated with market exchanges are important. And, if such an argument is to be made in the service of a developmental version of liberalism, he still has to show that market liberties do not impair the equal ability of each person to develop his or her capacities. It has been the contention of this chapter that Dworkin has not succeeded in his task of demonstrating that the abstract principle of equality can on its own yield a determinate theory of distribution. It remains to be seen in the next chapter what implications this failure has for his theory of democracy, community, and adjudication in a liberal state.

Chapter Seven

Democracy, Community and Adjudication

1. Introduction

In the preceding chapter it was shown that Dworkin both defends the market as the principal mechanism for economic distribution and argues for a number of familiar welfare measures devised to approximate what market transactions would accomplish in an ideal world of perfect equality. Dworkin insists on retaining the market as a metric for egalitarian distributions because it supposedly displays superior sensitivity to individual choice while at the same time revealing the social costs involved in any individual's particular choices. It was argued, however, that such a justification of market-based distributions encounters some fundamental problems in a political morality dedicated to the abstract principle of equality. To begin with, in assuming that the chief distributive concern of egalitarians is to match the social costs of individual choices over a lifetime, Dworkin fails to explain why individual choice is itself morally important. To say that the ability to exercise choice secures autonomy does not resolve the problem but merely begs the question of the moral significance of autonomy. To complicate matters, Dworkin avoids asking whether markets themselves model or merely respond to the choices individuals make. Without inquiring into these questions of the moral foundation of choice, or the sovereignty of consumers and producers in a market economy, Dworkin fails to show how his distributive theory is uniquely egalitarian.

If, however, Dworkin's purpose in singling out individual choice as morally important is that it represents the necessary condition for the realization of the moral good of self-development, he encounters another set of problems. For, by defining the market as an egalitarian distributive device, he leaves unsupported this deep moral goal of individual self-development. The reason is that, in adopting the view that there is no common criterion by which to evaluate economic choices other than their "social opportunity costs", Dworkin is committed to the proposition that only an impartial cost-benefit analysis can resolve the question of which choices are to prevail in a market economy. It is true that he would apply the various principles of authenticity, independence, and correction to ensure that individuals have the opportunity to develop informed choices free of the distortions created by social prejudices and devoid of external diseconomies. But, beyond that, his distributive theory allows for no other measure for determining to what uses resources can properly be put except that which actually results when individuals make their production and consumption decisions in a free market. In other words, the kind of cost-benefit analysis Dworkin has in mind is simply the pricing mechanism of a market in which individuals have assurances of more or less equal purchasing power.

But, the problem with this allegedly impartial measure is that it predetermines what is to count as the "moral costs" of choices. And, as suggested in the previous chapter, this leaves out of account a significant range of individual choices whose moral costs are arguably significant, yet which cannot be measured by comparing what others would have to give up in order that they be satisfied. The modern concern over

environmental protection, for example, illustrates this problem. Although there are certainly numerous contemporary efforts to derive policy instruments for environmental protection using conventional cost-benefit analysis (e.g. the polluter pay principle), such exercises beg the question of whether environmental protection is good in itself, or good only to the extent that it benefits individuals in some measurable utilitarian sense.

Another moral cost which likewise cannot be assessed using the instrumental criteria of a market cost-benefit analysis is the cost of private versus public ownership. If private ownership and a market economy fit the requirements of the abstract egalitarian principle because they allow for more choice-sensitive distributions, as Dworkin argues, this still does not establish that the moral costs of market inequalities are less than those often attributed to public or communal ownership. Put in a different way, is the freedom of individual choice which private property and a market economy presumably help secure a greater good than the collective determination of values which public or communal ownership encourages? And, if individual self-development is the deep goal of an egalitarian political theory, is that self-development more likely to be enhanced through private appropriation or through participation in collective decisions over the disposition and employment of commonly held resources?

These are questions which need to be answered if Dworkin is to succeed in demonstrating that the principle of abstract equality recommends a market-based welfare state as the best practical realization of distributive justice. Yet he confronts neither of these questions directly in his discussion of an appropriate egalitarian distributive theory. Nor is it obvious that they can be addressed by referring to the criteria of an ambition-

sensitive and endowment-insensitive distributive scheme as a standard of just allocations because these criteria already presuppose the private appropriation of resources as a distributive norm.

Dworkin is not wholly unaware that his market presupposition begs some important questions. Thus, in the introduction to his article on equality of resources, he concedes that a resource theory of distribution cannot settle the question of which resources should be made available for private ownership and which should be held in common. He goes on to suggest that the question of how to demarcate a domain in which private ownership is the legal norm is itself a political issue which summons yet another set of questions about how equality of political power is to be envisaged.¹ This opens up the possibility that the shortcomings which have been noted in Dworkin's distributive theory might yet be repaired by theoretical speculations on the conditions which comprise political equality.

In this chapter, Dworkin's theory of political equality will be examined with an eye to determining whether it successfully resolves some of the difficulties left by his theory of distribution. At the same time, this chapter will also return to some of the philosophical issues of adjudication which initially prompted him to attempt to provide a theoretical account of liberal political morality. For, when discussing political equality, Dworkin broaches the controversial issue of the role of courts in a democratic society. Thus, in a very important sense, his various arguments about law, morality, and politics

¹ See "Equality of Resources," p. 283.

converge on one central question: how should people dedicated to the abstract principle of equality govern themselves?

2. Two Definitions of Democracy

Dworkin explicitly addresses the question of how egalitarians should govern themselves in the fourth of his series of articles on equality², and in a related article on the democratic character of judicial review.³ In both of these articles, Dworkin introduces a collection of definitions devised to render explicit the moral and political differences between alternative conceptions of democracy. The best way of understanding the purpose of these often recondite definitional exercises is to note the political values which Dworkin hopes to accommodate in constructing what he thinks is the most attractive conception of democracy.

The most attractive conception of democracy, Dworkin maintains, must include not only familiar structural features like equal voting power, fair and frequent elections, and the principle of majority rule, but also must contain a number of guarantees for such things as freedom of speech and association. However, only courts with the power of judicial review, Dworkin suggests, can effectively secure such freedoms. But, this ostensibly poses a problem for democracy, because, in exercising its power of judicial review to protect unpopular speech or political association, the court can end up defying the wishes of democratic majorities. This question of whether the power of judicial

² "What is Equality? Part 4: Political Equality," *op. cit.*

³ Ronald Dworkin, "Equality, Democracy and Constitution: We The People in Court," *op. cit.*

review is consistent with the political ideal of majority rule thus governs Dworkin's theoretical reflections on democracy

Dworkin begins his formal discussion of democratic political institutions and processes by asserting that a large and complex egalitarian community would necessarily have to adopt a representative form of government. For this reason, he thinks that the pertinent political questions for egalitarians are how are representatives to be chosen, what powers are to be assigned to them, and what powers are to be retained by the community as a whole? These several questions call for a conception of democracy, and, in characteristic fashion, Dworkin engages in a theoretical process of elimination in which two alternative interpretations of democratic politics are contrasted.

The first conception he calls the "dependent interpretation of democracy." In this interpretation, it is assumed that the best model of democracy is "whatever form is most likely to produce the *substantive* decisions and results that treat all members of the community with equal concern."⁴ On this substantive view of democracy, therefore, the precise details about democratic institutions and processes can only be determined by assessing their suitability for reaching decisions conducive to egalitarian distributive goals.

The second conception Dworkin calls the "detached interpretation of democracy." This interpretation emphasizes only the procedural fairness in the process of reaching authoritative political decisions. Thus, in the detached interpretation, the democratic character of a political process is judged by "looking to the features of that process alone,

⁴ "Political Equality," p. 3.

asking only whether it distributes political power in an equal way, not what results it promises to produce."⁵

The distinction between a dependent and detached interpretation of democracy is only the first of a series of contrasts which Dworkin introduces in his analysis of political equality. A second important set of distinctions he draws is between the distributive and participatory consequences of a political process. The distributive consequences of a political process are the resource allocations and legal regulations of property and liberties produced by democratic decision-making. The participatory consequences of the political process, on the other hand, are those opportunities for political involvement which arise "from the character and distribution of political activity itself."⁶

Dworkin lists three kinds of participatory consequences of interest to egalitarians: symbolic, agency and communal. The symbolic consequences of participation are declarative insofar as the formal right of participation confirms who is and who is not to be regarded as an equal and free member of a political community. The right to vote, for instance, marks off those who are recognized as full members of a political community in this symbolic sense. Agency consequences supply a more active meaning to participation by signifying the extent to which individuals are able to bring to the political process the convictions and passion of their own moral experiences. From this latter perspective, the right to vote without the associated rights of speech and assembly would diminish the agency value of democratic participation because individuals would

⁵ *Ibid.*

⁶ *Ibid.*, p. 4.

be deprived of the ability to publicly integrate their personal moral convictions and their formal political activities. Finally, the communal consequences of participation refer to the benefits that come from individual identification with, and a personal acknowledgement of a responsibility for, the collective decisions of a political community. Conceding that the communal consequences of participation are difficult to estimate, Dworkin nonetheless suggests that for an individual such communal values are experienced when "he or she shares fully in the pride or shame of the collective decision."⁷ From the collective perspective, on the other hand, the communal consequences of participation can be assessed, Dworkin intimates, by the degree to which the political process succeeds in "nourishing a cohesive and fraternal political community."⁸

Dworkin's purpose in distinguishing distributive from participatory consequences of a political process is to emphasize the theoretically germane differences between the dependent and detached interpretations of democracy. The detached, or, to use a more familiar term, the procedural, interpretation of democracy tends to focus on the participatory consequences of a political process, insisting that fair democratic procedures consist only of equality of political power rather than of some more substantive notion of equality. The typical detached democratic view would thus regard the principle of one-person, one-vote, equal electoral districts, frequent and fair elections, and majority rule, as both the necessary and sufficient conditions for a genuinely egalitarian democracy.

⁷ *Ibid.*, p. 5.

⁸ *Ibid.*

Dworkin acknowledges that this in fact is the most popular view of democracy. One of the advantages of this view, he observes, is that it carries no further theoretical obligations to attempt to resolve the substantive political controversies which dominate electoral politics. Rather, one can simply adopt the impartial position that substantive political controversies must be decided according to the preferences of the majority. Moreover, the detached view of democracy encourages losers in political controversies to console themselves with the thought that their cause was defeated in an equitable contest. In this way the divisiveness of the democratic political process can at least be moderated by a shared conviction that fairness prevails in the decision-making process.

The dependent interpretation of democracy, on the other hand, seems to entail some rather dubious political implications. For instance, the dependent interpretation would appear to be concerned primarily with the distributive rather than the participatory consequences of the political process. However, if this were the case, the dependent approach would make for a rather poor interpretation of democracy. For, as Dworkin points out, it is possible to imagine a benevolent tyranny producing the type of property scheme which egalitarians endorse as just, even as it denies citizens the right to participate in political decision-making. It is obvious, he adds, that egalitarians concerned with political equality could not accept benevolent dictatorship as the price for distributive justice, and would insist that a dependent interpretation of democracy include participatory as well as substantive egalitarian goals in its conception of the political process.

But this introduces a different problem. Because substantive egalitarian goals are

by their nature subject to controversy, trying to model them into a conception of democracy along with participatory goals seems to be a particularly refractory task. By comparison, the theoretically uncomplicated, detached interpretation of democracy has less exacting political requirements, and, for that reason, would appear to provide a more attractive democratic ideal for egalitarians. Dworkin resists this inference, however, arguing instead that the dependent conception of democracy better matches the various moral and political concerns which egalitarians share. And, in typical fashion, he arrives at this conclusion by first showing that the detached interpretation of democracy is less promising as an egalitarian conception than its adherents believe.

3. The Detached Conception of Democracy

The detached interpretation of democracy is appealing to egalitarians because its political requirements appear simple: democracy is realized if individuals enjoy equality of political power. This appearance of political simplicity evaporates, however, when the detached interpretation is subjected to close examination. Dworkin notes that such a close examination must start with a working definition of equality of political power. This means that a detached interpretation of democracy needs both to stipulate a measure for political power and state the circumstances under which this measure of political power is assigned equally to all citizens. Both of these definitional requirements involve complex and controversial theoretical choices.

To illustrate some of the complexities involved both in measuring political power and determining when such power is equally dispersed in a democratic community,

Dworkin distinguishes between two dimensions of political equality: vertical and horizontal equality. Vertical equality compares the power of private citizens with individual public officials, while horizontal equality compares the power among different private citizens or groups of citizens. Each of these dimensions, Dworkin suggests, must be taken into account when equality of power is measured. For example, if a detached conception of democracy is defined simply on the horizontal dimension, it can produce results that are embarrassingly counter-intuitive for egalitarians. Thus, a dictatorship which denied power to everyone could be said to distribute political power equally, if only in a negative sense. Likewise, one-party democracies which award everyone the vote, albeit an ineffectual vote, meet the requirement of horizontal equality of political power. These examples demonstrate that horizontal equality of political power is not a sufficiently stringent criterion to establish the grounds for a genuine democracy, and, therefore, must also be supplemented by some notion of vertical equality.

But an opposite problem occurs if one insists that democracy requires full vertical equality. If each citizen were to have the same political power as elected representatives, representative democracy itself would be redundant because public officials would have no deliberative function left to them. While the kind of direct participatory democracy implied by full vertical political equality may be suitable for small political communities, Dworkin maintains, it is unlikely to work for large modern states. This leaves the detached interpretation of democracy with a curious predicament. Despite its promise of supplying an uncomplicated representation of an egalitarian democracy, the detached view seems to provide a conception of equality of political power on the horizontal

dimension which is no guarantee of democracy, and a conception of equality of political power on the vertical dimension which, for all intents and purposes, is unobtainable.

However, Dworkin suggests that this disconcerting dilemma confronting the detached interpretation of democracy might be circumvented if the different measures of equality of power are carefully distinguished. Accordingly, he offers two alternative interpretations of what equality of political power might consist: equality of impact and equality of influence. A person's impact in politics, Dworkin states, is the "difference he can make, just on his own, by voting or choosing one decision rather than another."⁹ A person's influence, by contrast, is the "difference he can make not just on his own but also by leading or inducing others to vote or choose as he does."¹⁰ If properly applied, Dworkin contends, the distinction between political impact and political influence helps to dispel some of the incongruous political results which the detached interpretation of democracy seems to generate.

For example, as already observed, Dworkin thinks that vertical political equality is an impossible ideal because no modern representative democracy could function if citizens and public officials alike had exactly the same power in the political process. However, this objection only holds, he says, if vertical political equality were interpreted to mean equality of impact. On the other hand, if it is taken to mean equality of influence, then democratically elected representatives could have a recognizable deliberative function and yet be open to the influence of their electors. Thus, if a number

⁹ *Ibid.*, p. 9.

¹⁰ *Ibid.*

of features were built into the political system such as frequent elections, plebiscites, and the right of recall, they would create powerful incentives for public officials to be responsive to the influence of all electors. Equality of influence in this sense would not mean that each citizen had the same formal power as public officials, but that they would enjoy equal chances of having their wishes prevail when officials make decisions for the community.

There are also good reasons, Dworkin acknowledges, for thinking that equality of influence is the proper measure of political equality on the horizontal dimension. For a strong case can be made that the idea of equality of influence explains why egalitarians feel so dismayed about the disproportionate influence the rich have on politics. The concept of equality of impact cannot capture this grievance because, by definition, the vote of a rich person carries no more weight than anyone else's, and this ultimately is what the measure of political impact is constrained to take into account. It would seem, therefore, that only if equality of influence is designated in advance as a political norm on the horizontal level could one categorically condemn a democratic polity dominated by the rich.

From these several observations Dworkin concludes that the most plausible detached interpretation of democracy would seem to be one in which equality of influence is adopted as the criterion of political equality, both on the horizontal as well as the vertical dimension of equality. But, Dworkin offers this inference only to serve as a foil against which he develops a more elaborate argument in favour of an alternative, dependent interpretation of democracy. Equality of influence may appear to be an

intuitively fair representation of what political equality calls for, but, after helping to establish how this view could be reasonably held by egalitarians, Dworkin registers his own dissent. He does so by first noting that vertical equality of influence may not after all be an appealing political norm if it ends up denying public officials the ability to exercise independent judgement in the Burkean sense. Dworkin adds that a number of features of American democracy such as fixed terms for legislators and the executive, or lifetime appointments of judges at certain levels, testify to the wide acceptance in that country of the principle that public officials must be given the opportunity to act independently of the wishes of the majority at least some of the time. This should give pause, he argues, to the uncritical acceptance of a pure detached conception of democracy that insists on full vertical equality of political influence.

But more significant, from Dworkin's perspective, is the reservations that can be made against the idea of full horizontal equality of influence. He concedes that the ideal of horizontal equality of influence appears to be particularly useful in explaining why egalitarians find it unfair for some private citizens to have more political influence than others because they are rich. But, he notes that there are actually two ways of accounting for this sense of unfairness. One could object to the disproportionate political influence which the rich possess on the straightforward grounds that any deviation from the goal of strict equality of political influence is a defeat for democracy. Or, one could object to the disproportionate influence of the rich on the grounds that the source of their excessive political power violates the distributive principles of equality. On this second view, what is ultimately wrong with the unequal political influence of the rich is not the

mere fact that they are able to exercise more political influence than others, but that they derive their inordinate influence from their unequal wealth which itself cannot be justified on grounds of egalitarian justice. It is, therefore, the inequality in wealth that is morally objectionable, and the further inequality of political influence which flows from that unjustified wealth is to be treated as a consequence and not an independent cause of political injustice.

Dworkin is convinced that the second way of accounting for objections to inequalities in political influence is superior because it does not condemn all sources of unequal political influence. For instance, some individuals may enjoy more influence in politics because they take a greater interest in the political process, or have undertaken the training which makes them more effective in the art of politics, or simply because they have the type of personality which helps them be more persuasive in political argument. To try to balance political influence in these latter cases would be plainly wrong, Dworkin insists, because the interest, training or natural charisma that individuals might bring with them to the political process cannot be regarded as unfair advantages. Rather, they should be seen as authentic expressions of an individual's commitment to, or preoccupation with, the success of his or her favoured political causes. Indeed, if no inequality of influence were to be permitted in a democracy, a powerful incentive to participate would be erased.

To reaffirm this point, Dworkin asks us to imagine what measures would have to be employed to ensure that everyone enjoyed exactly the same amount of influence in politics. One way would be to deprive politics of its character of collective deliberation

in order to neutralize the advantages in influence that would normally fall to those with superior gifts of persuasion. But the only effective way of preventing collective deliberation would be to prohibit political speech and association, and such measures would manifestly deny democracy some of its most morally attractive features.

A second way in which inequality of influence might be mitigated would be to set a limit to the amount of money any individual could invest in political campaigns. Dworkin admits that campaign expenditure limits are justified in democracies where unjust wealth differentials prevail because in such cases the goal is to prevent the wealthy from unfairly multiplying and perpetuating their already illegitimate economic advantages through political means. But, in a world where distributive equality obtained, campaign expenditure limits would lose their moral force. In such an ideal world, the fact that some might choose to spend more of their resources on politics than others is not a moral concern but merely a reflection of different interests or convictions which the politically motivated happen to have.

Finally, a third and most improbable method of eliminating differences in political influence would be to educate people not to use their experience, commitment, or character to influence others on political matters. Such a strategy is obviously pointless because it is inconceivable to have individuals somehow repress such vital aspects of their personalities when engaged in political argument. And even if it were feasible, this kind of deliberate self-restraint would be a mockery of democracy because it would eliminate the agency value of participation. By demanding that the passions and convictions which people ordinarily bring to politics be held in check, this alleged

egalitarian strategy would end up sundering the continuity between the moral and political components of peoples' lives. The result, Dworkin contends, would be a repudiation of the most profound moral point of political participation: "...people who accept equality of influence as a political constraint cannot treat their political lives as moral agency, because that constraint corrupts the cardinal premise of moral conviction: that only truth counts."¹¹

Dworkin's reappraisal of the value of equality of influence is meant to show that the detached interpretation of democracy is an unsatisfactory political ideal because its potentially most plausible measure of political equality fails to adequately capture the full range of moral and political concerns which egalitarians presumably share. If Dworkin is right in his analysis, there are good reasons to consider his further suggestion that a dependent interpretation of democracy might be better equipped to account for those central features of democratic politics which egalitarians esteem. Before examining his argument in favour of a dependent conception of democracy, however, it is important to come to some conclusion about the cogency of his critique of the detached or procedural conception.

Central to that critique is Dworkin's assertion that a detached interpretation of democracy which adopts equality of influence as its criterion for political equality exacts too heavy a price because it ends up removing vital political and moral values from the democratic process. There is a problem, however, in the way Dworkin conceives this price. The problem can best be illustrated by looking at the way in which Dworkin

¹¹ *Ibid.*, p. 17.

defends unequal political influence in an ideal world devoid of unfair economic inequalities. Dworkin asserts that in a society in which distributive equality is achieved, the remaining disparities in people's political influence is of no moral consequence because these differences merely register the varying interests in, and training for, politics, as well as the different persuasive powers which people have or have developed. This means that in an ideal egalitarian society, if some should choose to devote more of their resources and energies to politics than to other pursuits, this is no more morally reprehensible than the ambitions which lead some to make risky productive investments in a market economy while others employ their resources merely for purposes of consumption. Political ambitions, Dworkin appears to imply, are like economic ambitions. As long as they are not augmented by morally unfair discrepancies in individual endowments, they are beyond reproach from the point of view of an egalitarian ethic.

But this begs two very important questions. What is to count as morally unfair sources of inequality of influence? And secondly, even in the ideal world of equal resource distributions, what is there to guarantee that those who are politically more ambitious are not merely engaging their moral convictions through active participation but actually using their superior abilities to influence political decision-making in ways that are to their own exclusive advantage?

The first question invites a comparison with Dworkin's strategy for identifying which disabilities and talent deficiencies merit compensation in a theory of equality of resources. If the comparison is to be faithful to the ethic underlying resource equality,

it would seem that those individuals deficient in rhetorical skills or other capacities deemed essential to success in exerting political influence should receive compensation to bring them closer to some stipulated average influence level. On Dworkin's own sense of fairness, this would seem to imply that not only the illegitimate privileges of wealth, but all unchosen disadvantages in natural political skills must be levelled if an equitable democracy is to be attained. But then contrary to Dworkin's analysis of the shortcomings of the detached interpretation of democracy, this would argue in favour of, rather than against, equality of influence.

Doubtless it was the recognition that such a parallel argument from resource equality could be attempted which led Dworkin to add a coda to his article on democracy, disavowing any straightforward comparison between economic and political equality.

If a community is genuinely egalitarian in the abstract sense--if it accepts the imperative that a community must treat its members individually with equal concern--then it cannot treat political impact or political influence as themselves resources, to be divided according to some metric of equality the way land or raw materials or investments might be divided. Politics, in such a community, is a matter of responsibility, not another dimension of wealth.¹²

Defining equality of political power as a matter of responsibility rather than a dimension of wealth does not exactly clarify what is to count as unfair sources of inequalities in political influence, but it does suggest a line of response to the second question of what guarantee an egalitarian community can provide that its politically ambitious citizens will not use their superior skills simply to serve their self-interest. One

¹² *Ibid.*, p. 30.

could say that in an egalitarian democratic community the moral sentiment of individual responsibility for the common good would be sufficiently strong to ensure that the motive inducing the ambitious to pursue their political projects would never be self-serving.

If this is what Dworkin means, one could easily protest that he supplies neither an empirical nor a theoretical argument supporting the view that democratic societies, even democratic societies animated by a rigorous commitment to equality, produce just the right sort of moral sentiment of civic responsibility. There are, of course, no shortage of empirical arguments about how liberal democracies stimulate a destructive politics of self-interest. Working from within a liberal perspective, for example, Theodore Lowi has presented a cogent argument that the multiplication of interest groups in modern liberal democratic states has fatally weakened the capacity of government to construct policies for the common good.¹³ On the other hand, Marxist writers like Ralph Miliband, who take an instrumentalist view of the capitalist state, have been able to make plausible arguments concerning the linkages between state and economic elites, and by extension, the class nature of democratic politics.¹⁴

But, there are also compelling theoretical reasons for thinking that even an ideal democracy in which economic equality prevails might end up encouraging a politics of *parti pris* rather than a politics of the common good if it rejects the normative goal of equality of influence. Rousseau, for example, was one egalitarian who was convinced that unequal political influence would invariably diminish the possibility of deriving a

¹³ See Theodore Lowi, The End of Liberalism (New York: Norton Books, 1969).

¹⁴ See Ralph Miliband, The State in Capitalist Society (London: Quartet Books, 1973).

common good through democratic deliberation. Rousseau's well-known charge was that once partial associations and political advocacy are allowed to exist in a democratic society, individuals cease thinking about the common good and instead pursue their personal interests. In such circumstances, Rousseau argued that political decisions would simply represent the will of the majority which itself would be no different than the interest of the stronger. To preclude such a degeneration of democracy, Rousseau advocated a ban on political associations and advocacy, and, failing such austere measures, a deliberate multiplication of partial societies in an effort to prevent inequalities among factions from arising.¹⁵

It could, of course, be objected that Rousseau's reflections on the conditions that help to sustain a rigorously egalitarian form of democracy provide no real support for the detached interpretation of democracy which Dworkin criticizes. After all, this latter conception of democracy argues for the principle of strict equality of influence based on the idea of procedural fairness, that is, that no one should have more say than anyone else in the political matters of the community. Once procedural fairness is guaranteed, however, the detached conception of democracy abstains from assessing the wisdom of majoritarian democratic decisions. Rousseau, on the other hand, had different, and, in some philosophical quarters, rather dubious, grounds for insisting upon equality of influence. By representing the General Will of a community as an objective good to be discovered by sincere and independent individual judgements, or at least by judgements which are mediated by a thoroughgoing pluralism of factions, Rousseau was concerned

¹⁵ See Jean-Jacques Rousseau, *On the Social Contract*, Roger D. Masters, ed. (New York: St. Martin's Press, 1978), Bk. III:iii and Bk. IV:ii.

as much with the substantive results of democratic deliberation as with its procedural mechanisms. If one rejects as implausible Rousseau's view that a properly devised General Will unerringly produces the right substantive results, then one will be tempted to conclude that his apprehensions over the distortions which factions and political advocacy bring to democracy are misconceived.

However, this is a conclusion that Dworkin cannot readily share because, like Rousseau, he believes that the proper conception of democracy includes both substantive distributive and participatory goals. This introduces a dilemma into Dworkin's project. He cannot allay the Rousseauesque misgivings about unequal political influence by falling back on the procedural notion that democracy means majority rule *simpliciter* because he endorses a conception of democracy which aims at achieving the right distributive results. Therefore if Dworkin is to succeed in his task of defending a dependent conception of democracy, he will have to find a way of showing that certain inequalities in political influence are not only morally inconsequential, but are positive features of a democratic politics designed to secure the right substantive as well as procedural goals.

4. The Dependent Conception of Democracy

Dworkin begins his portrayal of a dependent conception of democracy by stating that it "provides an important though limited place for equality of impact but none for equality of influence."¹⁶ To illustrate why impact though not influence should figure as a qualified measure of political equality, he reports how a dependent conception of

¹⁶ "Political Equality," p. 19.

democracy ideally would depict the symbolic, agency and communal consequences of participation. The symbolic consequences of participation are established through the distribution of the vote, and any particular distribution, Dworkin claims, simply reflects the political impact citizens enjoy in the political process. For egalitarians, he declares, there are compelling symbolic reasons to take horizontal equality of impact as the *prima facie* standard for democratic institutional arrangements, and this means practically that the one-person, one-vote principle should be combined with equal electoral districts. But, Dworkin also allows that deviations from this standard can be condoned in certain circumstances and attempts to supply a justification for when such deviations are permissible.

This justification is framed in such a way as to pre-empt the criticism that departures from strict horizontal equality of impact directly offend the abstract egalitarian principle enjoining equal concern and respect for all citizens. Deviations from equality of impact are acceptable, Dworkin states, when they "cannot plausibly be understood as reflecting adversely on the standing or importance of those whose impact is made less."¹⁷ In other words, unequal voting power is admissible in the symbolic sense if it carries no connotation of contempt or disrespect for those who end up with less political impact. Dworkin explains that historical conventions can act as guides in judging when unequal voting power is a permissible deviation from the principle of horizontal political equality. Thus, whereas American history would condemn unequal voting power within electoral districts, it is at least possible, he says, to imagine other political communities

¹⁷ *Ibid.*

whose history supported a weighted voting scheme favouring older or better trained members of society.

While this discussion of tolerable deviations to strict equality of political impact has obvious affirmative implications for John Stuart Mill's theory of representative government with its recommendation of a plural voting scheme, Dworkin's more immediate purpose in raising the idea is to supply a justification for certain accepted practices in American politics. The constitutional arrangement whereby each state sends the same number of representatives to the American Senate, for instance, diverges from the democratic goal of equal political impact because the votes of individuals from smaller states are mathematically of more consequence than the votes of those from larger states. However, Dworkin is confident that American political history lends support for this deviation from strict equality of impact because the Senate scheme of representation was not originally motivated by, or reflective of, any contempt or disrespect for the citizens of more populous states.

This justification of acceptable departures from strict equality of impact might strike one as extraordinarily weak, particularly because the bar of history to which Dworkin alludes is a questionable source of standards of political right. After all, if historical conventions were granted canonical status in a political theory, one could, with at least a requisite measure of consistency, interpret the exclusion of blacks from the franchise during a large part of American history not as conveying contempt or disrespect for a particular class of individuals, but as reflecting a legitimate and socially sanctioned concern that voters possess the proper educational skills to fulfil their citizen obligations.

It takes little reflection to recognize that using history in this way as a gauge to decide what constitutes equal concern and respect is always a tempting invitation to indulge in ideological rationalizations.

Indeed, Dworkin's admission of historically determined standards of political equality into his argument for democracy seems to be at odds with the theoretically more complex attitude he takes to the question of historical or cultural relativism. For example, in his critical review of Michael Walzer's Spheres of Justice, Dworkin admonishes Walzer for falling into a form of relativism in which the customary distributive practices of a society are perceived to be self-justifying. Historical conventions, he counters, can illuminate the varied ways in which justice is conceived, but they can never replace reasoned normative arguments about justice.¹⁸

As it turns out, Dworkin appears to confirm the necessity of employing an independent normative argument to establish the limits of political equality. For even though he suggests that historical or cultural variations to the principle of strict equality are justifiable, he parenthetically notes that the qualification that any districting scheme which embraces inequality of impact must not reflect any lack of equal concern is a "requirement particularly easy to evade."¹⁹ He proposes, therefore, that for prophylactic reasons a dependent conception of democracy "would insist that a strong and evident case be made for any exemption from the equal impact requirement."²⁰

¹⁸ See Dworkin, "What Justice Isn't," A Matter of Principle, pp. 214-20.

¹⁹ "Political Equality," p.20n

²⁰ *Ibid.*

But what comprises a strong and evident case for exemptions from the presumptive principle of equality of impact? Dworkin's only concrete example of how a strict burden of proof for exemptions is to be constructed is offered in the context of a subsequent discussion about which democratic provisions are more likely to produce accurate decisions about community welfare. If a country which contains sparsely settled as well as populous regions observed the rule of equal electoral districts, chances are that the residents of the underpopulated regions will have their unique interests systematically neglected in electoral politics. According to Dworkin, the possibility that the interests of some identifiable group might consistently be disappointed in democratic contests furnishes compelling reasons for altering electoral arrangements to mitigate the risk. This argument justifies, for example, unequal districting between rural and urban constituencies, and, one might assume, the same argument could be used to support the American constitutional provision of equal state representation in the Senate.

However, Dworkin fails to recognize that what persuasive power his contingent argument for unequal districting has rests on the fact that it actually replaces the precept of the abstract egalitarian principle with quite different moral and political concerns. For instance, if it is perceived to be fair that rural constituencies can have fewer voters than urban, the reason cannot be that rural voters have special interests that they wish to protect, but that those interests are *deserving* of the type of protection which unequal districting helps provide. Or again, the reason why an equal Senate might be considered a fair arrangement is not because Wyoming voters will otherwise risk losing out to New York voters, but that Wyoming voters have unique interests that are *worth* defending

through a departure from the principle of representation by population.

It does not help to say, as Dworkin does, that unequal districting in these cases reflects no contempt or disrespect for urban or New York voters, because ultimately that is not what explains the decision to forsake the principle of equality of impact. Rather, in both cases further reasons have to be adduced to explain what constitutes the worthiness of rural or Wyoming interests, and which vindicates a departure from the principle of equality of political impact. It is possible, for instance, to argue that rural over-representation in legislatures is reasonable because agriculture is profoundly important to the national economy, and, therefore, requires the advantages of gerrymandered districts. Again, one could maintain with some plausibility that equality of state representation in a federal senate is a sensible institutional arrangement because states are distinctive political entities whose identities and interests require that each be given the same voice in deliberations over national policies.

Are these sufficiently sound and strong arguments to justify deviations from equality of political impact? From the perspective of Dworkin's theoretical argument it is difficult to answer because, after raising the idea of a strict burden of proof, his only explicit criterion for what is to be judged as an acceptable deviation from equality remains those historical conventions that are "obviously innocent" of inegalitarian moral attitudes towards any class of individuals.²¹ However, this is hardly a conclusive test for establishing what is politically right, especially since both unequal rural districting and state equality in the American Senate have not always been regarded as

²¹ *Ibid.*, p. 20.

uncontroversial arrangements.²²

It would seem, therefore, that if Dworkin wishes to make his case that such electoral arrangements are in fact justified in the face of genuine historical disagreements, he must be prepared to provide an evidentiary test that is less ambiguous than the argument invoking "innocent" conventions. Such a test would, in all likelihood, have to contain an acknowledgement that the ideal of democratic self-government includes a plurality of political aims, of which political equality is only one. Furthermore, identifying and rating the relative importance of these several aims would imply that in cases of conflict, one aim must give way to another. This means, for example, that if the goal of equality of political impact must give way to more important political aims such as protecting agriculture or state rights, it is rather beside the point to say that those who end up with diminished political impact were not discriminated against on account of their character. Instead, the more important theoretical challenge is to state why strict political equality is less momentous than other goals in these circumstances. Because he has not furnished any reliable indication of how to identify and rate the different political aims implicit in the ideal of democratic self-government, there are good reasons, therefore, for thinking that Dworkin's defense of limited inequalities of political impact remains crucially incomplete.

This impression of incompleteness is only reinforced when one observes the way in which Dworkin treats the second participatory goal of agency. The agency value of

²² And if recent Canadian history is to be heeded, the idea of equal provincial representation in the Senate is a source of contention rather than an innocent aberration from the notion of equality of political impact.

participation refers to the degree to which individuals are able to carry their moral concerns and convictions into the political realm. It is obvious, Dworkin says, that if political life is to be a satisfactory extension of moral life, freedom of expression and association must be guaranteed. But, our unhindered ability to speak and associate on behalf of our moral and political concerns is itself insufficient to secure equal moral agency, he adds, unless we have reason to believe that through participation we can make a difference in the common affairs of our political community. This leads Dworkin to conclude that a dependent conception of democracy must insure "a degree of political *leverage* for each citizen."²³

Significantly, Dworkin acknowledges that equal leverage is only partially achieved by the one-person, one-vote principle and equal districting. Individuals in large constituencies, for example, will discover the leverage of their vote to be almost negligible. If the idea of leverage is to have any meaning, therefore, it must include enough guaranteed access to institutions like the media in order to give everyone the opportunity to influence others if she or he can. But, once the notion of equal leverage is introduced, it is hard to see how this differs from the idea of equality of influence which Dworkin had previously rejected as a political norm for democracies.

Dworkin insists, nevertheless, that there is a difference between the two ideas. Whereas the concept of equality of influence implies a levelling of all sources of political influences, the notion of fair opportunity for leverage refers only to a threshold share of influence to which everyone is entitled. Thus, the emphasis behind the idea of leverage,

²³ "Political Equality," p. 21.

according to Dworkin, is "on the opportunity for some influence--enough to make political effort something other than pointless--rather than on the opportunity to have the same influence as anyone else has."²⁴

Unfortunately, this formulation begs questions similar to those that were previously raised in the discussion of Dworkin's rejection of the ideal of equality of influence. What kinds of opportunities are to be deemed to be sufficient to ensure political participation will not be pointless? And what guarantee is there that those who enjoy more leverage will not use this to their own narrow advantage? These questions once again raise the familiar Rousseauian apprehensions about the hazards facing democracy when political power is not distributed equally. Without some theoretical resolution to these questions, Dworkin's claim that the idea of leverage calls only for a threshold rather than an absolutely equal level of influence will surely sound suspect to egalitarians.

5. Democracy and the Value of Community

There is a sense, however, in which Dworkin is able to alleviate, at least in part, the suspicion that his theory of democracy is insufficiently attentive to genuine concerns which egalitarians might have over unequal political leverage. This can be seen when he turns to the last of the participatory goals of democracy, the communal values which emerge from individual identification with, and responsibility for, the nation's collective acts. It is interesting that when he discusses the communal values of participation, the

²⁴ *Ibid.*, p. 22.

various qualifications which Dworkin makes to the presumptive ideal of equality of political impact are presented with a distinctively Rousseauian cast. This Rousseauian turn represents a pivotal point in Dworkin's argument for democracy and bears close attention.

To clarify the place communal values occupy in a dependent conception of democracy, Dworkin begins by distinguishing two kinds of collective action: statistical and communal. Statistical collective action refers to group activities which are clearly and unambiguously reducible to individual activities. For example, it is common to refer to the foreign exchange market as a collective entity which, through its activities, influences the relative prices of currencies. But, one need not assume the existence of some mysterious group entity to explain this process because the collective action of the foreign exchange market is only the statistical consequence of the combined effects of numerous transactions made by individual currency traders. Communal collective action, on the other hand, is not something which can be reduced in this manner to a cumulative function of individual actions, according to Dworkin, because it is "collective in the deeper sense that does require individuals to assume the existence of the group as a separate entity or phenomenon."²⁵

The responsibility which many contemporary Germans feel for the actions not simply of other Germans but of the German nation during the Nazi regime testifies, Dworkin claims, to the existence of this communal sentiment. Alternatively, borrowing

²⁵ "Equality, Democracy and Constitution," *op. cit.*, p. 329.

Rawls's analogy of the orchestra,²⁶ Dworkin suggests that communal collective action can be likened to the performance of a symphony in which individual musicians "play as an orchestra, each intending to make a contribution to the performance of the group, and not just as isolated individual recitations."²⁷

Depending on which of the two conceptions of collective action is adopted, one's understanding of democratic self-government will vary. The statistical account of collective action, because it depicts the collective simply as an aggregate of individuals, encourages a view of democracy in which self-rule is equated with majority rule. The communal conception of democracy, in contrast, portrays the people who collectively make political decisions as a distinct entity, irreducible to individual citizens who together comprise it.

However, Dworkin recognizes that conceiving of the people as a collective entity is for many an unacceptable proposition, either because it entails doubtful ontological assumptions, or because it sounds ominously totalitarian. His response to such apprehensions is to say that it all turns on how we envisage the existence of the group as a separate entity. Thus, it is possible to represent the idea of a collectivity in ways that are not mysterious or threatening if a sharp distinction is drawn between *integrated* and *monolithic* communal collective action.

These two separate ways of understanding communal collective action involve critical differences in how responsibility for, and judgement about, political choices are

²⁶ See John Rawls, A Theory of Justice, *op. cit.*, p. 523n.

²⁷ "Equality, Democracy, and Constitution," p. 329.

to be attributed. These differences are manifested in the assumptions people have about how self-conscious activity is to be assessed. As Dworkin explains it, "[w]e assume, first, a particular unit of responsibility, by which I mean the person or group to whose credit, achievement or failure the action redounds, and, second, a particular unit of judgement, by which I mean the person or group whose convictions about what is right or wrong are the appropriate ones for us to use when making that assessment."²⁸

By introducing these latter distinctions between unit of responsibility and unit of judgement, Dworkin hopes to capture the various *attitudes* people bring with them to the notion of collective action. On the statistical conception of collective action, the typical attitude is that individuals are the pertinent units of action, both in terms of responsibility and judgement. But, in the communal conception of collective action, different sets of attitudes are possible. Hence, on the integrated view, people assume the attitude that the unit of responsibility for collective action is first and foremost the group rather than any of the individuals who belong to it. It is this integrated sense of collective responsibility, for example, which underlies the self-assumed war guilt which a contemporary generation of Germans often express, or which members of an orchestra or a baseball team feel when they experience the success or failure of their cooperative ventures. "In these cases," Dworkin advises, "the attitudes of individuals create and presuppose a new unit of responsibility: the group. The group, we might say, is the unit that does well or badly, and individuals share in its responsibility derivatively, because they are members of

²⁸ *Ibid.*, p. 335.

it."²⁹

While the integrated view of communal collective action thus recommends that citizens regard the nation of which they are a part to be the collective unit of responsibility, the same attribution is not extended to the activity of judgement. On the contrary, the integrated conception of communal action insists that the individual remains the unit of judgement for his or her actions, and, in a different sense, for the actions of the collectivity. But if this is to be the case, is the community to play no role in the formation of individual judgement? Here Dworkin urges that a crucial distinction be borne in mind between the idea that a collectivity *influences* the evaluative judgements of its members, and the quite different idea that a collectivity necessarily *constitutes* its members' evaluative judgements.

The integrated view of communal action recognizes that the collectivity supplies standards which influence its members evaluative judgments, but it also affirms that those judgements must finally be made on the basis of personal convictions. This is where the integrated conception of communal collective action parts company with the monolithic conception. The monolithic conception not only regards the collectivity as the appropriate unit of responsibility, but it also considers the collectivity to be the only relevant unit of judgement. The monolithic view, therefore, implies a totalitarian conception of the collectivity in which the community is seen as its own judge.

By contrasting monolithic from integrated conceptions of collective action in this fashion, Dworkin tries to draw the sting from criticisms that liberal political morality

²⁹ *Ibid.*, pp. 335-36.

cannot afford to embrace any metaphysically extravagant or politically dangerous notion of communal participation. Whereas the monolithic conception of communal collective action does give rise to a picture of political community which liberals find disturbing, its integrated counterpart is not only more benign, but, Dworkin contends, the more appropriate ideal by which to describe an egalitarian democracy. Unlike the monolithic conception, the integrated view of communal collective action reserves a critical space for independent political judgement. And unlike the statistical conception of collective action, which attends only to the additive aspect of individual interests, the integrated view of communal action presupposes a collective identity and purpose for which individual citizens take responsibility as members of the collectivity.

This latter supposition takes Dworkin some distance in the direction of Rousseau's idea of the General Will. And, although he stops short of fully embracing Rousseau's metaphysical portrayal of the General Will, Dworkin's argument for certain institutional features that would both protect and amplify the democratic supposition of a collective identity and purpose bears an interesting resemblance to Rousseau's more fanciful recommendations for ensuring that the General Will always prevails.

To appreciate this affinity it will be useful to recall how Rousseau posed the problem of the General Will. Assuming that individuals are motivated by self interest, Rousseau asks what form of political organization can allow individuals to unite forces in such a way as to leave each obeying himself, and, therefore, to remain as free as he was before. His answer is a radical pre-political contract whereby each individual surrenders his rights to the collective judgement of the whole community. The democratic

deliberations of the community produces the General Will, which, when properly articulated, never errs about the common good. And, because that common good represents the true interests of the citizens who conceive it, obeying the General Will is tantamount to obeying oneself.

However, as pointed out previously, Rousseau cautioned that for the General Will to be known, partial associations and political advocacy should either be prohibited or expressly controlled lest personal interests come to predominate over the common good. But this latter is not the greatest problem confronting the General Will. Rather, the more fundamental problem is that the contract by which pre-political individuals agree to obey the General Will presupposes that such individuals are already motivated to suppress private in favour of public interests. However, because Rousseau acknowledges that individuals are naturally self-regarding, the generation of the contract seems improbable. To resolve this dilemma, Rousseau resorts to an implausible solution. A Legislator is charged with the responsibility of preparing people for the transformation from self-centred individuals to collectively-oriented citizens. As well, Rousseau proposes further devices such as censors, a Tribune, and a civil religion, which together can serve to fashion resolutely civic-minded citizens. However, all of these measures, as Rousseau's critics routinely assert,³⁰ seem to make a mockery of the idea that citizens of Rousseau's democratic state are free and self-governing.

Unlike Rousseau, Dworkin does not attempt to construct an argument for democracy in which pre-political individuals are assumed to contract amongst themselves

³⁰ See, for example, Lester G. Crocker, Rousseau's Social Contract (Cleveland: Case Western Reserve University Press, 1968), pp. 73-94.

to create a political society. Indeed, his theoretical enterprise is much more complex than the typical contractarian argument. Dworkin attempts to fashion an interpretation of democracy which takes into account the established features of existing liberal democracies, and which provides those features with their most morally attractive justification. Such a theoretical exercise is at one and the same time interpretative and normative, supplying both a justification for existing democratic practices and prescriptions for whatever reforms are indicated by the interpretation.

Therefore, because Dworkin does not begin this interpretative exercise with any foundational speculations about human nature or political society, he does not encounter quite the same dilemma as did Rousseau of discovering a way of effecting moral transformations. But, an analogy can nonetheless be drawn between Rousseau's transformational problem and Dworkin's own theoretical predicament of reconciling the settled democratic convention of majority rule with the right substantive political results. Because Dworkin's predicament is most clearly evident in his discussion of communal collective action, it is necessary to look more closely at what is implied by its two variants.

The difference between the integrated and the monolithic conception of communal collective action, Dworkin asserts, is to be found in the attitudes which people have towards the appropriate unit of responsibility and judgment in politics. These attitudes are part of the general ethical convictions people have about the political world. It is this stress on ethical convictions which allows Dworkin to say that "[c]ommunal collective

action is not a matter of metaphysical but (as we might say) of *ethical* priority."³¹ In other words, an integrated communal democracy can only exist to the extent that individuals share the kinds of ethical convictions which promote civic-minded concerns for the well-being of the community as a whole. But whence come these ethical convictions? Dworkin's answer is that they come, in part, from the design of democratic institutions. Thus, he places great stress on the importance of the right institutional features in a democracy: "we need background institutions and assumptions which elicit and nourish the needed pair of democratic attitudes: collective responsibility and individual judgement."³²

When Dworkin says that background institutions are required to nourish and elicit the proper democratic attitudes, one cannot help but notice a parallel with Rousseau's own prescriptions for a Legislator and other institutions and practices which can guide citizens in their civic roles. Of course, the parallel is by no means exact because Dworkin insists that an attractive communal conception of democracy must preserve the individual's independence of judgement even as it encourages collective responsibility for the acts of the political community. It is worth exploring how far this difference takes Dworkin from Rousseau's transformational dilemma. But to do this, more needs to be known about the institutional principles which Dworkin claims serve to encourage the right democratic attitudes.

Political institutions can contribute to the creation and maintenance of an

³¹ "Equality, Democracy and Constitution," p. 336.

³² *Ibid.*, p. 337.

integrated communal agent, Dworkin states, if they give individuals "a *part* in the collective, a *stake* in it, and *independence* from it."³³ To be ensured a part in the collective means simply to have the opportunities to play a role in its decisions, and this implies the need for those familiar rights to voice and vote. Hence, the various arguments Dworkin made on behalf of equality of political impact and a threshold level of leverage gain added force when viewed from the communal perspective.

Securing each citizen's stake in the collectivity, on the other hand, makes vivid what collective responsibility means. As Dworkin describes it, the principle of stake reflects the central idea of communal agency: "Membership in a collective unit of responsibility involves reciprocity: a person is not a full member of a collective unit sharing success and failure unless he is treated as a member by others, and treating him as member means accepting that the impact of collective action on his life and interests is as important to the overall success of the action as the impact on the life and interests of any other member."³⁴ Because the principle of stake means that citizens must be prepared to foster reciprocal respect for each other's interests, Dworkin suggests that it highlights the way in which the communal conception of democracy unites procedural and substantive justice. "How the community treats its members," he insists, "is part of what decides whether they are members of it, and therefore whether political decisions are made by a collective agent that includes them."³⁵ In other words, it is not enough

³³ *Ibid.*

³⁴ *Ibid.*, p. 339.

³⁵ *Ibid.*

that citizens have voting rights and guarantees of free speech and association for them to feel a part of, and responsible for, the actions of the collectivity, but they must also have assurances that the collectivity will make substantive decisions which show equal respect for everyone's interests.

Described in this way, Dworkin's understanding of the principle of stake displays an affinity with Rousseau's formulation of the political problem for which the General Will is the solution. But this would seem to imply that no matter how fair its procedural guarantees, no democracy could be considered legitimate unless it produced exactly the right substantive egalitarian decisions. Because only in light of such decisions could one be certain that everyone's interests have been equally taken into account by the collectivity. Dworkin recognizes the danger that the principle of stake could be interpreted in such a manner as to make "democracy a black hole into which all other political virtues collapse."³⁶ Therefore, he qualifies the role which the principle of stake is to play in a communal conception of democracy. It is not necessary, he says, that the political community reach the right egalitarian results for citizens to feel that they have a stake in the community, but only that it abides by the abstract egalitarian prescription commanding equal concern for all citizens. According to Dworkin, this means that a political community's "economic, social and legal arrangements must be such as could in the main be justified by some good faith interpretation of what equal concern requires."³⁷ And, although egalitarians might sincerely disagree about what the best

³⁶ *Ibid.*

³⁷ *Ibid.*

interpretation of the abstract egalitarian principle entails for economic, social or legal policies, there are limits to what can conceivably count as a good faith interpretation. Thus, Dworkin offers the reassurance that a "political system with equal suffrage, in which the majority distributes everything to itself with no concern whatever for the fate of some racial or other minority, will not count as an unjust democracy on the communal conception, but as no democracy at all."³⁸

While this qualification might rescue Dworkin's conception of the principle of stake from the theoretical peril he identifies, it introduces a new set of problems. First, it presupposes that political actors in a communally defined democracy will be motivated to pursue good faith interpretations of the abstract egalitarian principle. However, as previously mentioned, there are both strong empirical and theoretical reasons for thinking that this kind of motivation for civic responsibility is not automatically forthcoming in democracies. Indeed, this problem again raises Rousseau's dilemma of finding a way of ensuring that self-regarding citizens pursue only the common good in democratic deliberations.

Even if we allow that Dworkin's point is not causal but conceptual, that is, that a communal concept of democracy by definition consists of citizens who agree that politics is to be regulated by the abstract egalitarian principle, it is still not free of problems. For, it then raises the question of how we are to decide when the democratic process has yielded, if not the right interpretation, at least a good faith interpretation of the abstract egalitarian principle. As shall be seen shortly, Dworkin's answer is couched

³⁸ *Ibid.*

in probabilistic terms about who is more likely to produce the right interpretations.

Before turning to this answer, however, the third of Dworkin's communal institutional principles--the principle of independence--needs to be examined briefly. If a communal democracy is to be understood in the integrated rather than the monolithic sense, Dworkin contends, it must provide its citizens with the opportunities to exercise independent moral, ethical and political judgements. The principle of independence, therefore, reinforces the need for a communal democracy to guarantee extensive political liberties. Such liberties are thus to be regarded as structural parts of democracy rather than as supplementary constitutional conventions devised to disable democratic majorities from discriminating against minorities. But, according to Dworkin, not only does the principle of independence lend support for such traditional democratic concerns as freedom of speech and association, it also supplies a general presumptive argument in favour of liberal tolerance for matters relating to personal morality. Therefore, the principle of independence "makes some form of liberal tolerance for unpopular sexual and personal morality part of the very conditions of democracy."³⁹

There is an ostensible difficulty with this position, however, because it presupposes a distinction between the public and the private which the communal conception of democracy has no means of drawing on its own. On Dworkin's account, the communal conception both encourages collective responsibility for the public good and discourages collective responsibility for matters which can be regarded only as a matter of a person's private good. But where the line is to be drawn between the public

³⁹ *Ibid.*, p. 341.

and the private good cannot be established simply by stipulating a principle of independence because that principle in turn is in need of a supporting ethical theory. In his theoretical reflections on democracy, Dworkin tries to parry this conceptual difficulty by effecting a shift in the definition of the problem itself. Thus, just like the problem of determining when an interpretation of the abstract egalitarian principle is offered in good faith, so the question of where to draw the line between public and private good is transformed by Dworkin into the question of who decides.

6. Democracy and Adjudication

This process of recasting these two issues occurs when Dworkin probes the distributive side of democracy more closely. Because the dependent, or what he alternatively calls the communal, conception of justice is concerned with producing the right decisions about the distribution of resources and opportunities as well as other public matters facing modern governments, Dworkin asks how we can be certain that this will in fact happen. Or to be more precise, he asks: "How would we design a dependent conception of democracy if we wanted to improve the *accuracy* of these various decisions?"⁴⁰

The answer, he suggests, depends on which class of political decisions are involved. He proceeds to distinguish between two broad categories of political decisions according to which issues are their chief concern. One class of political decisions involve *choice-sensitive* issues which are "those whose correct solution, as a matter of justice,

⁴⁰ "Political Equality," p. 23.

depends essentially on the character and distribution of preferences within the political community."⁴¹ For instance, the decision whether to spend money on a new sports centre or a new road is characteristically choice-sensitive in the sense that, after all relevant considerations are taken into account, the actual preferences of the people should normally be decisive in determining the proper decision.

There are other issues, however, which Dworkin thinks are *choice-insensitive*. The decision whether to adopt capital punishment for crimes of murder, or to outlaw racial discrimination in the workplace, are examples of issues which Dworkin considers choice-insensitive. In these cases, he argues, peoples's preferences should not decide the matter because they involve fundamental issues of right which are morally valid regardless of what the majoritarian sentiments of the day happen to be.

The contrast between choice-sensitive and -insensitive issues is, of course, only a restatement of Dworkin's distinction between policies and principles described in chapter two. This fact should prepare one for Dworkin's answer to the question of how to devise democratic institutions which improve the accuracy of political decisions. Quite simply, democratically elected legislatures are best placed to accurately assess the right answers to choice-sensitive issues, while courts empowered with a constitutional bill of rights are best placed to accurately determine the right answers to choice-insensitive issues.

One might say that Dworkin's legislative solution to the question of how to produce accurate policy decisions is so self-evident as to sound trivial. However, in the

⁴¹ *Ibid.*, p. 24.

course of discussing the various institutional features which improve the antecedent likelihood that legislatures will discharge their policy functions accurately, he does provide a final argument against insisting on equality of influence which responds effectively to the Rousseauian concerns noted previously. Equality of impact is obviously important if legislatures are to respond faithfully to the wishes of electors in choice-sensitive issues. Hence, there are once again *prima facie* reasons for adopting the usual democratic conventions of one-person, one-vote and equal electoral districts.⁴²

But the same reasons, Dworkin claims, do not extend to equality of influence. Equality of influence is not needed to improve the antecedent likelihood that legislatures will reach the proper policy decisions because any effort to secure such equality risks removing crucially important kinds of political advocacy. As Dworkin cautions: "For just as some people or groups use their political influence to deceive or manipulate, so others use their influence to teach, reform and ennoble, to suggest ranges of value and ambition that might, for example, lead some people to favour a theatre over both a sports stadium and a road system who would not otherwise have even considered the choice."⁴³

Therefore, while there are sound reasons for trying to design institutional constraints designed to reduce the inappropriate influence of wealth in politics, or to encourage political debate free of deception and trickery, there are no general reasons

⁴² Dworkin nonetheless continues to maintain that the principle of equal districting can be modified if there are reasons for thinking that the antecedent likelihood of reaching accurate policy decisions reflecting the interests of all relevant constituencies would be improved by a judicious gerrymandering. See "Political Equality," p. 25. Of course, as mentioned previously, this raises a new problem of justifying what constitutes a relevant constituency for purposes of modifying the presumptive principle of equal electoral districts.

⁴³ "Political Equality," p. 26.

for trying to rid the political forum of all forms of influence, or even to achieve as much equality of influence as possible. Dworkin is surely right on this point, for any Rousseauian attempt to remove discussion and advocacy from the forum of politics imperils rather than improves the prospects of deciding rightly.

But what about choice-insensitive issues? Should they too be open to the potentially educative, reforming or ennobling advocacy which legislatures, exposed to the influences of the electorate, make possible? Dworkin thinks not. Rather, he proposes that with choice-insensitive issues, courts practising constitutionally sanctioned judicial review are antecedently more likely to make the right decisions. Furthermore, Dworkin claims that on the dependent conception of democracy he has elaborated, the court is not an undemocratic institution because it offends neither the symbolic or agency roles of participation. For instance, he suggests, rather weakly, that the American court system with its practice of judicial review "does not impair equality of vote, because it is a form of districting and does not, in itself, reflect any contempt for or disregard of any group within the community."⁴⁴ In a stronger vein, he argues that courts do not damage but improve the agency value of democratic participation by supplying especially strong protection for the various political liberties which sustain moral agency in politics. But, Dworkin saves his most forceful democratic defense of the courts for a claim about their argumentative character:

It...provides a forum in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting

⁴⁴ *Ibid.*, p. 29.

almost ever is. In this forum, moreover, the leverage of the minorities who have the most negligible leverage in ordinary politics is vastly improved.⁴⁵

One cannot help think it odd that in an argument devoted to exploring the best conception of democracy, the most enthusiastic depiction of political participation is reserved for legal arguments made in courtrooms. But, from Dworkin's perspective this is not to be considered eccentric because the issues of truly capital importance for liberal societies are issues of principle, and, as he insists, these are issues that cannot be trusted to the vagaries of majoritarian politics.

However, there still remains the question of accuracy. Why should one think that courts are antecedently more likely to produce accurate decisions on matters of principle? Dworkin's answer should by now sound familiar. Matters of principle refer to putative rights which individuals are said to have regardless of majoritarian sentiments, or, more precisely, as a protection against majority sentiments. Because courts are shielded from the influence of the majority which legislatures must normally heed, they are antecedently more likely to ensure that popularly approved legislation does not violate the constitutional rights of individuals. Courts, therefore, are the final guarantors of democracy because they contain the best assurance we can hope to have that the most important decisions facing democratic societies will be rightly made.

Has Dworkin succeeded in demonstrating that a dependent conception of democracy reconciles participatory and substantive distributive goals by making judicial review a central feature of democratic politics? Throughout this chapter, several problems

⁴⁵ *Ibid.*

were noted in specific parts of Dworkin's argument which suggest that he has failed in his task. But over and above these specific conceptual problems, a more general problem pervades the entire theoretical venture. According to Dworkin, political equality is secured when the appropriate participatory and distributive goals are met. However, these goals can only be met if certain choice-insensitive issues are removed to the forum of the courtroom where dedication to arguments of principle prevails. But how do we decide which issues are choice-insensitive?

This is not a matter for the majority to decide, Dworkin warns, because the question of what constitutes choice-insensitive issues must, by definition, be determined independently of what a majority thinks of the matter at any particular time. Therefore, this can only leave the court with the responsibility of deciding which issues are choice-insensitive and outside the legitimate competence of legislatures. The courts, are, of course, limited in their decisions by the constitution, but then they are also charged with the responsibility of interpreting the constitution according to their best lights.

In this view, the court system is not just one feature of a dependent democracy but is its central and determining institution. This, however, is precisely what is contested by those who claim that courts which ardently exercise their power of judicial review overstep their proper reach in democratic politics. Moreover, these critics can hardly be reassured by Dworkin's proposal that the court is its own judge of the limits of judicial review, particularly since what is meant to guide Dworkin's court in deciding its own limits is the conceptual distinction between private and public realms. According to Dworkin, the special democratic provenance of a court is to carefully maintain the

separation of the private from the public domain through constitutional interpretations which preserve for individuals the equal right to entertain their private moral, ethical, and political judgments, and, by extension, the activities which embody these judgements. What Dworkin has failed to satisfactorily demonstrate, however, is how the line between public and private is to be unambiguously drawn. That failure not only makes the court's role in distinguishing between choice-sensitive and choice-insensitive issues problematic, but it also risks making his various egalitarian distributive arguments precariously unstable.

For example, this chapter began by noting Dworkin's concession that in his ideal distributive theory he had not established which resources should be made available for private appropriation and which should be commonly held. He suggested that the resolution to this question required a theory of political equality. But, in the end, his theory of political equality proves to be of no avail. For, ostensibly, that theory can only decide the question of the market's legitimate domain by determining whether the issue is choice-sensitive or -insensitive.

If the issue is choice-insensitive, it falls to the courts to judge what legal form resources should take. However, the courts could not then refer to Dworkin's ideal egalitarian distributive theory to settle the matter because that theory presupposes the very decision the courts are supposed to effect. As a matter of fact, this example is moot because Dworkin explicitly denies that courts can decide general matters of economic distribution because it is, in the first instance, a policy concern.⁴⁶ This means that the

⁴⁶ See, Law's Empire, pp. 222-24, 309-12.

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issue is ultimately choice-sensitive which implies that there is no *a priori* answer to the question of what should be made available for private appropriation.

If Dworkin's theory of political equality does not supply his distributive theory with a determinate solution to the critical question of the appropriate role for market transactions, what does it furnish? The answer, it would seem, is that it endows democracy with a Rousseauian solution to the problem of ensuring civic-mindedness. True, Dworkin resists portraying democracy as an exercise in discovering a General Will that never errs. Therefore, he takes considerable pains to show why independence of judgement is integral to democracy, why inequality of influence can be a positive feature in democratic decision-making, and why, in a certain class of decisions, the right answer is usually what the majority wishes. But, he also insists that the court must have the final judgement on how individuals are to deliberate collectively, and upon what matters they are permitted to collectively deliberate. The court is thus Dworkin's Legislator, working to make sure that citizens are guided by the proper motivations in the democratic forum of politics. Whether Dworkin's court has the same improbable powers as Rousseau's Legislator can only be determined, however, by returning once again to the question of how adjudication is to be understood. Therefore, in the next three chapters, Dworkin's right answer thesis will be reexamined, but this time in the light of his most sophisticated restatement of it in Law's Empire.

Chapter Eight

Interpretation and the Law

1. Introduction

Law's Empire represents Dworkin's most ambitious and sustained attempt to construct a theory of law and adjudication that could explain and justify the salient features of judicial practices in modern liberal states. In this most recent theoretical effort, Dworkin alters his earlier "model of rules" depiction of judicial decision-making that made use of a spatial metaphor in which moral and political principles were portrayed as inhabiting the interstices of the established rules of law. On this "model of rules" characterization, judges were charged with the task of "discovering" and reconciling the various legal, moral, and political principles latent in settled law into a coherent whole displaying the virtue of "articulate consistency."¹

While retaining the basic thrust of this description of adjudication, Dworkin has come to replace the formalism found in the model of rules argument with a more fully interpretative view of the judge's art. Thus, judges are now depicted as supplying interpretations of the law guided by the moral-political imperative of "integrity". On this interpretative view, judges must still attend to principles, but there is a decided shift of emphasis to the constructive role which they invariably must have in determining what principles underlie established law.

¹ See *supra*, chapter 2, pp. 69-70.

Despite this change in emphasis, three features of Dworkin's various arguments about law and adjudication have remained constant throughout his writings. One of those features is his continuing attack on legal positivism, supplemented, in Law's Empire, with criticisms of what he calls pragmatic and sceptical theories of law. In this latest work, Dworkin describes legal positivism as a "semantic" theory of law by which he means a theory stipulating that lawyers and judges must all share the same linguistic criteria for determining what comprises the law in their jurisdiction. If judicial actors did share the same linguistic criteria for identifying the law, Dworkin suggests, legal disagreements in hard cases should then be seen either as trivial debates over borderline usages of clearly recognized legal claims, or else as disguised arguments about repairing the law.

This concern for shared linguistic criteria, Dworkin further argues, discloses the central fear which positivists harbour. Simply put, the fear is that unless lawyers and judges do share the same criteria for identifying law, they will be engaged in futile debate at court, speaking past each other rather than joining in a common legal discourse. Under such circumstances of radical subjectivity, the appropriate view of law then would be that it is about anything a speaker wishes it to mean. Dworkin calls this apprehension the "semantic sting" and proposes to neutralize its effect by showing how legal positivism misconstrues the interpretative character of adjudication.

A second feature which has remained unchanged in Dworkin's writings is the internal perspective from which he theorizes about the law. In describing the subject matter of Law's Empire, for instance, Dworkin emphasizes the propaedeutic value of

assuming the internal perspective of judges.

This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint, not because only judges are important or because we understand everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice.²

Although there is certainly much to say in favour of adopting the participant's viewpoint when analyzing a social phenomenon like law, it should be noted that this methodological approach does have some significant implications for jurisprudential theory. Among other things, it implies that the law which is being analyzed belongs to a particular jurisdiction, or at least to a set of jurisdictions which share the same legal culture. Indeed this is typically how Dworkin presents his own analysis of law. His case material is drawn strictly from Anglo-American jurisprudence and his commentaries for the most part give the impression that he is supplying a theory that would explain and justify only American and British law.

However, at other times, Dworkin speaks as if his theory refers to law as a universal phenomenon, but without indicating how the latter is to be understood.³ The problem with Dworkin's casual mixing of the referents of the term "law" is that if he wishes to maintain that law can only be fruitfully understood from the perspective of

² Dworkin, *Law's Empire*, *op. cit.*, p. 14.

³ John Finnis, for one, claims to detect this confusion in Dworkin where at one and the same time he speaks of the law of particular communities and law in general. See Finnis, "On Reason and Authority in *Law's Empire*," *Law and Philosophy*, Vol. 6 (1987), p. 368.

participants in a particular legal jurisdiction, it is difficult to see how he can then offer generalizations about any universal features of law. This is not to say that one cannot generalize the method of viewing the law from the inside. But that would only leave one with a series of discrete theories about the laws of different communities. To speak of universal features of law, on the other hand, is to abstract from particularities. This is what a sociological theory of law such as legal positivism, and, in a different fashion, natural law theory, attempt to do. But, such efforts to identify characteristics common to all legal systems, although they must rely on the self-understandings of participants in a legal system, do not simply reproduce the insider's view but are instead presented as suitably abstract reports of outside observers.

In adopting the participant's viewpoint, therefore, Dworkin encounters a dilemma. If he is to successfully challenge legal positivism as a theory of law in general, he will have to abandon the internal view and propose a more adequate detached theory of law. But, in abandoning the internal view, Dworkin will have to relinquish any assumption that the argumentative character of law as evinced in litigation is its defining characteristic. For reasons central to his understanding of law as an essentially principled activity, Dworkin is reluctant to take this route, and chooses instead to refashion legal positivism as an interpretative doctrine used by judges to explain their own practice of adjudication rather than a sociological theory purporting to describe the distinguishing properties of law as a social phenomenon.

This transformation of legal positivism into a theory of adjudication which Dworkin calls "conventionalism" is undertaken largely for heuristic purposes. By

characterizing legal positivism as an interpretative concept of law used by participants, Dworkin is able to contrast it with his own interpretative concept of law as integrity. However, it must be noted that, in the process, what is left out of Dworkin's account are the social insights which legal positivism or other general jurisprudential theories do bring to bear on the study of law.

Another consequence of adopting the participants' perspective on law is that it forecloses one possible avenue for critically assessing not only the law of one's own community but that of other communities as well. If one employs the internal perspective, one cannot hope to identify some standard of right independent of participants' self-understanding of the law which can then be used to evaluate the law. This conceptual inhibition is made even more complicated by Dworkin's insistence that law as integrity requires any thoughtful exposition of a community's law to be intimately tied its past legal history. This narrowing of focus directly raises the problem of cultural relativism. If the standards by which law is both identified and evaluated are internal to the community to which the law applies, how does one comprehend the odious law of other communities, or, indeed, of one's own community?

The problem of cultural relativism also affects another theme which reappears in Law's Empire - Dworkin's controversial "right answer thesis." As in his earlier writings, Dworkin continues to maintain that in hard cases where there are disputes over what common, statutory, or constitutional law requires, a right answer is, in principle, available. It is clear that when Dworkin states that right answers are available to disputes in law, he means that the answers are right for the jurisdiction involved. Because he

proposes no universal theory of law, right answers must be regarded as relative to specific legal communities. However, they are also relative in an historical sense within the same legal community. What the settled law is at any point in time in a political community powerfully affects the discovery of the right answer in a legal dispute. Thus, had a country experienced a different legal history than the one which any credible interpretation can claim for it, right answers to contemporary legal disputes might also be different. This historical dimension to the right answer thesis, paradoxically, brings Dworkin's theory of law much closer to legal positivism than it would first appear, for it compels participants to treat past legal decisions as "legal facts" that figure in present law, even if these "legal facts" are contestable.

Dworkin is well aware that the theory of adjudication which he proposes engages both the cultural and historical poles of relativism. He does not conclude, however, that these relativistic implications undermine the normative force of his right answer thesis. On the contrary, Dworkin supplies a sophisticated counter-argument against all sceptical inferences about the normative validity of law. That counter-argument is given in two parts. First, Dworkin challenges the metaphysical motivations of philosophical scepticism by proposing that any serious challenge to the claim that right answers can be found in law must itself be posed from within the normative preoccupations that characterize the practice of law.

Secondly, Dworkin proposes that the central normative preoccupation of law, at least in the liberal democracies whose jurisprudence he canvasses, is with the justification of its own coercive nature. Hence, if a sceptical account of law is to succeed, according

to Dworkin, it must effectively demonstrate that there can be no philosophically satisfactory justification of the state's coercive power as reflected in its law. By the same token, Dworkin suggests that if he is to succeed in showing that his right answer thesis is plausible, he must find a way of linking established law to a satisfactory normative defense of the state's coercive power. This theoretical injunction leads Dworkin to propose that what legitimates the state's coercive power, and, therefore, what leads to normatively valid legal obligations, is the communal basis of reciprocal obligations which characterizes a true "fraternal community".

Locating the normative grounds of law in a conception of community is Dworkin's major theoretical innovation in Law's Empire. It is, likewise, an innovation which recommends the comparison between Dworkin's Hercules and Rousseau's Legislator introduced in the preceding chapter. For, when Rousseau poses the figure of the Legislator as a solution to the problem of transforming self-regarding individuals into communally-minded citizens, he confronts the same problems of cultural and historical relativism as does Dworkin. Like Dworkin, Rousseau rejects all notions of a natural teleology informing human moral and political behaviour. Instead, Rousseau sees men's moral and political dispositions as shaped by the society of which they are a part. For this reason, the Legislator's art must attend to the culturally and historically specific character of the people. This means that the appropriate form of government and its objects can only be detailed with reference to those for whom it is intended.⁴

However, because Rousseau's principal concern is to find a form of government

⁴ See On the Social Contract, *op. cit.*, Bk. II:vii-xii

which enables citizens to engage in self-legislation, he pays special attention to the problem of nourishing the rare sentiments of liberty and equality which, when transformed into a fully civic virtue, yield the desire to live according to self-willed laws. According to Rousseau, if the Legislator correctly frames the institutions, and properly nurtures the "mores, customs, and...opinion"⁵ of the people, the rectitude of the laws they enact will flow from their common dedication to the collective good.

As pointed out in the previous chapter, there is an ostensible difference between the theoretical projects of Rousseau and Dworkin. Whereas Rousseau represents the Legislator as playing out a foundational act, Dworkin portrays Hercules as performing a deliberative role. As an idealized judge, Hercules has the intellectual capacity and time enough to engage in the theoretical enterprise which law as integrity demands of properly conceived adjudication. Not concerned with constituting a people capable of self-legislation through legislative design and the manipulation of customs and public opinion, Dworkin's superhuman judge has only to correctly determine what the authoritative law of the community is. But, as suggested in the previous chapter, this deliberative function is not as far removed from a foundational act as it might seem. To begin with, Dworkin shares in common with Rousseau the view that the legitimacy of the laws is critically dependent on the character of the community from which it emerges. Thus, in deciding upon what the law is, Hercules not only assigns legal rights and obligations but justifies this assignment by a claim that it is what a community dedicated to living according to a coherent set of self-chosen principles would recognize as its law.

⁵ *Ibid.*, p. 77.

However, the judicial process does not merely reflect this common dedication to principled politics in its legal decisions. In his interpretation of the laws Hercules also aspires to guide citizens in their civic roles by eliciting and nourishing the democratic attitudes of collective responsibility and individual judgement. Because Dworkin sees in the laws both a normative and a coercive element, his ideal judge is both an extension of the state's coercive arm and an educator of citizens in their civic responsibilities. In this latter role, he is not unlike Rousseau's Legislator, leading citizens to what they should be.

One might still want to object that this comparison is misdrawn because, if Rousseau's Legislator actually accomplishes his foundational act, Hercules would be redundant since the people would always will the right laws and would always place themselves under perfect obedience to them. This objection, however, misconceives the status of the Legislator and Hercules in the respective political theories of Rousseau and Dworkin. For Rousseau the Legislator stands as a symbolic resolution to the transformational paradox which he identified. The symbolic value of the Legislator lies in the theoretical message his presence imparts. That message is that moral and political education are necessary prerequisites to genuinely civic-minded politics. And, to the extent that Dworkin likewise stresses the educative role of law, his Hercules symbolizes the need to instill in citizens a "protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances."⁶

⁶ Law's Empire, p. 413.

If a concern for moral and political education unite Dworkin and Rousseau, there still remains an important difference in their political theories. Whereas Rousseau sees the laws created by his General Will as serving a common good, Dworkin sees in the law of a community a common purpose. The difference is not terminological, but points instead to distinct conceptions of civic politics. Despite his adoption of a modern philosophical psychology, Rousseau retains the classic language of a moral good to which political associations are said to aspire. On the other hand, Dworkin, for a recognizably modern liberal reason, prefers the less strongly evaluative term "common purpose" to indicate the collective goal of politics. By saying that a community is united over a common purpose implicit in its laws, Dworkin hopes to accommodate the competing conceptions of the good characteristic of pluralistic societies to an overarching loyalty to the "procedural" nature of liberal politics. Whether Dworkin succeeds in investing the prosaic term "common purpose" with enough moral force to adequately capture the kind of civic politics which embraces both communal identification and individual moral and political judgement can only be determined by closely examining his several jurisprudential and political arguments in Law's Empire. Accordingly, in the next three chapters, his argument about the ubiquity of interpretation in law, and his argument in favour of an interpretative concept of law as integrity, together with his portrayal of the foundation of law in a fraternal community, will be subjected to critical scrutiny.

2. A Theory of Interpretation

What makes genuine disagreement in law possible? Dworkin believes the answer is that people who disagree over law are offering competing interpretations of a shared practice. And, although contending interpretations may employ different criteria for identifying the salient characteristics of the practice of law, these rival representations "are directed towards the *same objects or events* of interpretation."⁷ Thus, individuals may disagree, in fact, profoundly disagree, over issues at law and still be engaged in a recognizably common discursive enterprise. However, if the notion of interpretation supplies a phenomenological account of how genuine disagreement is possible in law, it still does not tell us how one interpretation can be superior, or, indeed, the "right" interpretation.

To understand Dworkin's controversial claim about the possibility of correct interpretations in law, it is important to first observe how he characterizes the interpretative act. For Dworkin, the paradigm of interpretation is artistic interpretation. The interpretation of social practices, is, like the interpretation of artistic works, a creative process. Such creative interpretation Dworkin calls "constructive" to distinguish it from the more familiar idea of "conversational" interpretation. In conversational interpretation we supposedly attempt to understand someone else's speech by assigning purposes or motives to that person's utterances. In so doing, we report the meaning of

⁷ *Ibid.*, p. 46 (emphasis mine). The phrase "the same objects or events" would seem to imply that Dworkin believes there to be social phenomena whose identity is prior to, and, in some fundamental sense, unaltered by, different interpretations. This has occasioned some critics, particularly Stanley Fish, to condemn Dworkin for being an unreconstructed positivist. For a detailed discussion of Fish's criticisms of Dworkin, see *infra*, ch. 10, pp. 476-97.

a person's speech by claiming that our interpretation is what the speaker intended to say. In constructive interpretation, on the other hand, the "intention" of a speaker is not what is sought. Rather, the emphasis shifts to the interpreter and to the purpose he or she ascribes to the interpreted object. In constructive interpretation, it is assumed that the object of interpretation has a purpose or a point, which the interpreter seeks to make explicit. As Dworkin describes it, constructive interpretation involves a creative interchange between the interpreter and the object of interpretation.

Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be...For the history or the shape of a practice or object constrains the available interpretations, although the character of that constraint needs careful accounting....Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.⁸

In claiming that constructive interpretation prescind from the question of historical intentions, Dworkin goes some distance towards embracing that understanding of hermeneutics associated with Hans-Georg Gadamer.⁹ Gadamer, whose philosophical reflections on the ontological status of interpretation involve a significant departure from the continental hermeneutical tradition identified with Schleiermacher and Dilthey, has

⁸ Law's Empire, p. 52.

⁹ Dworkin explicitly credits Gadamer with a theory of interpretation which bears directly on his own ambition to describe what takes place in legal interpretation. See Law's Empire, pp. 62 and 419-20n.

insisted that interpretation is not a matter of recovering a *mens auctoris*.¹⁰ Rather, according to Gadamer, the very fact of human historicity makes any encounter with the past an interpretative experience in which tradition mediates between the horizon of understanding of the interpreter and the past. And, what is true in general of historical understanding is also true of particular textual interpretations. The meaning of a text becomes problematic whenever time or cultural distance disrupts ordinary, unreflective understanding. Gadamer explains this existential condition as the paradoxical effect of the "forgetfulness" of language: "...I believe that what makes understanding possible is precisely the forgetfulness of language, a forgetting of the formal elements in which the discourse or the text is encased. Only where the process of understanding is disrupted, that is, where understanding will not succeed, are questions asked about the wording of the text, and only then can the reconstruction of the text become a task in its own right."¹¹

The task of interpretation thus implies that an individual cannot retrieve a pristine meaning from a text but must invariably bring to an interpretation the prejudices and linguistically preformed intentions of his or her own time and place. Although interpretative meanings are in this way historical and cultural projections, Gadamer does not conclude that the interpretative attitude he describes licences any and every

¹⁰ For a brief but very lucid introduction to Gadamer's understanding of hermeneutics, see his essay "Text and Interpretation," in Dialogue and Deconstruction: The Gadamer-Derrida Encounter, Diane P. Michelfelder and Richard Palmer, eds. (Albany: State University of New York Press, 1989), pp. 21-51. For a good general account of the historical development of interpretation theory from Schleiermacher to Gadamer, see Richard E. Palmer, Hermeneutics (Evanston: Northwestern University Press, 1969).

¹¹ Gadamer, "Text and Interpretation," *op. cit.*, p. 32.

interpretation of a text. Tradition, which unites past and present, is the medium through which an interpreter encounters a text. And, it is tradition which, through "prejudices" and linguistic structures, supplies the interpreter with much of the conceptual apparatus which he or she employs in understanding a text.

An interpreter thus comes to a text already equipped with a pre-understanding of its identity. However, the interpreter is always involved in a reflexive activity, at one and the same time relying on his or her pre-understanding to fix the identity and significance of the text, and deepening or even altering that pre-understanding in light of the act of interpreting the text. Thus, when we read a text, we always project a meaning on the whole by means of an historically and culturally mediated anticipation of its structure and theme, but at the same time we come to confirm or revise the initial projection through our particular reading of the text. This reflexive process describes the famous hermeneutical circle whereby the parts can only be understood with reference to the whole, and the whole can only be understood in light of its parts.

Of course the functioning of the hermeneutical circle is critically dependent upon those preliminary pre-understandings by which the identity and general character of a text are established. And, as pointed out by critics like Douzinas, McVeigh and Warrington, this leaves the hermeneutical circle vulnerable to accusations that it is always a self-fulfilling exercise: "Only the assumed unity and completeness of the text makes interpretative choices possible. In other words, the original projection of certain characteristics unto the text will determine and validate the later interpretations."¹²

¹² Costas Douzinas, Shaun McVeigh and Ronnie Warrington, "Is Hermes Hercules' Twin? Hermeneutics and Legal Theory," in *Reading Dworkin Critically*, *op. cit.*, p. 128.

Gadamer's response to the charge that the hermeneutic circle is always self-validating, and, hence, irremediably subjective, is to say that any interpretation must proceed on a good faith assumption that what is to be interpreted is sufficiently important to warrant the attribution of both wholeness and meaningfulness to it. Interpreting a text in good faith does not mean that one must abjure from criticizing it, but only that criticism must presuppose an interpretative attitude which attempts to invest the text, even if provisionally, with its most edifying explication.

Requiring interpreters to always seek good faith interpretations of a text, however, seems to burden the act of interpretation with a moral duty which remains unexplained. Gadamer does not think that this is true. For example, in answer to a charge levelled by Derrida that his understanding of interpretation rests on a suspect metaphysics in which something like a Kantian good will must inform the interpreter, Gadamer explained that "...one does not go about identifying the weakness of what another person says in order to prove that one is always right, but one seeks instead as far as possible to strengthen the other's viewpoint so what the other person has to say becomes illuminating."¹³ In one sense, Gadamer's insistence that interpreters must strive to give good faith interpretations of texts is unobjectionable, if by this he means that criticism should not aim at distorting a text for eristic purposes. However, as shall be argued below, there is another sense in which Gadamer's interpretative rule can be challenged for neglecting the potential ideological character of texts.¹⁴

¹³ Hans-Georg Gadamer, "Reply to Jacques Derrida," in Dialogue and Deconstruction, *op. cit.*, p. 55.

¹⁴ See *infra*, ch. 10, p. 496-97.

This idea of aiming at presenting something in its best light is something which Dworkin also places at the heart of his conception of constructive interpretation. And, like Gadamer, Dworkin conceives of constructive interpretation as a circular process. Dworkin describes three analytic stages in this process: the pre-interpretative stage, the interpretative stage, and the post-interpretative or reforming stage. In the pre-interpretative stage, the social rules and standards which stipulate the tentative content of a work of art or a social practice are identified. The pre-interpretative stage presupposes that people within a linguistic community share a sufficiently detailed vocabulary to allow them to speak sensibly to each other about objects and experiences. And, according to Dworkin, this common vocabulary in turn presumes what Wittgenstein called a shared "form of life" in which a similarity of interests and convictions permit people to understand each other's motives and beliefs reflected in their communications. But this similarity in interests and convictions is only relative and contingent. "It must be sufficiently dense," Dworkin argues, "to permit genuine disagreement, but not so dense that disagreement cannot break out."¹⁵

A shared form of life, therefore, supplies those pre-understandings which make interpretation possible, but the pre-understandings cannot be so univocal as to leave no room for reflection and debate over shared meanings. Although recognizing that the pre-understandings furnished by a shared form of life are themselves interpretative acts, Dworkin suggests that for practical analytic purposes, interpreters must treat as given the classifications yielded by ordinary, day-to-day reflection and argument. Such

¹⁵ Law's Empire, p. 64.

classifications, or conventional patterns of defining and rating objects and experiences, become the data for the second, interpretative stage. It is at the interpretative stage that one tries to make sense of a work of art or a social practice by imputing to it a point or purpose. And, imputing a point or purpose to a work of art or a social practice means trying to "see it in its best light."¹⁶ This requires an interpreter to construct a justification for the work or institution which confers on it the most artistically or morally attractive depiction possible.

The interpretative injunction to see an object in its best light must, however, pay heed to at least some of the conventional pre-understandings of the object. This means that there is a level of agreement over descriptive statements about an object, and about possible general classifications of that object, which no interpretation can ignore. For example, to interpret a novel as an instance of a particular genre requires attention to what are taken to be paradigmatic expressions of that genre. In other words, the interpretation must "fit" features of the novel sufficiently well so that the attribution to it of a particular genre does not depart radically from what the paradigmatic cases suggest are the constitutive elements of that genre. Thus, as Dworkin describes it, interpretation involves two axes of evaluation. Interpretative judgements are required both to decide when one justification fits its object better than another, and also to decide which justification shows the object in its best light.

And, once complete, these evaluations inform a person's post-interpretative attitude to the subject matter. For example, after interpreting a novel, one's initial

¹⁶ *Ibid.*, p. 47.

attribution to it of a particular genre or theme may be revised in light of judgements about what aesthetic convictions best fit the material. Or, one might succeed in altering what one had hitherto been accepted as a paradigmatic instance of a particular genre or theme because the interpretation one presents for the novel suggests that at least some of those paradigms are mistaken or irrelevant to a deeper understanding of that genre or theme. In either case, the two axes of evaluation, involving appeals to separate arguments of fit and justification, directly influence the post-interpretative attitude a person takes to the novel, or, to the general theme or genre which it is presumed to embody.

Dworkin supplies two different literary analogies to show how these two evaluative dimensions of constructive interpretation can be fruitfully understood. The first example consists of an elaboration of what is involved in the interpretation of a piece of art. To interpret Shakespeare's *Hamlet*, Dworkin states, is to offer a report about its point, meaning, theme, sense or tone. Any particular interpretation of *Hamlet* attempts to show which way of "reading (or speaking or directing or acting) the text reveals it as the best work of art."¹⁷ Of course, people do disagree on their interpretations of *Hamlet*. What these disagreements reflect, Dworkin argues, are theoretical disputes about what in general gives aesthetic value to literature. An interpretation of art is thus a justification of a point of view entailed by a general theory of aesthetic value. One's concrete interpretation of *Hamlet* is dictated in this way, consciously or not, by one's convictions about aesthetic value.

In locating the difference between concrete interpretations of a piece of art in

¹⁷ Ronald Dworkin, "How Law is Like Literature," *A Matter of Principle*, *op. cit.*, p. 149.

controversies over aesthetic theories, Dworkin can be thought to invite a relativistic understanding of literary interpretation. His formulation seems to suggest that interpretation creates the text by way of a theory of artistic value which validates a particular reading of it. And, because different aesthetic theories licence different interpretations, there can be no one authoritative text outside of any interpretation, nor can there be any single interpretation which is the right one. But this is not Dworkin's view. The activity of interpretation operates with internal constraints which together compose the requirement of "fit" which any credible interpretation must achieve.

Chief among those constraints, according to Dworkin, is a methodological inhibition against inventing an entirely new piece of art when interpreting a text: "Interpretation of a text attempts to show *it* as the best work of art *it* can be, and the pronoun insists on the difference between explaining a work of art and changing it into a different one."¹⁸ Thus, while it may be hypothetically true that Shakespeare's *Hamlet* would be a more artistically attractive play were its hero interpreted as possessing a forceful character, Dworkin insists that it "does not follow that *Hamlet*, the play he wrote, is really like that after all."¹⁹

Of course, what play Shakespeare wrote is itself an interpretative question and Dworkin acknowledges that different theories of interpretation will have to develop their own subtheories of what makes up the identity of a piece of art in order to tell the difference between interpreting and changing a work. But, in adding this new level of

¹⁸ *Ibid.*, p. 150.

¹⁹ *Ibid.*

interpretation, an obvious objection suggests itself. What informs the methodological inhibition against inventing a new text if the interpreter is the one who furnishes the test of what constitutes the text in the first place? Dworkin's response is that certain general interpretative constraints emerge regardless of which artistic theory of interpretation one embraces. One such constraint is the identity of the text. Any theory of interpretation must establish some text as being canonical, and this very act subsequently serves to place a boundary over possible interpretations of that text. This boundary amounts to something close to a formal rule of interpretation: "all the words [of the canonical text] must be taken account of and none may be changed to make 'it' a putatively better work of art."²⁰

A second interpretative constraint is provided by an interpreter's convictions about the role of coherence or integrity in art. Any aesthetic theory, Dworkin argues, must place some value on coherence or integrity in art. Again, this suggests a formal rule of interpretation: "An interpretation cannot make a work of art more distinguished if it makes a large part of the text irrelevant, or much of the incident accidental, or a great part of the trope or style unintegrated and answering only to independent standards of fine writing."²¹ For example, Dworkin argues that it would be an interpretative mistake to read an Agatha Christie novel as a philosophical treatise on death, under the assumption that philosophical novels are more aesthetically valuable than mysteries, because this would offend the test of coherence, thereby making of the novel a

²⁰ *Ibid.*

²¹ *Ibid.*

"shambles."²²

While the principles of identity, and coherence and integrity, act to constrain interpretations of a text, Dworkin concedes that these principles are themselves influenced by the aesthetic theory to which an interpreter subscribes. Invariably, different interpreters will impose different methodological constraints of "fit" on the reading of a text, depending on where they find value in art. Hence, although interpretation might have a complex internal structure in which appeals are made both to questions of fit and justification, it nonetheless remains the case that different theories of artistic interpretation will answer these questions differently. It would seem, therefore, that the problem of relativism has not been resolved but merely transferred to another level. Concrete interpretations of a text are seen as applications of more general interpretative theories, which, even if complexly articulated, are nonetheless distinguishable principally by the aesthetic value they express. And, when all is said and done, these aesthetic values are nothing other than the convictions of the interpreter, the authenticity of which cannot be corroborated by appeal to some independent and timeless facts about what really gives value to art.

Dworkin agrees that aesthetic judgements are subjective in this way, but does not conclude from this that different interpretations are equally valid.

Of course no important aesthetic claim can be 'demonstrated' to be true or false; no argument can be produced for any interpretation which we can be sure will commend itself to everyone, or even everyone with experience and training in the appropriate form of art. If

²² *Ibid.*

this is what it means to say that aesthetic judgements are subjective--that they are not demonstrable--then they are subjective. But it does not follow that no normative theory about art is better than any other, nor that one theory cannot be the best that has so far been produced.²³

Naturally, it is easy to object that this formulation leaves the main question unanswered. For if there is no *a priori* demonstration available that could certify the truth of one interpretation to be better than another, how can one still maintain the position that particular interpretations can be assessed as better or worse? Dworkin's response is that requiring an *a priori* demonstration of the possibility of generating valid interpretative claims about something like art rests on a mistaken assumption about how validity claims are to be conceived. Instead of beginning with an assumption about what makes an interpretative claim valid, Dworkin says, it is better to proceed empirically and observe how different interpretations of art actually make their cases: "We should first study a variety of activities in which people assume that they have good reasons for what they say, which they assume hold generally and not just from one or another individual point of view. We can then judge what standards people accept in practice for thinking that they have reasons of that kind."²⁴

In saying that the question of what constitutes a valid interpretative claim in art is best answered empirically, Dworkin in effect makes the issue of the truth of aesthetic convictions itself an interpretative question. In other words, different interpretative theories of art will deploy different reasons for adopting a particular interpretation as the

²³ *Ibid.*, p. 153.

²⁴ *Ibid.*

most plausible or right one. Deciding upon which set of reasons is most credible is in turn an interpretative act in which questions of fit and justification again figure at yet a higher level of abstraction. Different interpretations of art can thus be regarded as supplying competing conceptions of the abstract concept of artistic interpretation, that is, competing conceptions about what gives value to art. Seen in this way, there is no *a priori* reason to suppose that all competing conceptions are of equal value, or that no conception can be clearly superior to its alternatives. But, by the same measure, there is no way of determining which conception is better except by attending to the arguments provided by different interpretations. And, attending to these arguments requires interpretative judgements about what sorts of reasons furnish stronger support for adopting one or another view about aesthetic value, as well as judgements about the cogency of particular details of the concrete interpretations.

The inescapable responsibility for making these kinds of interpretative judgements becomes clearer in Dworkin's second illustration of the interpretative attitude which he thinks effectively captures the sense of what goes on in adjudication. For this comparative purpose Dworkin invents an imaginary genre of literature called the chain novel in which a group of novelists are asked to write a novel in series. Each contributor is asked to write a chapter based on what she or he thinks continues the previous work in such a way as to make it the best it can be as a single, unified novel. In taking up this task, each of the serial novelists is presented with an interpretative problem, though for later writers the interpretative problem is made more complex by the number of artistic factors they must account for in the text they inherit. Each successive novelist will have

to use his or her interpretative convictions about fit and justification to make sense of the accumulated textual material and to continue the novel in one direction or another. Dworkin allows that interpretative judgements about fit might qualify more than one reading of the artistic potential of the novel. In this case, the second dimension of interpretation, involving substantive judgements about what constitutes artistic value, picks out of the eligible readings the one which makes of the work of progress the best it can be.

Although this distinction between arguments of fit and justification suggest that the interpretation in which the chain novelist engages involves strictly sequential and separate steps in analysis, Dworkin concedes that judgements of fit and artistic justification in fact are interwoven in any complex act of interpretation. Thus, he notes that "the formal and structural considerations that dominate on the first dimension figure on the second as well, for even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration of style and content."²⁵ But, even if judgements about fit and justification might inform and reinforce each other, Dworkin insists that they must "remain distinct enough to check one another in an overall assessment, and it is that possibility of contest, particularly between textual and substantive judgements, that distinguishes a chain novelist's assignment from more independent creative writing."²⁶

²⁵ *Law's Empire*, p. 231.

²⁶ *Ibid.*, pp. 231-32.

To illustrate how convictions about fit and judgement are mutually informing and yet act as a check on how a chain novelist can accomplish her or his task, Dworkin envisages a situation where one is asked to complete Charles Dickens's *A Christmas Carol* and is given the bulk of the novel as Dickens had written it. Thus, Scrooge has already experienced his ghostly visitations, has ostensibly repented his ways, and has offered his largesse to the Cratchit family. How would the chain novelist write a concluding chapter for this book? It would still be necessary to interpret the extant novel, in the process, deciding whether a particular conclusion fits with what went on before, and whether it shows the novel as a whole in its best artistic light.

The novelist might decide that because *A Christmas Carol* is a study of character, two plausible interpretations of Scrooge's character can be constructed out of the textual evidence. In one interpretation, Scrooge is to be seen as irremediably evil, a literary embodiment of the doctrine of original sin. On the second, sociorealist, interpretation, Scrooge is regarded as the product of a soulless capitalist environment, originally good but progressively deformed by the perverse values he imbibes from his society. Obviously, these two interpretations will licence radically different concluding chapters. Thus, if the original sin view of Scrooge is adopted, one might write a conclusion in which his repentance is portrayed as an insincere act prompted only by momentary fright. If the sociorealist view is adopted, however, one could write a conclusion affirming that Scrooge's moral transformation, made possible by his extraordinary insight into his own character formation, was indeed authentic.

If the chain author happened to hold the aesthetic conviction that the doctrine of

original sin is a more artistically valuable theme, because more dramatic or morally edifying, he or she might be tempted to write a conclusion in which Scrooge's repentance is depicted as a counterfeit act. But, at the same time, the author's interpretative convictions about the formal requirements of fit could well serve to disqualify such a conclusion because presenting Scrooge's moral transformation as a hypocritical performance arguably does not sit well with the high drama of his ghostly encounters. In this instance, the author's judgements about fit would compel him or her to say that *A Christmas Carol* would have been a better novel from an artistic point of view were it written to express the theme of original sin, but, under the circumstances, the best that can be made of it is a sociorealist novel about moral transformation. However, had the chain novelist been entrusted with the writing task at an earlier juncture in the story, when characters and events were less developed, the author would have more opportunity to apply his or her fundamental convictions about artistic value in cultivating the theme of the novel.

Dworkin insists, however, that this difference between the early and late contributions to a chain novel should not be taken to signify the degree to which authors involved in this enterprise are able to invent rather than continue the novel. The chain practice enforces the same general interpretative duty on all participants. Both the earlier and later writers must summon arguments of fit and justification in favour of their particular interpretation of the novel in progress. These arguments will no doubt be controversial, both for the earlier and the later authors. But, the fact that these interpretative arguments will be controversial is no bar against making them, for, in the

end, the writer has no alternative but to attempt them.

And, to the extent that a chain writer makes a good faith effort to interpret a novel in progress according to his or her convictions about the dimension of fit and justification, he or she will experience the force of these arguments as normative constraints on how to continue the novel. Significantly, Dworkin argues that this experience of the normative force of such good faith arguments will be phenomenologically genuine for the author, so that it does not really matter if everyone concurred with the arguments or not. Thus, from the internal perspective of the interpreter, what ultimately gives force to interpretative convictions are the complex concatenation of his or her judgements about how the formal demands of fit intersect with his or her substantive beliefs about aesthetic value.

3. External and Internal Scepticism

The example of the chain novel is intended to demonstrate the inescapable necessity of making interpretative judgements about social objects and experiences. But what if someone refused to engage in the interpretative exercise represented by the chain novel on the grounds that it was incapable of producing a valuable work of art? Because judgements about the cogency of an interpretation ultimately must issue from the interpreter, Dworkin allows for the possibility that a participant in the chain novel, applying his or her convictions about fit and justification, might decide that no interpretation of the novel in progress can make of it an artistically valuable product, and, for this reason, discontinue the enterprise. Such an internally sceptical attitude is

always feasible in a chain practice, but, if it is to be convincing, it must nonetheless prove its case. In other words, the author who elects to discontinue the novel on grounds that no artistic sense can be made of it must be prepared to argue why this is so.

The injunction to always provide reasons for interpretative decisions is Dworkin's standard rejoinder to those who are sceptical about whether interpretations can be better or worse, right or wrong. This rejoinder forms part of Dworkin's very instructive treatment of the philosophical role of scepticism in theories of interpretation, and, more generally, in moral argument. Dworkin is well aware that regardless of how internally complex an interpretative or moral judgement is made out to be, there are critics who fasten on the subjective character of these judgements in order to deny them any objective value. If interpretative or moral judgements are subjective, these critics maintain, they can be neither right nor wrong in any impartial or objective sense.

The problem with such a sceptical position, Dworkin argues, is that it does not really address what goes on in interpretative or moral arguments. To illustrate the point, Dworkin distinguishes between two types of scepticism which he calls external and internal scepticism. External scepticism is a philosophical theory. It makes the metaphysical claim that interpretative and moral arguments cannot be objectively true because they cannot be verified with reference to any authentic "moral facts". For example, one familiar sceptical metaphysical claim of this type proposes that moral theories characteristically lay claim to the truth of moral convictions only by assuming that these convictions correspond to an objective moral order inscribed in the "fabric" of the universe. By denying the existence of such an independent moral order, the

external sceptic readily concludes that all moral arguments are without foundation in fact, and, therefore, are entirely subjective, thus neither true nor false. Of course the metaphysical claim of the external sceptic is just that - a metaphysical claim. It could be objected that the external sceptic has not proved a case but merely stated an ontological position which is itself vulnerable as an argument in metaphysics.²⁷

Dworkin, however, does not directly contest external scepticism as a metaphysical doctrine in this way. His point, rather, is that the external sceptic's argument is ultimately irrelevant to the claims made by interpretative or moral arguments. The reason, Dworkin states, is that these latter arguments need not, indeed, do not, refer to an independent moral order to substantiate their claims. One's understanding of objectivity in interpretative or moral arguments, therefore, must be tailored to the sense in which the term "objective" is used in such arguments. To explain this distinction, Dworkin refers to the way one might report the moral judgement that slavery is wrong. If pressed on the matter, one could easily add an adjective to say that slavery is "really" or "objectively" wrong, but the additional modifier does not betoken any formal proof of one's moral convictions about slavery. Rather, in moral arguments we use qualifiers like "really" or "objectively" to state more clearly the moral position we hold.

Dworkin describes two different ways in which such modifiers clarify a moral statement.

²⁷ For example, if we take historicism to be a paradigmatic instance of external scepticism, Emil Fackenheim shows how one can mount a metaphysical argument to refute the historicist contention that all truths are relative to one's historical situation. Historicism, Fackenheim argues, presumes an ontology which, paradoxically, implies that historicism is false: "Historicism is faced with a dilemma from which there is no escape. Either it renounces all philosophical assumptions (but then it can make no philosophical assertions; it is, in fact, not historicism at all but simply history), or else it insists that philosophical are superseded by historical questions (but then it is committed to philosophical assumptions which are ruled out by the thesis itself)." Emil L. Fackenheim, Metaphysics and Historicity (Milwaukee: Marquette University Press, 1961), p. 63.

We use the language of objectivity, not to give our ordinary moral or interpretative claims a bizarre metaphysical base, but to *repeat* them, perhaps in a more precise way, to emphasize or qualify their *content*....We also use the language of objectivity to distinguish between claims meant to hold only for persons with particular beliefs or connections or needs or interests (perhaps only for the speaker) and those meant to hold impersonally for everyone.²⁸

Thus, an adjective like "really" might be used to clarify whether a claim we make about something in the world is to be taken as a moral judgement rather than merely a reflection of some personal taste we have. Or, the adjective may be used to distinguish between those cases in which we think everyone has a moral obligation to behave in some way, and other cases in which we might think, for reasons appropriate to our circumstances, that we have a special moral obligation that others do not necessarily share.

In neither case, however, does the qualifier "really" establish the truth claim of a moral conviction. As far as moral truths are concerned, it makes no difference whether one says that slavery is wrong or that slavery is "really" wrong. Rather, one thinks that slavery is wrong because of one's moral convictions, the soundness of which are established by the moral arguments one employs. This means that the assertion that there are right answers in morality is made within that activity called moral argument. Should an external sceptic reply that moral arguments are simply refractions of a person's emotions, Dworkin's counter is that this explanation misses the obvious internal dynamics of moral argument: "[T]his explanation will not work because the convictions

²⁸ Law's Empire, p. 81.

philosophers try to explain away in this fashion do not function, on their own mental stage, as emotional reactions. They entertain arguments, take up or abandon different positions in response to arguments, see and respect logical and other connections among these positions, and otherwise behave in a way appropriate to belief rather than mere subjective reaction."²⁹

Nor can an external sceptic take refuge in a more sophisticated argument in which it is conceded that moral arguments are activities that occur in a common intellectual enterprise whose conventional rules of evidence and validity are appropriate to the enterprise, but which are in no ways germane to the "real" world. What makes this speculative move unintelligible, Dworkin asserts, is that it presupposes precisely what is at issue: that someone involved in moral argument can make a distinction between a moral assertion within a common intellectual enterprise, and a "real" moral assertion. Thus, once again, Dworkin reiterates that moral and interpretative arguments engender their own standards of apodicticity: "If moral or aesthetic or interpretative judgements have the sense and force they do just because they figure in a collective human enterprise, then such judgements cannot have a "real" sense and a "real" truth value which transcend that enterprise and somehow take hold of the "real" world."³⁰

If final proof is needed that external scepticism leaves moral or interpretative arguments untouched, Dworkin states, one merely has to observe that these same sceptical philosophers, when they take a less detached attitude to the world, themselves

²⁹ Dworkin, "On Interpretation and Objectivity," A Matter of Principle, p. 173.

³⁰ *Ibid.*, p. 175.

engage in familiar moral and interpretative arguments, using the very normative concepts which their general metaphysical position would deny them. Thus, Dworkin concludes, for all intents and purposes, external scepticism can do no fundamental damage to the right answer thesis.

But, he acknowledges that the same is not true of that other form of scepticism which he calls internal scepticism. An internal sceptic does not make any general metaphysical claims about the philosophical probity of moral or interpretative arguments. On the contrary, the internal sceptic takes up the challenge implicit in moral or interpretative arguments, which is to make of something the best it can be. However, while operating within the enterprise known as moral or interpretative argument, the internal sceptic comes to conclusions which deny rather than attribute value to an object or practise. For instance, it is possible, Dworkin states, that an interpreter who subscribes to a particular theory of aesthetic value will decide that no reading of *Hamlet* can make of it a valuable work of art, and, who, therefore, will argue that this particular play merits no literary attention. In this example, the internal sceptic's conclusion amounts to a specific challenge to other, more conventional views about *Hamlet's* artistic merit. And, as is the case with all interpretations, the cogency of this sceptical interpretation will stand or fall on the reasons adduced for it.

There is, however, a more daunting form of internal scepticism which makes a general, global claim condemning all interpretations of art or a social practice for failing to provide a compelling argument that would lead one to think that any single interpretation could be superior to all others. This form of global, internal scepticism is

more daunting because it does directly challenge the right answer thesis without appealing to dubious metaphysical claims about the nature of reality. Instead, it is a position taken up within the practice of interpretation or moral argument, albeit a position designed to challenge the truth claims of all moral or interpretative arguments.

However, as Dworkin points out, a globally sceptical position must itself be proposed as an interpretative or moral argument and make use of the appropriate protocols for such arguments. For example, he suggests that a person could conceivably argue that the point of artistic interpretation is not to make of something the best it can be, but to secure wide interpersonal agreement about the meaning of an interpreted object. Observing that no interpretative theory of art presently holds the prospect of winning that kind of concordance, the person can then easily draw the appropriate sceptical conclusion that no particular interpretation of art has any hope of satisfying the claim of being uniquely correct.

This globally sceptical argument has the merit of advancing interpretative propositions which other interpreters of art can engage in argument. Its central assumption about the point of artistic interpretation, for instance, is itself a controversial interpretative judgement about value, and needs to be defended against opposing conceptions of value. Thus, the simple point, Dworkin insists, is that sceptical conclusions must be established by arguments similar in structure to those it attempts to defeat: "The only scepticism worth anything is scepticism of the internal kind, and this must be earned by arguments of the same contested character as the arguments it

opposes, not claimed in advance by some pretence at hard-hitting empirical metaphysics."³¹

Dworkin's discussion of external and internal scepticism is valuable for the light it casts on the long-standing philosophical debates over the possibility of objectivity in moral and interpretative arguments. His assertion that moral or interpretative arguments can only be defeated by other moral or interpretative arguments is in the end a sensible philosophical attitude to assume. For, in the absence of the kind of totalizing philosophy to which philosophers like Hegel aspire, it is difficult to see how else sense can be made of moral or interpretative disputes except by entering into moral or interpretative arguments oneself. But, while Dworkin may have successfully parried the external sceptical challenge to his right answer thesis in this way, his response to an internal sceptical assault is more of a defensive posture. His argument against the internal sceptic is nothing less than an invitation for a convincing interpretative argument which can consistently maintain that all interpretations are of equal value. But this, of course, is only a tactical move, for Dworkin has not himself established the opposite argument, particularly with respect to interpretations of the law. The potential force of an internally sceptical argument about Dworkin's right answer thesis, therefore, can only be assessed against his own positive interpretative theory of law. In the next chapter, the relevant features of that theory, which Dworkin calls "law as integrity," will be explored.

³¹ Law's Empire, p. 86.

Chapter Nine

Law as Integrity

1 Introduction

Dworkin portrays the general structure of legal interpretation as a specialized application of constructive interpretation. It is specialized because those whose task it is to authoritatively interpret the laws are playing very consequential public roles. Their interpretations are not detached reports but themselves become the law, and, therefore, figure as data in subsequent interpretations. Thus, like the imaginary chain novelist, judges join in a shared practice which is already in progress, and, which they continue through their own interpretations. And, like chain novelists, they have no choice but to entertain arguments about the meaning of the law as it is evinced in cases before them.

This latter interpretative duty in turn implies that a familiar set of structural features can be found in judicial arguments. To begin with, implicitly or explicitly judges must make use of justificatory theories about the point or purpose of law. Thus, whatever interpretative theory of law a judge brings to court will be grounded in his or her convictions about the general purpose of the law taken as a whole.

Although different judges may subscribe to competing justificatory theories, Dworkin thinks that a variety of pre-interpretative forces conspire to temper these differences. First, in any community certain institutional facts are ordinarily recognized as constitutive of legal practice, and, certain propositions are taken to be paradigmatic

expressions of what the law entrains. Because interpretation demands that justificatory arguments about the purpose of the law fit the practice of law, no American judge, for instance, could offer a theory of the law which ignored legislative statutes and administrative decisions, common law principles, the doctrine of precedent, or the Constitution, much less widely accepted propositions of the law like traffic codes. Moreover, the general intellectual environment and the language of a society exercises practical constraints on a judge's conceptual imagination about what the law is. Finally, the conservatism of formal legal education and the political process of selecting legal officers discourages the emergence of radically iconoclastic interpretative theories of the law.

While these several factors together serve to promote a convergence of judicial views about the law, there are, nevertheless, powerful forces which mitigate against any homogeneous interpretation of the law. Chief amongst these forces, Dworkin suggests, are the political convictions of judges: "Different judges belong to different and rival political traditions, and the cutting edge of different judges's interpretations will be honed by different ideologies."¹ Indeed, the fact that judges's political convictions play a role in their interpretations of the law helps explain why what are routinely taken as paradigmatic expressions of the law change over time. Judges who successfully challenge a long line of precedents and happen to win general acceptance for their new interpretations have, in effect, employed arguments of political morality to alter what hitherto has been recognized as paradigms in the law.

¹ Law's Empire, p. 88.

Whatever fate legal paradigms enjoy at the conclusion of a judge's interpretative exercise, they do serve, nevertheless, as provisional data which contending legal interpretations strive to account for when proposing their justification of the law as a whole. In this fashion, they supply tests for helping decide which among competing legal interpretations fits the institutional history of a community's legal practices better. However, Dworkin reminds us that these tests must always be regarded as contingent because they necessarily involve controversial interpretative judgements about what should be taken as paradigms in the law.

In addition to treating widely accepted convictions about what constitutes the domain of law as a necessary, albeit controversial, precondition of interpretative arguments, Dworkin also suggests that it is a useful analytical tenet to suppose that different interpretative theories of the law have in common an abstract concept of what the law requires. Presupposing such a concept is useful for comparative and evaluative purposes because it implies the possibility of discovering an "abstract description of the point of law most theorists accept so that their arguments take place on the plateau it furnishes."²

In assuming that different interpretative theories of law offer competing conceptions of the abstract concept of law, one can understand jurisprudential debate as something joined by a common concern for explaining what is meant by that abstract concept. Dworkin recognizes, however, that legal theorists may not, in fact, all share the same abstract concept of the law, in which case the concept must be regarded as a

² *Ibid.*, p. 93.

controversial postulate employed by a jurisprudential philosopher to illustrate how different legal theories can be compared and contrasted in a perspicuous manner. The controversiality of the postulate, Dworkin argues, is no bar against using it, because, in the end, legal philosophy cannot avoid applying contestable concepts to its subject matter.

Notwithstanding this concession that an abstract concept may only be a heuristically valuable device rather than an accurate phenomenological depiction of what comprises the grounds of philosophical debate, Dworkin offers what he thinks is a relatively uncontroversial abstract concept of law which can organize further debate over the precise character of law.

Our discussions of law by and large assume...that the most abstract and fundamental point of legal practice is to guide and constrain the power of the government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by rights or responsibilities flowing from past political decisions about when collective force is justified.³

If it is conceded that the most general point of law is to justify state coercion by linking present legal rights and obligations to past political decisions, then different interpretations of the law can be regarded as competing bids to make more concrete the meaning of this abstract concept. Such interpretations of the law, Dworkin states, will have to address three interpretative questions. First, is the speculative connection between law and coercion itself justified? Secondly, what is the point of requiring present state coercion to conform to legal rights and responsibilities that flow from past political

³ *Ibid.*, p. 93.

decisions? And finally, how is the phrase "flow from" to be understood? In other words, what specific legal rights and responsibilities are contained in past political decisions?

The answers that an interpretative theory of law give to these questions, Dworkin suggests, are the grounds by which one can assess its plausibility as a conception of the general concept of law. And, as is the case with all interpretative exercises, such an assessment invariably must draw conclusions about how well the legal theory corresponds with what judges do and say in their adjudicative practise, and how morally attractive is its explication of the abstract concept of law.

Dworkin uses this series of suppositions about what comprises legal interpretation to argue in favour of a conception of law he calls "law as integrity". To make vivid the interpretative virtues of this conception, he sets out to contrast it with two competing interpretative accounts of the law, "conventionalism" and "pragmatism". Although acknowledging that conventionalism and pragmatism are his own terms of art which do not correspond exactly to any orthodox schools of jurisprudence, Dworkin is assured that "each captures themes and ideas prominent in that literature, now organized as interpretative rather than semantic claims, and the argument among them is therefore more illuminating than stale battles of the texts."⁴

2. Conventionalism

The first interpretative theory Dworkin examines in this comparative agenda is conventionalism. Conventionalism is meant to be legal positivism, now reconceptualized

⁴ *Ibid.*, p. 94.

as an interpretative rather than a descriptive or sociological theory of law.⁵ Conventionalism accepts the general proposition that the purpose of law is to justify state coercion. Indeed, according to Dworkin, conventionalism describes law precisely in terms of legitimate authority, insisting that "collective force should be trained against individuals only when some past political decision has licensed this explicitly in such a way that competent lawyers and judges will all agree what the decision was, no matter how much they disagree about morality and politics."⁶ Conventionalism thus makes the interpretative claim that judges adhere to strict criteria when determining what constitutes the law. These criteria amount to intersubjective agreements about the social conventions that designate which past political decisions are to be respected as the law.

But conventionalists also have a negative claim about the law. Recognizing that in certain hard cases the law can be silent, the conventionalist concludes that in these circumstances neither the plaintiff nor the defendant has an antecedent right to win, and, therefore, that it is up to the judge to assign rights and responsibilities by way of a discretionary legal decision. When exercising judicial discretion, judges are free to support their decisions with reference to some forward-looking justification of a preferred legal development, or by appeals to abstract justice or to general interest. Nevertheless, in whatever way a judge supports his or her discretionary legal decisions, these decisions are sharply distinguishable from other, more routine judgments rendered according to the

⁵ The legal positivism Dworkin mainly has in mind is that tradition of legal theory associated with John Austin, H.L.A. Hart, and Joseph Raz. Needless to say, Dworkin's depiction of this tradition has not gone unchallenged. For a discussion of the critical reception of Dworkin's portrayal of legal positivism, see *infra*, ch. 10, pp. 464-71.

⁶ Law's Empire, p. 114.

strict criteria of what constitutes the law.

Besides making the interpretative claim that judges normally follow socially sanctioned criteria when deciding upon the law, conventionalism also offers a normative justification for requiring present law to conform to past political decisions. According to Dworkin, this justification is posed in terms of the ideal of protected expectations: "Past political decisions justify coercion because, and therefore only when, they give fair warning by making the occasions of coercion depend on plain facts available to all rather than on fresh judgements of political morality, which different judges might make differently."⁷ It is only fair, therefore, that judges strictly follow precedents and statutory and constitutional provisions, because only in this way can citizens know in advance their legal rights and responsibilities and order their lives accordingly.

Having described conventionalism as a descriptive and normative theory of the law, Dworkin assails both of its interpretative claims. On descriptive grounds, Dworkin states, conventionalism is inadequate because it manifestly fails to account for how judges practice their craft, particularly in hard cases. Reprising the phenomenological argument he deployed in his earlier, "model of rules" articles, Dworkin points to the care and attention which judges devote to the authoritative material of law in controversial cases. For example, in discussing the judicial history behind a renowned case in American law where the explicit statutory language was of no avail in disposing the case,⁸ Dworkin notes that had they assumed a conventionalist doctrine about the law, the judges "would

⁷ *Ibid.*, p. 117.

⁸ The case involved the question of whether murderers can inherit their victim's estate if they are legatees of a valid will. See *Riggs v. Palmer*, 115, N.Y. 506, 22 N.E. 188 (1899).

not have pressed on with the arguments they actually did use, probing the statute, obsessed with the question whether one decision was more consistent with its text, or spirit, or the right relation between it and the rest of the law."⁹ The fact that judges do engage in these kinds of arguments, Dworkin continues, only makes sense under the assumption that even in hard cases there is law to be constructed from past legal materials, and that the judges are under an obligation to enforce that law. Hence, the conventionalist characterization of the law in hard cases does not fit the actual practice of law as evidenced in the case histories Dworkin cites.

If conventionalism fails the test of descriptive fit, Dworkin argues, its normative argument about the point of law is also open to challenge. What makes the conventionalist's normative justification of the law implausible, he asserts, is that the appeal to fairness upon which it rests cannot be consistently maintained. Although the idea that state coercion is legitimate only if exercised in a manner consistent with past political decisions does serve the normative goal of providing citizens with fair notice of their rights and responsibilities, this idea obviously does not apply to hard cases in which judicial discretion is at work. Thus, the normative goal of fair notice is germane only to a part rather than the whole of the law. This discontinuity, Dworkin concludes, invariably seems a poor way of trying to justify the law.

However, one way that conventionalism can avoid the problem of assigning a normative goal for only part of the law, Dworkin suggests, would be to assert the existence of a conventional metarule which would require that, in cases where the

⁹ *Ibid.*, p. 131.

application of ordinary rules of law is unclear, defendants must receive the benefit of the doubt. In other words, the ideal of fair notice can be realized in all parts of the law only if it is assumed that there is a general regulative principle in law stipulating that no one can be found guilty of an offence or held responsible for a legal obligation unless the offence or responsibility is clearly enunciated in past political decisions. But, Dworkin argues, the fact that there is no such metarule in Anglo-American law, and the fact that judges do assign legal rights and responsibilities in the absence of transparent legal rules, should be sufficient evidence that goal of fair notice cannot be regarded as the exclusive normative purpose of the law.

However, a conventionalist might be able to circumvent this conceptual difficulty, Dworkin allows, by professing that the ideal of fair notice is itself only part of a more complex goal to which law aspires. Thus, a conventionalist could argue that the purpose of linking present law to past political decisions is that such a legal strategy makes possible the co-ordination of human activities through clearly established rules of conduct. On this explanation, the notion of fair notice is important to the extent that social co-ordination is more easily accomplished if everyone is made aware of the legally sanctioned rules, and, therefore, can predict the legal consequences of their behaviour. But, because the overarching purpose of the law is social co-ordination, fair notice is not an issue in hard cases where the explicit extensions of recognized rules run out. In such cases, judges are free to make forward-looking decisions about which assignment of legal rights and responsibilities best promotes social co-ordination. On this conventionalist view, therefore, judges must entertain a strategy of balancing the predictability of

conventionally sanctioned law with the flexibility of judge-made law.

However, Dworkin maintains that this scheme of balancing predictability and flexibility is ultimately an unstable normative strategy for law because, if its overall goal is to enhance social co-ordination, there can be no *a priori* reason for not sacrificing the predictability of conventionally recognized laws for judicial activism in all cases if social co-ordination could thereby be made more effective. Why reserve the flexibility associated with judicial activism to hard cases alone if social co-ordination could be better served by a court willing to adapt all laws to contemporary social exigencies? Significantly, the argument of fair notice no longer suffices to unconditionally protect conventionally recognized law from judicial reinterpretations because the value of fair notice is itself contingent on judgements about what legal practices best contribute to social co-ordination. Hence, according to Dworkin, the inability of conventionalism to provide a compelling reason for why judges should always follow what are taken to be conventionally recognized laws renders its normative justification of the law weak if not entirely vulnerable.

3. Pragmatism

This same normative problem does not, on the face of it, afflict pragmatism, the second interpretative theory of law which Dworkin considers.¹⁰ As he portrays it,

¹⁰ Dworkin loosely models what he calls the interpretative theory of pragmatism on the socio-realist school of American jurisprudence associated with such jurists and legal writers as Oliver Wendell Holmes, Roscoe Pound, and Felix Cohen, and on contemporary economic theories of law, in particular, that offered by Richard Posner. Again, as with his depiction of legal positivism, many critics have assailed Dworkin for misconstruing the fundamental character of legal realism. For a discussion of these criticisms, see *Infra*, ch. 10, pp. 471-83.

pragmatism is an internally sceptical theory of law which denies the alleged normative connection between past law and present state coercion. Rather, for the pragmatist, law is always prospective. It is whatever judges decide is good or beneficial for the community as a whole in present or anticipated future circumstances. Thus, as Dworkin states, pragmatism "denies that people ever have legal rights; it takes the bracing view that they are never entitled to what would otherwise be worse for the community just because some legislature said so or a long string of judges decided other people were."¹¹

On the pragmatist view, therefore, the legitimacy of the law is not based solely on the consequences for the community which flow from interpreting the law in one way or another. The consequentialist test does not commit pragmatism to a single vision of what constitutes the good of a community, hence, different pragmatist judges will disagree over what the law is. However, pragmatists have no general, *a priori* reason for thinking that past legal decisions are binding on the present.

Predictably, Dworkin seizes on this ecumenical rejection of the normative weight of past law to argue that pragmatism is a poor descriptive fit in terms of accounting for the way justices actually decide cases. For, the only way that a thoroughgoing pragmatist can explain the obvious allegiance judges do express to past law is to maintain that this is all just legal rhetoric devised to deceive people into thinking that their legal rights and responsibilities have a consistent application. But this deception is performed entirely for pragmatic reasons. Thus, a typical pragmatist argument might be that "judges must

¹¹ Law's Empire, p. 152.

sometimes act *as if* people had legal rights, because acting that way will serve society better in the long run."¹² Dworkin finds such an explanation implausible because it asks us to ignore too easily the known declarations which judges make about their responsibility to enforce the law as it stands in favour of a theory about a judicial "noble lie" whose social benefits are only asserted rather than proven.

While condemning pragmatism for failing to give an adequate descriptive account of judicial practice, Dworkin is willing to grant that its normative justification of the law enjoys a theoretical consistency which he thinks is absent in conventionalism. For, although conventionalism fails to furnish good reasons for why present law must exhibit suitable deference to the past, pragmatism manages to escape the problem by depicting law as a wholly forward-looking enterprise. And, while this may not be descriptively accurate as far as contemporary judicial practices are concerned, pragmatism could, nonetheless, be taken as a normative proposal advocating the reform of present practices so that they would better express the point of law. There is, after all, much to recommend in a legal theory which sees law not as obtuse fidelity to a runic order but as a dynamic institution, continually adjusted to sound judgements about how community well-being can be served in present and future circumstances.

4. Integrity

If Dworkin wishes to vanquish the pragmatist argument, which he acknowledges contains at least a *prima facie* reasonable explication of the point of law, then he must

¹² *Ibid.*

find a way of defending the view that past political decisions inform present law which depends neither on the pragmatist's notion of judicial deception nor on the conventionalist's theoretically unstable normative argument. Not surprisingly, law as integrity, the third of Dworkin's theoretical candidates, is presented as just that interpretative solution. Like conventionalism, law as integrity accepts the idea that present state coercion is justified only by those legal rights and responsibilities which flow from past political decisions. But, it justifies this normative point of law in an ostensibly different way than does conventionalism. Whereas conventionalism justifies the precedence of the past over the present according to the ideal of fair notice or the political virtue of combining legal predictability with legal flexibility, law as integrity proposes that the point of integrating past political decisions with present law is to ensure that the state "acts in a coherent and principled manner towards all its citizens..."¹³ Dworkin calls this injunction to treat all citizens in a coherent and principled fashion the political virtue of integrity, and he contends that it is this virtue which distinguishes his conception of law from the rival interpretative theories of conventionalism and pragmatism.

But how is the political virtue of integrity to be understood? Dworkin suggests that a parallel idea drawn from personal morality illustrates what is involved in the notion of political integrity. In our day-to-day dealings with our neighbours, Dworkin observes, we normally hope that they will behave to us in ways that we think are morally right. But, even if such a stringent moral expectation cannot be met because people disagree

¹³ *Ibid.*, p. 165.

over issues of moral rectitude, we can at least hope that our neighbours will "act in important matters with integrity, that is, according to convictions that inform and shape their lives as a whole, rather than capriciously or whimsically."¹⁴ By analogy, we elevate integrity into a political virtue when "we make the same demand of the state or community taken to be a moral agent..."¹⁵

In other words, if it can be assumed that the state is a moral agent in its own right, then it is of practical moral importance that, in matters of justice and political fairness, the state treat all its citizens alike in a principled and coherent fashion, even though its citizens disagree on what the substantive principles of justice and fairness should be. Thus, legislators should strive to enact laws that are coherent in principle, and courts should interpret the law as a whole as if it contained a coherent set of principles. This latter injunction helps explain why courts must take cognizance of past law, for if the state is assumed to be acting according to the political virtue of integrity, it is necessary to seek out those principles by which present state actions can be deemed to be consistent with past political decisions.

Dworkin is aware, however, that the analogy between personal and political morality might be challenged on grounds that it personifies the state or political community in a way that is metaphysically unsupportable. He is careful, therefore, to deny that the state has some sort of ontological status independent of the thoughts and practices of individuals who comprise it. But, he is also unwilling to conclude from this

¹⁴ *Ibid.*, p. 166.

¹⁵ *Ibid.*

fact that an assertion that a community as a whole is committed to some set of principles is just a convenient fictional way of saying that some representative or average individuals in the community are committed to those principles. Rather, he maintains that a community or state must bear the kind of deep personification necessary to sustain any complex moral argument about the responsibilities of officials and the duties of citizenship.

To illustrate why deep personification is essential to any complex moral argument, Dworkin refers to the problem of how to assign moral responsibility for accidents caused by a manufacturer's defective design of an automobile. If one were staunchly committed to the philosophical doctrine of methodological individualism, the natural answer would be that the moral responsibility for the accidents must be assigned to those individuals who were personally at fault for the defective design. But, what if no single individual was blameworthy in this way? That is, each individual discharged his or her corporate responsibilities in a manner which is unimpeachable from the point of view of personal morality. This discovery would seem to exhaust the search for a moral agent who could be held responsible for the accidents? Dworkin suggests, however, that a different approach to moral responsibility would yield a better answer. If it is assumed that the corporation is a moral agent in its own right, then the question of responsibility can be directly addressed by asking whether, and in what way, the corporation is morally accountable for accidents caused by the faulty design of its automobiles. Moreover, if it is decided that the corporation is responsible for the accidents on this assumption of deep personification, subsidiary questions can still be asked about how different members and

agents of the corporation must share in this responsibility. But, this further question is crucially contingent on the prior question of corporate responsibility, and this prior question cannot help but presuppose that some sense of moral agency must be attributed to the corporation.

In like manner, moral assertions about the responsibility of the state make it indispensable that it be treated, for purposes of moral argument, as a moral agent. Thus, if we say that the state has a responsibility to protect individuals from assault, we invariably mean not just that some designated officers of the state have a personal duty to protect us, but that the state taken as a whole has this obligation. And, if we claim that legislatures and courts have the responsibility to treat citizens in accordance with a coherent set of principles, we do not mean that as a matter of personal morality elected officials and judges must display integrity in their magisterial decisions. Rather, we mean that it is the responsibility of the state to enact coherent principles in its laws, and individual legislators and judges share in this responsibility insofar as they are official agents of the state.

However, even if Dworkin is successful in showing, through analogy, that there is a plausible moral structure to an interpretative argument about law resting on a deep personification of the state acting on principle of integrity, he has not demonstrated that such an argument fits Anglo-American judicial and political practices. To make the case that integrity is a distinctive political ideal that does figure in the Anglo-American political culture his theory is intended to canvass, Dworkin suggests that the reaction people intuitively display to "checkerboard" solutions in law testifies to the real and

practical force of this ideal. By checkerboard solutions Dworkin means any legislative or judicial decision in which principles of justice or fairness are compromised in and of themselves. He contends that liberals generally disapprove of checkerboard solutions in law because, regardless of the advantages to such solutions, they offend the principle of integrity.

For example, if we are moved by the political ideal of fairness to say that each person or group should have roughly equal influence in the decisions of a legislature, what reason is there for not accepting laws that are internally compromised in a way that attempts to satisfy different people who disagree on what the right law should be in controversial cases? Thus, if people disagree on the issue of product liability laws, why not craft a Solomonic law which imposes strict liability on automobile manufacturers but not washing machine manufacturers? If people are divided over the issue of racial discrimination, why not pass a law forbidding discrimination on buses but not in restaurants? If abortion is controversial in a community, why not outlaw abortions for women born in odd years but not for women born in even years? Each of these checkerboard laws would have the virtue of furnishing some satisfaction to people divided by their moral beliefs, because, as compromises internal to the shared conviction they supposedly have about fairness, people on either side of a controversial issue will at least gain something by the laws.

Dworkin thinks that most people in fact would be dismayed by such checkerboard laws. However, the reason cannot be that they think such checkerboard laws are unfair or unjust. They cannot be regarded as unfair, because, under the hypothesis that political

fairness requires everyone to enjoy an equal influence in the legislative process, a checkerboard law satisfies that moral requirement by granting everyone at least some say in the substantive content of the law. Nor can checkerboard laws necessarily be condemned on grounds of justice, for, if people disagree on what justice requires, and a checkerboard law satisfies at least part of their rival conceptions of justice, then there is no good *a priori* reason for rejecting it, particularly if the alternative is a law which wholly disappoints some and not others. Thus, it is plausible for a right to life proponent to prefer, on grounds of justice, a law which legalizes abortions during some but not all stages of pregnancy compared to a law which removed abortion entirely from legal regulation. By the same token, it is plausible that advocates of freedom of choice would prefer that same checkerboard law, on grounds of justice, because they deem it better than the alternative in which abortions are entirely prohibited.

Therefore, if the values of fairness and justice do not condemn checkerboard laws, there must be another principle which explains the general liberal aversion to such laws. The only reason, Dworkin concludes, that most people instinctively disapprove of checkerboard laws must be that they embrace the idea of integrity as a political virtue distinct from the more familiar notions of fairness and justice. And, this ideal of integrity comes into play precisely when liberals are divided on issues of principles. In such situations, Dworkin contends, liberals believe "that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural

limits of its authority."¹⁶

While Dworkin thinks that integrity is a political ideal against which both legislative acts and judicial decisions can be assessed, he concedes that legislatures do have the authority to enact laws that are compromised internally, although such compromises can still be subject to criticism. Courts, on the other hand, are more strictly circumscribed by their role as interpreters of the law, and, for this reason, are under greater moral obligation to maintain integrity in their legal decisions. But, even courts have to weigh the demands of integrity against other political values in their interpretations of the law. Specifically, Dworkin mentions three other political values which figure in the interpretation of law: fairness, justice, and procedural due process. By fairness Dworkin means the degree to which legislatures and their acts can be judged to be equally representative of, and responsive to, the people. By justice he means the degree to which the distribution of resources and rights resulting from legislative decisions can be judged to be morally defensible. And, by procedural due process, he means the degree to which courts and other legal institutions can be judged to have used the right procedures of evidence, discovery, and review which promise to improve the accuracy of their decisions while respecting the moral standing of citizens.

The distinct requirements of each of these political values make adjudication, on the interpretative model of law as integrity, a much more complex and discriminating exercise than merely striving to display consistency in judgement. In any particular legal dispute, a judge may find that the demands of fairness, justice and integrity conflict, in

¹⁶ *Ibid.*, p. 179.

which case he or she must make an intricate, and doubtless controversial, judgement about which value rightly prevails. Thus, although integrity demands that cases be decided according to the most defensible normative scheme of principles embodied in past law, this does not mean that everything must be left as it is found. For example, a judge might resolve, in the course of considering a present case, that the cause of justice, as she or he understands it, convicts some settled part of past legal decision as illegitimate, and, for that reason, might choose to "isolate it as a mistake because it is condemned by principles necessary to justify the rest of the institution."¹⁷

Dworkin believes that the interplay between the different convictions judges might have about the values of fairness, justice, procedural due process and integrity ensure that law will be both dynamic enough to accommodate change and development, and coherent enough to be regarded as the reasoned product of a political community personified as a moral agent. But, of course, the latter will be true only if integrity is not just a competing but a dominant value in the nest of interpretative concepts that make up adjudication. Dworkin suggests that integrity, indeed, should be viewed in this way because "a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force."¹⁸

This latter attribution of a special justification for the coercive power of the state of course merely restates Dworkin's contention that law as integrity is a morally

¹⁷ *Ibid.*, p. 203.

¹⁸ *Ibid.*, p. 188.

attractive interpretation of the abstract concept of law. But, this still does not tell us wherein the moral attraction lies. Specifically, Dworkin has not yet shown why law, understood in the way his interpretative conception recommends, provides any justification for state coercion, much less its most attractive justification. To explain how law as integrity serves to justify a state's coercive power, Dworkin presents what arguably is his most original contribution to political theory. That contribution consists of a justification of state authority derived from an elaborate analysis what he calls associative or communal obligations.

5. Eternal Obligations

Dworkin arrives at this notion of communal obligations by first stating that the "classical problem of the legitimacy of political power...rides on the back of another classical problem: that of political obligation."¹⁹ In other words, the question of what makes the state's power legitimate is intimately tied to the question of whether citizens have genuine moral obligations to obey what is assumed to be legitimate law. Dworkin recognizes that these two questions are not identical. Thus, even if it is held to be true that a state's power is legitimate, this does not mean that all of a citizen's legal obligations should be enforced. Likewise, even if it is conceded that citizens do have genuine moral obligations to obey the laws of a legitimate state, these moral obligations might be overridden in special circumstances if other moral considerations warrant. Nevertheless, in the main, the legitimacy of a state's power, Dworkin argues, is crucially

¹⁹ *Ibid.*, p. 191.

dependent on how we understand the moral basis for political obligation.

With this connection in mind, Dworkin reviews only to dismiss a number of familiar liberal answers to the related questions of what confers legitimacy on a state's authority, and what creates obligations on the part of citizens to obey the laws. For example, Dworkin rejects the idea of tacit consent which Locke used as a practical surrogate for a genuine contractual agreement upon which political obligations could be based. Because tacit consent is not exactly freely given, since genuine alternatives to living in the country of one's birth are not readily available, it ill serves as a strong justification for political obligation. And, it is even less an argument for the legitimacy of a state's power, Dworkin argues, "because a person leaves one sovereign only to join another; he has no choice to be free from sovereigns altogether."²⁰

Nor is an argument which grounds political obligation in the duty to be just an adequate explanation for why citizens of a particular country feel obliged to obey its laws. For example, if it is claimed that we have a natural duty to support and obey the institutions that realize an abstract conception of justice, this injunction is too universal to tie citizen obligations to the laws of their own country. Thus, because the obligation is addressed to just institutions, it remains an open question whether citizens will feel compelled to obey the laws of their own country in the personal and intimate way that theories of political obligation usually describe it.

Finally, Dworkin thinks that the most popular defense of political legitimacy, the argument from fair play, is also less promising than it might appear. The argument from

²⁰ *Ibid.*, p. 193.

fair play, a variation of which again can be found in Locke, assumes that if someone received benefits under a standing political organization, then that person has an obligation to bear the burdens of the political organization, even if the benefit itself was not actively solicited. Against this theory, Dworkin makes the simple observation that it is unreasonable to claim that "people can incur obligations simply by receiving what they do not seek and would reject if they had the chance."²¹

Furthermore, Dworkin asserts, the argument from fair play trades on an ambiguity in its conditional statement about people benefiting from political organization. How exactly is it to be assumed that people benefit from political organization? If the answer is that people's welfare is thereby improved, the answer is question-begging because the obvious retort is: "improved compared to what?" Once the comparative question is asked, however, the principle of improved welfare plainly appears too strong because it would require that we measure each person's imputed welfare gains across the entire range of all possible political organizations. If, on the other hand, we use a Hobbesian standard in which political organization is compared to the anarchy of a state of nature, then the principle of improved welfare is too weak because it is too easily satisfied.

In these three commonplace arguments for establishing a basis for political legitimacy and obligation, a common theme emerges. All presuppose that some defining act on the part of individuals, taken as moral agents in their own right, justifies both the ascription of legitimacy to the state, and the assumption of citizen obligations. But a

²¹ *Ibid.*, p. 194.

more fruitful way of looking at the problem, Dworkin suggests, is to examine the special associative obligations which membership in a social group entails. In other words, Dworkin relocates the problem of legitimacy and obligation within the wider question of whether any special responsibilities attach to the roles we normally assume because of our "membership in some biological or social group, like the responsibilities of family or friends or social group."²²

Noting that most people do think that they have associative obligations just by the fact that they belong to groups, Dworkin points out that these obligations are not necessarily incurred through choice or consent, or any other defining act. Thus, children do not choose their parents, and in that way incur filial responsibilities. Nor do we assume obligations to our friends in a single defining moment, but rather, "it is a history of events and acts that *attract* obligations, and we are rarely even aware that we are entering upon any special status as the story unfolds."²³

Associational obligations should thus be seen as a constitutive part of the social practices by which a group comes to have its own identity. And, as Dworkin describes it, these associational obligations or role responsibilities serve to define what membership in a group involves: "The history of social practice defines the communal groups to which we belong and the obligations that attach to these. It defines what a family or a neighbourhood or a professional colleague is, and what one member of these groups or

²² *Ibid.*, p. 196.

²³ *Ibid.*, p. 197.

holders of these titles owes to another."²⁴ In this sense, associational obligations are to be regarded as historical facts whose moral weight derives not from consent or contract but are instead a defining feature of membership in a group whose roles and rules are set out in advance. Thus, the obligations one owes to family, friends, or colleagues are, in the first instance, determined by the cultural history of those institutions and their internal value structures. And, if political obligation can be assimilated to these other experiences, then the validity of such obligation must also be assessed by the associative values of the historical states in which we happen to find ourselves.

In describing associative obligations in this way, Dworkin is aware that he has not strayed far from the fair play argument which he had previously rejected as an unsuitable foundation for political obligation. He thinks, however, that the objections he made against the argument from fair play do not apply to associative obligations. For, the latter stresses the special existential condition of "belonging" which marks off membership in associative groups from the conditional relationship between benefits and obligations by which citizenship is defined in the fair play argument. However, Dworkin is also alert to the fact that the special existential condition of "belonging" which distinguishes associative or communal obligations is often regarded with mistrust by political philosophers, either because this condition presupposes a degree of personal acquaintance among group members which cannot be realized in large political communities, or because it intimates a kind of political chauvinism or even racism which draws its force from exclusionary or otherwise unjust politics. His response to the latter criticism is to

²⁴ *Ibid.*, p. 196.

refer to the interpretative responsibility we all have to ascertain what exactly is required by the communal or associative obligations we acquire by virtue of the historical groups to which we belong:

...social practice defines groups and obligations not by the fiat of ritual, not through the explicit extension of conventions, but in the more complex way brought in with the interpretative attitude. The concepts we use to describe these groups and to claim or reject these obligations are interpretative concepts; people can sensibly argue in the interpretative way about what friendship really is and what children really owe their parents in old age²⁵

By reintroducing the notion of interpretation into his analysis of political obligation, Dworkin is able to argue that not all associative or communal obligations are worthy of allegiance. For, just as is the case in all interpretative arguments, one must defend the associative values and obligations of the group as expressions of a morally attractive social practice. This recognition of the indispensability of interpretative judgements in turn gives Dworkin the opportunity to indulge in his theoretical stock in trade. He proposes, therefore, to construct an interpretation not of particular associative obligations, but of the more general practice of associative obligation itself, showing it in its best possible light. Dworkin calls this general practice "fraternal obligation" and suggests that such obligation can prosper only under conditions of reciprocity, that is, only if everyone in a fraternal group feels responsibilities towards each other because they all are members of the same group.

While reciprocity is a condition that has to be present and continually nurtured

²⁵ *Ibid.*, pp. 196-97.

in a fraternal group, this still leaves open the question of what individuals do in fact owe each other by virtue of their common membership. Dworkin admits that different individuals might well entertain different interpretative understandings of what their obligations are to each other. But, these divergent views need not destroy the underlying sentiment of reciprocity so long as certain attitudes are shared about what kind of responsibilities are to count as genuine fraternal obligations.

Dworkin cites four such interpretative attitudes which he thinks are necessary to engender genuine fraternal obligations.²⁶ First, members in a group must regard their reciprocal obligations as *special*, that is, pertaining distinctly to the group to which they belong. Secondly, members must accept that their responsibilities are *personal*, that is, that they are responsibilities for other people and not for the group taken as some collective entity. Finally, members must see their specific responsibilities to each other as deriving from a more general responsibility each has of *concern* for the well-being of others in the group, and this general responsibility must be conceived of as an *equal* concern for all members.

This last interpretative attitude, Dworkin states, ensures that fraternal associations are "conceptually egalitarian."²⁷ But, this does not imply that they must assign the same social roles to everyone. Thus, Dworkin allows that fraternal associations "may be structured, even hierarchical, in the way a family is, but the structure and hierarchy must reflect the group's assumption that its roles and rules are equally in the interests of all,

²⁶ *Ibid.*, pp. 199-200.

²⁷ *Ibid.*, p. 200.

that no one's life is more important than anyone else's."²⁸ On the basis of this understanding of the conceptual egalitarianism of fraternal associations, Dworkin concludes that armies which potentially meet the four conditions of reciprocity can be considered fraternal organizations, while caste societies, which discount some of their members as inherently less worthy than others, can make no claim to be fraternal associations, and, hence, can yield no genuine communal obligations.

The "conceptual egalitarianism" behind Dworkin's notion of fraternal association is intended to play an important role in his theory of political legitimacy and legal obligation. That theory is built around a conception of a "true" community. The four conditions which entitle one to judge reciprocal obligations as genuine fraternal obligations are what distinguish "bare" from "true" communities. A bare community, according to Dworkin, is one which, for genetic, geographical, or historical reasons, ties people together under reciprocal rules of obligation. But, a true community can be said to exist only if these reciprocal responsibilities "are special and individualized and display a pervasive mutual concern that fits a plausible conception of equal concern."²⁹

Significantly, Dworkin maintains that these conditions should not be regarded as psychological properties which people must share, but as "an interpretative property of the group's practices of asserting and acknowledging responsibilities."³⁰ In making this distinction between psychological properties of individuals and the interpretative property

²⁸ *Ibid.*, pp. 200-01.

²⁹ *Ibid.*, p. 201.

³⁰ *Ibid.*

of a group's shared practice, Dworkin hopes to defend his conception of fraternal obligations from the charge, alluded to previously, that such obligations could only conceivably have force in a community small enough that members can know and feel an emotional bond with each other. That kind of intimacy is not necessary to constitute a "true community", Dworkin insists, as long as we can detect in the interpretative arguments about fraternal responsibilities which the community routinely recognizes, the four conditions mentioned. It is thus to representative political arguments that we must turn our attention if we hope to determine whether a bare community is also a true fraternal community.

However, even if our interpretative judgements suggest that the four conditions are met in a community and its fraternal obligations are for that reason genuine, Dworkin acknowledges that such obligations might still come into conflict with other moral values such as a member's conception of justice. Dworkin illustrates this potential for conflict between fraternal obligations and justice by referring to the not unfamiliar family tradition in some communities where equal paternal concern for children places a differential obligation on sons and daughters. "Does a daughter have an obligation to defer to her father's wishes," Dworkin asks, "in cultures that give parents power to choose spouses for daughters but not sons?"³¹

Dworkin's general answer is that it depends on the interpretative concepts one brings to bear on the question. If long settled obligations in what are deemed to be fraternal communities offend one's interpretative sense of justice deeply enough, then that

³¹ *Ibid.*, p. 204.

may be sufficient grounds for ignoring the obligation or working to reform the social practices of the community in order to eliminate the practice. Such decisions, of course, will depend on the degree to which an obligation of the community departs from one's conception of justice, or indeed, from the conditions which constitute genuine fraternal obligations.

Thus, in the case of the daughter's duty to defer to her father's wishes in the matter of a spouse, if it can be shown that this particular duty is the product not of a paternal attitude of equal concern for all children but the result of a pervasive sexism in the culture, then it cannot be considered a genuine fraternal obligation. But, on the other hand, if it can be shown that the culture accepts equality of the sexes but believes in good faith that this equality requires paternalistic protection of women, and this requirement is consistent with other family practices honouring the conditions of reciprocity, then a daughter's obligation to defer to her father might not be so easily ignored. Thus, while a daughter may still refuse to respect her father's wishes in regards to a husband because of her convictions about justice, Dworkin thinks that in this instance she has something to regret and "owes him at least an accounting, and perhaps an apology, and should in other ways strive to continue her standing as a member of the community she otherwise has a duty to honour."³²

There is a sense in which Dworkin's example of the conflict between fraternal obligations and the demands of justice rings strange. What is peculiar about the example is the way in which he assimilates filial obligations to fraternal obligations. Dworkin

³² *Ibid.*, p. 205.

might have profited, in this case, from reading Freud, who claimed that fraternal association arose as a consequence of the symbolic or actual murder of the father.³³ Notwithstanding the curiosity of Dworkin's analogy, the general direction of his argument about fraternal obligation is clear. If the four conditions describing fraternal obligations are present, and, absent countervailing arguments drawn from convictions about justice, or fairness, or some other moral values, people are normally under strong obligation to discharge the legal responsibilities their community imposes upon them.

6. Community of Principle

This argument for fraternal obligations, however, is thus far only presented in the formal mode. It says nothing about what politics must be like if a bare community is to be regarded as a true fraternal political community. In turning to this question of the form which a fraternal political community must take, Dworkin focuses his attention on the political attitudes which are presupposed by fraternal association. However, he stresses that how we construe attitudes is ultimately an interpretative, not an empirical matter. Thus, what is important to determine is not whether people self-consciously hold the attitudes which comprise the conditions of fraternal obligation, but whether the political practices normally performed in a state express the kind of mutual concern and responsibility appropriate to a true community. To this end, Dworkin offers three general

³³ On Freud's depiction of fraternal organization as a manifestation of filial rebellion against the father, see Norman O. Brown, Love's Body (New York: Vintage Books, 1966), pp. 3-31. For a critical assessment of the more general implications of Dworkin's identification of political and familial obligations, see *infra*, ch. 10, pp. 493-96.

models of political association which a community's political practices might express. From each model one can infer the kind of political attitudes citizens would have to embrace in order to hold the view of community the model expresses. And, coincidentally, each model suggests a theory of adjudication appropriate to that community, although for expository purposes, Dworkin chooses to emphasize this connection only for two of the three models.

The first model of political association is one of circumstance. On this model, members of a community treat their association merely as an accident of history, or geography, and, therefore, not special enough to support any strong sense of reciprocal obligations. People may still accept the political obligations of their *de facto* community, if, for example, they see a personal advantage in it, or, alternatively, if their more universal convictions about justice recommend concern for community affairs. But, in either case the motivation to obey the laws is contingent on considerations independent of the fact that one belongs to a particular community.

The second model of political association is something Dworkin calls the "rulebook" model of community. In the rulebook model there is not just the attitude of forbearance typical of the community of circumstance, but an active, shared commitment to live according to a common set of laws. Thus, in the rulebook community, individuals, acting from motives of enlightened self-interest, agree to obey the laws that result from fair negotiations represented by the political process of which they are a part. Significantly, members of a rulebook community do not regard the rules they agree to obey as embodiments of any deeper moral or political principles, but simply as effective

compromises worked out in the political realm among competing interests and viewpoints. Because rules are seen in this way as negotiated political compromises, individual members of the community, always protective of their interests and viewpoints, insist that their agreement to obey is limited only to what has been explicitly assented to in the rules.

The legal correlate to this rulebook community is the theory of law Dworkin previously described as conventionalism. Because laws are regarded as something akin to treaties or pacts in the rulebook community, a conventionalist philosophy of adjudication which insists on fidelity to the letter of the law is uniquely suited to it. Furthermore, Dworkin contends, a conventionalist theory of law combined with a rulebook community would have no principled reason for rejecting checkerboard statutes because such statutes would naturally be seen as products of precisely the kind of compromises that politics is said to represent.

The third model of community which Dworkin considers is the "community of principle." Unlike the rulebook community, the community of principle "insists that people are members of a genuine community only when their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise."³⁴ Such a common commitment encourages a kind of politics in which debate about broad normative issues takes precedence over sectarian compromises prompted by self-interest. Moreover, in such a community members recognize that their rights and responsibilities are not limited to the

³⁴ Law's Empire, p. 211.

particular decisions reached by their political institutions, but depend more broadly on the "scheme of principles those decisions presuppose and endorse."³⁵ And, obviously, the correlative theory of adjudication for a community of principle is law as integrity. For, if the theatre of politics in this community aims at establishing a set of coherent principles as the foundation of its laws, then it is incumbent on courts to view the law as in fact embodying such principles.

Dworkin's description of the community of principle makes the outcome of his comparative exercise rather predictable. The three models of community express, in their central political practices, the kind of general attitude members assume towards each other in their political community. Given Dworkin's portrayal of these different practices, it is relatively easy to see which community expresses, through its political practices, attitudes that satisfy the four conditions of a true fraternal community. A community of circumstance plainly does not meet the conditions because its members do not acknowledge that their obligations to each other are special or personal in any strong sense. Members of rulebook communities, on the other hand, recognize that their reciprocal obligations are special and personal because they are reflective of an agreement to live according to common rules. However, they are not committed to any pervasive mutual concern for each other reflective of a shared conception of equality.

Only a community of principle meets all four conditions of a true fraternal community. Citizens of such a community regard their political obligations as special to their community because they pertain to the particular principles embodied in their

³⁵ *Ibid.*

standing law. These obligations are also respected as personal because a community of principle insists that "we are all in politics together for better or worse, that no one may be sacrificed, like the wounded left on the battlefield, to the crusade for justice overall."³⁶ Likewise, this injunction can be seen as an expression of an egalitarian commitment to treat each person as if he or she was worthy of equal concern. Thus, in honouring the aim of integrity in both its legislative and adjudicative acts, a community of principle can "claim the authority of a genuine associative community and can therefore claim moral legitimacy-- that its collective decisions are matters of obligations and not bare power--in the name of fraternity."³⁷

This, finally, is Dworkin's normative justification of his conception of law as integrity. On the assumption that the point of law is to legitimize the coercive power of the state, he has argued that this legitimacy obtains only if the political community can be regarded as a fraternal community. The conditions which together constitute a fraternal community are the same conditions which confer legitimacy on the community's laws. Because a community of principle, acting on the political belief in integrity, best expresses the four conditions of a fraternal community, its authority is inherently legitimate and its member's political obligations are genuine. According to Dworkin, therefore, law as integrity is the most morally attractive interpretation of the abstract concept of law.

It must be stressed, however, that while communities of principle engender

³⁶ *Ibid.*, p. 213.

³⁷ *Ibid.*, p. 214.

legitimate laws, Dworkin does not assert that these laws will necessarily also be just in the sense that they will be morally unimpeachable when viewed from the perspective of the best conception of justice. His position on the link between legitimacy and justice is that rather than expecting congruence in the real world, the best we can expect is to try to determine how far principled, and, therefore, *prima facie* legitimate, laws can depart from what our understanding of justice commands without thereby losing their obligatory character. Thus, he allows that fraternal communities might entertain different and faulty conceptions of what equality requires, yet not faulty enough to warrant outright condemnation of their laws. But, Dworkin is assured that we can state some limits beyond which allegedly fraternal communities lose their claim to moral legitimacy. For example, while a racist society can make no *prima facie* claim that its discriminatory laws reflect equal concern for all its members, a paternalistic society has at its disposal at least a plausible justification for the unequal treatment of sons and daughters.

The relationship between justice and integrity is only one of a number of interpretative questions that a real judge must address when deciding cases. While the principle of integrity, if applicable, provides a presumptive argument in favour of regarding the settled laws of a community as legitimate, it is only after a judge applies a whole range of interpretative judgements about justice, fairness, and procedural due process, as well as integrity, that she or he can finally determine what the law requires in specific cases. Significantly, Dworkin acknowledges that in this complex real-world process of adjudication, judges will often find it necessary to settle for compromises between integrity and competing moral values. Therefore, he contrasts pure integrity, in

which no compromises are necessary, from the inclusive integrity which judges are constrained to adopt as their working principle in the imperfect world they inhabit. Although he only mentions it in passing, this contrast is instructive, for by it Dworkin signals a conceptual dilemma in the very heart of his right answer thesis. To understand this dilemma, we must observe how he describes the process of law "working itself pure."

7. Law Beyond Law

A large part of Law's Empire is devoted to showing how Hercules, adopting the interpretative attitude endorsed by law as integrity, would decide a few selected hard cases in common law, under statutes, and, in the United States, under constitutional law.³⁸ The ostensible purpose in having Hercules revisit these historic cases is to demonstrate that law as integrity can be seen to fit Anglo-American jurisprudence sufficiently to qualify as a credible interpretation of the law. And, while many of the distinct interpretative arguments which Hercules brings to these cases can be anticipated from Dworkin's general theoretical remarks about law as integrity, this extended commentary permits Dworkin to engage in criticisms of a number of contemporary judicial doctrines and theories. Thus, he constructs telling arguments against employing currently fashionable economic theories of law to dispose of cases involving contracts and

³⁸ The common law case which Hercules examines at length, *McLoughlin v. O'Brian*, is drawn from British jurisprudence. The case revolves around the question of how far the common law principle of liability in accidents can be extended to cover third party anguish. The statute case Hercules probes is the famous U.S. "snail darter" case, *Tennessee Valley Authority v. Hill*. Finally, Hercules offers his judgement for two well-known U.S. constitutional cases, *Brown v. the Board of Education*, and *Regents of the University of California v. Bakke*.

tort. He also mounts a very effective critique of theories of statutory and constitutional adjudication which appeal to the idea of "framers's intent" or "judicial passivism" to oblige courts to exercise judicial restraint. But, however interesting these theoretical engagements are, they add little that is new to the picture of law as integrity which Dworkin previously developed in a more abstract fashion. What is of interest in Hercules' application of the judicial ideal of law as integrity to concrete cases, though, are the constraints which Dworkin acknowledges even his exemplary judge must face as a matter of fact.

The first two constraints involve the popular morality of the community and the force of precedence. For example, in his discussion of liability law and third party emotional injury in *McLoughlin*, Dworkin proposes a series of more or less plausible judicial interpretations of the common law principle underlying the record of past legal decisions that have addressed the issue liability. After excluding some of these interpretations as unsupportable descriptions of the law for a variety of reasons, Hercules is confronted with two eligible candidates as a statement about what the common law principle actually is. Following the dictates of integrity, Hercules must resolve the case by appealing to an argument drawn from political morality which would show that only one interpretation of the common law principle can make of the community's legal history the best and most morally attractive story possible. Among the factors Hercules must consider when deciding which explication of the common law principle realizes this aim, Dworkin states, is the need to demonstrate how the existing precedents, interpreted in a particular way, "show judges making decisions that give voice as well as effect to

the convictions about morality that are widespread through the community."³⁹ When this need to interpret precedents in a way that squares with popular morality⁴⁰ is coupled with the commonplace judicial requirement that greater weight must be placed on the most recent precedents, there is a considerable predisposition for Hercules prefer an "interpretation that is not too novel, not too far divorced from what past judges and other officials said as well as did."⁴¹

Against this bias towards judicial passivism, Dworkin sets a countervailing interpretative requirement which has Hercules consult his political convictions about the substantive merits of the alternative interpretations of the common law principle. This at least give Hercules the opportunity of discounting some precedents, or otherwise interpreting the principle in a way that makes the opinions of popular morality less important. But, although integrity requires Hercules to view the law as a whole as if it were an expression of a coherent set of principles issuing from the community personified as a moral agent, there are practical limits to how much of the settled precedents Hercules can ignore, and how far his interpretation can depart from what the community's popular morality of the day would assent to. For if he ignored entirely popular morality and past judicial history, Hercules would neglect his judicial duty to attend to questions of political fairness and due process. Thus, in the case of *McLoughlin*,

³⁹ *Ibid.*, p. 248.

⁴⁰ It must be noted that Dworkin does try to draw a line between those occasions when public morality plays a role in a judge's decision, and those occasions when it is either less relevant or entirely irrelevant. Thus, as argued elsewhere (see *supra*, ch. 3, p. 110), Dworkin does not think that a judge's view of an individual's constitutional rights should be dictated by popular morality. Whether this is a distinction he can consistently maintain is an issue that is discussed at *infra*, ch. 10, pp. 504-9.

⁴¹ *Law's Empire*, p. 248.

Hercules might well be faced with a situation where he must compromise his convictions about which substantive values best fit the law.

He may think that [one] interpretation is better on grounds of abstract justice, but know that this is a radical view not shared by any substantial portion of the public and unknown in the political and moral rhetoric of the times. He might then decide that the story in which the state insists on the view he thinks right, but against the wishes of the people on the whole, is a poorer story, on balance. He would be preferring fairness to justice in these circumstances, and that preference would reflect a higher-order level of his own political convictions, namely, his convictions about how a decent government committed to both fairness and justice should adjudicate between the two in this sort of case.⁴²

While popular morality forms a background against which Hercules must weigh the political intelligibility of his judicial interpretations, and while the doctrine of precedent serves to guide his legal imagination, another constraint he faces when rendering his judgements is the way law is compartmentalized in his jurisdiction. By the compartmentalization of law Dworkin means the boundaries which Anglo-American jurisprudence usually draws between different kinds of legal rights and responsibilities. Thus, the distinctions typically drawn and respected in adjudication between economic or physical injury, intentional and unintentional torts, tort and crime, contract and other parts of common law, public and private law, or constitutional and statutory law, are all features of judicial practice which Hercules must deal with when deciding cases.

If he follows normal judicial procedures, he will attempt to dispose of a case by first looking at what the legal history of the relevant department of law has already

⁴² *Ibid.*

decided on the matter. If the case cannot be easily resolved at this stage, he will expand his search for a coherent set of principles by looking to related areas of law. But his search will be constrained by how law has been compartmentalized in his jurisdiction, and, therefore, by what arguments drawn from other departments of law will be recognized as pertinent to the case at hand. Hercules can, of course, contest a compartmentalization that denies, for example, that legal arguments drawn from public law can be applied to private law. He might try to show that a redrawing of the boundaries of law better serves the overall aim of integrity. But, if he fails to convince his judicial colleagues, Hercules will be compelled to seek the best justification of the law in the case at hand by restricting himself to the principles he can find in those departments where legal comparisons are considered licit, and part of what could more broadly be conceived of as due process.

Yet another restriction felt by Hercules is the deference which judges are normally expected to pay to legislatures in non-constitutional cases. Within the confines of explicit or implicit constitutional provisions, legislatures have the sovereign power to enact law. And, that law may well be of the checkerboard variety which Dworkin claims our instincts of political morality condemn. Courts must, nonetheless, enforce such laws if their content is clear and legally uncontestable because the political principle of fairness requires that the people's will, as reflected in legislative acts, must be respected. Thus, while bound to observe the dictates of integrity, Hercules may find himself in a position where some parts of the law cannot be made coherent according to a single set of principles.

Finally, Hercules must face the constraints that go with courtroom politics. For example, if he is one member of a panel of constitutional judges divided over the substantive issues of a case, Hercules may think it prudent to alter some of the principles he otherwise would uphold in order to persuade a majority to reach a decision that on balance is the best that can be achieved. In this instance, Hercules is willing to compromise his own convictions about substantive moral values in order to obtain a result that approximates what he thinks the right decision should be.

These several constraints which Hercules must operate under when trying to adjudicate in ordinary circumstances represent what Dworkin calls the conditions of "inclusive integrity." Inclusive integrity compels a judge to take account of all the component virtues which law is presumed to reflect, and, in observing this mandate, construct "his overall theory of the present law so that it reflects, *so far as possible*, coherent principles of political fairness, substantive justice, and procedural due process, and reflects these *combined in the right relation*."⁴³ The very fact that a judge may encounter conflicts among different moral principles embodied in settled laws and legal practices means that his or her efforts to fashion the coherence integrity demands can only aim at a qualified success.

If, however, a judge looks only to coherent principles of justice to decide the law, a different picture emerges. Dworkin calls this different picture "pure integrity." Pure integrity, Dworkin states, invites us to consider what our laws should be from the standpoint of the finest principles of justice, assuming that our own institutional history

⁴³ *Ibid.*, p. 405 (emphases mine).

posed no barrier to the realization of perfect justice. For Dworkin, however, the task of resolving what the law can be is reserved only for those who dare to imagine: "It falls to the philosophers, if they are willing, to work out law's ambition for itself, the purer form of law within and beyond the law we have."⁴⁴

Dworkin introduces the contrast between inclusive and pure integrity at the end of Law's Empire, and then remarks only briefly on its significance. Yet, the contrast immediately raises the question of the status of his right answer thesis. The problem, quite simply, is that right answer in a particular legal dispute might be one thing, if viewed from the standpoint of inclusive integrity, and another when looked at from the perspective of pure integrity. How can Hercules, whose judicial deliberations are made under the practical constraints of inclusive integrity, claim to reach the right answer when he might disavow that answer under pure integrity?

Dworkin does have an answer of sorts to this question. Recall that he admitted that a judge, applying the principles of inclusive integrity to present law, must seek to construct, *as best as possible*, the most coherent view of law. This suggests that Hercules' decisions must be regarded only as provisionally right answers. But provisional in what sense? Different judges will order the principles of fairness, justice and due process in different ways. They will accede to the force of popular morality, pay heed to precedence and the compartmentalization of law, display deference to legislatures, and play courtroom politics in a variety of different ways according to their distinct views of integrity, justice, fairness, and due process. Does this mean that the right answer

⁴⁴ *Ibid.*, p. 407.

delivered under circumstances of inclusive integrity is simply whatever answer a judge decides upon in a good faith application of his or her principles? If so, this would relativize Dworkin's right answer thesis in a way that would make it almost indistinguishable from legal positivism. For, although Dworkin expands the range of principles a judge must consider in adjudication, if right answers are a matter of good faith judgement, then it still remains the case that the law is whatever the proper authorities, exercising good faith judgements, pronounce it to be.

There is much in Dworkin's description of Hercules' legal calculations which support this conclusion. Because each of Hercules' interpretative judgements about fit and justification are contestable, different judgements are possible so long as they conform to a morally defensible view of a coherent set of principles that can be seen to be embedded in settled law. This suggests that hard cases may have a number of good answers, though not necessarily one which is uniquely right. It does not really help to say, as Dworkin does, that in such circumstances a judge must still choose the answer he or she thinks right, because this only signifies an inescapable fact about our legal practices, namely, that someone must finally decide a case. Thus, among competing good faith interpretations of the law, the last word must be regarded as the right answer.

However, Dworkin is unwilling to close the hermeneutical circle in this fashion. Therefore, he includes what appears to be an objective standard in his instructions to judges operating under the constraints of inclusive integrity. They must try to construct a theory of law which reflects, as best as possible, coherent principles of fairness, justice and due process *combined in the right relation*. The phrase "the right relation" suggests

that there is a criterion by which different good faith interpretations of the law can be assessed. But how are we to devise this standard? The natural reply, which Dworkin encourages, appears to be that we can look for this standard in the arguments about justice which pure integrity makes possible.

But this reply turns out to be question-begging. For, as Dworkin concedes, different philosophers will advance competing conceptions of what pure justice requires: "Each proposes to show how law can develop in the direction of justice while preserving integrity stage by stage."⁴⁵ If we are then asked to compare and assess different good faith interpretations of the law according to one of a number of contestable conceptions of pure justice worked out by philosophers labouring in the rarefied intellectual environment of pure integrity, how shall we know which conception to choose?

Dworkin's only possible response seems to be that this too is an interpretative question. We choose the conception of justice, the implicit outlines of which we can detect in our present law, to guide us in our judgements about which good faith interpretation of the law supplies the right answer called for by inclusive integrity. And, this interpretative choice in turn helps us reform the law in a way that brings us closer to the ideal described by our chosen conception. Much, of course, rides on the assumption that our present law strives, at least implicitly, to realize a conception of justice which we could defend under arguments drawn from pure integrity. Not everyone might agree. Indeed, Dworkin recognizes this when he states neither a "Marxist nor a fascist could find enough present law distinctively explained by his political philosophy

⁴⁵ *Ibid.*, p. 409.

to qualify for the contest."⁴⁶

In these circumstances, how does one defend law as integrity from charges that the law of a jurisdiction does not contain any semblance of what a correct conception of justice commands? Dworkin thinks it is a matter of interpretative attitude: "Which attitude--pessimism or optimism--is wise or foolish? That depends on the energy and imagination as much as foresight, for each attitude, if popular enough, contributes to its own vindication."⁴⁷

However, even if we concede Dworkin's point that a sincere interpretation of our legal practices means that we must be prepared to see in our present laws a defensible normative content, this still does not resolve the question of how to choose among different, but, nevertheless, plausible, good faith interpretations of the law. For, he, in effect, merely shifts the problem to the plane of pure integrity where once again questions of fit and justification make their appearance. Thus, if two or more plausible candidates for a conception of pure justice can be seen to fit what is presumed to be the outlines of an implicit conception of justice in our jurisdiction, we must still choose which is the best. And, that choice can again be contested on interpretative grounds, prompting a new round of questions about whether the "right relation" that different theories of pure integrity propose for their arguments of fit and justification is correct. It is easy to see that interpretative questions are, in this sense, interminable, generating

⁴⁶ *Ibid.*, p. 408.

⁴⁷ *Ibid.*, p. 407.

arguments that proceed asymptotically, yet which never arrive at the right answer.⁴⁸

But it may, after all, be a mistake to regard Dworkin's right answer thesis as principally an epistemological claim made within a moral argument. Rather, the right answer thesis may function more importantly as a conceptual marker addressing the problem of moral transformation. Thus, if Hercules is conceived, not as an idealized judge rendering correct judgements, but as a philosopher advancing a vision of law as potentially displaying pure integrity, then his role changes. In educating us about the possibilities of a law purer than we presently have, his goal is to instill in us the ambition to replace the politics of self-interest with a politics of principle, the truth of which we attest to because we have, in good faith, constructed it ourselves. And, indeed, this is how Dworkin finally depicts "law's empire," as something "defined by attitude, not territory or power or process [and which] must be pervasive in our ordinary lives if it is to serve us well even in court."⁴⁹ But, if law taken in its broadest sense describes an attitude people have to their common political affairs, the question remains of how Hercules the judge who decides what the law presently is can be reconciled with Hercules the philosopher who bids us to construct the best law? It is this question which is the central focus of the next chapter.

⁴⁸ This is a problem of which Dworkin is also aware. For his response to this difficulty, see *infra*, ch. 11, p. 522.

⁴⁹ Law's Empire, p. 413.

Chapter Ten

Hercules as the Legislator

1. Introduction

In the preceding chapter it was shown that Dworkin's ideal portrait of adjudication involves a conceptual puzzle. That puzzle is represented in the two faces of Hercules. As an exemplary judge, he demonstrates how the values of integrity, justice, fairness, and procedural due process can be combined in specific cases to produce right answers in law. In this role, Hercules must attend to the practical exigencies of adjudication such as the disposition and force of popular morality, or the compartmentalization of law in his jurisdiction. Moreover, he must deliver decisions through an interpretative scheme which justifies the capacity of present law to establish valid obligations on the part of citizens. In other words, in his adjudicative role, Hercules represents what is to be regarded as the legitimate coercive nature of the state.

But, as a philosopher who seeks to make explicit a pure conception of justice supposedly implicit in the existing law of a community, his role changes. In the latter case, his interpretation of the right answer to disputes in law is governed by considerations of justice alone. No longer constrained to justify present law as a whole, Hercules the philosopher can attend to forward-looking questions about what the law could be if it embodies pure and consistent principles of justice. Such forward-looking speculations are an invitation to regard law as an evolving enterprise whose latent goal is to encourage the development a society where all citizens are motivated to act justly. In this sense, Hercules the philosopher represents the reforming or educative role of law

rather than its coercive side. But the question remains, how can the coercive aspect of present law be reconciled to the educative aspect of an imaginary pure law? Does Dworkin's interpretative theory of the law contain the conceptual means to bridge the gap between is and ought?

2. The Politics of Interpretation

One answer to the question of how Hercules the judge and Hercules the philosopher can be reconciled is to deny that such reconciliation is either necessary or possible. Although not necessarily posing the question in the way just described, most critics of Dworkin's jurisprudential theory contend that his effort to show that the normative, and, therefore, educative, aspect of law can be combined in a conclusive way with its coercive side is untenable.

Perhaps the most commonplace objection to Dworkin's interpretative theory of law is that it misconstrues the alternatives of legal positivism and legal realism, and is, therefore, presented as a solution to a theoretical problem whose existence is doubtful. Because most commentators who adopt this line of criticism pay attention primarily to Dworkin's transformation of legal positivism into an interpretative theory of law,¹ it will be useful to summarize their main grievances.

First, self-identified legal positivists usually insist that their theories do not have

¹ Although, see Andrew Altman, who suggests that Dworkin's depiction of legal realism is no less faulty than his portrayal of legal positivism. Altman, "Fissures in the Integrity of *Law's Empire*: Dworkin and the Rule of Law," *Reading Dworkin Critically*, *op. cit.*, pp. 162-73. Another writer, John Finnis, also contests both Dworkin's description of legal positivism and natural law theory. See Finnis, "On Reason and Authority in *Law's Empire*," *op. cit.*, pp. 367-70.

the semantic character which Dworkin attributes to them. Thus, they do not need to be rescued from the semantic sting by being converted into the interpretative theory which Dworkin calls "conventionalism". For example, Hart, who has long been a target of Dworkin's, and, who is said to be consumed by semantic concerns, is explicit about his theoretical interests in his principal text, The Concept of Law: "...its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena."² Joseph Raz, another contemporary legal positivist whom Dworkin has occasion to criticize for presupposing that the meaning of law is contained in some central definition, is equally explicit in denying the charge: "...legal philosophy is not and never was conceived to be by its main exponents as an enquiry into the meaning of this or any other word. It is the study of a distinctive form of social organization."³

Although Raz and Hart have their own intramural disputes about what a sociological enquiry into law entails, they at least are united on the conviction, common to legal positivism, that law and morals are two distinct social phenomena which require different kinds of analyses. The sociological analysis of law is primarily interested in eliciting the social norms that make law a distinctive social practice, and not testing

² H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), pp. 16-17.

³ Joseph Raz, The Concept of a Legal System, *op. cit.*, pp. 209-210.

either the definitional or moral probity of the legal concepts in use in a flourishing legal system.⁴ Thus for both theorists, what the law is can only be answered by examining the social norms which constitute a particular legal practice, while what the law should be can only be answered by canvassing moral theory. The line which positivists try to draw between the "is" and "ought" of law illustrates their analytical ambition to produce a general theory of law applicable to all societies without having to submit such a theory to normative questions about the moral power of the law of any particular society.

By converting legal positivism into the interpretative theory of conventionalism, therefore, Dworkin can be criticized for distorting its central tenets in two ways. First, by ascribing to positivism, or, as he comes to call it, conventionalism, a "shared-meaning" view of the criteria of law, Dworkin can be accused of caricaturing rather than characterizing the legal positivist's account of the shared rules of recognition by which a community comprehends the acts that create law. Secondly, by attributing to legal positivism, in its interpretative guise, a certain account of law meant to justify its coercive nature, he can be accused of fabricating a normative concept which is absent in mainstream expositions of that doctrine.

Dworkin is, of course, the first to admit that the conventionalist theorist he describes in Law's Empire is an invention. But, no doubt to avoid the accusation that the invention is designed to serve as a straw man in his argument for law as integrity, he notes, parenthetically, that while different versions of legal positivism "are not, on the

⁴ Although, see Soper, who claims that legal positivists like Hart and Raz are in fact engaged in definitional exercises, although definitional exercises which exclude questions of moral soundness. Philip Soper, "Dworkin's Domain," Harvard Law Review, Vol. 100 (1987), pp. 1171-72.

surface, claims about why law justifies coercion [they] nevertheless depend on or presuppose such claims."⁵

Dworkin's terse explanation of how legal positivism presupposes the normative claim about justified coercion amounts to a declaration that neither Hart's nor Raz's theory of law can satisfactorily demonstrate why conventional rules of recognition impart a binding force on law except by arguments drawn from political morality. However, aside from the fact that Dworkin errs in summarizing Raz's if not Hart's position on the matter,⁶ a positivist could simply state that it is descriptively true that arguments drawn from political morality inform the understanding which members of a community have of their legal obligations. But this does not in turn commit the positivist to a particular moral argument. In other words, it is perfectly consistent for a positivist to say that, as a matter of social fact, arguments of political morality enter into a community's self-understanding of its laws. And, by the same token, a positivist can criticize those arguments of political morality from some other moral standpoint, in which case he or she would be offering prescriptions for, not descriptions of, the law. In neither case, though, is a positivist legal theorist committed to the interpretative claim about justified coercion which Dworkin assigns to conventionalism.⁷

If Dworkin's attribution of a normative concern for justifying coercion to legal

⁵ *Law's Empire*, p. 429n3.

⁶ A point succinctly made by Finnis, *op. cit.*, p. 369n15.

⁷ Thus, Soper, for one, finds troubling Dworkin's ascription of this normative concern to positivism, "[b]ecause positivists typically go to some lengths to defend the opposite view—that the concept of law refers to collective force simpliciter, not to justified collective force...." "Dworkin's Domain," *op. cit.*, p. 1170. For a more detailed discussion of the implications of Dworkin's contention that justified coercion is the central normative preoccupation of interpretative theories of law, see *infra*, pp. 486-92.

positivism is suspect, so too is his claim that, as an interpretative theory, conventionalism must portray adjudication in hard cases as a purely subjective exercise involving legal invention. According to Dworkin, the shared-criteria thesis means that conventionalists are agreed that only when statements or acts conform to a strict definition of what constitutes the law can they be regarded as law. For adjudication, this means that not only do judges share a consensus on what rules make up the law, but also, in hard cases where the explicit rules are silent, they recognize their discretionary power to make new law unrestrained by existing legal facts.

The problem with this characterization of legal positivism, as many commentators have pointed out, is that it is hard to find a theorist who subscribes to any strict doctrine of shared criteria as the basis of legal meanings.⁸ Thus, someone like Hart is prepared to admit that law contains explicit as well as implicit dimensions, so that within the penumbral territory comprising the implicit extensions of the law, judges can quite rightly be seen as disagreeing over what the law requires rather than making new law. Though, Hart maintains that in certain circumstances it is more accurate to say that while the implicit extensions of the law frame their answers to hard cases, judges are, nevertheless, engaged in judicial law-making.

In Law's Empire Dworkin seems to agree that his description of legal positivism might be misdrawn. Thus, after first offering a portrait of positivism as committed to the strict shared-criteria view of the law, he admits that there is a more plausible version of

⁸ See, for instance, Ken Kress, "The Interpretative Turn," Ethics, Vol. 94, no. 4 (July, 1987), p. 853, and Steven Burton, "Ronald Dworkin and Legal Positivism," Iowa Law Review, Vol. 73 (1987), p. 112.

this interpretative doctrine which he calls "soft conventionalism." Soft conventionalism, unlike its theoretically more austere counterpart, acknowledges that law has both explicit and implicit dimensions, and, therefore, that adjudication entails interpretative judgements about the principles implicit in the law. However, he introduces soft conventionalism only to state that it is a poor rendition of law as integrity because its normative justification of the law is still contradictory.

One could, of course, complain that this merely begs the question of why justified state coercion should be the normative criterion by which soft conventionalism and law as integrity are compared. But such criticism is, in one sense, beside the point, for, in the end, Dworkin reverts to strict conventionalism as his foil because he thinks it brings into sharp relief the distinction between the concept of judicial discretion with which he finds fault in legal positivism, and the duty to render judgements according to the dictates of integrity which is at the heart of his own interpretative theory of law.

This distinction between how positivism and law as integrity conceive the practice of judicial discretion becomes questionable, however, in light of Dworkin's own understanding of the interpretative act. For, when describing the process of interpretation, Dworkin distinguishes between three stages of interpretation - the pre-interpretative, interpretative, and post-interpretative or reforming stages. Significantly, Dworkin treats the pre-interpretative stage as one in which there is wide consensus over what constitutes the social facts of law. The interpretative stage, on the other hand, involves an explanation and justification of those social facts, or at least the majority of them, according to the most attractive moral and political theory possible. This in turn

leads to the post-interpretative or reforming stage of the law where the actual legal judgement serves to confirm or modify the meaning and force of what are taken to be the relevant precedents.

However, if closely examined, Dworkin's distinction between the pre-interpretative and later interpretative and reforming stages of legal judgements do not appear incompatible with legal positivism's description of adjudication. Thus, one could arguably claim that, insofar as legal positivism purports to describe the law, its efforts yield what Dworkin calls the pre-interpretative understanding of law. And, as far as interpretation and reform are concerned, this is comparable to the positivist's contention that judges apply their own moral convictions when using their discretionary power to make new law. On this view, therefore, it would seem that Dworkin has not supplanted but merely recycled legal positivism in a more contemporary dress.⁹

If this latter observation is correct, then the relationship between Hercules the ideal judge and Hercules the philosopher is easy to divine. The two merely reinstate the positivistic distinction between law and morals, with one representing what law is, and the other, what law should be. On this positivistic interpretation of Dworkin's theoretical project, no further enquiry is needed to clarify the relationship between Hercules the judge and Hercules the philosopher because they are engaged in two separate enterprises.

However, while this conclusion is tempting, it overlooks an important point which Dworkin has continually tried to make about adjudication. In censuring legal positivists for their portrayal of judicial discretion, Dworkin has always insisted that the moral

⁹ Or, as Steven Burton contends, as an interpretative theory of a specific culture's laws, "Dworkin's account presupposes legal positivism." "Ronald Dworkin and Legal Positivism," *op. cit.*, p. 128.

principles that judges bring to the law must somehow be seen to be embedded in the law. This means that judges are never actually involved in making new law, but are extending the reach of principles implicit in existing law. Likewise, when describing the imagination of the theorist who attends to the question of what pure law would look like, Dworkin maintains that this philosophic vision must still be tied to a specific legal culture. It is clear that with these admonitions Dworkin is doing more than making a normative plea that law and morals *should* be integrated in a good political system. Rather, his purpose in Law's Empire is to show that the most reasonable theory of legal interpretation confirms that they *are* integrated, even if imperfectly, in Anglo-American liberal democracies.

For many critics, therefore, it is this strong interpretative claim, rather than any implicit positivism in his interpretation of the law, which proves to be Dworkin's most vulnerable side. And, a number of these critics think that the fault lies in what is regarded as Dworkin's ill-conceived interpretative methodology. For example, Alan Hunt claims that Dworkin displays confusion over the question of whether "purpose" is something imposed on a social practice by an interpreter, or whether it is an attribute of the practice itself. To escape this conceptual complication, Hunt proposes an elementary remedy.

To avoid the confusions Dworkin commits is simple; restrict all attribution of 'purpose', 'motive', 'meaning', etc. to social actors (in this context it is perfectly proper to refer to the motives of a participant or of an observer) and do not extend this usage to the analysis of social or legal practices. The implications of this simple move are important: law has no purpose or motive! Social institutions and social practices do not have motives, intentions, aims,

or plans; what they do have are both meanings for participants and roles, results or functions.¹⁰

Were Dworkin to abstain from imputing purpose to law, Hunt concludes, his various metaphors about law's "dreams", "ambitions" or "empire" could be dissolved into more realistic assertions about the political motives and projects that surround the practice of law.

If Hunt is right in his claim that Dworkin is guilty of an unwarranted projection, then the alleged conflict between Hercules the judge and Hercules the philosopher would disappear. For, if law has no single normative purpose, its philosophical explication would be futile. But, it is not clear that Dworkin's theory of interpretation is methodologically unsound simply because it attributes a normative purpose to social practices. To see why, it is useful to inspect one of his central examples meant to illustrate the properties of interpretation.¹¹ In this example, Dworkin refers to an imaginary community in which the social practice of courtesy has changed over time, and, therefore, whose meaning is controversial within the community. If asked to interpret the meaning of courtesy in this community, a philosopher will invariably have to refer to its purpose or point. Assuming that it is possible to express the purpose or point of courtesy in terms of the general concept of respect, the philosopher must be prepared to give an account of what is required by the respect which courtesy is said to signify. Such a philosophical account would thus offer an explicit conception of the

¹⁰ Alan Hunt, "Law's Empire or Legal Imperialism?" in Reading Dworkin Critically, *op. cit.*, pp. 30-31.

¹¹ See Law's Empire, pp. 46-53.

abstract concept of respect.

The philosopher could, of course, simply report what each person in the community thinks is meant by paying the respect to others which courtesy requires. This would satisfy Hunt's contention that meanings are properties of social actors and not social institutions or practices. But, such a descriptive move, in effect, a *biographie en grande serie*, does not answer the question of what kind of respect is required by the concept of courtesy when the meaning of the concept itself is in dispute. For this the philosopher still must offer his or her account, no doubt controversial, of what courtesy really means. It does not help to say that this is merely what the philosopher *thinks* courtesy means, because the philosopher does not invent this particular social practice but joins it as a "virtual participant" when trying to determine its purpose.

In joining a shared practice, the philosopher proposes a meaning for something, the contours of which have a social existence independently of his or her interpretation of it. For this reason, meaning can be attributed to a social institution or practice without assuming that it enjoys an autonomous ontological status, but also, without reducing that meaning to the projections of discrete agents. Indeed, Hunt confirms rather than contradicts this point when he declares that social institutions and practices have roles and functions. These latter terms, after all, signify the meanings or purposes that theoretical discourse assigns institutions and practices as part of an attempt to explain what these institutions and practices are about.¹² There is no *a priori* reason, therefore, for rejecting

¹² It should be noted that Hunt, in another article written together with Valerie Kerruish, alters somewhat his critique of Dworkin's hermeneutical method. In the latter article, Hunt and Kerruish's principal exception to Dworkin's manner of projecting meaning unto social practices is the "essentialism" it presupposes. See Valerie Kerruish and Alan Hunt, "Dworkin's Dutiful Daughter: Gender Discrimination

any attribution of a meaning or purpose to a social whole, for it all depends on how that attribution figures in an overall explanatory argument.¹³

Another critic who takes Dworkin to task for his methodological approach is John Finnis. A modern natural law theorist, Finnis is in general sympathy with Dworkin's contention that law contains a normative point or purpose. But Finnis denies that a uniquely right answer can always be found in legal disputes, and complains that Dworkin is guilty of introducing a fallacious syncretism in the criteria he uses to decide which of a competing set of interpretations of the law is the correct one.

Hercules himself, no matter how superhuman, could not justifiably claim unique correctness for his answer to a hard case....For in such a case, a claim to have found the right answer is senseless, in much the same way as it is senseless to claim to have identified the English novel which meets the two criteria 'shortest and most romantic' (or 'funniest and best', or 'most English and most profound'). Two incommensurable criteria of judgement are proposed - in Dworkin's theory, 'fit' (with past political decisions) and 'justifiability' (inherent substantive soundness).¹⁴

What makes a hard case difficult to resolve, Finnis insists, is precisely the fact that "not only is there more than one answer which violates no applicable rule, but the answers thus available are ranked in different orders along each of the available criteria of evaluation: brevity, humour, Englishness, fit (integrity), romance, inherent 'quality',

in *Law's Empire*," Reading Dworkin Critically, *op. cit.*, p. 231. For an extended commentary on their argument, see *infra*, pp. 492-97.

¹³ For a short but incisive argument about the possibility of retaining a general commitment to methodological individualism while allowing for group properties as a feature of description and explanation, see May Brodbeck, "Methodological Individualism: Definition and Reduction," Readings in the Philosophy of the Social Sciences, May Brodbeck, ed. (London: Macmillan, 1968), pp. 280-83.

¹⁴ John Finnis, "On Reason and Authority in *Law's Empire*," *op. cit.*, p. 372.

profundity, inherent 'justifiability', and so forth."¹⁵ A good dose of moral realism, he concludes, should confirm the commonplace view that just as there are "many ways of going and doing wrong, there are also in most situations of personal and social life a variety of incompatible *right* options--that we should seek good answers and eschew bad answers, but not dream of *best* ones."¹⁶

Although Finnis's belief that moral life admits of different right answers is doubtless true, it is not immediately evident that this fact damages Dworkin's more specific claim that in legal disputes there is one right answer which forms part of the authoritative framework of the law of a community, though not necessarily of an individual's moral life within that community. Nor is Finnis's charge that Dworkin employs incommensurate criteria in assessing the correctness of competing interpretations of the law entirely accurate. The criteria of "fit" and "justification", as Finnis himself parenthetically notes, appear to share the same evaluative plane.¹⁷ This should not be altogether surprising. The subject of legal interpretation is law which does, after all, have a prescriptive character.

A theory of the law, therefore, must take into account this prescriptive character when laying out the criteria for a good interpretation. Thus, unlike Finnis's example of the incomparable criteria of the shortest and most romantic English novel, Dworkin's notions of "fit" and "justification" are not as incommensurate as he thinks. An

¹⁵ *Ibid.*, pp. 373-74.

¹⁶ *Ibid.*, p. 371.

¹⁷ *Ibid.*, p. 373n23.

interpretation of the law "fits" its subject matter if the legal and other principles it enunciates matches what can be plausibly asserted of the established law, which itself is assumed to be a principled activity. At the same time, arguments of justification come into play when two or more sets of principles make prescriptive sense of the law. Seen in this way, "fit" and "justification" are not two independent criteria but are interrelated parts of an evaluatively complex interpretative process directed towards an object that is itself prescriptive in nature. However, even if they are interrelated parts of the interpretative process, Dworkin is assured that arguments of fit and justification act as checks on the interpreter's constructive imagination, and, thereby, improve the likelihood that a particular interpretation can be considered the right one.

This latter idea that evaluative arguments internal to the act of interpretation can themselves check each other to elicit a right answer has been vigorously contested by another critic, Stanley Fish.¹⁸ Although Fish also maintains that law is a matter of interpretation, he has been one of Dworkin's most resolute antagonists, occasioning a rather acrimonious exchange between the two. Fish condemns Dworkin for fashioning a theory of adjudication which is, at best, superfluous, and which, at worse, wrongly implies that it is possible to achieve a transcendental viewpoint from which legal judgements can be evaluated.

At least Finnis, while doubting that Dworkin's evaluative criteria can produce one unique right answer instead of a plurality of acceptable answers, nonetheless believes that

¹⁸ See Stanley Fish, "Working on the Main Gang: Interpretation in the Law and in Literary Criticism," *The Politics of Interpretation*, W.J.T. Mitchell, ed. (Chicago: University of Chicago Press, 1983), "Wrong Again," *Texas Law Review*, Vol. 62, no. 1 (Aug., 1983), pp. 299-316, and "Still Wrong After All These Years," *Law and Philosophy*, Vol. 6 (1987), pp. 401-18.

there is a range of acceptable answers in law which have their ground in the moral goods they embrace. Fish, on the other hand, is prepared to relativize completely the interpretative process, locating the criteria by which different interpretations are assessed neither in the substantive moral values they profess nor in the interaction between arguments of fit and justification, but in the interpretative rules through which a community of interpreters defines itself.

Fish's specific criticism of Dworkin's interpretative approach is that arguments of fit and justification cannot act as checks on each other in such a way as to constrain a judge's interpretation, preventing him or her from inventing rather than explaining the law. The reason, Fish argues, is that the precedents against which a judge matches his or her interpretation of the law for fit are not self-availing facts, but must themselves be rendered meaningful by an interpretative act. Moreover, the moral and political justifications which lead a judge to prefer one interpretation of the law over others are, *eo ipso*, the grounds by which he or she will render meaningful the precedents which a successful interpretation must fit. Different judges will read into precedents different legal stories according to which moral and political principles she or he adopts as sovereign in the law. Therefore, because arguments of fit and justification are really part of the same interpretative exercise, Fish insists, the "distinction between explaining a text and changing it can be no more maintained than the others of which it is a version (finding versus inventing, continuing versus striking out in a new direction, interpreting versus creating)."¹⁹

¹⁹ Stanley Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism," *op. cit.* p. 281.

In saying that there is no difference between explaining and changing a text, Fish does not imply that interpretation is a radically subjective act. On the contrary, he asserts that individuals are compelled to conceptualize a text through the categories of value and relevance that the interpretative community to which they belong has historically generated as its own authoritative interpretative rules. In the case of law, he contends, this means that legal judgements are necessarily constituted by categories which an interpreter learns as he or she joins the legal practice.

The very ability to formulate a decision in terms that would be recognizably legal depends on one's having internalized the norms, categorical distinctions, and evidentiary criteria that make up one's understanding of what the law is. That understanding is developed in the course of an educational experience whose materials are the unfolding succession of cases, holdings, dissents, legislative actions, etc., that are the stuff of law school instruction....They are not the materials the legal actor thinks *about*; they are the material with which and within which he thinks, and therefore whether he 'knows' it or not, whether he likes it or not, his very thinking is irremediably historical, consistent with the past in the sense that it flows from the past.²⁰

According to Fish, because judicial actors are always involved in an interpretative exercise whose sense and meaning derive from the professional norms of their particular interpretative community, the philosophical differences which Dworkin claims to expose among the judicial doctrines of conventionalism, pragmatism and integrity are simply non-existent. The conventionalist judge cannot attend to the plain meanings of law because there are no meanings that are not mediated by interpretative legal concepts. Nor can the pragmatist judge invent law out of whole cloth because whatever concepts she

²⁰ Stanley Fish, "Still Wrong After All These Years," *op. cit.*, p. 406.

or he uses to interpret the law will bear the imprint of legal tradition, even if they are posed as a condemnation of the tradition. What this means, Fish remonstrates, is that the doctrine of integrity which Dworkin tries to elevate into a special theory of adjudication is superfluous because it is already normally practised. Thus, a judge needs no express urging to follow the methodology recommended by the concept of law as integrity, because "[t]he moment he sees a case *as* a case, a judge is already seeing it as an item in a judicial history, and, at the same moment, he is already in the act of fashioning (with a view toward later telling) a story in which his exposition of the case exists in a seamless continuity with his exposition (and understanding) of the enterprise as a whole."²¹

From these several observations Fish concludes that Hercules the philosopher is redundant because he adds nothing to our understanding of the legal enterprise. His real purpose, therefore, must be figurative. The image of an unencumbered philosopher of law is raised, Fish contends, in order to credit legal practices with a moral quality thought to be absent in day-to-day politics. Indeed, Dworkin does routinely characterize the courts as an institution which "calls some issues from the battleground of power politics to the forum of principle."²² But this characterization of legal institutions, Fish asserts, is less revealing of the practice of law than it is of Dworkin's own fear of politics. For, in the end, Fish states, law itself is a form of politics in which different judges, adhering to different, politically motivated schools of interpretation, compete to

²¹ *Ibid.*, p. 414.

²² Dworkin, "The Forum of Principle," in A Matter of Principle, *op. cit.*, p. 71.

claim for some discrete political policy the title of legal principle. Thus, the element of power which is present in politics also resides in law, even if its manifestation and effects differ in these two social practices according to the regulative conventions each has come to embrace.

Although Fish offers a forceful critique of Dworkin's philosophical aspirations, his own theory of interpretation is susceptible to criticism for its perfunctory portrayal of an interpretative community's internal rules of evaluation. And this is precisely what Dworkin does in responding to Fish's theoretical reproaches. First, he counters Fish's assertion that no valid distinction can be drawn between explaining and inventing the law by simply noting that these are two different ways a judge has for reaching a decision "that has a *particular* relationship to the past...."²³ Thus, a pragmatist judge who chooses to ignore precedents in favour of purely forward-looking considerations displays one attitude to the relationship of present to past law, while a judge governed by the principle of integrity displays another and different attitude to the past. While it may be trivially true that both are, thereby, continuing a recognizable judicial practice, the relevant question remains whether the appreciable differences in their judicial styles can be rated according to some standard of rightness. If Fish is to deny that there is a standard of rightness by which such an evaluation can be made, Dworkin continues, then he must believe that "any judgement which involves some kind of interpretation is essentially like any other judgement that involves interpretation."²⁴

²³ Ronald Dworkin, "My Reply to Stanley Fish (And Walter Benn Michaels): Please Don't Talk About Objectivity Anymore," *The Politics of Interpretation*, *op. cit.*, p. 306.

²⁴ *Ibid.*, pp. 305-306.

Characterizing Fish in this way as a thorough-going relativist, Dworkin extends the same kind of challenge to him as he does to all internal sceptics: demonstrate the proposition that no interpretation can be the uniquely right one. What makes such a demonstration improbable, Dworkin insists, is that even while they deny that interpretations can be infallibly right or wrong, people like Fish persist in promoting their particular textual interpretations as superior to others. Significantly, Dworkin refuses to recognize as valid Fish's routine reply that each different interpretative community enjoys its own consensus about what constitutes the value and relevance of a genre or subject, and, therefore, what qualifies as a superior interpretation according to those rules of value and relevance. Hence, an interpreter who works within the rules of a particular community, and who declares a particular interpretation as superior to its alternatives, is trying to persuade others to adopt the perspective enjoined by those rules, and is, in effect, engaged in politics.

Dworkin protests that this conception of the art of interpretation as an instance of rhetoric is question-begging, for if people believe that the interpretation licensed by the rules of their interpretative community is superior to the alternatives, they must also believe that their interpretation of the evaluative rules of their community is also superior. The latter belief points to the necessity of articulating a standard of rightness which contradicts the initial sceptical proposition that no standard can be employed to commensurate and evaluate competing interpretations.

What is significant about this refusal to accept Fish's theoretical assertion that evaluative standards are situated within the consensual politics of an interpretative

community is that, in other contexts, Dworkin is prepared to admit that social consensus is a self-validating process. For example, as previously noted, when pondering the question of whether a political community contains the implicit norms of a morally defensible conception of justice, Dworkin allows that the answer could well be determined by the pessimism or optimism about values which informs the interpreter's attitude, and which "contributes to its own vindication."²⁵

With respect to this issue of self-validation in legal interpretation, Owen Fiss, another legal writer who adopts the view that adjudication is a thoroughly interpretative act, provides a politically more vivid picture of the supposedly "nihilistic" consequences of Fish's relativism. Although unacknowledged by Dworkin, Fiss's description of the political implications of what he considers sceptical schools of interpretation corresponds to Dworkin's own distinction between optimistic and pessimistic interpretative attitudes. Like Dworkin, Fiss contends that an interpreter is not free to assign any meaning he or she wishes to a text but is bound to observe a number of "disciplining rules" which define the basic concepts and procedures under which an interpretation can be conducted. But, like Fish, Fiss maintains that the disciplining rules issue from the interpretative community which accepts them as authoritative, and this would seem to imply that the objectivity of an interpretation is relative or contingent.

However, what makes the interpretation of law different from other interpretative activities, Fiss contends, is both the prescriptive nature of law, and the institutional authority which bestows upon the judiciary the ability to make conclusive interpretations

²⁵ Cited at *supra*, ch. 9, p. 461n47.

of the law. In this sense, Fiss argues, legal interpretation has an objectivity absent in literary or artistic interpretation. But, no doubt recognizing that observations about the reality of institutional power are not sufficient to silence critics who contend that the law is without a singular normative point or purpose, Fiss offers a concluding exhortation about the importance of nurturing loyalty to a moral ideal, and, *inter alia*, a political regime: "Against the nihilism that scoffs at the idea that the Constitution has any meaning, it is difficult to reason. The issues seems to be one of faith, intuition, or maybe just insight....I believe it is imperative to respond, in word and deed, for this nihilism calls into question the very point of constitutional adjudication; it threatens our social existence and the nature of public life as we know it in America; and it demeans our lives."²⁶ Thus, like Dworkin, Fiss sees the debate over the moral objectivity of legal interpretation as a battle between optimism and pessimism, or more dramatically still, as a battle of political loyalties. Though in this instance, it is surely worth contemplating Alan Hunt's comment about conceiving of political argument in terms of loyalty: "...loyalty tests are illiberal in general and especially so when employed by liberals."²⁷

3. Dworkin's Normative Defence of the Law

To the extent that Dworkin agrees with Fiss that the real challenge to the notion of objective legal interpretations is the sceptical and potentially nihilistic attitude of critics like Fish, he inadvertently subscribes to a consensus theory of truth by singling out the

²⁶ Owen Fiss, "Objectivity and Interpretation," Stanford Law Review, Vol. 34 (1982), p. 763.

²⁷ Hunt, "Law's Empire or Legal Imperialism," *op. cit.*, p. 34.

interpretative "attitude" as the distinguishing factor in interpretative controversies. However, as previously noted, Dworkin also denies that consensus among interpreters can, in itself, settle the truth of an interpretation. Nevertheless, in spite of his vacillation on the question of the role of consensus in interpretative arguments, Dworkin's treatment of Fish as an example of an internal sceptic has the advantage of clarifying the nature of their debate. And, more importantly for present purposes, it leads directly to the most problematic part of Dworkin's legal theory.

Despite appearances to the contrary, Dworkin and Fish do not really disagree on the formal properties of interpretation, including the questions of whether past law is self-announcing or whether consistency in legal interpretations is a virtue. Where they do differ, however, is on the normative point which Dworkin thinks particular interpretations of the law seek to explicate. As one discerning commentator, Drucilla Cornell, has pointed out, "the real disagreement Fish has with Dworkin has less to do with the debate over the possibility of consistency in interpretation than with Fish's rejection of Dworkin's argument that the "is" of the modern legal community incorporates principles that restrain the brute exercise of power."²⁸

It is worth repeating that Dworkin's standard rejoinder to radical sceptics like Fish is to state that politics without the restraining and edifying hand of principles is not only a morally unattractive state of affairs, but also a doubtful representation of political life in Anglo-American democracies. Thus, the coercive and educative side of Hercules, at

²⁸ Drucilla L. Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation," University of Pennsylvania Law Review, Vol. 136, no. 4 (April, 1988), p. 1163.

once the exemplary judge and legal philosopher, are twin aspects of a political ideal which, even if imperfectly realized, nonetheless is present in liberal institutional practices. But has Dworkin truly established his case? Are liberal democracies somehow constituted by principles, and are these principles sufficiently determinate to allow both the practice of inclusive integrity by an idealized judge, and the critical reflections of an institutionally unencumbered philosopher?

These latter questions prompt yet another, more general, question. Dworkin suggests that there is a normative point to law, acting as a conceptual prism by which judges, loyal to the aim of integrity, assign the relative place and weight of the different principles of fairness, justice, and due process in their effort to make of the law a whole and coherent story. Is this alleged normative point of law itself defensible? Because the answer to this most general question will govern the possible responses to the others, it requires careful and thoughtful attention.

The general point of law, Dworkin claims, is to find a way of justifying the connection between past political decisions and present state coercion. This justification must attend both to the question of what makes law the legitimate occasion for state coercion, and, what grounds a citizen's obligation to obey the laws. Dworkin's theory of law as integrity is proposed as just such a justification. The intelligibility of that theory in turn is dependent on its presuppositions about the conditions of fraternal community which are said to confer legitimacy on the laws and authenticate political obligations. The right interpretation of the law, therefore, requires that judges be prepared to engage in fundamental arguments of political theory.

There is, however, an obvious objection that could be raised to the way that Dworkin poses the problem of devising a correct interpretation of the law. After reproving "semantic" theories of law for wrongly assuming that everyone uses the same criteria for deciding what the law is, Dworkin introduces his own version of a semantic rule, namely, that law is about justifying coercion. As Philip Soper protests, "...Dworkin does not defend his abstract concept; he simply asserts it."²⁹ Noting that many positivists normally deny that law is about *justified* coercion, Soper concludes that "Dworkin seems open to the charge of having assumed the very point at issue."³⁰ Soper is right to accuse Dworkin of engaging in a preemptory conceptual move, but the criticism is of more consequence once it is understood what is implied in that conceptual move.³¹

What bears notice about Dworkin's description of the general point of law is the way he links together questions of political legitimacy and obligation. Significantly, Dworkin envisages this link in a manner that is profoundly modern. It is modern because, until the seventeenth century, the question of political obligation was never central to political theory.³² It was only after individual freedom and equality were

²⁹ Philip Soper, "Dworkin's Domain," *op. cit.*, p. 1170.

³⁰ *Ibid.*

³¹ Soper does not fully comprehend the significance of Dworkin's theoretical assertion about the point of law because he, like Dworkin, accepts that the legitimacy of law is grounded in certain formal characteristics of community, and disagrees with him only on how strictly these characteristics must be observed before legitimacy can be ascribed to a state. See *Ibid.*, pp. 1184-85, and the discussion at *infra*, pp. 487-92.

³² On the unmistakably modern provenance of the question of political obligation, see Carole Pateman, The Problem of Political Obligation (Berkeley: University of California Press, 1985), ch. 1.

assumed to be natural and self-evident truths that obligation to the laws was perceived to be a theoretical and, more to the point, an acute practical political problem. One finds this shift in perspective most pronounced in the writings of the early liberal writers, Hobbes and Locke. For both Hobbes and Locke, the question of political obligation was pre-eminent. By disdaining received doctrines of political order which portrayed political subordination and super-ordination as an expression of a natural or divinely inspired design, Hobbes and Locke confronted a critical dilemma: why should free and equal individuals obey the law? For both the answer was consent. By dint of contracting amongst themselves to fashion a political society and a sovereign power, individuals freely place themselves under obligation to that sovereign power. Individuals must, therefore, obey the law because they are its remote author, or, at least, because they enter into self-assumed obligations by consenting to be ruled by a sovereign.

The idea of a contract, and, in Locke, its functional equivalent, the notion of tacit consent, is the archetypical liberal solution to the problem of political obligation. But, it must be emphasized, the problem of political obligation for which consent is deemed the solution itself has its origins in a set of assumptions about human beings and society by which liberalism is characterized. The same is not true, however, of the question of political legitimacy. The question of what makes a state legitimate, or, as it was more commonly asked, what justifies the power of the state, is as old as political philosophy. If its philosophical pedigree is ancient, the question of political legitimacy has, nonetheless, elicited different kinds of answers.

For classical and medieval natural law theorists, what justifies the power of the

state is the ends that it pursues. Moreover, in underscoring the ends, in particular, the end of justice, for which the power of the state is justifiably deployed, these theorists made no serious effort to distinguish between state and society. Thus, the ends by which the state's exercise of power can be considered justified are the same ends which distinguish a political community from lesser associations. True political communities are, on this view, constituted normatively. Augustine, paraphrasing Cicero's Scipionic speech, gives a classic formulation of this thought: "[Scipio] defines 'community' as meaning not any and every association of the population, but 'an association united by common sense of right and a community of interest.'"³³

The disposition among classical and medieval natural law theorists to regard genuine political communities as constituted by normative concerns stands in sharp contrast to the modern liberal view of the matter. To begin with, liberal theory ordinarily distinguishes between state and society. The state, that assemblage of coercive institutions whose instrument of rule is the laws, is portrayed as something which owes its existence to the consent of the people. But, the same consent which authorizes the state to govern by laws also signifies the realm of freedom which is regarded as the natural estate of human beings. When natural freedom gives way to political freedom, the public space left untouched by the laws is recast as civil society. The distinction between state and civil society, already present in outline in Locke but most clearly enunciated by Hegel, establishes the framework usually adopted by modern liberal arguments about political legitimacy. Thus, on the modern liberal view, the state's power is considered legitimate

³³ Augustine, Concerning the City of God against the Pagans, Henry Bettenson, trans. (Middlesex: Penguin Books, 1972), p. 73.

if it respects and protects the freedoms associated with civil society. The pursuit of a common good defined in terms of ethical value which earlier theorists had regarded as the essential feature of justified political power is replaced by an emphasis on origins and procedures. More specifically, for conventional liberal theory the answer to the question of political obligation determines how we conceive political legitimacy. Thus, political power is deemed legitimate if it is derived from the people and is applied without prejudice to all the people with due regard for their civil freedoms. This liberal notion of political legitimacy is reflected, as Andrew Altman points out, in the modern understanding of the phrase "the rule of law."

The notion that the aim of political society is to promote some narrowly drawn conception of the best human life is rejected. The principal advantage of the rule of law, on the standard liberal view, is not that it can inculcate ethical virtues, but rather that it establishes a well-defined, non-controversial zone of freedom within which each person can define and pursue his or her own conception of what kind of human life is best.³⁴

Dworkin endorses this modern understanding of the rule of law when he explicitly argues that the state must be neutral among competing conceptions of the good. He likewise follows the standard liberal argument about political legitimacy by relating it to the question of political obligation. But, here he appears to part company with conventional liberal theorists by refusing to ground political obligations in consent. Instead, he tries to show that political obligations are a variant of the more general phenomenon of associative obligations found in social units ranging from families and

³⁴ Andrew Altman, "Fissures in the Integrity of *Law's Empire*: Dworkin and the Rule of Law," *op. cit.*, p. 158.

friendships to collegial, workplace, and political arrangements which reflect the values of fraternity. To deny the moral reality of political obligations, Dworkin argues, would be tantamount to denying that we incur family, collegial or workplace obligations by virtue of our membership in these associations. Thus, it is the fact of membership in a community, rather than consent, which forms the grounds of our obligations.

Although the general tenor of Dworkin's argument for political obligation seems illiberal because it appears to extend a moral privilege to the obligatory norms of social groups prior to any consideration of individual interests or rights, the details of the argument nonetheless reflect distinctively liberal concerns. One such concern is to refuse to identify the legitimacy of a political community in terms of the substantive moral goods it pursues. Dworkin observes this theoretical convention by classifying as true fraternal communities only those which display *formal* features of reciprocity. Thus, reciprocal obligations are said to be fraternal if they are regarded as special and personal, and can be seen to reflect an equal concern for all members of the community.

Significantly, none of these conditions state a moral good by which the community aspires to define itself. Not even the aim of realizing equal concern for all members is presented as a substantive good, for, as Dworkin has constantly argued, equal concern is a framework concept which admits of contending interpretations. And, of course, the interpretation he favours is one in which the state supplies the legal, political and economic conditions that allow everyone the equal opportunity to cultivate his or her own conception of the morally good life.

One paradoxical result of Dworkin's reliance on formal characteristics of

reciprocity to distinguish true fraternal communities, however, is that it illustrates the discontinuity rather than the affinity between political and other associations. For, associations like the family or a friendship are typically grounded in shared conceptions of substantive goods. As John Finnis indicates, this makes Dworkin's defence of the legitimacy of political authority in Law's Empire a characteristic liberal argument.

A principle weakness of this argument, as developed in the book, is that other fraternal associations are characteristically founded upon shared interest in substantive human goods, whereas political community, as far as Dworkin invites us to envisage it, eschews any official concern--certainly any imposition of obligations on the basis of such concern--for substantive human goods such as health, beauty, the transmission of human life and culture, and so forth. In this respect, the book, while it differs from earlier books by abstaining from explicitly describing itself as "liberal", retains the salient characteristics of Dworkin's liberalism; it portrays justified politics, and thus law, as neutral about what is truly worthwhile and worthless in human life.³⁵

If the refusal to permit substantive moral goods to occupy a central, regulative position in his portrayal of a political community makes Dworkin's theory of obligation recognizably liberal, his treatment of the political implications of consent also confirms rather than contradicts his commitment to liberalism. For, after denying that political obligations are grounded in consent, Dworkin is not willing to entirely abandon it as a moral criterion in assessing the force of political obligations. Thus, curiously, after criticizing Locke's idea of tacit consent, he sees fit to rehabilitate it for his own purposes: "Political obligations are less involuntary than many obligations of family

³⁵ Finnis, *op. cit.* 4, pp. 377-78.

because political communities do allow people to emigrate, and though the practical value of this choice is often very small the choice is important, as we know when we contemplate tyrannies that deny it."³⁶

Dworkin's equivocation on the importance of consent in authenticating political obligations signals his continuing preoccupation with one classical pole of liberalism--its stress on individual freedom. The nature of this political concern is made all the more apparent by the contrast the previous quote introduces between tyrannies and states liberal enough to allow emigration. His judgement that tyranny cannot be regarded as a true fraternal community because it recognizes no rights among its citizens, not even the negative right of exit, displays more than a residual attachment to the political values of liberal individualism.

One of the strongest argument to this effect is made by Kerruish and Hunt who argue that Dworkin merely transforms the terms by which individual and community are characterized, but not the sense in which individualism has always figured as a value in liberal theory:

...although the liberalism Dworkin develops abandons methodological individualism, it continues to confer ontological and political privilege on the individual as citizen. The centrality of the associative individual or citizen is manifest in his persistent preoccupation with the possibility of structural conflict between society and individual; it is still the threat of illicit public (rather than private) violation of individual/citizen rights that is the hallmark of his political concerns.³⁷

³⁶ Law's Empire, p. 207.

³⁷ Kerruish and Hunt, "Dworkin's Dutiful Daughter," *op. cit.*, p. 213.

While Dworkin does not abandon liberal individualism as a principal political value, Kerruish and Hunt conclude that his introduction of the notion of associative obligations in Law's Empire moves him, or at least his political theory, to the conservative side of liberalism. This latter contention is important to understand because it helps illuminate the structural disposition Dworkin's political theory has for reifying certain economic, social, and political relations, and, hence, insulating these relations from genuine political contestation.

Kerruish and Hunt suggest that Dworkin's example of the duty a daughter owes to the father she chooses to disobey illustrates how his theory of associative community both confirms ontological individualism and acts to reify existing social and political relations. The example, it should be recalled, imagined a paternalistic community in which daughters but not sons are expected to defer to their fathers's wishes regarding a spouse. For the sake of argument, Dworkin presumed that most people in this community share a good faith belief that their differential treatment of sons and daughters satisfy the edict of equal concern, and, moreover, that this good faith belief is a plausible interpretation of what equal concern requires. In such circumstances, Dworkin is quite ready to concede that a daughter could justifiably elect to disobey her father and choose her own spouse, on grounds that justice commends her the right to decide for herself who she should marry. The daughter's disobedience in this case would be emblematic of the conflict between individual (citizen) rights and community norms (state prerogative).

In allowing the daughter's right to prevail, Dworkin resolves the conflict in characteristic liberal fashion. But the triumph of individual right is purchased at a price,

for Dworkin advises that in defying her father's legitimate expectations, the daughter "owes him at least an accounting, and perhaps an apology, and should in other ways strive to continue her standing as a member of the community she otherwise has a duty to honour."³⁸

Kerruish and Hunt are able to show that Dworkin's recommendation is not only ill-conceived but symptomatic of the way his theory of law, and the political theory which supports, it conduces towards an apologetic for existing relations of power. To begin with, the daughter's right to refuse her father's command is individualized - it is represented as an individual's moral capacity to resist what otherwise is deemed a legitimate authority. The individualization of this right is fortified by the daughter's corollary obligation to account for her action, perhaps apologize, and otherwise act to honour her other duties of citizenship.

What is missing in this picture, Kerruish and Hunt observe, is any indication that the father may also owe an account to his daughter. But equally missing is any sense that the daughter may realize that her other duties of citizenship are suspect because reflective of a pervasive sexual inequalities. Honouring her other duties would, in this instance, be tantamount to legitimizing the inequalities of her community, and would contribute to reproducing it intergenerationally. On the other hand, were the daughter to contest the general obligations of her community because they are grounded in a defective understanding of equal concern, the political character of her defiance might be altered. Her political awakening might allow her to see that the conflict in allegiances

³⁸ Law's Empire, p. 205.

she faces is not simply between her father and her own interests in autonomy, but, between the norms of her community and the interests of all women who share the consequences of inequality. The daughter's revolt would then no longer represent a conflict between individual right and legitimate authority, narrowly conceived as choice between deference and individual disobedience with an appropriate accounting, but as a conflict over power relations, and, therefore, a conflict between a class of individuals suffering from inequality and a particular political community and state.

Dworkin's representation of the daughter's choices, Kerruish and Hunt argue, forecloses the possibility of this more radical contestation of a community's norms and political obligations because it is based on a questionable theoretical construction of community that personifies it, and which, thereby, makes its normative claims appear univocal. In criticizing Dworkin's personification of a community, Kerruish and Hunt point to several of its problematic features. First, they take issue with his assertion that if it can be reasonably construed that a community holds to a good faith interpretation of the requirements of equal concern in its social practices, then it has a *prima facie* claim to legitimacy and citizens have a general obligation to obey its laws. As Kerruish and Hunt rightly note: "The central deficiency of relying on a subjective test of sincerity is that it provides no way of distinguishing between crude rationalizations of inequality in the name of 'equal concern' and the sincerely, albeit erroneous belief, that some hierarchal or discriminatory practices serve the best interests of all participants."³⁹ To this observation they add the reminder: "Even if we could determine sincerity it does not

³⁹ Kerruish and Hunt, *op.cit.*, p. 225.

follow that sincerity otherwise saves a bad argument...discriminatory rules are no less discriminatory because they are adhered to with sincerity."⁴⁰

Nor can Dworkin save himself from this reproach by saying that it is not people's opinions or popular morality which decide whether a social practice sustains a sincere belief in equal concern, but the interpretative attitude which the social practices of a community licence.⁴¹ For this begs the question of whether a political community is a moral agent whose practices taken together are to be regarded as expressions of a principled dedication to the value of equality.

Moreover, regardless of the question of whether the community can be personified in this way, someone must still do the interpreting of this community's practices. For Dworkin, the interpreter, or rather, the community of interpreters whose judgements about whether social practices convey a good faith explication of the requirements of equal concern are those public officials entrusted with the responsibility to declare the law. Thus, it is the opinion of judges that should be examined, Dworkin tells us at the beginning of Law's Empire, because "judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice."⁴² But, if judicial arguments are propositional in nature, this still is no assurance that they do not represent sincere but mistaken beliefs about, or are dissimulating rationalizations of, the principles supposedly embedded in a community's

⁴⁰ *Ibid.*

⁴¹ On this distinction which Dworkin tries to make between popular morality and an interpretative attitude, see *supra*, ch. 9, pp. 443-44.

⁴² Law's Empire, p. 14.

political practices. In short, Dworkin's understanding of interpretative communities lacks any theory of ideology or discourse formation by which pretext and context in arguments can be distinguished.⁴³

Without a theory of ideology, Dworkin resorts to projecting an image of the political community as speaking with a single voice, whose authoritative interpreters are likewise integrated by their common conviction that the community is a moral agent. This leaves Dworkin's theory, Kerruish and Hunt chide, remarkably silent about questions of competing interpretative groups in the community, and the power relations which contribute to success or failure in these interpretative battles: "Dworkin's unitary conception of an interpretative community, with the presumption that it involves a shared 'form of life', leaves unexamined the sociologically important question of the complex coexistence of interpretative consensus and 'dissensus' between constituent groups and classes within any concrete community."⁴⁴ In failing to address these critical questions about the social reality of competition among groups of interpreters, Kerruish and Hunt conclude, Dworkin's theory of law, with its rigid judicial perspective, has difficulty not lapsing into a legitimizing or apologetic role for the prevailing structures of power.

⁴³ In this regard, Dworkin, like Gadamer, offers a theory of interpretation which fails to account for the way in which a community's traditional discourses are situated in, and reflect, relations of domination. Habermas, in his well-known review of *Truth and Method*, makes precisely this point about Gadamer's hermeneutics. See Jurgen Habermas, "A Review of Gadamer's *Truth and Method*," *Understanding and Social Inquiry*, Fred R. Dallmayr and T.A. McCarthy, eds. (Notre Dame: University of Notre Dame Press, 1977), pp. 357-61.

⁴⁴ Kerruish and Hunt, *op. cit.*, p. 227.

4. Liberal or Conservative?

Of course, it might be objected that this conclusion about Dworkin's theoretical predisposition to legitimize existing relations of power overstates the case because he is the first one to admit that interpretative conceptions of the law can be controversial within a legal community. Hence, he does not deny that there is rivalry and political contestations over legal interpretations. But, this objection carries only so much weight because Dworkin also assumes that there is a consensus about the object of interpretation against which contending interpreters argue their cases. And, although he is willing to allow that this consensus can itself be challenged, his attitude to such challenges is instructive.

For instance, when discussing controversies over the meaning of the social practice of courtesy, which Dworkin used as a paradigm of the interpretative act, he claimed, for argument's sake, that the community enjoys a pre-interpretative consensus that courtesy is about respect. Different interpreters could have different conceptions of what respect requires, but their arguments are, nonetheless, conducted on the same discursive plateau. Of course, someone might dispute the notion that courtesy is about respect, and instead assert that it is a social practice denoting subservience. Dworkin's characterization of such a profoundly sceptical challenge to the prevailing social consensus is telling. A pre-interpretative consensus that the point of courtesy is to indicate respect, he says, does not mean that "anyone who denies this is guilty of self-contradiction or does not know how to use the word 'courtesy', but only that what he says marks him as outside the community of *useful* or at least *ordinary* discourse about

the institution."⁴⁵

By classifying radical critics of what is presumed to be a pre-interpretative consensus as being outside the community of useful or ordinary discourse, Dworkin in effect attempts to subvert their criticisms. Thus, even though he continually invites external sceptics to demonstrate their case, he undermines the pertinence of their arguments by peremptorily consigning them to the margins of acceptable discourse. In light of this theoretical manoeuvre, his confidence in the illustrative potential of the formal statements of judicial actors betrays an eminently conservative theoretical predisposition. It is conservative because it tends to exalt these official statements as embodiments of ordinary discourse, against which critical or sceptical claims stand to be judged as inconsequential.⁴⁶

Nowhere is this conservative inclination more clearly evident than in Dworkin's approach to the "critical legal studies" movement. While legal positivism and legal realism, transformed into the interpretative doctrines of conventionalism and pragmatism, are posed as useful foils to law as integrity, critical legal studies is treated more dismissively by Dworkin. Noting that critical legal theorists often purport to find that the law of discrete jurisdictions is reflective of fundamentally contradictory principles, he rebukes them by remarking, "Nothing is easier or more pointless than demonstrating that a flawed and contradictory account fits as well as a smoother and attractive one. The

⁴⁵ *Law's Empire*, p. 71 (emphases mine).

⁴⁶ And even here, as Altman points out, Dworkin takes at face value only those judicial statements that support his theory, conveniently ignoring others that might be construed as contradicting it. See Altman, "Fissures in the Integrity of *Law's Empire*," *op. cit.*, p. 175.

internal sceptic must show that the flawed and contradictory account is the only one available."⁴⁷

Thus, when contending with critical legal studies, Dworkin once again reprises his admonition that an optimistic interpretative attitude is to be preferred to a pessimistic one. But, if scrutinized closely, this admonition itself rests on an evasion. For, in asking which interpretation fits the institutional history of a political community better, one that is sceptical or one that bears the moral optimism of law as integrity, Dworkin has conceded that what is at issue is descriptive accuracy. And, the question of descriptive accuracy becomes very pointed once it is realized that Dworkin's judicial theory presupposes that the laws of a community can only display the coherence, and, therefore, the legitimacy integrity demands if the community itself is constituted on fraternal lines. Hence, the question of whether fraternal community accurately describes the Anglo-American democracies which are the test cases for law as integrity cannot, in the end, be avoided. Yet, this is precisely what Dworkin attempts when he states that

This is not a question of descriptive sociology, though that discipline may have a part to play in answering it. We are not concerned, that is, with the empirical question of which attitudes or institutions or traditions are needed in order to create and protect political stability, but the interpretative question of what character of mutual concern and responsibility our political practices must express in order to justify the assumption of true community we seem to make.⁴⁸

If Dworkin wants to be understood in this quote as saying that empirical questions

⁴⁷ Law's Empire, p. 274.

⁴⁸ *Ibid.*, pp. 208-9.

are interpretative questions because they rely on theoretically informed procedures for identifying and certifying what counts as evidence, this would be unobjectionable. But obviously his statement means something different by "interpretative" here. In this passage, interpretation means trying to infer the character of mutual concern and responsibility that *our* political practices *must* express to justify the *assumption* of true community we *seem to make*. However, it is just this assumption that some particular political community is fraternal in the sense dictated by Dworkin's definition that some critical theorists contest. And, in doing so, they try to corroborate their assertions with interpretative arguments that are empirical in the straightforward sense of stipulating what is to count as evidence.⁴⁹

Dworkin's attempt to inoculate himself against such empirical arguments by falling back on a notion of interpretation that speaks of justifying assumptions is, in the end, rather disingenuous. It is for this reason that Hunt reports his principal objection to Dworkin in terms of the latter's failure to engage in the very arguments his theory invites; "...whatever might be the merits of his model of political association as an exercise in utopian political philosophy, it focuses the core of likely disagreements on the terrain he persistently avoids, namely, a sociological or empirical enquiry into the conditions under which fraternity might be realized."⁵⁰

⁴⁹ One such critical theorist is Allan Hutchinson who, in a series of articles spanning a number of years, has persistently attacked Dworkin for his lack of descriptive realism, particularly in his assumption that Anglo-American democracies display the value of equal concern that would justify the bulk of their laws. See Allan C. Hutchinson, "Of Kings and Dirty Rascals," *Queen's Law Journal*, Vol. 9 (1984), pp. 273-292, "Indiana Dworkin and Law's Empire," *The Yale Law Journal*, Vol. 96 (1987), pp. 637-65, and "The Last Emperor," in *Reading Dworkin Critically*, *op. cit.*, pp. 45-70.

⁵⁰ Hunt, "Law's Empire of Legal Imperialism," *op. cit.*, p. 20.

Perhaps "persistently avoids" does not quite capture how Dworkin's recourse to the terminology of interpretation camouflages his own carefully crafted empiricism. After all, he does make the empirical claim that Anglo-American democracies are true fraternal communities as evidenced by the assumptions that "we seem to make." But, of course, the "we" that Dworkin refers to are precisely those public officials whose utterances are selected by him to demonstrate that the United States and England are communities of principle. However, in constricting his evidentiary test to these public pronouncements, Dworkin stands convicted of precisely the conservatism of which critical legal theorists routinely accuse him.⁵¹

That conservatism also manifests itself in other significant ways in his theory of the law. His approach to the question of how to interpret the law of regimes that are manifestly evil is a case in point. The question of whether evil law can be considered law is an old one, but it has taken on its contemporary significance in light of legal positivism's insistence that law and morality must be viewed separately. On the face of it, Dworkin's theory of judicial interpretation, which is directed towards explicating the law of Anglo-American political communities, would seem to render us unable to pass judgements on the law of other communities which do not share a liberal political morality. Dworkin rightly states that this does not follow because we are quite capable of using the term "law" in many different ways. Thus, the issue raised by legal positivism as to whether evil law can still be considered law is itself a non-question

⁵¹ And, incidentally, it is this circumspect empirical claim, Altman argues, which finally undermines Dworkin's theory of law as integrity, because even the most cursory inspection would lead one to conclude that the political practices of these two countries conform more closely to the rulebook rather than the principled model of community which he sketches. See Altman, *op. cit.*, pp. 182-184.

because our moral and political vocabulary is rich enough to say that evil law is law in a pre-interpretative sense, but not necessarily justifiable in any conceivable moral sense. We can, therefore, understand Nazis having law as legal positivists would define it, at the same time as our moral sentiments might condemn that law as unjust.

But, once we ask the question in the way law as integrity recommends, that is, from the internal perspective of a judge who must interpret Nazi law, Dworkin allows that the issue becomes more complex. He summarizes a number of possible interpretative dilemmas that we might face as virtual participants, interpreting the legal choices that Siegfried, an imaginary judge in this Nazi community, could entertain. On the one hand, we might conclude that Siegfried has no choice but to decide that the wickedness of Nazi-enacted law has so contaminated the whole of the community's law that it no longer qualifies as law according to the test of coherence. In this instance, Dworkin states, "we will think that in every case Siegfried should simply ignore legislation and precedent entirely, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means available to him."⁵²

But, Dworkin also raises the possibility that at least part of the law in this regime, even if contains discriminatory features, might be justifiable on the interpretative test of coherence, and, therefore, that Siegfried faces the difficult decision of whether to enforce such law. For example, a contract case might arise in which the defendant is Jewish, and subject to discriminatory statutes which "denies Jews defenses available to Aryans in

⁵² Law's Empire, p. 105.

contract cases."⁵³ But for that complication, it is assumed the rest of the contract law justifies the plaintiff's right in this case. In such circumstances, Dworkin concludes, "We might still think that the facts justify a *weak* right in the plaintiff to win, even if we want to add that this weak right is overridden, all things considered, by a competing moral right in the defendant, so that Siegfried should do all in his power--even lie about the law if this could help--to dismiss the claim."⁵⁴

What is curious about these reflections on Siegfried's judicial choices is the degree to which Dworkin's commitment to the interpretative attitude of integrity compels him to try to see the Nazi law in its best light. If such a good faith effort cannot "save the phenomenon," then Siegfried is absolved of responsibility for applying the law and is free to find ways of ignoring it. But, if even part of the law can be justified, Siegfried's choices become harder. This amounts to a highly conservative counsel for the interpretation of the law of foreign regimes, for it means that criticism of the law must first await the results of a sincere effort to construct a justification of the law as a whole.⁵⁵

This same conservatism marks Dworkin's approach to bad law in the Anglo-American democracies for which law as integrity is supposed to fit as a uniquely appropriate judicial doctrine. Judges are certainly entitled, Dworkin insists, to declare

⁵³ *Ibid.*, p. 161.

⁵⁴ *Ibid.*

⁵⁵ And, Dworkin's counsel is conservative in another sense. Barring any successful interpretation of the law that can save its moral force, Dworkin proposes that Siegfried should lie about the law or otherwise do all in his power to mitigate the injustices which it occasions. But missing in this characterization of Siegfried's options is any indication that he should join the resistance and challenge Nazi law in a directly political fashion.

some of the past law of their jurisdiction as mistaken. Judges are not slaves of the institutional history of their community. Instead, their task is to fashion that history into a coherent pattern which tells the best moral story of the community's commitment to a politics of principle. If telling that story in present circumstances requires condemning some of that institutional history as iniquitous, then law as integrity justifies disregarding what are taken to be regrettable precedents.

However, when practising inclusive integrity, Dworkin maintains, judges face functional limits in the amount of precedents they can ignore without being accused of inventing rather than interpreting the law. He further concedes that these limits are, in part, determined by the popular morality of the day against which a judge will test his or her interpretation of the law, realizing that an interpretation that strays too far from public sentiments risks being rejected by other judicial colleagues. Thus, despite his repeated claims that the principles which underlie a community's laws are not reducible to popular morality, but are instead constructed under the assumption that the community speaks in a single principled voice, the difference between constructing principles and reflecting popular morality appears less than absolute. This imparts both a moral relativism and a conservative flavour to Dworkin's right answer thesis which in other instances he is inclined to dispute.

For example, when discussing the *Brown v. Board of Education* decision, which Dworkin has Hercules retry under the auspices of law as integrity, he notes that Hercules must somehow come to terms with the precedent established in *Plessy v. Ferguson*. In this landmark 1896 decision, the Supreme court, advertent to a doctrine about separate

but equal treatment, ruled that segregation did not offend the Fourteenth Amendment of the U.S. Constitution. Employing arguments made familiar in his previous articles on civil liberties, Dworkin shows how Hercules would decide *Brown* according to a theory of political morality in which state policies stand to be impugned if they reflect prejudices towards others. On such grounds, Hercules would have no trouble rejecting the *Plessy* precedent and rule in favour of the black school children of Kansas.

But in what way would Hercules regard *Plessy* a regrettable mistake? Curiously, Dworkin allows that at an earlier time in American history, a different theory of political morality, for instance, a theory which justified all state actions which contributed to community welfare, might have been circumstantially appropriate. This admission governs Hercules' present judicial attitude towards *Plessy*. For, even though he rejects the precedent, he is prepared to concede that the ruling, and the political theory that could conceivably have supported it, may have had its valid place in American institutional history at one time.

Perhaps this theory would have been adequate under tests of fairness and fit at some time in our history; perhaps it would have been adequate when *Plessy* was decided. It is not adequate now, nor was it in 1954 when Hercules had to decide *Brown*....The American people would almost have unanimously rejected it, even in 1954, as not faithful to their convictions about racial justice.⁵⁶

Why does Dworkin not simply reject *Plessy* out of hand as a piece of odious law, unsupported by any political theory with a sound moral foundation? One obvious reason is that he does not want to depart entirely from popular morality as the context in which

⁵⁶ *Law's Empire*, p. 387.

a community's political principles become perspicacious. Hence this accounts for the relativism in his observation that contemporary public morality would condemn what a previous generation may have regarded as just.

But, the other reason Dworkin ostensibly has for not simply repudiating *Plessy* is the way law as integrity construes the act of legal interpretation. Compelled to see the political community as a unified subject whose laws express the values of fraternity, integrity enjoins us to try to see the institutional history of a community in its best possible light. Moreover, as a unitary subject, this political community is presumed to have a continuous identity over time. Thus, segregation may be viewed, from the perspective of present public morality, as a mistaken interpretation of what fraternity requires. But, in other respects, the institutional history of the community is presumed to testify to, rather than contradict, the assumption that it embodies the values of fraternity which are continually reaffirmed in its laws. The alternative, Dworkin seems to suggest, is to demean the present by rejecting the moral legitimacy of the past. However, this is just another indication that the interpretative attitude which Dworkin invites us to entertain is conservative because it requires us to always try to reaffirm a community's identity as something that consists of a continuity with, rather than a rupture from, the past.⁵⁷ For this reason, Hercules' theoretical gesture towards *Plessy* is not unlike the dutiful daughter's obligation to her father. In both cases, even if authority is defied in favour of an alternative conception of justice, some form of deference is still

⁵⁷ Joseph Raz is quite explicit on this point. Noting that Dworkin's interpretative theory requires the best explanation and justification of *existing* law, he states that the "two-stage procedure that his theory involves puts coherence at the moral service of the powers that be." Raz, "Dworkin: A New Link in the Chain," *op. cit.*, p. 1111.

owed it.

The same conservative attitude which governs Dworkin's retrospective view of the law also informs his prospective view. For example, when Dworkin talks of Hercules, not as a judge constrained by the potentially competing demands of inclusive integrity, but as a philosopher who can envisage a pure form of law, he is still represented as someone whose political imagination is restricted by the history of his community. As Dworkin describes it, Hercules the philosopher must try to show "how law can develop in the direction of justice while preserving integrity stage by stage."⁵⁸ In this way, he will be able to claim that "his vision of justice could be secured by the community advancing through a series of steps, none of which would be revolutionary, each of which would build on and take its place within the structure already in place."⁵⁹ Thus, because the pure law of which the philosopher dreams must somehow be seen to be implicit in present law, his theoretical prescriptions are invariably reformist, keyed to what is deemed acceptable to existing social relations of power and consensus.

The conservatism which suffuses so much of Dworkin's theory of legal interpretation presents us, however, with something of a paradox. In his many interventions in contemporary legal and political disputes in the United States and Britain, Dworkin has almost always taken what can fairly uncontroversially be described as a left liberal position. Hence, in debates over such issues as civil rights, affirmative action, civil disobedience, abortion, or the welfare state, Dworkin has routinely challenged

⁵⁸ *Law's Empire*, p. 409.

⁵⁹ *Ibid.*

conservative orthodoxies. How then can it be said that his legal theory itself is conservative? To answer this question, it is best first to summarize the several arguments that attest to Dworkin's theoretical conservatism. The most general argument is that Dworkin's theory of law as integrity is idealist in the pejorative sense of failing to find support in the reality it purports to describe. This idealism in turn fosters a conservative political perspective in two different ways. First, it mystifies the nature of liberal political communities by ascribing to them a principled character they do not necessarily have, and, in the process, it contributes to the legitimization of existing relations of power and authority. Secondly, it recommends a judicial attitude that emphasizes the need to find in past political decisions a coherence that might be non-existent, and, in the process, it fixes our moral attention on something we might be better off simply ignoring or rejecting.

How does this conservatism square with Dworkin's progressive political stands? The immediate answer which suggests itself is that his is a theoretical conservatism in the service of liberal individualism, a combination which can sometimes produce radical political results. What makes for this potential radical combination is the fact that the variant of liberalism which Dworkin embraces places a high value on the developmental rather than the possessive side of liberal individualism. But, there are, nevertheless, limits to this radicalism. Hence, Dworkin's promotion of generous welfare measures that might approximate what equality of resources recommends is tempered by his insistence that market transactions are the surest measure of distributive equality. Or, his defence of civil disobedience is mediated by his understanding of the distinction between

principles and policies which he claims supplies the moral justification for legitimate resistance to the state. In both these examples, challenges to existing socio-economic or political relations are both authorized and confined, in the one instance, by the endorsement of the distributive possibilities of the market, and in the other, by the acceptance of what are taken to be the community's enunciation of principles.

To describe Dworkin's legal theory as conservatism allied to the cause of liberal individualism also helps to resolve the question posed at the beginning of this section, namely, how can Hercules, the ideal judge, be reconciled to Hercules, the institutionally unconstrained philosopher? The answer is that they are two different theoretical constructions who serve different but complementary functions. Hercules the judge, practising inclusive integrity, points to the need for political reform to remedy the internal compromises his jurisdiction enforces upon him. Hercules the institutionally unconstrained philosopher, on the other hand, represents the perspective of pure justice which informs such political renovation. But, because this latter theoretical perspective must respect the implicit norms already found in the political community, it represents none other than the perspective of liberal individualism, refined in such a way that it entails no internal contradictions.

In working out the pure principles of justice that comport with the norms of liberal individualism presumed to be implicit in the political community, Hercules the philosopher is, in the end, virtually indistinguishable from Rousseau's Legislator. For, like the Legislator, Hercules does not invent "principles of right" but attends to the problem of their actualization, that is, to the problem of transforming a political

community, whose potential is for self-rule according to liberal precepts of justice, into one fully capable of realizing that aim. Thus, in both cases the problem is finally recognized as one of citizen formation, and hence, of political education. Rousseau, however, recognized that this presented a dilemma. "In order for an emerging people to appreciate the healthy maxims of politics, and follow the fundamental rules of statecraft," he admits, "the effects would have to be the cause; the social spirit, which should be the result of the institution, would have to preside over the founding of the institution itself; and men would have to be prior to the laws what they ought to become by means of the laws."⁶⁰

As pointed out previously, this particular dilemma is of less consequence for Dworkin because he is not concerned with the foundational act of constituting a political community. Instead, he is interested in the question of how members of an existing liberal community can come to a more fully developed understanding of the constitutive principles of their shared political morality, and, hence, to aspire to construct a community of pure principle. But, there is still enough of Rousseau's transformational dilemma left in this formulation of the problem to note the resemblance between their respective solutions. Rousseau gives us the Legislator, who uses the art of persuasion, fortified by institutional artifices whose value is symbolic, to educate a people in the skill of self-government. Dworkin gives us Hercules, or more prosaically, Law's Empire, replete with legal arguments and philosophical reflections designed to instill a "protestant" attitude that "makes each citizen responsible for imagining what this

⁶⁰ Rousseau, The Social Contract, *op. cit.*, p. 69.

society's commitments to principle are, and what these commitments require in new circumstances."⁶¹

However, Rousseau recognized that for the Legislator's work to succeed, he would require fertile ground. Dworkin has recently come to share this view. For, after repeatedly asserting that liberalism is a political rather than a personal morality, and hence indifferent to the moral life of the citizens of a community as long as that moral life respects the autonomy of others, Dworkin has amended this view in a series of articles published after Law's Empire. This amendment can be regarded as Dworkin's solution to the transformational dilemma. Thus, liberal citizens can be seen as willing to undertake the task of constructing a politics of principle because their personal ethical convictions have already prepared them for this assignment. They are, in this sense at least, prior to the laws what they would have to become by means of the laws. But what must these ethical convictions be like if the politics of pure principle which Hercules holds forth as an ideal are to be realized? For this we must attend to one final component in Dworkin's expansive repertoire of arguments about the character of liberalism.

⁶¹ Law's Empire, p. 413.

Chapter Eleven

Ethics and Community

1. Introduction

In many of his early political writings, Dworkin insisted that his rights-based theory of justice was unconcerned with questions of personal ethics. For example, in one of his seminal articles on liberalism he declared that "Liberalism does not rest on any special theory of personality....[T]he liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals...."¹ More recently, however, he has come to alter his views about the relationship between politics and ethics. Nowhere is this change more evident than in his lengthy examination of the foundations of liberal equality,² and in his reflections on the policy of toleration characteristic of liberalism.³ These latter two articles respond to two very crucial questions, which, in the course of this dissertation, have been singled out as problematic elements in Dworkin's overall political theory.

The first question concerns Dworkin's claim that liberalism is fundamentally an egalitarian political morality. In chapter two, it was noted that Dworkin failed to supply a persuasive reason for thinking that liberalism reflects a commitment to an abstract concept of equality.⁴ Thus, although he managed to produce a series of intricate, and,

¹ Dworkin, "Liberalism," *A Matter of Principle*, *op. cit.*, p. 203.

² Dworkin, "Foundations of Liberal Equality," *op. cit.*

³ Dworkin, "Liberal Community," *op. cit.*

⁴ See *supra*, ch. 2, pp. 100-3.

in some ways, powerful arguments in favour of various egalitarian political principles in the distribution of resources and legal rights, the assumption which these arguments shared about the intrinsic egalitarianism of liberal political morality remained unsupported.

The second question concerns the role of tolerance in a liberal political community. In chapter three, it was observed that Dworkin's argument in support of official toleration of contending moral viewpoints appeared circular because it implied that a state could only pursue a policy of toleration if its citizens were already prepared to be tolerant of each others's moral convictions.⁵ Moreover, Dworkin's argument seemed to be implicated in a paradox characteristic of liberal defences of the principle of toleration, for, without a theory of the human good which invests tolerance with a positive moral weight, there is no categorical reason to support either a policy of tolerance or intolerance.

Dworkin appears to confront both of these questions directly when he acknowledges that the deontological liberal theory he endorses is open to some rather fundamental objections. He observes, for example, that romantic iconoclasts like Nietzsche regard a political morality predicated on liberal equality as a prison "made by the jealous to lock up the great."⁶ Marxists, on the other hand, criticize liberalism for "caring too much rather than too little about individual triumphs."⁷ And, finally,

⁵ See *supra*, ch. 3, p. 154-55.

⁶ Dworkin, "Foundations of Liberal Equality," p. 3.

⁷ *Ibid.*

conservatives, and their politically more ambiguous modern counterparts, communitarians, fault liberals for failing to understand that "life can only be satisfying when it is rooted in community-defining norms and traditions."⁸ In the face of these different criticisms, Dworkin recognizes that deontological theorists encounter a fundamental problem: "[L]iberal philosophers who...adopt the restricted view that liberalism is a theory of the right but not the good face the problem of explaining what reason people have to be liberals."⁹

Explaining what reasons people have for being liberals, Dworkin concludes, is tantamount to furnishing a philosophical foundation for the conception of equality which he thinks inheres in liberalism. But where is this foundation to be sought? His seemingly paradoxical answer is that the foundations for liberal equality can be found in ethics. Why this has the appearance of a paradox is that the liberal principle of toleration which Dworkin embraces seems to preclude any identification between a person's ethical convictions and his or her conception of what is appropriate or just in the political sphere. Indeed, Dworkin concedes that a recurrent complaint against liberalism is that it enforces a distinction between personal ethics and political activity:

Liberalism apparently asks us to ignore instincts and attitudes on political occasions which are central to the rest of our lives. It insists that we distribute our concern with fine equality, that we care no more about a brother than a stranger, that we banish the special allegiances we all feel to family or specialized community or neighbourhood or institution. It asks us to put our most profound and powerful convictions, about religious faith and moral virtue

* *Ibid.*

* *Ibid.*, p. 5.

and how to live, to sleep. Liberalism therefore seems a politics of ethical and moral schizophrenia; it seems to ask us to become, in and for politics, people we cannot recognize as ourselves, special political creatures wholly different from ordinary people who decide for themselves, in their ordinary lives, what to be and what to praise and whom to love.¹⁰

Dworkin hopes to dissolve this paradox by showing that a certain conception of the good life makes a particular model of personal ethics indispensable to liberal political morality. Yet, by claiming that a certain conception of the good life serves to connect ethics to politics, Dworkin appears to be willing to abandon the austere deontological precept that the right is independent from and antecedent to the good. This is not entirely the case, however, for the conception of the good life which he eventually defends is framed mostly in formal rather than substantive terms.

The structure of his argument about the ethical foundations of liberalism retains the methodological characteristics which had previously been identified as central to his constructive method of reasoning in moral and political theory.¹¹ Thus, when asking which model of ethical value underlies liberalism, Dworkin assumes both that liberalism entails a particular set of political principles, and that individuals in a liberal society are motivated to act in their private lives according to their own, potentially conflicting, personal convictions of what conduces to the good life. His theoretical project, in these circumstances, is to construct a view of ethical life which sanctions the personal search for ethical value, and, at the same time, embraces distinctively liberal political principles.

¹⁰ *Ibid.*, p. 15.

¹¹ For details of Dworkin's constructive method, see *supra*, ch. 2, pp. 81-92.

The principles which Dworkin thinks liberalism entails have been described in some detail in the preceding chapters. The first of these principles is the idea that a just society is defined in terms of the share of resources each individual has available. Secondly, the liberal notion of justice commands that each person is entitled to an equal share of resources. Thirdly, liberal justice insists that equal distributions respect the distinction between a person's circumstances and his or her personality. On this distinction, resources are to be allocated in such a manner as to equalize as best as possible each individual's circumstances while remaining indifferent to those material disparities which arise from differences in people's tastes, preferences, and ambitions. Finally, liberal justice requires tolerance which means that the state is prohibited from using criminal or other laws to limit someone's liberty on the basis of an assessment of the ethical worth of that person or his or her idea of the good life.

The question Dworkin faces is how can these four liberal principles be made conformable with ethics if it is acknowledged that people differ in their own conceptions of what constitutes the good life. His resolution to this problem is to offer an overarching, though largely formal, conception of the good life which he thinks it is reasonable for liberals to accept. That conception of the good life in turn supports an ethical attitude which promotes precisely those principles that ostensibly define liberalism.

To uncover this formal conception of the good life, Dworkin engages in a what should now be a familiar theoretical approach. He offers two contrasting strategies for reconciling personal ethical convictions with the political perspective which liberalism

allegedly requires individuals to adopt. A consideration of these rival strategies in turn prompts the question of how individuals decide upon what constitutes value in their lives. This leads Dworkin to propose a second contrast between two models of ethical value. And, characteristically, through a process of elimination he arrives at a model of ethical value by which a person's ethical convictions can be seen to cohere with liberal political principles. To understand this complex argument, it is necessary to follow it step by step.

2. Ethics and Politics: Two Strategies for Reconciliation

The most common analytical scheme for reconciling personal ethics and liberal political principles, Dworkin claims, is to employ what he calls the "strategy of discontinuity." On this strategy, a committed ethical life is consistent with the liberal political principles of equality and neutrality because "the second, political perspective is in a special but important sense *artificial*, a social construction whose purpose is to provide a perspective that no one need regard as the application of his full ethical convictions to political decisions, so that people from diverse and conflicting personal perspectives can occupy it together."¹²

The paradigm of the discontinuity strategy, according to Dworkin, is social contract theory. A social contract offers an artificial perspective through which individuals can bracket their own ethical convictions the better to find a *modus vivendi* for participating in collective political ventures. The virtue of the contractual approach is that it allows individuals to find a way of accommodating each others's interests

¹² "Foundations of Liberal Equality," p. 17.

without presuming that this political accommodation reflects any particular ethical principle. Hence, the contract does not enforce an ethical viewpoint on anyone, but merely represents an instrumentally efficacious means of securing social co-ordination. Outside of the explicit terms of the contract, therefore, individuals are free to pursue their own ethical convictions as they please.

While the tradition of liberal contract theory typically portrays the motivation for agreeing to liberal political principles as one of rational prudence, Dworkin suggests this type of argument cannot supply categorical force to the liberal principles of equality and neutrality. Thus, a hypothetical contract of the Hobbesian or Lockean variety is of no use in the world we actually inhabit because we have not in fact agreed to its terms. Nor does it help, Dworkin adds, to look at a social contract in prospective terms, as something that is likely to improve our political future if we act in ways consistent with its imagined terms. For, even if it is in a person's best interests to abide by the terms of a contract that could plausibly be instituted at some point in time, this still does not furnish anyone with a moral reason to act in the present as if the contract was established.

This problem of tying imagined consent to present political duties, Dworkin concludes, is the chief weakness of social contract theories. If liberal political principles are to have categorical force, that means that officials are obliged to try to implement policies that realize equality of resources in the here-and-now. Likewise, it is incumbent on officials to adhere to the principle of neutrality when devising laws that affect the liberties of citizens. Unable to demonstrate that consent is given to an actual contract,

orthodox social contract theories fail to show why such liberal political principles should have categorical force in our day-to-day lives.

Dworkin acknowledges, however, that Rawls's social contract appears to escape this particular problem because, at least in Rawls's latest interpretation of it, the contract is not simply a hypothetical device for reaching principles of justice but an element in a larger argument which tries to organize moral and political convictions latent in a society into a coherent conception of justice. On this view of Rawls's contractarian argument, if it can be shown that his conception of justice captures in a theoretically perspicacious manner the implicit moral and political norms in a society, then it holds out consensual promise in the sense that most people upon reflection would agree to that conception of justice. Moreover, if it is true that his conception of justice corresponds to moral and political principles latent in a society, then this fact would also seem to furnish a plausible reason for recognizing that it has a categorical force in the society.

Curiously, however, although Dworkin agrees that such an argument which makes use of the idea of principles latent in society is perfectly acceptable for the interpretative project of determining what the law is for a community, he doubts that it is sufficient to supply reasons for regarding a particular conception of justice as having categorical force in a society. His reasoning here is worth exploring because it sheds some light on the problem of reconciling Hercules the exemplary judge and Hercules the ideal philosopher discussed in the previous chapter.

Dworkin doubts that any appeal to principles latent in society can settle the question of which conception of justice should be embraced because it is likely that more

than one plausible interpretation of those principles can be fashioned from a society's political history. For instance, while Rawls's theory of justice might fit some part of the settled political convictions in American history, it is also true that utilitarianism could fit other parts of that country's political tradition as well. Rawls recognizes that two compelling conceptions of justice might be available for the political history and rhetoric of a society. In such circumstances, he suggests that a practical political contest in the end must decide which conception will ultimately be accepted as the proper one to implement.

However, this advice, Dworkin objects, merely yields the *post facto* conclusion that whichever conception of justice comes to prevail in politics is the right one. This does not help anyone actively engaged in the political process to decide which conception of justice is the right one for which to fight. When commenting on a structurally similar problem in legal interpretation, Dworkin's own counsel was that in the event that two interpretations of the law fit equally well, a judge must resolve which offers a better justification for the law as a whole. In this more narrowly conceived problem of determining which conception of justice is better, presumably the same advice obtains. Dworkin agrees that as a practical matter this is true. Thus, a legislator or judge confronted with two competing interpretations of justice must decide which is the morally more attractive conception. But, to make that decision, the legislator or judge cannot be guided by any further interpretation of a community's political morality. For, as Dworkin describes the dilemma, a public official "cannot ask which of two general theories of justice--justice as fairness, say, or utilitarianism--provides a more just interpretation of

his community's history because he would need a further theory of justice, more abstract still, to decide that question, and so forth to higher and higher levels."¹³ To escape this interminable process of moral reasoning, Dworkin suggests that an "independent, non-interpretative argument" for the categorical force of a conception of justice is needed: "We can only decide which principles are latent [in a society] when we already have in hand some conception of justice whose categorical force we can defend in some *other* way, as not dependent on or derived from its congruence with the community's tradition."¹⁴

In posing the problem in this way, Dworkin seems to confirm the point previously made in this dissertation that if justice itself is treated as an interpretative concept, then arguments of fit and justification at the level of "pure integrity" would proceed asymptotically without a final resolution.¹⁵ His call for a non-interpretative justification of a conception of justice ostensibly circumvents this problem, but it raises a new difficulty. Hercules the ideal philosopher, it should be recalled, was charged with the task of fashioning a pure theory of justice *appropriate* to the political history of his society. This admonition, it was noted, reflected Dworkin's concern that a society's political institutions should be reformed gradually rather than altered in a revolutionary fashion. But, how can Dworkin maintain that a conception of justice must ultimately be defended in a way that is independent of the moral and political convictions presumed

¹³ *Ibid.*, p. 34.

¹⁴ *Ibid.*

¹⁵ See *supra*, ch. 9, p. 461-62.

to exist in a community, and still claim that any institutionally unencumbered philosophical reflections on justice must take into account the community's political tradition? Or, to put it in a different way, if the normative foundations of justice are really independent of prevailing popular opinion, why not opt for a revolutionary rather than a reformist attitude to contemporary questions of justice?

The answer to this puzzle, as shall become apparent in the remainder of this chapter, is that the non-interpretative argument which Dworkin constructs in defence of his own egalitarian conception of justice gains its categorical force only on the assumption that individuals are capable of entertaining a crucial moral conviction about the relationship between personal and political ethics. Significantly, this moral conviction licences some radical political policies, but otherwise acts to undermine appeals to genuinely transformative politics. And, as to the question of whether this critical moral conviction obtains in existing liberal societies, Dworkin appears to leave it open to empirical debate, although the general force of his argument is that such a conviction would find support among self-designated liberals. Thus, his defence of an egalitarian conception of justice is, in a roundabout way, interpretative after all. For, it is only on the interpretative judgement that existing liberal societies are made up of a majority of individuals who share this fundamental moral conviction can he maintain that the conception of justice which he or Hercules elaborates provides grounds for right answers in law.

But, what is this fundamental moral conviction which provides support for an egalitarian conception of justice and the various right answers to the legal and political

disputes which Dworkin has canvassed throughout his career? The answer begins to take shape when Dworkin discusses a second strategy for reconciling personal ethical convictions with the perspective of politics. That second strategy--which he calls the "strategy of continuity"--does not require individuals to bracket their personal ethical convictions while participating in some artificial point of view represented by politics. On the contrary, the continuity strategy insists that people should be able to integrate their ethical and political convictions. Unlike the discontinuity strategy, therefore, this second approach tries to find a foundation for the liberal political principles of equality and tolerance in a theory of ethics. However, discovering the grounds for liberal political principles, particularly the principle of tolerance, in ethics seems a rather daunting task. For, ethics summons questions about the good life, and, ordinarily, individuals committed to a particular ethical view of the good life are not impartial between it and contending ethical views. How can individuals both be committed to a particular ethical viewpoint about the good life and endorse political principles which prescribe tolerance of competing conceptions of the good?

3. Volitional and Critical Interests

Dworkin responds to this dilemma by attempting to clarify certain philosophical issues in ethical theory. Ethics in the broadest sense, Dworkin tells us, is concerned with the art of living. In this broad sense, ethics is composed of two departments: morality and well-being. Morality involves the question of how we should treat others. The question of well-being, on the other hand, refers to how we should live to make our lives

good. Dworkin often refers to questions of well-being as ethical questions in the narrow sense. In this narrow sense, ethical reflection must be able to state what kind of goodness a good life has. Dworkin notes that familiar reductionist ethical explanations of the good life, like that offered by utilitarianism, cannot capture the complex structure of our normal intuitions about what comprises our well-being. He suggests, therefore, that in order to attend to this complexity we must keep in mind a distinction between two types of personal interests whose satisfaction contributes to our well-being.

The first class of interests Dworkin calls "volitional". They refer simply to what an individual wants, and their satisfaction gives rise to an obvious sense of well-being: "Someone's volitional well-being is improved, and just for that reason, when he has or achieves what in fact he wants."¹⁶ The second class of interests Dworkin calls "critical". Critical interests refer to things which an individual should want, and, for this reason, have more complex normative implications for well-being: "[A person's] critical well being is improved by his having or achieving what he *should* want, that is, the achievements or experiences that it would make his life a worse one *not* to want."¹⁷

Volitional interests are important to a person because he or she wants them. However, had he or she never envisaged a particular volitional interest, its absence in his or her life would not detract from the goodness of that life. Thus, volitional interests like avoiding the pain of dental work or taking pleasure from sport add to the well-being of a person's life in a straightforward fashion if they happen to be achieved. But, if they

¹⁶ "Foundations of Liberal Equality," p. 43.

¹⁷ *Ibid.*

are not achieved, a person's life is not made any worse for that failure. As Dworkin explains, "My life is not a worse life to have lived--I have nothing to regret, still less to take shame in--because I have suffered in a dentist's chair."¹⁸

The same is not true for critical interests. Critical interests like forming a close relationship with one's children or securing some success in work are generally thought to be important elements of a good life in and of themselves. As Dworkin explains it, the failure to recognize or accomplish what ostensibly are part of a person's critical interests do detract from living a good life: "I do not think that having a close relationship with my children is important just because I happen to want it; on the contrary, I want it because I believe a life without such relationships is a worse one."¹⁹

Volitional and critical interests, Dworkin observes, can often be complementary. Thus, if a person has embraced some volitional interest as important to his or her life, it may well be in that person's critical interests to be successful in securing that interest simply because personal success in life projects are critically important. And, of course, the opposite can also be true. People usually do develop a volitional interest in accomplishing what they think are their critical interests. But conflicts between these two kinds of interests can occur. Individuals may not want what they believe it is in their critical interest to have. Or, reflection may tell them that the volitional interests they happen to have detract from their critical well-being. In such cases of conflict, Dworkin concludes, there is no higher-order ethical principle available to resolve the issue of

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 44.

whether success in volitional or critical interests, or some trade-off between the two, is the best strategy for improving well-being. Instead, one must simply assume that critical interests must prevail in any internal ethical conflicts. To lead a good life, therefore, individuals must be prepared to follow their critical interests whenever they conflict with what they simply want to do.

This last conclusion leads Dworkin to suggest that an ethical foundation for liberal political principles must be sought in what comprises a person's critical rather than volitional well-being. Thus, when reflecting on what political principles conduce to their well-being, individuals must be ready to ignore what they happen to want for their life as a matter of contingent fact and explore the question of what they should want in order to make their lives better. But, this still begs the question of whether it is in people's critical interests to adopt the liberal political principles adumbrated by Dworkin.

This question is made more complex by the fact that the idea of critical interests is thought by many to be philosophically problematic. Dworkin acknowledges this latter difficulty and lists a series of conceptual puzzles which the idea of critical interests introduces to a philosophical discussion of ethics. Four of these conceptual puzzles speak directly to the problem of linking ethics directly to politics in the continuous strategy which Dworkin eventually comes to advocate. The first conceptual puzzle involves the question of the ontological status of a person's critical interests. If critical interests are not what a person happens to want but what he or she should want, is the ethical value which they represent *transcendent* or *indexed*? If transcendent, the good life of which these critical interests are components is everywhere and at all times the same. However,

if critical interests are indexed to the culture, abilities, and circumstances of individuals, then the idea of a good life must itself be relative. However, if the idea of a good life is relative, does it make sense to say that critical interests are not simply what people subjectively want but what they should want?

The second puzzle concerns the relationship between ethics and morality. Morality, to repeat Dworkin's definition, involves the question of how we should treat others. Can a person's life go better, Dworkin asks, if individuals pursuing their critical interests engage in actions which conflict with their moral obligations to others? To make vivid this question, Dworkin raises a theme addressed by Plato in the *Crito* and the *Republic*: can a person live a good life while being unjust? Dworkin notes that there is more than one intuitive response to this question. Thus, some might feel like Plato that a life can never go better if it includes unjust acts. Others might object that while unjust acts should be avoided, their commission does not automatically make a person's life worse. For instance, Paul Cezanne was a draft dodger, and, therefore, guilty of committing an injustice. But, without that unjust act he could not have succeeded in his life as a painter, a life manifestly worthwhile from the perspective of critical well-being. How can we order these competing intuitions in such a way as to definitively resolve the question of the relationship between ethics and morality?

A third puzzle concerns the question of whether critical well-being is an *additive* or a *constitutive* aspect of the good life. Dworkin explains the difference between the additive and constitutive view of critical well-being by posing two questions. One could sensibly ask of another, he says, how far that person's life "includes whatever

experiences or relationships or events or achievements we count as components of the good life."²⁰ Secondly, we can ask "how far he recognizes whatever components of the good life his own life contains, whether he sought them, regarded them as valuable, in short endorsed them as serving his critical interests."²¹

According to Dworkin, the additive view of critical well-being suggests that we can judge how well or badly a person's life goes by attending to the first question without consulting whether that person recognized, sought, or presently endorses what are deemed to be components of the good life. In other words, the experiences, relationships, events, or achievements which are thought to be elements of critical well-being add to the goodness of a person's life regardless of whether she or he sought or presently endorses them. Of course, if a person endorses these components of critical value, his or her life is better on that account. But, if subjective endorsement is lacking, the ethical value of those components remains intact.

The constitutive view of critical well-being, on the other hand, denies that a person's life can go better if he or she does not endorse those components that are presumed to be of critical value. On this view, a person's own attitude to what makes up critical value constitutes what the good life is for him or her. However, Dworkin adds that this does not mean that the idea of critical well-being is, in the end, a subjective notion:

The constitutive view is *not* the sceptical view that someone's life is good or bad in the critical sense only

²⁰ *Ibid.*, p. 50.

²¹ *Ibid.*

when and because he thinks it good or bad. Someone might be wrong in thinking his life a good one, and wrong because he counts something as a component of the good life that in fact is not. And he might be wrong in not recognizing and endorsing some feature of his life that, had he recognized it, would have made his life better. The constitutive view denies only that some event or achievement can make a person's life better against his opinion that it does not.²²

If the constitutive view of critical well-being is not, after all, merely another version of subjectivist ethics, does this mean that it offers a better way of understanding how we approach questions of the good life than the additive view? The problem, Dworkin notes, is that our ordinary ethical intuitions seem to support both viewpoints. Thus, many may well agree that Hitler's critical well-being would have better been served had he been locked up from adolescence, even if he had spent the rest of his life imagining the horrors he could have committed. This observation seems to promote the additive view of critical value. On the other hand, our ethical convictions also seem to support the opposite view that a person's critical well-being cannot be improved by third party interventions of which he or she does not approve. For instance, even if we think religion counts as part of a good life, most of us would deny that people's lives are improved if they are compelled into religious observances which they believe to be worthless. Thus, once again, competing ethical intuitions make it difficult to resolve the question of whether critical well-being is an additive or constitutive part of the good life.

A fourth and final puzzle concerns the question of the unit of ethical value. By

²² *Ibid.*

unit of ethical value, Dworkin means the "entity whose life ethics aims to make good."²³ The most obvious answer to this question is that it is the individual whose life ethics aims to make good. However, Dworkin observes that there are occasions when we sense the fundamental ethical unit is collective, not individual. On such occasions, Dworkin says, "the question of whether my life is going well is subordinate to the question whether, for some group of which I am a member, *our* life is going well."²⁴

The examples which Dworkin uses to illustrate this latter view that a collectivity is the appropriate unit of ethical value are familiar because they were previously raised in his discussion of democracy and community.²⁵ Thus, people who feel a personal failure because of the unjust or wicked acts of their nation, in the way that many contemporary Germans feel about their Nazi heritage, rate their personal ethical success in terms of the ethical well-being of their political community. In this case, the critical interests of an individual are somehow dependent upon, or merged with, the critical interests of a larger collectivity. Does this mean, Dworkin asks, that collectivities are the fundamental ethical units of value? If not, how can the idea of the ethical priority of community interests to which many people subscribe be explained? Or, alternatively, if one believes that ethics are both personal and communal, how can one determine which is more important in cases where community ethical norms conflict with what one takes to be one's own critical ethical interests?

²³ *Ibid.*, p. 51.

²⁴ *Ibid.*, p. 52.

²⁵ See *supra*, ch. 7, pp. 363-66.

4. Two Models of Ethical Value: Impact and Challenge

The several conceptual puzzles associated with the idea of critical interests seem to summon conflicting intuitions about what a person's good life consists in. Dworkin thinks the reason that these conflicts appear is that our ethical instincts reflect two different, if not antagonistic, ways of conceiving what gives critical value to life. Because both of these models of ethical value have some hold on our lives, our ethical intuitions will remain divided and inconclusive until we finally settle on one model as regulative of our conception of the good life. And, settling on one model of ethical value, Dworkin hopes to show, helps to resolve the question of how liberal political principles can be grounded in a person's ethical convictions. Thus, it is at this most fundamental stage of his philosophical examination of ethics that Dworkin begins the journey back to politics.

Dworkin calls the two basic models of ethical value to which we intermittently appeal in our lives the "model of impact" and the "model of challenge." He cautions that these two models of ethical value do not purport to establish what is ethically valuable by deducing ethical norms from some bedrock premise about what constitutes value. Rather, these models are "*interpretations* of ethical experience, attempts to organize the intimations of ethical value which most of us do have into a coherent picture."²⁶ As interpretations of ethical intuitions, these models, Dworkin tells us, serve to defend ethics from the sceptical view that, because no reconciliation between conflicting ethical intuitions is possible, ethics as a whole can make no claim to provide a true account of what constitutes the good life. The only defence against internal scepticism of this sort,

²⁶ "Foundations of Liberal Equality," p. 54.

Dworkin reiterates, is to show that a suitably constructed ethical viewpoint can render most of our ethical intuitions consistent with each other.

It should be noted that in claiming that his argument in favour of a particular model of ethical value is interpretative rather than deductive, Dworkin seems to involve himself in a contradiction. Previously, he asserted that any philosophical argument supporting a particular conception of justice must be non-interpretative if it is to escape the problem of infinite regress.²⁷ He subsequently offered to find a philosophical foundation for liberal political principles, including principles of justice, in ethics. But, his ethical theory, it turns out, remains interpretative in precisely the sense which seems to invite interminable questions about what justifies one interpretation of ethical value over another. How, then, can such infinite speculative exercises be averted? As shall be seen presently, Dworkin's response to this dilemma is to resort to his familiar admonition that an optimistic interpretative attitude is required if moral and political arguments are ever to be successfully concluded. What this response means for his theoretical project of discovering an ethical foundation for liberalism can only be determined after examining Dworkin's explication and assessment of the respective explanatory power of his two models of ethical value.

The model of impact is a theoretical construction of ethical value which purports to locate ultimate value in some objective state of affairs in the world. On this view, a person's life is judged to be good if it contributes to an objectively valuable state of affairs. Hence, the lives of Alexander Flemming, Mozart, or Martin Luther King can be

²⁷ See *supra*, p. 522.

judged as ethically worthwhile, on the model of impact, because their particular achievements added to what people generally consider an objectively good state of affairs. Ethical value in this sense is consequentialist. Such a consequentialist view of ethical value reduces some of the mystery surrounding the question of how one should live, Dworkin observes, because its prescription for an individual's critical well-being is straightforward: "A life can have more or less value, the model claims, not because it is intrinsically more valuable to live one's life in one way rather than another, but because living in one way can have better consequences."²⁸

It is important to understand that Dworkin does not use the model of impact as a conceptual device to define which particular state of affairs is the authoritative source of ethical value. Rather, the model is meant to organize people's ethical intuitions in a coherent fashion. The explanatory significance of the model, therefore, lies in its theoretical recommendation that individuals should recognize and measure ethical value in terms of the consequences of actions. For example, if people believe that art of a particular type offers the greatest objective value to the world, then to be ethically consistent in terms of the model of impact they should regard those who produce such art as possessing the most ethically valuable lives.

There is, Dworkin observes, much in conventional ethical opinion and rhetoric which supports such a consequentialist view of ethical value. Those who in their personal achievements contribute good to the world are routinely esteemed and considered especially virtuous. But, Dworkin also notes that some of our ethical convictions deny

²⁸ "Foundations of Liberal Equality," p. 55.

that the consequences of an action are in themselves ethically significant. "Many people," he remarks, "set wholly adverbial goals for themselves; they want to live, they say, with integrity, doing things their way, with the courage of their convictions."²⁹ These convictions, Dworkin adds, make no sense in the consequentialist view of ethics. For, even though a person might hope the world is made better by his or her actions, if it were not, he or she could still sensibly maintain that certain actions have an ethical significance in and of themselves.

This latter view seems to call for another model of ethical value and Dworkin offers such an alternate model based on the idea of personal challenge. The challenge view of ethics, he declares, "adopts Aristotle's view that a good life has the inherent value of a skilful performance."³⁰ In valuing life in terms of skilful performance, the model of challenge requires no further ethical assumptions about the impact or consequences of a person's life on others. For, as is the case in all skilful performances, such as accomplishing a complex and elegant dive or climbing Mount Everest, the virtue of the performance is in its execution. What is true of such discrete acts, Dworkin suggests, can also be regarded as true of life as a whole: "The challenge model holds that living a life is itself a performance that demands skill, that it is the most comprehensive and important challenge we face, and that our critical interests consist of the achievements, events, and experiences that mean that we have met the challenge well."³¹

²⁹ *Ibid.*, p. 56.

³⁰ *Ibid.*, p. 57.

³¹ *Ibid.*

The advantage of subscribing to the challenge model of ethical value is that it can account for both consequentialist and non-consequentialist ethical convictions. Thus, if a person believes that relieving the suffering of others is an ethically valuable way of living a life, the challenge model can explain this sentiment by treating it as a self-assigned challenge to live life well by performing altruistic acts. On the other hand, if a person believes that an ethically valuable life can be had by becoming literate in the arts and sciences, regardless of whether such education benefits others, the challenge model can accommodate this sentiment as well. The challenge model of ethical value is, therefore, more ecumenical than the model of impact, though Dworkin is confident that it does not reduce to the tautology that "living well is doing whatever counts as living well."³² Rather, the model of challenge, like its consequentialist counterpart, starts from the assumption that people already have convictions about how to live well in the critical sense. Its role as an explanatory model of ethics is to persuade people that their convictions about their critical interests are better understood as reflecting the value of performance instead of impact.

It is this difference between understanding ethical value in terms of performance or impact which also underlines the way in which the two models respond to the previously mentioned conceptual puzzles which the idea of critical interests encounters. For instance, is ethical value transcendent or indexed? Because the model of impact maintains that ethical value is tied to a state of affairs in the world, it is hard, Dworkin says, to imagine the model supporting anything other than a transcendental view of

³² *Ibid.*, p. 58.

ethical value. For, if we think that the only objective good in the world is God's pleasure, or human happiness, for example, it would be implausible to say that this measure of ethical value does not apply to all people or at all times.

The model of challenge, on the other hand, can accommodate the view that ethical value is indexed. Indeed, Dworkin thinks that the indexed view of ethics is uniquely suited to the challenge model: "It seems irresistible that living well, judged as a performance, means among other things living in a way responsive and appropriate to one's culture and other circumstances."³³ To clarify the manner in which the challenge model supports an indexed view of ethics, Dworkin offers an analogy between art and ethics. Great art, he states, does have a consequentialist value. Thus, a brilliantly executed painting has the power to excite aesthetic experiences amongst those who behold it. And, one could fairly say that the artist in this instance has made the world a better place by his or her craft. But, this aesthetic value is different, Dworkin insists, from the artistic value which the painting has simply in virtue of the way it was produced. It is this difference, he continues, which explains why we discriminate between originals and expertly fashioned reproductions: "The value we attach to great art reflects not just its value as a product, but our respect for the performance that produced it considered as a skilful response to a well-judged artistic challenge."³⁴

The analogy between art and living well allows us to see why the indexed view of ethical value is particularly appropriate to the model of challenge. For, what

³³ *Ibid.*, p. 63.

³⁴ *Ibid.*, p. 64.

distinguishes great art from mechanical reproduction of images is its inventive character. The challenge of art is not simply to execute a predetermined form but to define what is to constitute artistic success. In like manner, Dworkin suggests, "...if living well is regarded as a challenge, defining what it is to live well must be part of that challenge."³⁵ And, if the comparison with artistic invention is to be drawn out to its natural conclusion, this means that the ethical value reflected in the skilful performance of life is in some way the creation of the very person who decides which performances are required for a good life. This means, Dworkin concludes, that just as there can be no single definition of what constitutes great art, there can also be no single definition of ethical excellence on the challenge model. A transcendental view of ethical value, therefore, seems to be ruled out by this pattern of ethical belief.

However, Dworkin does not think that this implies that ethical value is entirely a matter of subjective opinion. Neither in art nor in life, he asserts, are an individual's performative choices entirely unconditioned. For instance, artists, he claims, "enter the history of art at a particular time, and the artistic value of their work must be judged in that light, not because their circumstances limit how close they can come to the perfect ideal of artistry but for the opposite reason, that their circumstances affect what for them is a skilful performance of defining and extending and executing art."³⁶ These circumstances, including the political, technological, and social conditions of an artist's age, comprise the boundaries he or she faces when deciding on what form his or her art

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 65.

is going to take. An artist may well decide to respect or defy the existing boundaries of an artistic tradition, but it is only because those boundaries are already there can an artist conceive of his or her artistic project.

The same holds true, Dworkin contends, for the challenge model of living well. Art and ethics, on this view, are similarly indexed to the historical and cultural circumstances in which individuals find themselves: "Both call for a decision, as part of the challenge they present, about the right response to the complex circumstances in which the decision must be made."³⁷ The circumstances can thus be seen as posing categorical demands on individuals, even though those categorical demands vary in time and place. At this level of abstraction, Dworkin adds, the model of challenge does not stipulate that there is a uniquely right way for an individual to meet his or her circumstantially defined challenges, but merely indicates that the question of rightness can only be addressed by concrete individuals responding to the full particularity of their situation.

However, in addressing the full particularity of their situation when contemplating which challenge they should pursue, individuals must be prepared to decide what part of their circumstances is to be treated as an indice of value, or preconditions for achieving that value, and what part serves as obstacles to realizing a dimension of value. Dworkin concedes that such decisions are complex:

Living well includes defining what the challenge of living, properly understood, is....We have no settled template for that decision, in art or ethics, and no philosophical model

³⁷ *Ibid.*, p. 66.

can provide one, for the circumstances in which each of us lives are enormously complex. They include our health, our physical powers, our tenure of life, our material resources, our friendships and associations, our commitments and traditions of family and race and nation, the constitutional and legal system under which we live, the intellectual and literary and philosophical opportunities and standards offered by our language and culture, and thousands of other aspects of our world as well. Anyone who seriously reflects on the question of which of the various lives he might lead is right for him will consciously discriminate among these, treating some as limits and others as parameters.³⁸

Sorting out the circumstances of one's life into limits and parameters is not something that can be governed by a single philosophical model because people's lives are complexly structured. But, even in the absence of an authoritative philosophical blueprint, Dworkin points out, people do routinely discriminate between what they think are parameters as opposed to limits to living well. In fact, such discrimination is essential for those who reject the transcendental in favour of the indexed view of ethics. For, if ethical value is indexed, it can only be so because certain circumstances in a person's life are regarded as his or her parameters for living a good life.

Ordinarily, what counts as a parameter for, and what counts as a limitation to, living a good life is something which a person's culture determines. In other words, we normally accept our own culture's definition of what constitutes the challenge of living well. However, Dworkin notes that any genuine ethical conviction must be self-reflective. Thus, meditation on what part of one's circumstances actually constitute parameters of a good life is an essential step in one's decision about what kind of life is worth

³⁸ *Ibid.*, p. 67.

pursuing. Moreover, Dworkin allows that such critical reflection can lead individuals to reevaluate their lives and decide to alter their personal destiny in order to live the right way: "I might come to think, for example, that my professional or religious or some other convictions are even more fundamental in defining the challenge I face in living than my political ones are, and I may *seek citizenship in some other nation* in consequence."³⁹

Reflecting on our ethical convictions in this way, Dworkin suggests, reveals an important internal complexity in the notion that some part of our circumstances count as parameters in our definition of a good life. What these reflections disclose is that some of our parameters are normative in the sense of defining what our circumstances should be rather than what they are. As Dworkin explains it, this sense that some parameters are normative introduce a new complication for the challenge model of ethics: "Our lives may go badly...not just because we are unwilling or unable to properly respond to the circumstances we have, but because we have the wrong circumstances. We do not even face the challenge we identify as the right one; even if we do the best we can in the circumstances we face, we do badly measuring our success against the chance we believe we ought to have been given, and it is the latter that defines a good life for us."⁴⁰

As an example of a normative parameter, Dworkin discusses our typical attitude towards our own mortality. Normally, we do not think that the mere fact that we will die someday constitutes a limitation on the value of the life we can have. Rather, we think

³⁹ *Ibid.*, pp. 68-9 (emphasis mine).

⁴⁰ *Ibid.*, p. 69.

that a life can be good if it lasts as long as it should by contemporary human standards. If someone dies prematurely, however, we count that as a tragedy because she or he has not had the opportunity to fully experience the challenges deemed important to a good life. In this sense, living to a ripe old age is a normative parameter for ethical well-being.

This example of human mortality suggests, however, that a further distinction needs to be drawn between two kinds of normative parameters. Hard parameters, Dworkin contends, state essential conditions without which no performance can be successful. The formal structure of a sonnet, for instance, dictates what is to count as a sonnet. No variation on this compositional rule can make of a poem a sonnet, no matter how beautiful it is. Soft parameters, on the other hand, act as standards of a good performance which nonetheless permit defects if they are compensated by other evaluative factors. Compulsory figures in competitive figure skating, for example, are normally regarded as soft parameters because deviations from the standard they represent are usually penalized. However, if a deviation is brilliant, it may end up winning more points than a purely mechanical performance of the required figures. The same is true, Dworkin suggests, in the art of living. Ordinarily, a short life detracts from a person's ethical well-being. But, a short life can also be a splendid success, as was Mozart's. In such cases, any judgement about the ethical value of a person's life must take into account what exactly was accomplished in that life rather than what could have been accomplished had the life been longer.

Most of us, Dworkin resolves, are inclined to treat the parameters that define a

good life as soft parameters in this way. Yet, once we accept that these parameters are soft, we must also be prepared to concede that they may pose conflicts or dilemmas. Dworkin's example of a conflict among soft parameters is instructive, for it includes the acknowledgement that no single satisfactory solution might be available to resolve the normative dilemmas we encounter in our lives:

Suppose I think my life must be a life appropriate for an American and also for a Jew, and then I come to think that recognizing both of these allegiances would tear my life apart. I might think that the best life for me required some compromise, or that it required accepting one parameter and rejecting the other. Or I might think that no choice, in these circumstances, could really be thought better than the other, that I must just choose knowing that my life will be marred either way.⁴¹

What makes these dilemmas so important and poignant in our lives, Dworkin concludes, is also what recommends the model of challenge as the most appropriate characterization of how our lives come to have ethical value. For, on the model of impact, the dilemma just described can make no real sense because if the ethical value of a person's life is tied to an objective state of affairs in the world, presumably only one state of affairs defines what is to be taken as an ultimate good. The challenge model, on the other hand, assumes that it is individuals who, in the final instance, decide what makes their lives good, and this makes possible the kind of conflict of values which arises from allegiance to a multiplicity of normative parameters.

The challenge model of ethics also supplies a different answer to the question of the relationship between ethics and morality than does the model of impact. As pointed

⁴¹ *Ibid.*, p. 70.

out previously, Dworkin illustrates this particular problem by asking the Platonic question of whether a person can lead a better life in the face of injustice. This Platonic question, Dworkin notes, is actually a two-part question. Thus, one can ask how a person's own critical well-being is affected by his or her own unjust acts. Or, alternatively, one can ask how a person is affected by the unjust acts of others, or by an unjust situation such as living in community where resources are unjustly distributed.

The model of impact, Dworkin observes, has no definitive answer for the first question. For example, if it is assumed that individuals can only do good in the world by making it less unjust, then the model of impact must conclude that a person's critical well-being is harmed by committing unjust acts. On the other hand, if it is assumed that ethical well-being consists of producing great art for the enjoyment of others, then the model of impact can conclude that living a perfectly just life is not essential to ethical well-being.

The model of impact does, however, take up a position on the second question of how the critical value of a person's life can be affected by the unjust acts of others or by an unjust situation. Quite simply, the model of impact denies that third-party injustice can affect the ethical value of a person's life. For example, in a society where the resource distribution is unjust, a rich individual may choose to use his or her wealth to make a positive impact in the world according to the notion of objective good which prevails in that society. Thus, a wealthy individual might use his or her fortune to subsidize great art, or sponsor research into life-saving medicine, or even give it away to reduce the overall level of injustice in the world. The model of impact would judge

any of these actions as contributing to the ethical well-being of the wealthy individual, regardless of the fact that his or her wealth itself was unjustly earned. For, in consequentialist terms, these actions have served to advance an objectively valuable state of affairs in the world, and, from the perspective of the model of impact, this is all that counts in deciding on what constitutes ethical value.

The same is true for the ethical life of the poor in this economically unjust society. A poor person will ostensibly have less opportunity to lead an ethically valuable life on the impact model because he or she will lack the resources necessary to make those contributions to the world that are deemed good. But this lack of success is a result of the amount of resources a poor person has, not the injustice of his or her share of resources. Of course, this does not mean, Dworkin adds, that everyone should be prepared to approve of economic injustice, or not work and vote to eliminate it. But, the fight against injustice is a moral rather than an ethical requirement according to the model of impact, for, on that model, a person can lead an ethically valuable life even in the face of injustice.

The model of challenge, on the other hand, treats the connection between ethics and morality differently. To begin with, the latter model assumes that certain aspects of a person's circumstances act as normative parameters for his or her conception of the good life. Someone who accepts the challenge model will find it difficult, Dworkin says, "...not to consider justice as figuring among those normative parameters."⁴² The reason is that we cannot describe the challenge of living well without making some assumption

⁴² *Ibid.*, p. 72.

about the amount of resources a good life should have available to it. The only way to account for the manner in which resource serves as a parameter of the good life, Dworkin concludes, is to "...bring justice into the story by stipulating that a good life is a life suitable to circumstances in which resources are justly distributed."⁴³

Once justice is regarded as an integral part of ethics, however, a person's life cannot go better if he or she either commits injustices, or lives in an unjust world. For, if an ethically valuable life consists of meeting the right challenge in the right way, then a life goes worse when it includes unjust acts, or when prevailing injustices prevent the right challenge from emerging. This conclusion would seem to reinforce Plato's view that a good life is inconceivable without justice. However, while Dworkin admires Plato's resolute identification of justice and ethics, he thinks it is too austere a view to take. Thus, instead of regarding justice as a hard parameter of the good life, Dworkin suggests that we should consider it a soft parameter which permits deviations if other evaluative factors can be seen to compensate for injustices. From this ethically more flexible position, for instance, unjust economic distributions can still be condemned even though it is recognized that some people might have ethically valuable lives as a consequence of economic injustice. Thus, Michelangelo achieved a life greater than anyone possibly could in a just state because his genius was financed by the unjust wealth of the Medici family. Or, a child whose life is saved because of the medicine only its rich parents could afford will likely lead a better life in consequence. But, in the end, Dworkin

⁴³ *Ibid.*

cautions, these examples are rare enough to suggest that for most of us a life lived unjustly, or in unjust circumstances, cannot be an ethically valuable life.

5. Critical Interests and the Problem of Paternalism

In treating justice as something that has the virtual force of a hard parameter in any definition of the good life, Dworkin encounters a problem. The nature of this problem can best be understood by turning to his discussion of the third conceptual puzzle prompted by the idea that individuals have critical as well as volitional interests. If the realization of a person's critical interests are essential to his or her ethical well-being, is it necessary for that person to acknowledge and endorse them, or is it sufficient that his or her life contains those components of critical well-being thought to be indispensable to the good life? In other words, does having a good life depend on a person's belief that it is good?

The trouble with these questions, as pointed out before, is that our ordinary ethical convictions seem to support both the additive and the constitutive view of critical well-being. Thus, on the one hand, it seems counter-intuitive to say that a person's belief is sufficient to determine whether a particular life is good. Our ordinary convictions seem to suggest that ethical value must have an objective foundation; otherwise any and all beliefs about the good life would qualify as *bona fide* ethical beliefs. But, on the other hand, it also seems counter-intuitive to say that it is in someone's critical interests to lead a life he or she despises or thinks unworthy. In this case, it appears that judgements about ethical value must, after all, take into account a person's subjective beliefs.

The model of impact resolves this dilemma by insisting that ethical value is fully objective. Hence, if some action contributes to an objectively good state of affairs in the world, it is for that reason an ethically valuable action regardless of whether an individual recognizes it. The model of impact, therefore, supports the view that ethical value is additive, even though this means that we must ignore those convictions which tell us it is wrong to claim that a person's life is made better by actions they disown.

The challenge model of ethical value, however, resolves this dilemma differently. The challenge model does not make sense, Dworkin explains, unless it is assumed that the connection between a person's beliefs and ethical value is constitutive. In other words, a person's life cannot go better because it contains some presumed critical value unless he or she thinks it does. For, if ethical value is contingent on the way a person responds to a challenge, then the intention of that person is crucial in evaluating his or her performance in life. After all, we do not normally give credit to performers for some feature of their performances that they did not intend, or that they would not recognize as good or desirable in retrospect.

However, philosophical reflection on the additive or constitutive nature of ethical value raises yet another question: is it proper for the state to try to make people better by compelling them to act in ways which they personally disapprove? In other words, is it legitimate for the state to engage in coercive paternalism to improve the critical well-being of its citizens? The model of impact, Dworkin claims, accepts the theoretical basis of state paternalism. For example, if it is thought that objective good resides in pleasing God through prayer, then the model of impact could reasonably support compulsory

prayer on the assumption that even if non-believers were thereby compelled to do something they regarded as worthless, their lives would nonetheless go better because they contributed to the objective good of God's pleasure. The model of challenge, however, views state paternalism with suspicion because it contradicts its central insight that ethical value is constituted by a person's beliefs. In subscribing to this model of ethical value, one might still think that religious devotion is an integral part of living life well. But, one cannot, for this reason, advocate compulsory religious observance because it would not have any ethical value for the person who is coerced to pray. "On the challenge model," Dworkin concludes, "it is performance that counts, not merely external result, and the *right motive or sense* is necessary to the right performance."⁴⁴

This does not mean, Dworkin adds, that all forms of paternalism are ruled out by the model of challenge. Paternalistic treatment of children, for instance, is acceptable because one might safely assume that as children mature they will come to retrospectively endorse their parent's restrictive rules or their compulsory education. But, even in these instances of what Dworkin calls "surgical paternalism", he insists that coercion can only be of a short duration and limited so that, if a child does not in the end come to endorse these practices, it does not effectively constrict the adult choices he or she can make.

More sophisticated forms of paternalism, however, are invariably precluded by the challenge model of ethical value. For example, Dworkin raises the possibility that the state might decide to employ "substitute paternalism" to induce a certain kind of behaviour among its citizens. With substitute paternalism, the goal is not to justify a

⁴⁴ *Ibid.*, p. 78 (emphasis mine).

prohibition on the basis of the worthlessness of what is prohibited, but by emphasizing the positive value of the substitute lives the prohibition makes possible. For example, if a state decided that a life dedicated to religious worship is wasted and passed a law prohibiting monastic orders, its rationale for such a paternalistic act could well be that the substitute lives which pious people might choose in these circumstances would be ethically more valuable than that of monastic devotion.

This, of course, reintroduces the problem of whether a person's life can really go better without his or her endorsement of its critical components. For instance, even if a person succeeds in a life which most of us consider ethically valuable because he is legally denied the opportunity to pursue the vocation of a monk, does this mean that his life is better despite his abiding conviction that it is not? In what sense can we say that people's critical interests are served when their own ethical convictions tell them to regard their actual lives as a disappointment?

Dworkin thinks that the model of challenge has a way of responding to this dilemma because it insists on something called "ethical integrity".

If we accept the challenge model we can insist on the priority of ethical *integrity* in any judgement we make about how good someone's life is. Ethical integrity is the condition someone achieves who is able to live out of the conviction that his life, in its central features, is an appropriate one for him, that no other life he might live would be a plainly better response to the parameters of his life rightly judged....Giving priority to ethical integrity makes a merger of conviction and life a parameter of ethical success, and it stipulates that a life that never achieves that kind of integrity cannot be critically better for

someone to lead than a life that does.⁴⁵

People may, of course, fail to lead their lives out of a sense of ethical integrity because they choose not to reflect on their critical interests, or because they ignore what they know to be their critical interests. Alternatively, they may fail to live their lives according to a sense of ethical integrity because they find themselves in the wrong situation, and, therefore, do not enjoy the normative parameters such as a just distribution of resources which they think essential to leading a good life. But, by the same token, they cannot live a life of ethical integrity if they are compelled by the state to behave in ways they do not personally condone. Hence, the idea of ethical integrity condemns substitute paternalism as an unwarranted intrusion in a person's ethical life.

Recognizing the priority of ethical integrity, however, appears to introduce a new difficulty for the challenge model of ethical value. If individuals have the ultimate responsibility to decide whether their lives display ethical integrity, is this not tantamount to saying that ethical value is a purely subjective notion? Dworkin denies that ethical integrity has this implication. Rather, he claims that saying that a person must be able to live according to his or her convictions about what constitutes a good life is not the same thing as saying that a person should live according to whatever ethical conditions he or she has. For, the idea of ethical integrity, Dworkin contends, carries with it a reflective injunction:

...living *out* of conviction--treating my beliefs *as* convictions--requires reflection, coherence, and openness to the examples of others. It requires me to reflect, from

⁴⁵ *Ibid.*, p. 80 (emphasis mine).

time to time, on whether I do find the life I am living satisfactory, and to take doubts and twinges to heart. It also requires me to open my mind to the advice and examples of others....In other words: ethical integrity is not a different demand, in the first person, from the demand of ethics itself. I must want to live a good life, and not merely one I think good, to satisfy either.⁴⁶

Engaging in this kind of reflective thought, Dworkin maintains, offers the best assurance that a person's ethical convictions are not just a rationalization of his or her volitional interests, but represent a genuine attempt to discover an objective ethical value for his or her life. Perhaps the best way of understanding what sense of ethical objectivity Dworkin is trying to articulate in this idea of ethical integrity is to refer to a structurally similar definition of virtue offered by Aristotle. In his famous doctrine of the mean, Aristotle tried to show that virtuous actions are both relative to the agent who must perform them, and subject to a rational demonstration: "We may thus conclude that virtue or excellence is a characteristic involving choice, and that it consists of observing the mean relative to us, a mean which is defined by a rational principle, such as a man of practical wisdom would use to determine it."⁴⁷

Like Aristotle, Dworkin emphasizes the relativity of ethical decisions. But, at the same time, like Aristotle, he wants to save room for a notion of ethical objectivity. Aristotle attempts to close this circle by invoking the notion of the *Spoudaios*, the ethically mature man capable of engaging in practical reason. For Aristotle, it is the *Spoudaios* who ultimately is able to demonstrate which mean it is reasonable for an

⁴⁶ *Ibid.*, p. 81.

⁴⁷ Aristotle, *Nicomachean Ethics*, trans. Martin Ostwald (Indianapolis: Bobbs-Merrill, 1962), p. 43.

individual to observe when making choices. In the case of Dworkin, one can detect a similar theoretical manoeuvre. Thus, when speaking of the priority of ethical integrity, he insists that persons must decide which life is the best life for them to lead according to their own understanding of the parameters of their ethical situation. But, he also appends the significant qualification that these parameters must be "rightly judged."⁴⁸ This qualification suggests that people may be wrong about what their critical interests are, and, that if they reflect on their lives in the way that someone genuinely committed to living a good life would, they might be able to correctly judge what is required of them by their ethical situation. Genuine ethical self-reflection, therefore, calls for the kind of ethical maturity displayed by an ethical philosopher like Dworkin who is prepared to subject all his ethical convictions to close and systematic scrutiny in search of a coherent explanatory model that could account for them.

One could, of course, object that this amounts to a circular form of reasoning. For, it assumes the very ethical objectivity that must be demonstrated by way of an independent ethical argument. Thus, Dworkin's ethical philosopher, no less than Aristotle's *Spoudaios*, can be regarded as convenient ethical fictions designed to give the impression that ethical judgements can ultimately be objective when in fact no arguments have been adduced to prove such a contention. This objection is no doubt true, but it misses an important point about the understanding of ethics present in both Aristotle and Dworkin.

When Aristotle illustrates how the mean is to be determined in practical situations,

⁴⁸ Cited at *supra*, p. 551n45.

he in effect takes up the aristocratic attitude that appearing to desire excess is unseemly for a gentleman. In the case of Dworkin, on the other hand, his governing assumption is that someone who reflects on his or her choices in life must be prepared to take a liberal attitude towards his or her own ethical convictions. On the one hand, this liberal attitude recommends that we regard our ethical convictions as expressing a challenge view of ethical value. Hence, we should see our critical well-being as consisting of performing well those assignments we identify as essential to the good life. However, the liberal attitude also means that we must both hold our ethical convictions contingently, and, when required to act with ethical integrity, we must refrain from imposing these convictions on others. Hence, even when we judge others to have what we think are the wrong convictions about ethical value, we cannot coerce them into changing their views. We must not engage in such coercion, not only because we may in the end be wrong, but because even if we are right, people who implacably hold mistaken ethical beliefs must be left alone to live at peace with their own convictions unless they pose a danger to others.

But, cannot we try to persuade others to abandon their mistaken beliefs? Dworkin allows that for reasons of benevolence we might well be motivated to try to coax others into changing their minds about what they regard as their critical interests. If such acts of benevolence are acceptable, however, why not support state paternalism as a special form of benevolence? Dworkin considers this argument when he examines one last form of paternalism which he calls "cultural paternalism". With cultural paternalism, a state might try to influence the ethical decisions people make not through prohibitions and

criminal law but through educational devices. Thus, in this scheme a state could employ a number of educational measures that hold up certain models of life as exemplary while other patterns of life deemed unworthy of emulation are deliberately concealed from public view. In this way the state could conceivably profess that it is constructing an ethical environment whose parameters would ensure that citizens have the best potential for choosing rightly in their lives.

Dworkin notes this argument only to declare that its central premise makes no sense in the challenge view of ethical value: "...a challenge cannot be more interesting, or in any other way a more valuable challenge to face, when it has been narrowed, simplified, and bowdlerized by others in advance, and that is as much true when we are ignorant of what they have done as when we are all too well aware of it."⁴⁹ This answer, however, may still not seem satisfactory to those who see in cultural paternalism the possibility of making the challenge of living more valuable for people by improving their chances of selecting a truly good life. Such a view of cultural paternalism, Dworkin remonstrates, profoundly misunderstands what is involved in the challenge model of ethical value.

It assumes that we have some standard of what a good life is that *transcends* the question of what circumstances are appropriate for people deciding how to live, and so can be used in answering that question, by stipulating that the best circumstances are those most likely to produce the really correct answer. On the challenge view, living well is responding appropriately to circumstances rightly judged, and that means that the direction of the argument must go in the other way. We must have some *independent* ground

⁴⁹ "Foundations of Liberal Equality," p. 84.

for thinking it is better for people to choose in ignorance of lives other people disapprove; we cannot, without begging the question, argue that people will lead better lives if their choices are narrowed.⁵⁰

In this intricate response to advocates of cultural paternalism, Dworkin suggests that because the challenge model rejects a transcendental view of ethical value, it cannot countenance paternalism dedicated to modelling the circumstances most likely to be productive of the "right" ethical value. For, without an authoritative paradigm of the good life to guide them, how can public officials be certain that people's lives are actually being improved by having them make choices in ignorance of all options? Paradoxically, however, this response also seems to undermine Dworkin's own argument against paternalism. The problem is that Dworkin wants to simultaneously maintain two positions: a person constitutes ethical value through his or her choices; and a person can be mistaken in his or her judgements about what is ethically valuable. But, can these two positions really be reconciled in the way Dworkin envisages?

In chapter one it was observed that typically liberal deontological theorists try to justify the view that it is right for individuals to have rights to choose or refrain from doing certain acts.⁵¹ It was further suggested that the test case for the moral warrant of individual rights is the question of whether people have the right to do what is wrong. In canvassing some of the possible answers to this question, it was noted that the argument invoking the notion of autonomy seemed to furnish the strongest philosophical

⁵⁰ *Ibid.*

⁵¹ See *supra*, ch. 1, pp. 18-20.

defence of the right to do wrong.⁵² In championing the challenge model of ethics and the idea of ethical integrity, Dworkin appears to follow this philosophical strategy. For example, when discussing the propriety of using state coercion to enforce religious observance, Dworkin insists that the challenge model cannot condone such compulsion because if ethical value is exemplified by a person's performance in living, then the "right motive or sense is necessary to the right performance."⁵³ What counts as a valuable performance, therefore, is not its product but the motive that led to it. This, in effect, means that Dworkin's challenge model of ethics relies on the idea that autonomy is crucial to any sense of ethical well-being.

However, does the idea of autonomy itself make any sense without a companion notion of what constitutes ethical goodness? In chapter one it was suggested that if one were agnostic about questions of the good, the ethical force of the idea of autonomy itself collapses.⁵⁴ The reason why this is so is that distinguishing right from wrong motives can only be meaningful if the choice itself is of something good. After all, if a person's choices are not potentially trained on what is good, what difference does it make from an *ethical point of view* if those choices are coerced or freely made?

When Dworkin denies that ethical value is transcendent, he seems to invite the objection that autonomy is of no great ethical importance. Thus, his claim that a state contemplating cultural paternalism must provide an independent argument for why

⁵² See *supra*, ch. 1, p. 18.

⁵³ Cited at *supra*, p. 549n44.

⁵⁴ See *supra*, ch. 1, p. 21.

people's lives are improved if their choices are narrowed appears to be beside the point. For, it can be fairly objected that he has not provided an argument to support the opposite contention that people's lives go better if they are free to imagine and experiment with all possible lives. Dworkin's notion of autonomy, to repeat, does not supply such an argument because it begs the question of the ethical value that makes autonomy important. Without linking autonomy to an objective ethical good, therefore, free choice becomes important only in the tautological sense that with it people have the opportunity to choose. However, this tautology undermines Dworkin's whole argument for critical interests, leaving us with an entirely subjectivist view of ethics.

One could, however, object that this case against Dworkin misrepresents his defence of autonomy and his opposition to state paternalism. After all, he takes care to remark that ethically good lives are those chosen by individuals who "rightly judge"⁵⁵ their circumstances. In this formulation, it would seem that autonomous choice does have a standard by which right and wrong motives can be distinguished. Thus, if individuals sincerely attempt to correctly judge what life is appropriate to their circumstances, and act consistently with those judgements, then they can be said to be acting from the right motives, even if they have erred in their ethical judgements.

This description of ethical choice, however, still provides no strong argument against state paternalism. This is so even if we grant Dworkin's claim that in modelling a person's circumstances by nurturing a particular ethical environment, a state cannot be assured of eliciting the right ethical behaviour. Dworkin's point is that the challenge

⁵⁵ Cited at *supra*, p. 551n45.

model sees ethical value as something that is indexed. Hence, what constitutes an ethically valuable life can only be determined by attending to the concrete circumstances in which individuals find themselves. However, Dworkin acknowledges that some of these circumstances act as normative parameters stipulating what a person should have if he or she is to live a good life. Why cannot the state use its coercive power to mould these normative parameters to induce individuals to pursue a particular life? Significantly, Dworkin cannot fall back on the argument that the state has no assurance that its actions will produce the right ethical behaviour, because the same is true if the identification and adoption of normative parameters were purely a personal prerogative. For, just as the state can err in its selection of normative parameters, so too can individuals judge wrongly about what is circumstantially right for them. The mere fact that the state is fallible, therefore, establishes no *a priori* argument against state paternalism.

As a matter of fact, Dworkin inadvertently reinforces this conclusion when he proposes that justice should be seen as a normative parameter within ethics. This section began with the observation that the challenge model invites us to consider justice as virtually a hard parameter of the good life. However, this kind of conceptual link between ethics and justice seems to undermine Dworkin's notion of autonomy and ethical integrity. For example, what if a person held the sincere and well thought out ethical conviction that a just distribution of resources can only be had according to something like Nozick's theory of entitlements, but happened to live in a state which adopted equality of resources as its distributive norm? Could not that person claim that, in the absence of the ethical environment he or she thinks necessary to living a good life, he

or she is prevented from living his or her life with integrity? Would not such a claim then be tantamount to saying that a person's autonomy has been compromised by the paternalistic interventions of a state?

Obviously, Dworkin cannot respond by saying that justice is a special component of ethics because it affects the well-being of others, and, hence, cannot be left to be decided purely by an individual's own personal ethical convictions. Why this is an inadequate response is that it involves the same dilemma found in John Stuart Mill's harm principle. Thus, where does one draw the line between self-regarding and other-regarding actions which licences the distinction between private and public spheres of ethics?

Instead of taking this route, Dworkin tries a different theoretical approach to the question of the relationship between justice and other ethical convictions. Our sense of justice, he claims, stipulates what we think is fair for everyone to have, and, therefore, it establishes the conditions by which individuals can define their ethical plans of life. However, reflection suggests that this is not an entirely satisfactory answer to the problem of the relationship of justice and ethics either, for it invites the question of which conception of justice is the right one for us to adopt in order to live our lives in the right way. This in turn seems to lead to that interminable series of questions about what justifies a conception of justice, and this brings us back to the interpretative dilemma announced previously.⁵⁶

⁵⁶ See *supra*, p. 522-23.

6. Community and Critical Interests

Dworkin's contention that justice should be seen as a part of ethics gives one pause to wonder whether he can consistently maintain his argument against state paternalism. Indeed, if he cannot find stronger conceptual reasons for prohibiting state paternalism, his whole argument for liberal tolerance is threatened because paternalism denies that tolerance is ethically important. This problem becomes even more acute when Dworkin addresses the last of the conceptual puzzles associated with the idea of critical interests. That puzzle refers to the unit to which ethical value should be attributed. Is it the individual in whose life ethical value is to be found, or is it the community which is the source of ethical value? If the community is the source of ethical value, should we regard it as ontologically or ethically prior to the individual?

In discussing this question of the appropriate unit of ethical value, Dworkin acknowledges that the communitarian challenge to liberalism has at least some merit.⁵⁷ Thus, he accepts the familiar communitarian view that people's lives are integrated with that of their community in such a way that their own critical well-being is dependent on the well-being of the community. However, communitarians routinely take this insight as grounds for arguing that toleration is not necessarily a political virtue because it may be in the ethical interests of a community, and of its citizens, if certain ways of life were prohibited. On the communitarian view, therefore, individuals should necessarily be

⁵⁷ For examples of this communitarian challenge, see Michael Sandel, Liberalism and the Limits of Justice, *op. cit.*, Alasdair MacIntyre, After Virtue, *op. cit.*, Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," *op. cit.*, and Philip Selznick, "The Idea of a Communitarian Morality," California Law Review, Vol. 75, no. 1 (Jan., 1987), pp. 445-63.

concerned with the ethical well-being of their community in all its details because their own well-being is intimately tied to that of the community.

The problem Dworkin poses for himself is how to justify the integrated view of community and personal ethics and still defy the communitarian argument that integration authorizes state paternalism. His theoretical strategy, in this instance, is to distinguish the different ways in which communal integration can be characterized. Thus, in an argument made familiar in his discussion of democracy and community,⁵⁸ Dworkin asks which is the best way to understand the community as a personified ethical agent. If one takes the integrated view that one's critical well-being is somehow dependent on the community, he declares, this can only mean that the community is the more fundamental ethical unit. But, does this mean that the community is somehow ontologically prior to the individual? Or is there a different way that the ethical priority of the community can be established?

Hoping to avoid a baroque metaphysics, Dworkin refuses to see the community as ontologically prior to the individual. Rather, he suggests that the ethical interdependence of individual and community can best be understood on what he calls the "practice view" of integration. The example of an orchestra is used by Dworkin to illustrate what the practice view of integration entails. In an orchestra, musicians belong to a collectivity and perform communal acts defined by their orchestral roles. An individual musician can only rate his or her performance in terms of the performance of the orchestra as a whole. In this sense, the good of the orchestra is prior to that of the

⁵⁸ See *supra*, ch. 7, pp. 363-66.

individual performer, or, to state it as an ethical injunction, an individual musician must regard his or her musical success as contingent on the success of the orchestra as a collectivity.

If individuals are to be seen as integrated with a collective in this practice sense, Dworkin declares, three conditions must be met. First, identifying something as a collective agent presupposes that there are specific acts demanded of individuals which are designated as communal acts. For example, playing an oboe is a part of a collective act only if an orchestral performance requires it. Secondly, the individual acts which constitute collective acts must be self-consciously performed in a concerted fashion. Thus, an orchestral performance can only succeed if its members intend to play co-operatively. Finally, the composition of a collectivity is tailored to its collective acts. A community's collective acts, therefore, determines who belongs to it, and membership, in turn, makes collective acts possible.

The key to this account of communal integration is the notion that a community's collective acts are limited only to those practices and attitudes necessary to constitute a collective life. Hence, in the case of an orchestra formed to play music, the only acts which count as collective acts are the musical performances of the orchestra members. Significantly, what these musicians do outside of their collective activity in the orchestra is of no consequence for the excellence of an orchestral performance.

The same attitude, Dworkin suggests, should govern our view of an integrated political life. But, this still begs the question of what constitutes the collective acts of a political community. Dworkin's response is that, in light of the three conditions deemed

necessary to the practice view of integration, only the formal political acts of a political community can count as collective acts. Thus, legislative, executive, and judicial decisions represent collective acts because they are undertaken by individuals whose public roles oblige them to act for the collective good of the community. Moreover, Dworkin states, citizens, when engaged in formal political actions like voting, speaking, lobbying, or demonstrating, are self-consciously performing actions in concert, and, thus, display the condition of co-operative behaviour essential to the practice view of integration. And, finally, membership in a political community is defined by the ability to participate in its formal political activities, thus satisfying the third condition of integration understood in practice terms.

According to Dworkin, therefore, a political community's collective life is limited to its formal legislative, administrative, and judicial decisions, and activities like voting or lobbying through which citizens can exercise their influence on the political process. Communitarians, however, do not think that such formal political activities are the only aspect of a political community's collective life. Some communitarians may think, for example, that the sexual practices in which citizens normally engage constitute part of a community's collective life, and, therefore, are properly a concern for communal regulation. Dworkin, however, resists this conclusion. If a political community is personified in some ontological sense, he admits, it might be possible to maintain that individual sexual habits contribute in a mysterious way to the sex life of the community. But, on the practice view, this identification is implausible. There is nothing, he insists, in the formal political acts by which a community is constituted to suggest the existence

of something called a national sex life. Nor are there conventions and practices which provide structures for co-operative sexual activity. And, finally, the composition of a political community is not determined by the idea that a certain kind of sexual behaviour is a precondition of citizenship. For these reasons, Dworkin concludes, the practice view of integration rules out the legal supervision of sexual activity, although he concedes that in smaller communities, such as the family unit, communal sentiments may well include attitudes towards proper sexual behaviour. In the latter case, a person integrated into the communal life of his or her family must be prepared to accept as authoritative its norms of sexual conduct. But, Dworkin adds, the very fact that there are a plurality of lesser communities in which we can satisfy our desires for communal integration testifies against the communitarian argument that the state must be the ultimate custodian of our personal ethical lives.

The practice view of integration which Dworkin champions thus ends up supporting the liberal principle of toleration because it limits the occasions in which citizens are asked to identify with the community as a whole to what he characterizes as purely formal political activities. Yet, even in this limited sense, Dworkin insists, the practice conception of integration offers a genuine opportunity for citizens to recognize the ethical priority of their political community: "An integrated citizen will count his community's success or failure in these formal political acts as resonating in his own life, improving or diminishing it."⁵⁹ He immediately notes, however, that "[o]n the liberal

⁵⁹ Dworkin, "Liberal Community," *op. cit.*, p. 500.

view, nothing more should be added."⁶⁰ In other words, for liberals the practice conception of integration is exhausted by a community's formal political acts and no other effort should be made to find any further grounds for employing the community's coercive political power to monitor the personal ethical lives of its citizens.

Dworkin acknowledges that such a conception of integration will disappoint those who feel that genuine identification between a citizen's ethical life and his or her community must produce a substantive community ethical life. What is the use, after all, of declaring that citizens should be ethically integrated into their political community if this injunction adds nothing of substance to the idea of a public good? Dworkin's answer is that even if the practice conception of integration offers no new argument about the justice or wisdom of any formal political decisions, it does produce a valuable attitude towards politics. If individuals accept that they are integrated into their political community in the practice sense, he suggests, they will have reasons for approaching the activity of politics in a truly civic-minded way. Hence, if they disagree over what justice requires, they will recognize that this disagreement is over what is good for the community as a whole, not what is good in their own narrow interests. Moreover, this collective sentiment that political decision-making concerns everyone is a powerful source of political stability and legitimacy. "Integration, so understood," Dworkin concludes, "gives a fresh meaning to the old idea of a commonweal, a genuine interest people share in politics, even when political disagreement is profound."⁶¹

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, p. 502.

But, is Dworkin right to think that a practice conception of integration nourishes healthy sentiments of civic republicanism while protecting the personal ethical lives of individuals? Even the most cursory inspection of his argument suggests that he has not proved his case. For instance, he assumes that it is in everyone's critical interests to experience some form of ethical integration with his or her political community. However, if critical interests are something which, in the final analysis, must be recognized and endorsed by individuals themselves, what assurance is there that they will choose to regard as ethically significant those practices which make integration possible? In other words, what can induce people to become truly civic-minded? This, it might be noticed, is Rousseau's question. In his purely conceptual analysis of the idea of integration, it is clear that Dworkin has not supplied an answer.

In one sense, however, this failure to give reasons why individuals should be motivated to recognize that integration is in their own critical interests is of less consequence for Dworkin because the practice conception of integration to which he subscribes is not a particularly demanding political ethic. Thus, if integration only means voting, lobbying, or engaging in political discussion, it is plausible to argue that individuals might at least see their volitional interests served by such minimal requirements of political participation and act accordingly. By these acts of political participation, therefore, one could say that citizens are integrated into their political communities even if they fail to recognize how this satisfies their critical interests. Yet, this certainly does not ensure that the spirit of civic republicanism will flourish. Indeed, if present anomic or hostile attitudes in western democracies to such activities as voting,

lobbying, and political debate are any indication, participation in such purely formal political practices are less likely rather than more likely to reinforce sentiments of civic-mindedness. Thus, Dworkin's depiction of integration is fated to remain an ideal unless he shows why formal political participation can furnish a sense of communal well-being which it presently does not.

There is, however, another problem in Dworkin's view of integration which involves the opposite difficulty of asking too much from integration. In sketching out the three conditions which support the idea of the ethical priority of the community, Dworkin attempts to distinguish between those practices which can be deemed collective acts and those which must be regarded as purely individual acts. It is in this fashion that he tries to counter the communitarian assertion that many aspects of our private behaviour are implicated in, or dependent upon, public norms of ethically correct behaviour.

However, his argument in this regard is hardly conclusive because it is cast in formal terms. That is, he assumes that by definition alone he can resolve the question of which acts are to be considered collective and which can not. As Bernard Williams points out, such a formal argument is ill-considered: "For how can we settle *a priori* the question of what is relevantly meant by identification with community? How can we exclude by these merely structural arguments the possibility that the tests, whatever they may be, that identify critical interests, will show that people, usually and for the most part, have a critical interest in living in an ethically homogenous community?"⁶²

The communitarian theorist, Philip Selznick, takes this line of criticism still

⁶² Bernard Williams, "Dworkin on Community and Critical Interests," California Law Review, Vol. 77, no. 3 (May, 1989), p. 518.

further. Noting that Dworkin wishes to limit the definition of collective acts to formal decisions of legislative, executive, and judicial bodies, Selznick indicates that this still does not tell us what the *reach* of these government bodies should be. It does not help, Selznick continues, for Dworkin to say that certain activities like a person's sexual behaviour is the concern of the individual alone because there can be no such thing as a communal sex life. It may well be true that sexual behaviour is an individual activity, Selznick states, but this has nothing to do with the fact that "the *norms* that govern our sex lives are collective, as are the institutions within which regulated sex life occurs."⁶³ Nor is Dworkin's orchestra analogy, Selznick suggests, capable of sustaining the idea that integration is limited to certain narrow political acts. An orchestra, he points out, is a special purpose enterprise concerned with creating musical excellence. A political system, on the other hand, has the more comprehensive goal of attending to the well-being of its citizens. For this reason, he concludes, it "cannot be neatly separated from the historical community or the moral community."⁶⁴

What both Williams and Selznick confirm in their criticisms of Dworkin is that his notion of integration is too formal not to beg the very question at issue in the debate between liberals and communitarians. If Dworkin is to show that the liberal principles of equality and tolerance are supported by a theory of ethics, therefore, he must find firmer reasons than those provided by the practice conception of integration. As it turns out, Dworkin does try to provide firmer reasons when attempts to demonstrate in a more

⁶³ Philip Selznick, "Dworkin's Unfinished Task," California Law Review, Vol. 77, no. 3 (May, 1989), p. 563.

⁶⁴ *Ibid.*

direct fashion how liberal political principles can be derived from the challenge model of ethical value.

7. From Ethics to Politics

In contrasting the impact and challenge models of ethical value, Dworkin's express purpose was to offer two competing theoretical models which could plausibly serve to organize our ordinary ethical intuitions into a coherent system of beliefs. When applying these two models to a series of conceptual puzzles occasioned by the idea that people have critical as well as volitional interests, Dworkin tried to demonstrate that the challenge model offers the most attractive interpretation of our ethical intuitions. With this conclusion at hand, Dworkin turns to the question of how liberalism can be seen to flow naturally from the challenge conception of ethical value. To this end, he proposes an imaginary discussion among individuals who embrace the challenge model of value. Such individuals he describes as "ethical liberals", people prepared to advance their own critical interests by responding rightly to their circumstances as they ought to be. What reasons, Dworkin asks, would these ethical liberals have for adopting the four political principles he claims are central to egalitarian liberalism?

The first principle of egalitarian liberalism holds that justice is a matter of the right distribution of resources rather than welfare. Ethical liberals, Dworkin argues, cannot regard justice as a matter of the right distribution of welfare because welfare-based theories of justice seem to be particularly appropriate to the view that ethical well-being consists of the satisfaction of volitional interests. On this view, people's well-being is improved when they have more of what they want. Justice, then, becomes a second-

order principle needed to determine what makes for a fair allocation of individual states of welfare. Ethical liberals, however, think that their well-being is not simply a matter of the satisfaction of their volitional interests. On the contrary, they rate their success in realizing their critical interests as the authoritative measure of their well-being. However, once critical interests are considered crucial to well-being, justice cannot be regarded as a second-order distributive principle. Instead, ethical liberals require a theory of justice which can stipulate in advance what their circumstances, rightly judged, offer in the way of critical challenges. And, this must mean, Dworkin concludes, that ethical liberals will agree that only when there is a just distribution of resources can they fathom what their critical challenges are.

But what makes for a just distribution of resources? The second principle of egalitarian liberalism maintains that resources must be distributed equally. Why should ethical liberals, however, choose equality over other distributive norms? Dworkin thinks the answer has to do with the way the challenge model of value embraced by ethical liberals makes justice an integral parameter of ethics. If an ethical liberal cannot conceive of his or her critical challenge in life without at the same time thinking of what distribution of resources make up the appropriate conditions of that challenge, ethics is intrinsically tied to a notion of justice. But the reverse, Dworkin contends, is also true. On the challenge model we are unable to think of what conception of justice best serves our critical interests because justice cannot be identified independently of our ethical convictions. And, because this model implies that our ethical convictions support the general view that what gives value to life is the successful completion of the challenges

we set for ourselves, it is hard to see how we can deny that everyone should have equal opportunities to define their own challenges in life. For this reason, Dworkin concludes, an ethical liberal will invariably realize that distributive justice must be dedicated to the principle of equality.

Moreover, Dworkin argues, ethical liberals will be inclined to accept the third of the four principles of egalitarian liberalism: the idea that what needs to be equalized through resource distributions are people's circumstances rather than those features of their personality which affect how they conceive the good life. Distributing resources in a way that would equalize the well-being of individuals caused by their differing tastes, ambitions, and convictions, Dworkin observes, would inevitably reinstate equality of welfare as a distributive norm, and this, he reiterates, is something that ethical liberals reject for reasons already described. Furthermore, because ethical liberals see ethical value as something which arises from identifying and successfully meeting a challenge which individuals set for themselves, any attempt to somehow equalize the well-being that results from their unique personalities contradicts the central premise of the challenge model of ethics.

If ethical liberals are indeed attracted to equality for these reasons, there is still a final, more problematic, liberal political principle to which they must be prepared to subscribe: the principle of tolerance. Why should ethical liberals, even if they accept that a scheme of justice modelled on equality of resources is in their critical interests, also embrace tolerance as something which is ethically valuable in their lives? On the face of it, this last political value seems the most difficult to reconcile with ethics because if

individuals believe that politics should be continuous with their ethical lives, it would appear only natural for them to want to use politics to advance their own ethical views. Insisting on toleration as a principle governing the collective use of political power seems to place an unwarranted constraint on their ethical lives. Dworkin, however, thinks that ethical liberals will find this constraint congenial to their own convictions about what comprises ethical value.

Ethical liberals have what seems a conclusive reason for accepting that constraint: they accept that an account of justice that demands equality of circumstances and resources. The law plainly is part of people's circumstances, and circumstances are plainly unequal when the law forbids some to lead the lives they think best for them only because others disagree. So ethical liberals, who accept equality of circumstances as what justice requires, must accept liberal tolerance too.⁶⁵

Dworkin immediately adds that it is crucial to the continuity strategy linking ethics and politics that ethical liberals do not resent this political injunction to be tolerant of others. He concludes that they will not feel resentment because "tolerance gives full force to their abstract ethical convictions about how they and others can live best, because the theory of justice that requires tolerance is not a competing department of morality that checks their ethical convictions, but, on the contrary, is drawn from and *serves* these ethical convictions in ways which [are demonstrated by reflection on the challenge model of ethics]."⁶⁶

Seeing the political principle of tolerance as something which flows from the

⁶⁵ "Foundations of Liberal Equality," p. 115.

⁶⁶ *Ibid.*

challenge model of ethical value, however, does not mean that a state can or should make all lives possible. Dworkin readily concedes that if the four principles deemed essential to egalitarian liberalism are faithfully applied, some lives will become too expensive or impossible to lead, while other lives will be positively prohibited by the principle of toleration itself. For example, if equality of resources is fully realized, a person dedicated to a life of collecting rare artistic masterpieces will not have the financial wherewithal to satisfy his or her convictions about what constitutes the good life. As for those who regard the good life as something which involves coercing others to share the ethical convictions he or she holds, the political principle of toleration positively forbids such an ethical aspiration. "Liberal equality," Dworkin concludes, "is neutral about first-person, not third-person, ethics, and only insofar as first-person ethics does not embody antiliberal principles."⁶⁷

Significantly, when drawing this distinction between first-person and third-person ethics, Dworkin introduces an important qualification into his argument that ethical liberals will naturally accept the political principle of toleration. Ethical liberals will only accept the argument for toleration if they are prepared to abandon the belief that third-party interventions into other people's ethical lives is an ethically valuable challenge. In other words, ethical liberals must accept that ethics is a personal affair which others have no business interfering with. However, as pointed out previously in the discussion of state paternalism, Dworkin does not furnish a convincing argument that the challenge model of ethics absolutely prohibits paternalism.

⁶⁷ *Ibid.*, p. 118.

Resolution test chart showing patterns of vertical and horizontal lines with numerical values: 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0 (NBS), 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10.

MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

As it turns out, Dworkin more or less concedes this criticism when he states that even if people do not presently hold the view that third-party intercession into the ethical lives of others is ethically unwarranted, they *could* be made to see that their lives would go better in the challenge sense if they adopted an attitude of tolerance. However, by converting his examination of ethical value from an interpretative attempt to bring coherence to existing ethical intuitions into a prescriptive argument about how we could modify our ethical views, Dworkin's claim to ground liberal principles in ethics belongs to ideal rather than practical moral reasoning. Moreover, as an ideal prescriptive argument, Dworkin's account of ethics requires a certain optimism. Indeed, as he notes, "[i]t is important, to that optimistic view, that almost anyone could occupy the position of an ethical liberal without abandoning the heart of his ethical convictions understood in the first person, that is, as convictions about how he should live well."⁶⁸ This might sound utopian, Dworkin admits, but he remains convinced that it "is far less utopian to hope that people will change their third-person than their first-person views, particularly if arguments are available to show how these can be decoupled."⁶⁹

But, are those arguments purporting to show how we can live a life ethically integrated with the political community of which we are a part while attending only to our own first-person ethical convictions altogether sound? It would seem not, for, in many instances, Dworkin's own arguments contradict his belief that ethics and politics form a seamless web. For example, when discussing the possibility that people's

⁶⁸ *Ibid.*, p. 113.

⁶⁹ *Ibid.*

professional, religious, or some other convictions might prove to be more fundamental in defining their challenge in living than their (liberal) political convictions, Dworkin suggests that they may "seek citizenship in some other nation in consequence."⁷⁰ Or, again, when asking the hypothetical question of whether someone who identifies both with his or her Jewishness and his or her American citizenship can reconcile these dual allegiances, Dworkin admits that it may be possible that no ethical choice about a single way of life is better than the other in these circumstances. In this case, he allows that "I must just choose knowing that my life will be marred either way."⁷¹ In neither of these two examples is the promise of an integrated ethical life fulfilled. Instead, we have, on the one hand, a choice of becoming an ideal ethical liberal or emigrating, and, on the other hand, the practical advice that it may be necessary to learn to live with the disappointment that there is no way of reconciling all our ethical convictions.

Where does this leave Dworkin's general assertion that liberalism can be grounded in ethics? It would seem that his argument is still circular. Liberalism, as he understands it, is an appropriate political ethic for those who are ideal ethical liberals. This is just another way, however, of repeating Rousseau's dictum that individuals "would have to be before the laws what they ought to become by means of the laws."⁷² Rousseau's paradox is not, in the end, relieved but merely reinforced by Dworkin's reflections on the ethical foundations of liberal equality.

⁷⁰ Cited at *supra*, p. 541n39.

⁷¹ Cited at *supra*, p. 543n41.

⁷² Cited at *supra*, ch. 10, p. 511n60.

Conclusion

In a speech to the University of Georgia law School, H.L.A. Hart once remarked that American jurisprudential thought has oscillated between two extremes. He called one of these extremes a nightmare in which adjudication is recognized to be a form of disguised politics carried out by judges who pretend to impartially report what the law is. The other extreme Hart called a noble dream. In this version of American jurisprudence, law is regarded as a seamless web of rights and duties which judges are dedicated to discovering, not creating. According to Hart, Dworkin's jurisprudential theory is one of the most recent illustrations of this noble dream, a dream in which the ascription of wholeness to the law is meant to extinguish the fear that adjudication is "...a legally uncontrolled act of lawmaking..."

While much of Dworkin's jurisprudential writings seem to corroborate Hart's view that he longs to see adjudication as something that is unsullied by politics, this characterization of Dworkin's theoretical approach to law is not entirely accurate. Dworkin does not so much wish to find an escape from politics in an immaculate realm of legal debate as he wishes to make politics over into a forum in which principled arguments, not class or other interests, hold sway. Thus, his right answer thesis, so often assailed even by his sympathetic critics, does not amount to a repudiation of politics. On the contrary, Dworkin is the first to admit that judges must apply their political convictions to the task of adjudication.

¹ H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream," Georgia Law Review, Vol. 11, no. 5 (Sept., 1977), p. 974.

The way in which Dworkin depicts the play of political convictions in both adjudication and legislation, however, reveals how deeply committed he is to the politics of liberal individualism. Political convictions, Dworkin argues, must be principled if they are to have a determining role in adjudication. And, if legislators are to avoid the moral predicaments occasioned by checkerboard statutes, they too must be prepared to engage in coherent, principled politics. By stressing the need for judges and legislators to bring coherence to their political convictions, thereby transforming them into a system of principles suitable to making and adjudicating the laws, Dworkin in effect attempts to establish a contrast between two types of politics. On the one hand, there is an unprincipled form of politics which reduces to a struggle over power. In this view, politics, and, by extension, law, simply reflects the interests of the stronger. On the other hand, there is a politics of principle whose currency is not power but truth. On the principled view, the aim of politics and adjudication is to arrive at an ordering of social relations which conforms to what is morally right. Political or judicial debate inspired by principles, therefore, establishes the formal conditions under which such an edifying goal can be realized.

In the history of philosophy the contrast between truth and power in politics is at least as old as Plato. There is, however, a significant counter-tradition which denies the contrast. For instance, drawing on the insights of Nietzsche, the influential contemporary historian and philosopher, Michel Foucault, declares that truth is an historical construct inextricably reflecting relations of power.

Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular

effects of power. Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.²

Dworkin would not dispute Foucault's claim that each society has its own regime of truth, at least if it is presented as an historical or metaphysical assertion about political and moral matters. But such assertions, he contends, are not sufficient to empty the notion of political or moral truth of normative meaning. Dworkin is quite willing to concede that because the apprehension of truth in politics and morality is determined by historical and cultural horizons, there is no way to transcend these horizons to deliberate on some "real" or "timeless" truths. This fact, however, does not by itself authorize a sceptical attitude to moral and political truth. Instead, according to Dworkin, it reinforces the view that moral and political arguments must rely on the criterion of coherence to establish their normative validity for those whose convictions reflect a particular cultural and historical horizon.

In defending a coherence model of truth in this way, Dworkin can be seen to be making what is essentially an existential argument. Thus, if we wish to live our lives in a way which presumes that there are right answers in morality and politics, in the absence of decisive ontological arguments to that effect, we must be prepared to act on principles which can be defended on the basis of their internal coherence. This is not a

² Michel Foucault, Power/Knowledge Colin Gordon, ed. (Brighton: Harvester Press, 1980), p. 131.

second-best approach to political and moral truth, Dworkin insists, but is in fact the only approach available to us.

Dworkin's right answer thesis, therefore, relies on the notion that in pursuing the goal of coherence, practical moral and political reasoning is capable of providing a normative justification for prescriptive principles. For political communities broadly defined as liberal, Dworkin sets out to demonstrate that the rule of coherence recommends a set of principles including the political principle of neutrality and the distributive principle of equality of resources. The principle of neutrality reflects the modern deontological propensity to define what is right independently of considerations of what is good. Significantly, in separating out questions of the right and the good, Dworkin hopes to prevent power from masquerading as truth in politics. Hence, by ensuring that the state does not discriminate against individuals because some transient majority happens to find their character or moral convictions distasteful, the power possessed by such a numerical majority is prevented from transforming a shared conception of truth into a standard which everyone is compelled to observe. This means that the neutrality principle, in the end, supports a thoroughly liberal individualist view of politics. Dworkin's contrast between truth and politics becomes, for practical purposes, a contrast between the individual and society. In highlighting this contrast, Dworkin's theoretical aim is to show that a system of legal rights are necessary to protect individuals from the potentially discriminatory or intrusive behaviour of the state acting in the name of society.

The liberal individualism inscribed in the legal regime of rights promoted by

Dworkin is reinforced by his distributive theory of justice. Although ostensibly an egalitarian distributive theory, it makes a virtue of individual liberty by stipulating that only when individuals are free to choose their life plans can equality of resources itself be measured. Moreover, by using money and leisure as the units by which an individual's resources can best be calculated over a lifetime, Dworkin effectively removes from the purview of distributive justice the question of how equality can be secured in decisions over production. Thus, Dworkin's distributive theory ends up sanctioning private appropriation as the most plausible means of effecting equality of resources, and, this means that once again liberal individualism is privileged over alternative conceptions of social and political organization.

In developing his arguments in support of official neutrality in politics and the distributive ideal of equality of resources, Dworkin had for a long time insisted that no conception of the good was implied or endorsed by either principle. Rather, he was content to describe his arguments as procedural in the sense that they were trained on the formal characteristics of moral and political reasoning. In the course of this dissertation, however, it was contended that, at a minimum, Dworkin has to subscribe to the premise that individual self-development is a moral good if he hopes to bring coherence to his distributive principle and to the politics of toleration which he champions. Dworkin confirms this contention in his more recent writings where he attempts to find a foundation for egalitarian liberalism in ethics. In claiming that an ethical liberal is drawn to the challenge model of ethical value, Dworkin places the moral good of individual self-development at the centre of liberalism. Moreover, by insisting that justice forms

part of the ethical environment by which an individual can properly identify and respond to the challenges he or she thinks appropriate to a good life, Dworkin believes he has shown that an effective link exists between personal ethics and the political principles entailed by liberalism.

However, the link between ethics and politics remains tenuous in Dworkin's theory. Unwilling to go beyond a formal description of the conditions by which people can recognize and respond to the challenges in their lives, Dworkin's portrayal of the moral good of individual self-development proves to be too scanty to support the liberal political principles he esteems. For example, ethical liberals attracted to the challenge model of ethical value, Dworkin declares, must be prepared to separate out their first-person and their third-person ethical convictions. In other words, they must treat questions of ethical value as a private affair, and, thus, maintain a tolerant attitude to those who do not share their ethical convictions. But why should they be willing to make this distinction between first-person and third-person ethics? How is the moral good of individual self-development served by such an attitude of tolerance? Dworkin thinks the answer is to be found in the manner in which ethical liberals conceive justice to form part of the parameters of their ethical life. This, however, is a question-begging answer, for Dworkin assumes, without adequately demonstrating, that justice requires tolerance.

In this dissertation it has been proposed that a fruitful way of understanding the persistent circularity in Dworkin's political and moral arguments is to regard them as variations on a theme addressed by Rousseau in the Social Contract. In a perceptive analysis of Rousseau's writings, Louis Althusser has suggested that the way he posed the

problem of politics determined the range of theoretical solutions available to him.³ Thus, by asking how individuals can form a political association in which each obeys only himself, Rousseau defined a set of conditions, obstacles, and forces which together produce the ostensible contradiction between individual freedom and the social determination of the laws. Rousseau's eventual resolution of this contradiction, Althusser argues, involved, alternatively, a "flight forward in ideology" or a "regression in reality." Thus, in the Social Contract, Rousseau was compelled to seek an ideological solution to his self-diagnosed political contradiction by introducing the figure of the Legislator capable of moulding people's consciousness in such a way as to remove any conflict between private and public interests. In the Discourse on Inequality, on the other hand, Rousseau's practical proposal for abandoning the life of luxury made possible by the division of labour and returning to a life of economic self-sufficiency as a means of restoring a healthy sociability reflected a regressive attitude to economic reality. In either case, Althusser concludes, Rousseau's theoretical solutions to the problem of politics were circumscribed by his initial definition of the conflict between the individual and society.

There is much in Althusser's analysis of Rousseau which can also be applied to Dworkin. The problem of politics, for Dworkin, consists in demonstrating how individuals in a liberal society, subscribing to their own convictions about what is the right way to live, can serve their self-developmental goals by accepting both an egalitarian rule of distributive justice and the practice of official toleration. Significantly,

³ See Louis Althusser, Politics and History: Montesquieu, Rousseau, Hegel and Marx (London: New Left Books, 1972), pp. 113-60.

Dworkin also has two solutions to this problem. Thus, in the first instance, he gives us the figure of Hercules, who, in his dedicated judicial labours, fashions precisely those interpretations of the law which will encourage individuals to consciously adopt the egalitarian and tolerant sentiments required of liberalism. Paradoxically, however, the ideal of a judicialized politics is hardly conducive to the moral goal of individual self-development. For, just as the ministrations of Rousseau's Legislator make problematic the whole idea of autonomy, so too does relinquishing the capacity to make crucial decisions about principles to the competence of the courts make self-development a dubious prospect.

As for his second solution, Dworkin suggests that individuals can reform themselves by abandoning any ethical convictions they might have about the value of paternalism, turning themselves into ideal ethical liberals. But, in posing this as essentially an act of the will, Dworkin can be accused of affirming rather than disproving Foucault's observation that truth is a political construction. For, in proposing that a reform in attitudes can establish conditions suitable to the flourishing of liberal political principles, Dworkin in effect implies that if a sufficient number of individuals are prepared to commit themselves to ethical liberalism, its truth will be installed by that act.

In either case, one can remonstrate that, just as in the case of Rousseau, Dworkin's solutions to the problem of justifying liberal politics are a function of the way he conceives the potential for conflict between the individual and society. This is the burden of the communitarian critique of deontological liberalism. Communitarians admonish deontological liberals like Dworkin for drawing too stark a distinction between

the individual and society, making it impossible to envisage a politics in which a substantive public good takes precedence over abstract liberties. Critical theorists of the left are likewise inclined to challenge the contrast between the individual and society which Dworkin identifies as the central problem of liberal politics. For these critical theorists, emphasizing the conflict between the individual and society serves not only to obscure the way in which social and political conflicts are structured around class, gender, and racial differences, but also to undermine the kind of collective action by which such conflicts can effectively be resolved.

Despite Dworkin's efforts to meet these criticisms of the deontological project, his liberal individualist framework restricts the theoretical responses available to him. Thus, he is ultimately unable to successfully allay the communitarian critique with his own theoretical evocation of an individual integrated into the formal political process of his or her community because his portrayal of this ethical liberal lacks the motivational foundation for the principle of tolerance. Likewise, he is unable to unequivocally capture the issues raised by class, gender and racial politics in the conceptual language of policies and principles because the contrast between these latter concepts presupposes a settled conviction about the nature of the political process which is precisely what is contested in the real world of politics. Thus, in the end, the politics of principle, for which Dworkin is such an eloquent advocate, seems destined to remain a theoretical dream, and the good, served by individual liberties and resource equality, the unexplored secret of that dream.

Bibliography

- Alexander, Larry, and Schwarzschild, Maimon. "Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources." Philosophy and Public Affairs Vol. 16, n. 1 (Winter 1987): 85-110.
- Althusser, Louis. Politics and History: Montesquieu, Rousseau, Hegel and Marx. London: New Left Books, 1972.
- Altman, Andrew. "Fissures in the Integrity of *Law's Empire*: Dworkin and the Rule of Law." In Reading Dworkin Critically, edited by Alan Hunt. New York: Berg Publishers, 1992.
- Andrew, Edward. Shylock's Rights. Toronto: University Press, 1988.
- Aristotle. Nicomachean Ethics. Translated by Martin Ostwald. Indianapolis: Bobbs-Merrill, 1962.
- Arneson, Richard A. "Equality and Equal Opportunity for Welfare." Philosophical Studies Vol. 56, no. 1 (May 1989): 77-93.
- _____. "Liberalism, Distributive Subjectivism, and Equal Opportunity of Welfare." Philosophy and Public Affairs Vol. 19, No. 2 (Spring 1990): 158-94.
- Augustine. Concerning the City of God against the Pagans. Translated by Henry Bettenson. Middlesex: Penguin Books, 1972.
- Austin, John. The Province of Jurisprudence Determined. New York: Noonday Press, 1954.
- Baker, C. Edwin. "Counting Preferences in Collective Choice Situations." UCLA Law Review Vol 25, no. 2 (1978): 381-416.
- Barry, Brian. The Liberal Theory of Justice. Oxford: Clarendon Press, 1973.
- Bennett, John. "Ethics and Markets." Philosophy and Public Affairs Vol. 14, no. 2 (Spring 1985): 195-205.
- Bentham, Jeremy. The Works of Jeremy Bentham. Edited by John Bowring. New York: Russell and Russell Inc., 1962.
- Berlin, Isaiah. Four Essays in Liberty. Oxford: Oxford University Press, 1969.
- Bickel, Alexander. The Supreme Court and the Idea of Progress. New Haven: Yale University Press, 1978.

- Bondman, Elsie L., and Bondman, Bertram, eds. Bioethics and Human Rights. Boston: Little, Brown, 1978.
- Bork, Robert. Tradition and Morality in Constitutional Law. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1984.
- Bowles, Samuel, and Gintis, Herbert. Capitalism and Democracy. London: Routledge & Kegan Paul, 1986.
- Brodbeck, May. "Methodological Individualism: Definition and Reduction." In Readings in the Philosophy of the Social Sciences, edited by May Brodbeck. London: Macmillan, 1968.
- Brown, Norman O. Love's Body. New York: Vintage Books, 1966.
- Burton, Steven. "Ronald Dworkin and Legal Positivism." Iowa Law Review Vol. 73 (1987): 109-29.
- Carens, Joseph. "Compensatory Justice and Social Institutions." Economics and Philosophy Vol. 1, no. 1 (1985): 39-67.
- Cohen, G.A. "Self-Ownership, World-Ownership, and Equality." In Justice and Equality Here and Now, edited by Frank S. Lucash. Ithaca, N.Y.: Cornell University Press, 1986.
- _____. "On the Currency of Egalitarian Justice." Ethics Vol. 99 (July 1989): 906-44.
- Cohen, Marshall, ed. Ronald Dworkin and Contemporary Jurisprudence. Totowa, N.J.: Rowman and Allanheld, 1984.
- Cornell, Drucilla L. "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation." University of Pennsylvania Law Review Vol. 136, no. 4 (April 1988): 1135-1229.
- Crocker, Lester G. Rousseau's Social Contract. Cleveland: Case Western Reserve University Press, 1968.
- Daniels, Norman, ed. Reading Rawls. Oxford: Basil Blackwell, 1975.
- Davidson, Donald. "A Coherence Theory of Truth and Knowledge." In Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson, edited by Ernest LePore. Oxford: Basil Blackwell, 1986.

- Douzinas, Costas; McVeigh, McVeigh; and Warrington, Ronnie. "Is Hermes Hercules' Twin? Hermeneutics and Legal Theory." In Reading Dworkin Critically, edited by Alan Hunt. Providence, R.I.: Berg Publishers, Inc., 1992.
- Dunn, John. The Political Thought of John Locke. Cambridge: Cambridge University Press, 1969.
- Dworkin, Andrea. Pornography: Men Possessing Women. New York: Perigee Books, 1989.
- Dworkin, Ronald. Taking Rights Seriously. Cambridge: Harvard University Press, 1978.
- _____. "Liberalism." In Public and Private Morality, edited by Stuart Hampshire. Cambridge: Cambridge University Press, 1978.
- _____. "What is Equality? Part 1: Equality of Welfare." Philosophy and Public Affairs Vol. 10, No. 3 (Summer 1981): 185-246.
- _____. "What is Equality? Part 2: Equality of Resources." Philosophy and Public Affairs Vol. 10, No. 4 (Fall 1981): 283-345.
- _____. "In Defense of Equality: Comment on Narveson." Social Philosophy and Politics Vol. 1, Issue 1 (Autumn 1983): 24-40.
- _____. "My Reply to Stanley Fish (And Walter Benn Michaels): Please Don't Talk About Objectivity Anymore." In The Politics of Interpretation, edited by W.J.T. Mitchell. Chicago: University of Chicago Press, 1983.
- _____. "A Reply to Hart." In Ronald Dworkin and Contemporary Jurisprudence, edited by Marshall Cohen. Totowa, N.J.: Rowman and Allanheld, 1984.
- _____. A Matter of Principle. Cambridge: Harvard University, 1985.
- _____. Law's Empire. Cambridge: Harvard University Press, 1986.
- _____. "What is Equality? Part 3: The Place of Liberty." Iowa Law Review Vol. 73, No. 1 (October 1987): 1-54.
- _____. "What is Equality? Part 4: Political Equality." University of San Francisco Law Review Vol. 22, No. 1, (Fall 1987): 1-30.
- _____. "Liberal Community." California Law Review Vol. 77, no. 3 (May 1989): 479-504.

Dworkin, Ronald "Equality, Democracy and Constitution: We The People In Court." Alberta Law Review Vol. XXVIII, no. 2 (1990): 324-46.

_____. "Foundations of Liberal Equality." In The Tanner Lectures on Human Values XI, edited by Grethe B. Peterson. Salt Lake City: University of Utah Press, 1990.

Elster, Jon. Sour Grapes. Cambridge: Cambridge University Press, 1983.

Ely, John H. "Professor Dworkin's External/Personal Preference Distinction." Duke Law Journal no. 5 (November 1983): 959-86.

Entreves, A.P. Natural Law. London: Hutchinson and Co., 1970.

Fackenheim, Emil L. Metaphysics and Historicity. Milwaukee: Marquette University Press, 1961.

Feinberg, Joel. Social Philosophy. Englewood Cliffs, N.J.: Prentice-Hall, 1973.

Finnis, John. "On Reason and Authority in *Law's Empire*." Law and Philosophy Vol. 6 (1987): 357-80.

Fish, Stanley. "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism." In The Politics of Interpretation, edited by W.J.T. Mitchell. Chicago: University of Chicago Press, 1983.

_____. "Wrong Again." Texas Law Review Vol. 62, no. 1 (August 1983): 299-316.

_____. "Still Wrong After All These Years." Law and Philosophy Vol. 6 (1987): 401-18.

Fiss, Owen. "Objectivity and Interpretation." Stanford Law Review Vol. 34 (1982): 739-63.

Foucault, Michel. Power/Knowledge. Edited by Colin Gordon. Brighton: Harvester Press, 1980.

Gadamer, Hans-Georg. "Text and Interpretation." In Dialogue and Deconstruction: The Gadamer-Derrida Encounter, edited by Diane P. Michelfelder and Richard Palmer. Albany: State University of New York Press, 1989.

- Gadamer, Hans-Georg. "Reply to Jacques Derrida." In Dialogue and Deconstruction: The Gadamer-Derrida Encounter, edited by Diane P. Michelfelder and Richard Palmer. Albany: State University of New York Press, 1989.
- Gallie, W.B. "Essentially Contested Concepts." Proceedings of the Aristotelian Society Vol. 56 (1965).
- Golding, Martin P. "The Concept of Rights: A Historical Sketch." In Bioethics and Human Rights, edited by Elsie L. Bondman and Bertram Bondman. Boston: Little, Brown, 1978.
- Goodin, Robert E., and Reeve, Andrew, eds. Liberal Neutrality. London: Routledge, 1989.
- Gray, John. "On the Contestability of Social and Political Concepts." Political Theory Vol. 5 (1977): 331-348.
- Griffin, James. "Modern Utilitarianism." In Contemporary Political Theory, edited by Philip Petit. New York: Macmillan Publishing Company, 1991.
- Grotius, Hugo. Prolegomena to the Law of War and Peace. New York: Liberal Arts Library, 1957.
- Guest, Stephen. Ronald Dworkin. Stanford: Stanford University Press, 1991.
- Habermas, Jurgen. "A Review of Gadamer's *Truth and Method*." In Understanding and Social Inquiry, edited by Fred R. Dallmayr and T.A. McCarthy. Notre Dame: University of Notre Dame Press, 1977.
- Hampshire, Stuart, ed. Public and Private Morality. Cambridge: Cambridge University Press, 1978.
- Hart, H.L.A. The Concept of Law. Oxford: Clarendon Press, 1961.
- _____. "Rawls on Liberty and its Priority." In Reading Rawls, edited by Norman Daniels. Oxford: Basil Blackwell, 1975.
- _____. "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream." Georgia Law Review Vol. 11, no. 5 (September 1977): 969-89.
- _____. "Between Utility and Rights." Columbia Law Journal Vol. 79, no. 5 (June 1979).

- Hegel, G.W.F. The Phenomenology of Mind. Translated by J.B. Baillie. New York: Harper Colophon Books, 1967.
- _____. Hegel's Philosophy of Right. Translated by T.M. Knox. London: Oxford University Press, 1971.
- Hirschman, Albert. Exit, Voice, and Loyalty. Cambridge, Mass.: Harvard University Press, 1970.
- Home Office. Report of the Committee on Obscenity and Film Censorship (Williams Report), Cmnd 7772. London: HMSO (1979).
- Hunt, Alan. "Law's Empire or Legal Imperialism?" In Reading Dworkin Critically, edited by Alan Hunt. New York: Berg Publishers, 1992.
- _____. "Reading Dworkin Critically." In Reading Dworkin Critically, edited by Alan Hunt. New York: Berg Publishers, 1992.
- Hutchinson, Allan C. "Of Kings and Dirty Rascals." Queen's Law Journal Vol. 9 (1984): 273-292.
- _____. "Indiana Dworkin and Law's Empire." The Yale Law Journal Vol. 96 (1987): 637-65.
- _____. "The Last Emperor." In Reading Dworkin Critically, edited by Alan Hunt. New York: Berg Publishers, 1992.
- Kelsen, Hans. Pure Theory of Law. Berkeley: University of California Press, 1967.
- Kerruish, Valerie, and Hunt, Alan. "Dworkin's Dutiful Daughter: Gender Discrimination in Law's Empire." In Reading Dworkin Critically, edited by Alan Hunt. New York: Berg Publishers, 1992.
- Kress, Ken. "The Interpretative Turn." Ethics Vol. 94, no. 4 (July 1987): 834-60.
- Kymlicka, Will. Contemporary Political Philosophy: An Introduction. Oxford: Clarendon Press, 1990.
- Langton, Rae. "Whose Right? Ronald Dworkin, Women and Pornographers." Philosophy and Public Affairs Vol. 19, no. 4 (Fall 1990): 311-59.
- LePore, Ernest, ed. Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson. Oxford: Basil Blackwell, 1986.

Low, W. Augustus, ed. Encyclopedia of Black America. New York: McGraw-Hill Book Co., 1981.

Lowi, Theodore. The End of Liberalism. New York: Norton Books, 1969.

Lucash, Frank S., ed. Justice and Equality Here and Now. Ithaca, N.Y.: Cornell University Press, 1986.

MacIntyre, Alasdair. "The Essential Contestability of Some Social Concepts." Ethics Vol. 84 (1973): 1-9.

_____. After Virtue. 2d ed. Notre Dame: University of Notre Dame Press, 1984.

Mackie, John. "The Third Theory of Law." Philosophy and Public Affairs Vol. 7, no. 1 (Fall 1977): 161-171.

Macpherson, C.B. The Political Theory of Possessive Individualism. Oxford: Oxford University Press, 1962.

_____. Democratic Theory: Essays in Retrieval. Oxford: Oxford University Press, 1973.

Mapel, David. Social Justice Reconsidered. Urbana, Ill.: University of Illinois Press, 1989.

Marx, Karl. Karl Marx: Selected Writings, edited by David McLellan. Oxford: Oxford University Press, 1978.

Micheldfelder, Diane P., and Palmer, Richard, eds. Dialogue and Deconstruction: The Gadamer-Derrida Encounter. Albany: State University of New York Press, 1989.

Miliband, Ralph. The State in Capitalist Society. London: Quartet Books, 1973.

Mill, John Stuart. Utilitarianism. Indianapolis: Bobbs-Merrill Co., 1957.

_____. On Liberty. Indianapolis: Hackett Publishing Company, 1978.

Miller, David. Market, State and Community. Oxford: Clarendon Press, 1989.

Mitchell, W.J.T., ed. The Politics of Interpretation. Chicago: University of Chicago Press, 1983.

Nagel, Thomas. "Rawls on Justice." In Reading Rawls, edited by Norman Daniels. Oxford: Basil Blackwell, 1975.

- Narveson, Jan. "On Dworkinian Equality." Social Philosophy and Politics Vol. 1, Issue 1 (Autumn 1983): 1-23.
- Nielsen, Kai. Equality and Liberty: A Defense of Radical Egalitarianism. Totowa, N.J.: Rowman and Allanheld, 1985.
- Nozick, Robert. Anarchy, State, and Utopia. New York: Basic Books, 1974.
- O'Donnell, A.T. "The neutrality of the market." In Liberal Neutrality, edited by Robert E. Goodin and Andrew Reeve. London: Routledge, 1989.
- Palmer, Richard E. Hermeneutics. Evanston: Northwestern University Press, 1969.
- Pateman, Carole. The Problem of Political Obligation. Berkeley: University of California Press, 1985.
- Petit, Philip, ed. Contemporary Political Theory. New York: Macmillan Publishing Company, 1991.
- Postema, Gerald J. "Liberty in Equality's Empire." Iowa Law Review Vol. 73, no. 1 (October 1987): 55-95.
- Rajchman, John, and West, Cornell, eds. Post-Analytic Philosophy. New York: Columbia University Press, 1985.
- Rawls, John. A Theory of Justice. Cambridge: Harvard University Press, 1971.
- _____. "Kantian Constructivism in Moral Theory." Journal of Philosophy Vol. 77, no. 9 (1980): 515-72.
- _____. "The Basic Liberties and Their Priority." In The Tanner Lectures on Human Values III, edited by S.M. McMurrin. Salt Lake City: University of Utah Press, 1982.
- _____. "Social Unity and Primary Goods." In Utilitarianism and Beyond, edited by A.K. Sen and B. Williams. Cambridge: Cambridge University Press, 1982.
- _____. "Justice as Fairness: Political not Metaphysical." Philosophy and Public Affairs Vol. 14, no. 3 (1985): 223-51.
- _____. "A Kantian Conception of Equality." In Post-Analytic Philosophy, edited by J. Rajchman and C. West. New York: Columbia University Press, 1985.

Rawls, John. "The Idea of an Overlapping Consensus." Oxford Journal of Legal Studies Vol. 7 (1987): 1-25.

Raz, Joseph. "Professor Dworkin's Theory of Rights." Political Studies Vol. XXVI, no. 1 (1978): 123-37.

_____. The Concept of a Legal System. 2d ed. Oxford: Clarendon Press, 1980.

_____. "Legal Principles and the Limits of Law." In Ronald Dworkin and Contemporary Jurisprudence, edited by Marshall Cohen. Totowa, N.J.: Rowman and Allanheld, 1984.

_____. "Dworkin: A New Link in the Chain." California Law Review Vol. 74, no. 3 (May 1986): 1103-23.

_____. "Liberalism, Scepticism, and Democracy." Iowa Law Review Vol. 74, no. 4 (May 1989): 761-86.

Regan, Donald. "Glosses on Dworkin: Rights, Principles, and Policies." In Ronald Dworkin and Contemporary Jurisprudence, edited by Marshall Cohen. Totowa, N.J.: Rowman and Allanheld, 1984.

Roemer, John E. "Equality of Talent." Economics and Philosophy Vol. 1, no. 2 (October 1985): 151-81.

_____. "Equality of Resources Implies Equality of Welfare." Quarterly Journal of Economics Vol. 101 (1986): 751-84.

_____. Free to Lose: An Introduction to Marxist Economics. Cambridge, Mass.: Harvard University Press, 1988.

Rorty, Richard. Objectivity, Relativism, and Truth Philosophical Papers, Vol. I. Cambridge: Cambridge University Press, 1991.

Rousseau, Jean-Jacques. On the Social Contract. Translated by Roger D. Masters. New York: St. Martin's Press, 1978.

Sager, Lawrence G. "Rights Scepticism and Process-Based Responses." New York University Law Review Vol. 56, nos. 2-3 (May-June 1981): 417-45.

Sandel, Michael J. Liberalism and the Limits of Justice. Cambridge: Cambridge University Press, 1982.

- Scanlon, Thomas. "Nozick on Rights, Liberty, and Property." Philosophy and Public Affairs Vol. 6, no. 1 (Fall 1976): 3-25.
- Selznick, Philip. "The Idea of a Communitarian Morality." California Law Review Vol. 75, no. 1 (January 1987): 445-63.
- _____. "Dworkin's Unfinished Task." California Law Review Vol. 77, no. 3 (May 1989): 505-13.
- Sen, Amartya. "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory." Philosophy and Public Affairs Vol. 6 (1977): 317-44.
- _____. "Utilitarianism and Welfarism." The Journal of Philosophy Vol. 76, no. 9 (September 1979).
- Sen, Amartya, and Williams, Bernard, eds. Utilitarianism and Beyond. Cambridge: Cambridge University Press, 1982.
- Soper, E. Philip. "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute." In Ronald Dworkin and Contemporary Jurisprudence, edited by Marshall Cohen. Totowa, N.J.: Rowman and Allanheld, 1984.
- Soper, E. Philip. "Dworkin's Domain." Harvard Law Review Vol. 100 (1987): 1166-86.
- Strauss, Leo. Natural Right and History. Chicago: University of Chicago Press, 1953.
- Taylor, Charles. Philosophy and the Human Sciences Vol. 2. Cambridge: Cambridge University Press, 1985.
- _____. "Cross-Purposes: The Liberal-Communitarian Debate." In Liberalism and the Moral Life, edited by Nancy Rosenblum. Cambridge: Harvard University Press, 1989.
- Tully, James. A Discourse on Property: John Locke and his Adversaries. Cambridge: Cambridge University Press, 1980.
- Varian, Hal R. "Dworkin on Equality of Resources." Economics and Philosophy Vol. 1, no. 1 (April 1985): 110-25.
- Williams, Bernard. "Dworkin on Community and Critical Interests." California Law Review Vol. 77, no. 3 (May 1989): 515-20.
- _____. Moral Luck. Cambridge: Cambridge University Press, 1981.

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