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BOOK REVIEW

TAKING RIGHTS SERIOUSLY.—By Ronald Dworkin.[1] Massachusetts: Harvard University Press. 1977. Pp. 563.

Reviewed by Norman E. Bowie[2]

Since Ronald Dworkin is well established as an original, perceptive legal philosopher, the publication of his *Taking Rights Seriously* should be a significant event. Regrettably, it is something of a disappointment. This book contains less than thirty pages of previously unpublished material. Although it is useful to have Dworkin's published articles within one volume, one would have hoped that a book by a scholar of his acumen would have reflected the growth and maturity of his thought.

Dworkin defends a liberal theory of law which has as its thesis "the idea that individuals can have rights against the state that are prior to the rights created by explicit legislation." (p. xi) This theory stands in contrast to the prevailing legal positivism exemplified by the writings of H.L.A. Hart[3] and his utilitarian ancestors. Unfortunately, however, Dworkin's central thesis is obscured by his previously published articles—themselves lengthy expositions of technical scholarly disputes. For example, Chapters 2 and 3 do not take rights seriously; instead, they represent a struggle among scholars. In Chapter 2, Dworkin attempts to show that legal positivism, especially the positivism exhibited by H.L.A. Hart, cannot adequately account for the role

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3. Although Dworkin's account stands in contrast to legal positivism on a number of points, the following deserve special mention:

A. Dworkin disagrees that positivism can provide "a theory about the necessary and sufficient conditions for the truth of a proposition of law." (p. vii). In other words, he disagrees with people like H.L.A. Hart who argue that it is possible to have a hierarchy of rules with some master rule at the apex which will tell us if some rule really is a rule of law.

B. Dworkin rejects the positivist slogan that "the law as it is must be distinguished from the law as it ought to be."

C. Dworkin substitutes a theory of moral rights for the utilitarianism of most positivists as the ethical justification for law. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (1961).

played by moral principles in legal reasoning; Chapter 3 is Dworkin's response to those who have criticized his criticism of the positivists. Although these chapters contain important issues for the specialist, it is unfortunate that most of the first eighty pages of the book are concerned with a technical issue rather than with an explanation and defense of Dworkin's central thesis, for which no foundation has been laid.

Despite my negative introductory comments, Dworkin's central thesis deserves extended study. In this review I will first attempt to isolate Dworkin's main arguments to support his assertion "that citizens have moral rights against their governments." (p. 184) Second, I will show how Dworkin's broad philosophical perspective on rights contributes to his account of legal reasoning. Third, I will show the implications of his view of rights and legal reasoning on some of his subsidiary positions. In all three sections, I will make critical comments on Dworkin's view.

I. DWORKIN AND THE JUSTIFICATION OF RIGHTS

How does Dworkin justify his contention that citizens have rights against their government? He appeals to the concepts of human dignity and political equality:

> 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. (p. 199)

In a recent analysis of John Rawl's *A Theory of Justice*,[4] Dworkin indicates that the claim to equal treatment is itself a fundamental natural right. Dworkin criticized Rawls' use of social contract[5] for deriving principles of justice, his point being that the use of the social contract (or "original position," as Rawls calls it) itself needs justification. Dworkin claims that the contract process rests on a fundamental natural right to equality of respect, and endorses Rawls' view that this right is owed to us as persons:

> We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern

4. 40 U. CHI. L. REV. 500 (1973).

5. In political philosophy, a contract theorist argues that the authority of the state is grounded in an agreement among the individual members of the state as to what the responsibilities and powers of the state are to be. The contract agreement can be designed to limit the power of the state. John Locke and Jean Jacques Rousseau are traditional contract theorists. The contemporary philosopher John Rawls added some special constraints to traditional contract theory so that the contract might yield principles of justice.

> and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice. (p. 182)

Dworkin correctly perceives rights, self-respect, and dignity as interrelated, but fails to indicate the nature of the relation. Perhaps the following analysis would suit Dworkin's purposes:

> To respect persons as ends, to view them as having basic human dignity, seems to be inextricably bound up with viewing persons as possessors of rights, as beings who are owed a vital say in how they are to be treated and whose interests are not to be overridden simply in order to make others better off . . . .
>
> Rights we are suggesting are fundamental moral commodities because they enable us to stand up on our own two feet, "to look others in the eye, and to feel in some fundamental way the equal of anyone." To think of oneself as the holder of rights is not to be unduly but properly proud, to have the minimal self-respect that is necessary to be worthy of the love and esteem of others. Conversely to lack the concept of oneself as a rights bearer is to be bereft of a significant element of human dignity. Without such a concept, we could not view ourselves as beings entitled to be treated as not simply means but ends as well. Consequently, to opt for a code of conduct in which rights are absent is to abandon the kind of respect for persons and human dignity at issue.[6]

In this view, human beings expect to be treated differently from nonhuman objects, because humanity carries with it dignity and self-respect. But people must be able to make fundamental moral claims against one another if their claims to self-respect and dignity are to have any substance. In other words, human rights can be justified by showing that they are essential to those characteristics which distinguish humans from nonhumans. I do not know whether Dworkin would accept this argument, but it would give some moral basis to his contention. We must assume, however, that Dworkin could provide some basis for his assertion that citizens have rights.

What does Dworkin mean when he says that citizens have rights? In the introduction he says:

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them. (p. xi)

Throughout the book Dworkin tells us what rights are good for, but he does

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6. N. BOWIE & R. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER 78 (1977).

not define them. The previous analysis can fill this gap by providing us with a definition. Rights are moral entitlements which we possess as beings with self-respect and dignity. On the basis of this definition, Dworkin can argue that rights are claims against the state which prevent individual needs and preferences from being sacrificed simply on the basis of the collective welfare. This view places Dworkin in the anti-utilitarian tradition. Utilitarians are mistaken if they think societal arrangements, including the legal system, should be constituted simply because such arrangements produce the greatest good for the greatest number. The rights of individuals must be taken into account. The thesis that individuals have rights which the law *must* take into account is, I believe, the central thesis of Dworkin's book.

Most rights theorists argue that some rights are more fundamental than others, and many of them have argued that a right to liberty is one of these fundamental rights. Those within the libertarian tradition argue that it is the only right. Dworkin, on the other hand, denies that there is any general right to liberty. Rather, in his view, the fundamental right is the right to equal concern and respect—the same right he believes Rawls must accept if his use of the social contract is to be justified.

At this point, however, Dworkin's earlier failure to provide suitable arguments for rights and his lack of definitional precision begin to cause problems. Just what does a right to equal concern and respect entail? He admits that this fundamental right is abstract and can be given two different interpretations:

> The first is the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given. . . . The second is the right to treatment as an equal. This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed. (p. 273)

Dworkin then opts for the right to equal concern and respect in the political decision as fundamental, while the right to equal treatment is demoted to a subordinate position except when "it follows from the more fundamental right." (p. 273)

To me, all of this seems a hopeless muddle, and since Dworkin gives no argument for his position, it is difficult to unravel. Instead, the proper argument may be as follows:

> Human beings possess a special dignity and self-respect which must be protected by the possession of rights. With respect to our fundamental rights we are equal. Dworkin asserts this equality but provides no argument to establish it. For example, some rights—

> like the right to a minimum standard of living—are not derivative of any other right, but rather are justified by connecting the right itself to dignity and self-respect. Other rights, however, derive from a right to liberty, which is equally justified by its connection with dignity and self-respect.

While some of this may be acceptable to Dworkin, he does have an explicit argument against rights derived from a general right to liberty, for Dworkin seems to believe that no such general right exists. We are not free to do what we want, and since we are not free to do what we want, there is no right to Liberty. But Dworkin is guilty of the same error he finds in the critics of J. S. Mill when in Chapter 11 he eloquently points out the distinction between liberty and license. Dworkin is correct in arguing that Mill never sanctioned license, but he limits the range of the principle of liberty to that liberty which is required by the "moral concepts of dignity, personality, and insult." (p. 263) What Mill argued for, according to Dworkin, was liberty as independence.

However, given Dworkin's defense of Mill and a general theory of rights similar to that outlined above, it is plausible to maintain the classical view that everyone has a right to liberty. If I am correct, Dworkin's analysis of liberty in Chapter 12 is seriously in error, and he need not defend a right to certain liberties on the mistaken view that the right to equal concern and respect in the political decision has priority over the equal right to the distribution of goods or opportunities.

Of course, so long as Dworkin's theory of rights can be repaired, his view that the law must take rights into account remains intact. Since I believe Dworkin's view can be repaired, and since I have made some efforts on its behalf, let us now consider the impact of Dworkin's concern for rights on his theory of legal reasoning.

II. Rights and Legal Reasoning

Dworkin develops a theory of judicial reasoning that may be characterized as hierarchical. It is predicated on the view that a well-reasoned decision must be both coherent and committed to a rights-based theory of ultimate justification. Dworkin begins where any judge begins: with statutes, precedents, and a written constitution. What interests Dworkin is the "hard" cases, in which statutes and precedents may be vague, unclear, or in apparent conflict. How are such hard cases to be decided? The judge must get behind the statutes and precedents to the principles and policies that underlie them. Any theory regarding the applicable principles and policies will depend on a proper understanding of our legal institutions and rights. However, a proper understanding of our legal institutions depends in turn on a

proper understanding of our political institutions, which are ultimately rights-based. It is obvious that this type of reasoning is hierarchical.

There is, however, nothing mechanical about the reasoning which occurs within the hierarchy. One must examine the structure as a whole to determine which decision most adequately fits the structure. Dworkin is committed to what philosophers call the coherence theory of justification. While it is extremely difficult to cite one particular passage which illustrates Dworkin's coherence view, perhaps the flavor of his remarks will be captured by this statement:

> You will now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal ordering. The verticle ordering is provided by distinguishing layers of authority; that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States the rough character of the vertical ordering is apparent. The constitutional structure occupies the highest level, the decisions of the Supreme Court and perhaps other courts interpreting that structure the next, enactments of the various legislatures the next and decisions of the various courts developing the common law different levels below that. Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level. (pp. 116-17)

The last component of Dworkin's theory is his commitment to a right-based theory of ultimate justification. Part of his argument rests on the distinction between matters of principle and matters of policy. Dworkin makes the distinction as follows: "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. . . . Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right." (p. 82) This analysis of judicial decisionmaking is designed to show that judicial decisions are not based solely on matters of policy; indeed, in the final analysis they are based on matters of principle.

Several of Dworkin's arguments are designed to show that claims of principle are ultimately more basic than claims of policy. First, he contends that

judicial arguments based on principle comport more readily with the view that adjudication should be subordinate to legislation. Since policy decisions should be made by responsible elected officials, they are inappropriate devices for the judiciary. Moreover, the use of policy considerations is ex post facto because the decision is based on future consequences rather than on past rules or obligations. On the other hand, the use of principles enables a decision to be made on the basis of a right of one of the parties.

A second argument appears when the grounds for overruling a precedent are considered. The use of precedents is justified on the fairness principle of treating like cases alike. This commitment to consistency cannot be overruled simply on the grounds of policy the way a legislature may overrule one policy on the basis of another one. Rather, a precedent can only be overruled on grounds of a principle which limits what Dworkin calls the gravitational force. In this way, judicial reasoning must be grounded in principle. Dworkin is to be applauded for recognizing that arguments from rights play a central role in judicial reasoning, that utilitarianism is insufficient as a theory of justification, and that policy arguments are frequently inappropriate in judicial decisionmaking. On all of these grounds, Dworkin's discussion is clearly preferable to competing discussions such as Richard Wasserstrom's, *The Judicial Decision.*[7]

Nevertheless, Dworkin's own theory is far from complete. He makes no explicit attempt to relate his theory of rights underlying judicial reasoning to the primary right to treatment as an equal. He may not think that such an argument is necessary, since he might say that the fairness principle of treating like cases alike is merely an instance of the primary right to treatment as an equal, or he might think that the fairness principle and the primary right to treatment as an equal are identical. But the fairness principle and the right to equal treatment clearly do not mean the same thing. The latter is a claim of moral entitlement, while the statement that like cases should be treated alike is just another way of stating the logical principle of consistency. Whether the principle of consistency is fair requires separate analysis. Part of that analysis might be supplied by appealing to the primary right to treatment as an equal. Under this view, the principle of consistency is one means, but surely not the only means, for securing our right to equal treatment.

Actually, however, the consistency principle is never the sole basis for judicial justification. Since every case is similar to many others and since no two cases are exactly alike, other principles besides fairness must be articulated if Dworkin's theory of justification by principle is to stand. Although

7. R. WASSERSTROM, THE JUDICIAL DECISION (1961).

Dworkin discusses principles for constitutional interpretation and principles for statutory interpretation, his views are not expressed in detail and he makes no attempt to tie together these principles of interpretation with his over-arching theory of rights. Dworkin must amplify his theory of legal rights and then connect it to his larger theory of general rights.

III. Taking Rights Seriously—Applications

A. Dworkin and Hard Cases

Dworkin's main thesis that judicial reasoning is ultimately based on rights provides the material for several important corollaries. By far the most important is Dworkin's view that for every case in law there is only one correct decision. Dworkin's main contention is that: a proposition of law may be asserted as true if it is more consistent with the legal theory that justifies its prior application than is its contrary. It may be denied as false if it is less consistent with that theory of law than the contrary. For every hard case among the various propositions which could encapsulate the legal decision, one proposition is true, the others are false. (p. 283)

Dworkin admits that this claim is not readily accepted, but advances supportive arguments which are widely scattered. Some appear fairly early in the book, in Chapters 3 and 4. Another appears in the last chapter in which Dworkin argues that to deny that there is a "correct" decision in a controversial case is to admit that there are two or more decisions which are legally correct. In other words, it is possible that there may be a "tie" in terms of legal correctness amongst several competing decisions. Dworkin then states that a belief that two or more principles may "tie" makes precisely the same epistemological presuppositions as the belief that there is a correct decision because each belief makes an objective claim as to its own correctness. Dworkin denies the claim that principles can "tie" in controversial cases.

The error in Dworkin's reasoning is obvious. He thinks the metaphor for judicial reasoning in hard cases is a confidence line, running from a left-hand point at which the judge is confident that the proposition favoring the plaintiff is true, to a right-hand point at which the judge is confident that the proposition favoring the defendant is true. A "tie" would be located at the exact center point of the line. This metaphor is clearly deficient when viewed against the far more complex and more accurate analysis of judicial reasoning that Dworkin developed in Chapters 4 and 5. However, if we take the more complex and more adequate view of judicial reasoning seriously,[8] the notion of a "tie" becomes much more plausible. Dworkin's model of

8. *See* section II *supra.*

judicial reasoning can be described as a coherence theory, in which correctness is determined by "fit." In controversial cases, it is perfectly plausible to argue that two or more possible decisions fit equally well in terms of coherence with current legal norms and the principles which underlie them. Indeed, since Dworkin insists that moral principles beyond formal precedents and statutes are relevant in deciding cases, it is even more likely that principles will "tie" in terms of their coherence. A decision which does not fit well with precedents might fit better with moral principles. What Dworkin finds irrational, I find plausible and fully explainable, given the theory of judicial reasoning that Dworkin develops.

His argument from Chapters 3 and 4 is somewhat different. Here Dworkin argues that the existence of controversial cases does not require that judges be given discretion. By discretion, Dworkin means that judges are not bound by rules and principles and hence, in hard cases, may make new law. When judges have discretion in this strong sense, a party in a case cannot be said to have a "right" to a certain decision. Dworkin seeks to deny such discretion. He points out correctly that just because judges disagree as to what the correct decision should be, does not mean that no correct decision may be had. Furthermore, the exhaustion of applicable legal rules does not prevent a case from being decided on the basis of higher political and moral principles. Dworkin's theory of correct judicial reasoning is ultimately based on rights (or principles). In hard cases, judges must reason coherently; there is no quick jump from legal rules to discretion.

The strength of Dworkin's position is not that he eliminates discretion, but that he appropriately constrains it. For example, his insistence that judges consider legal and moral principles when confronting hard cases, does not require the elimination of all discretion. If the competing decision might pass the coherence test equally well, the judge might then be said to have discretion in choosing the decision. Not only do we allow a judge such discretion, but we subsequently give his decision credence.

Perhaps a comparison with science will be helpful. Suppose we cannot agree whether light is a particle or a wave. Both explanations fit the model of scientific reasoning equally well. We could then say the physicist has discretion to use whichever model might best serve his purposes. We can also argue that eventually one or perhaps both models will be shown to be wrong. However, once a physicist thinks a model is wrong, he is not only free to ignore it, but is under professional obligation to do so.

The situation with judicial decisions is quite different. Suppose we argue that in terms of coherent fit, two competing decisions are equally justified. The judge then has discretion to choose one of the competing principles over

the other. Here the similarity with the competing theories of the nature of light ends. When legal cases are decided, the decision necessarily becomes part of the legal tradition and therefore part of the "answer" that future judges must confront. In science, once a scientist thinks an answer is wrong, he is free to ignore it. In judicial reasoning, once a judge thinks an answer is wrong, he cannot simply ignore it. Correct decisions do not exist independently of the decisions made by judicial authorities. Since a judge's decision becomes part of the legal tradition which must be considered in similar, future cases and since judges make mistakes, we cannot claim that there is one and only one correct decision.

Dworkin's main point is that proper judicial reasoning is based upon rights. From this point he can conclude that his theory radically constrains judicial discretion. He cannot claim, however, that his theory eliminates discretion; nor can he claim that his theory shows there is one correct decision in every case. His failure to establish these claims in no way undermines his theory of rights or his theory of judicial reasoning.

B. Dworkin and Civil Disobedience

Chapters 7 and 8 are concerned with civil disobedience. The discussion in Chapter 8 has nothing to do with the clash between individual rights and the laws of the state. Surprisingly, although he believes that there are correct decisions even in hard cases, Dworkin argues that since some laws are always in doubt, civil disobedience can be justified. Of course, some questions are legally closed. Dworkin has a few comments concerning the criteria to be used in determining when it is reasonable for citizens to think that the legal issue remains open, but somehow his discussion seems beside the point. Suppose the legal issue is closed, but the legal conclusion is believed to be immoral. Can civil disobedience then be justified?

Dworkin's discussion in Chapter 7 ties more directly into his rights thesis, for in this chapter he asks whether a person ever has a "right" to break the law in the strong sense that the government would be wrong to stop him by arresting and prosecuting him. Dworkin says that such a right exists "whenever that law wrongly invades his rights against the Government. If he has a moral right to free speech, that is, then he has a moral right to break any law that the Government, by virtue of his right, had no right to adopt." (p. 192) Much of Dworkin's discussion is plausible and represents an important corrective for those who think that rights can be sacrificed for utilitarian considerations. He also appears correct in arguing that no one has the right to have all the laws of the nation enforced.

However, Dworkin never discusses who decides when the government has violated a right illegitimately. In most instances in which citizens allege that their rights have been violated, government spokesmen argue that no violation has occurred or that the infringement is a legitimate one. Obviously, therefore, government cannot be the final arbiter, because such a concession would establish the very tyranny sought to be avoided. However, to give the individual the ultimate authority to make this determination raises the specter of anarchy. The number of people who think the government has violated at least one of their rights is probably very high. Do these people have a right not to obey in the sense that the government would be wrong to arrest and prosecute them for their disobedience? Dworkin seems committed to three propositions which may not be mutually coherent:

1. The government has little justification for preventing disobedience to a law which the individual believes violates his rights.

2. The individual is the final arbiter of when the government has infringed on his rights.

3. The consequences of (2), in terms of disobedience and lawbreaking, would be small.

Consider the impact of such an analysis on, for example, the tax laws. The issue is far more complicated than Dworkin makes it seem.

C. Dworkin and Strict Constructionism

Another application of Dworkin's theory to political and moral controversies is his defense of the judicial philosophy of the Warren Court against Richard Nixon and other critics. Dworkin begins by insisting that a distinction be drawn between:

> (1) Which decision is required by strict . . . adherence to the text of the Constitution or to the intention of those who adopted the text [and]
>
> (2) Which decision is required by a political philsosophy that takes a strict, that is to say narrow, view of the moral rights that individuals have against society[.] (p. 133)

Dworkin is willing to be labeled a strict constructionist with respect to the first position, but thinks that strict constructionism in the second sense is quite mistaken for it requires that rights be limited to those recognized by a limited group of people, at a fixed date in history. Such a view is contrary to the way moral notions are taught. To make his point, Dworkin uses the example of how children are taught not to treat others unfairly. As he puts it, "I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind." (p.

134) Decisions on how widely our rights extend must be guided by the concepts of legality, equality, and cruelty rather than by our forefathers' conception of them.

But if our forefathers' conceptions are not decisive, whose conceptions should be? Under the Constitution, that decision is not left to the majority. Dworkin argues that judges should decide how widely an individual's rights extend. The views of judges, he maintains, are superior to an appeal to history or the judicial tradition. Here I take issue with Dworkin. He seems to think that an appeal to the process of history is like a utilitarian appeal to society at large. "Indeed the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are." (p. 147) However, the traditional view on the extent of a right need not be identical with the utilitarian view. What the defenders of the tradition are trying to avoid is judicial capriciousness. As Benjamin Cardozo has stated:

> That does not mean that in judging the validity of statutes they [the judges] are free to substitute their own ideas of reason and justice for those of the men and women who they serve . . . . In such matters, the thing that counts is not what I believe to be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right. His duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom.
>
> . . . .
>
> It is the customary morality of right-minded men and women which he is to enforce by his decree.[9]

Dworkin's rights thesis has shown that the utilitarian concept which sacrifices rights to the public good is inadequate. While he may be correct in arguing that in our system of checks and balances judges must determine whose conception of rights is decisive, he has not proved that such a determination is in fact the judges' own. Indeed, given his views on discretion and objectivity, I think Dworkin would have good grounds for saying it is *not* the judges' conception which should count. As a defender of the coherence theory of judicial decision making—a theory which encompasses political and moral principles as well as legal concepts—he should be more sympathetic toward the historical view. One wonders why Dworkin does not follow Cardozo. If the critics of the Warren Court were arguing that the Court's decisions were wrong, because the justices infused the law with their *own* moral ideals, Dworkin has not refuted them.

9. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 88-89, 106 (1928).

D. Dworkin and Reverse Discrimination

One of the most controversial legal issues now before the courts concerns educational programs which give special consideration to blacks or other minorities. Using *DeFunis v. Odegaard*[10] as an example, Dworkin argues that such programs do not violate individual rights and are a means to the creation of a more equal society. Dworkin distinguishes between the right to an equal distribution of some opportunity, resource, or burden (equal treatment) and the right to be treated with the same respect and concern as anyone else (treatment as an equal), arguing that although a person has a right to treatment as an equal insofar as admissions standards are established and applied, he does not have a right to equal treatment in the assignment of law school places. Dworkin points out that any standard of admissions will put some candidates at a disadvantage compared to others. The individual's right to treatment as an equal is not violated if the admission policy chosen produces an overall gain to the community which exceeds the overall loss. In Dworkin's opinion, a policy of reverse discrimination meets the overall community benefit criterion.

But the overall benefit criterion is utilitarian and Dworkin finds utilitarianism inadequate. He is not oblivious to charges of inconsistency and tries to avoid contradiction by distinguishing two different senses in which a community may be said to be better off—a utilitarian sense, in which the average or collective welfare in the community is improved even though the welfare of some individual declines, and an ideal sense, in which the community is more just or closer to an ideal society regardless of whether the average welfare is improved. The ideal conception of community betterment is superior to the utilitarian in two respects. First, utilitarian arguments presuppose that the welfare of individuals can be measured and then compared. (p. 232) Second, the ideal conception does not rely on preferences at all but on the independent argument that a more equal society is better, even if its citizens prefer inequality. (p. 239)

Dworkin's argument is seriously deficient. Not only has he made no attempt to show how arguments concerning ideal societies are independent of personal preferences, but he cannot show that an argument based on ideals always protects the rights of individuals when utilitarian arguments do not. More importantly, Dworkin does not base his defense of reverse discrimination on rights, but rather on an ideal conception of society. His strongest claim is that the ideal argument does not deny anyone's right to treatment as an equal; in other words, the rights thesis is not inconsistent with the ideal

10. 416 U.S. 312 (1974).

argument. But since Dworkin believes that judicial reasoning is based on rights, one would expect him to justify reverse discrimination on the right to equal respect. Although Dworkin's view of reverse discrimination may not deny rights, it hardly takes them seriously.

It could, nevertheless, be argued that reverse discrimination, by denying the right to treatment as an equal, is inconsistent with Dworkin's rights thesis. The structure of the argument is as follows:

1. The chief purpose of civil rights legislation, embodied in the antidiscrimination principle, is to ban explicitly the use of race, sex, or ethnic identification as a legitimate criterion for a *denial* of the opportunity to participate in America's major political, economic, and social institutions.

2. Such legislation conforms with America's individualist ideal that each person should be judged solely on his or her own merit.

3. Characteristics such as race, religion, or ethnic identification are irrelevant to merit.

4. Reverse discrimination programs make race, religion, and ethnic identification not only relevant, but in some cases determinative for participation in America's political, economic, and social institutions.

5. Such programs not only conflict with original civil rights legislation, but, to the extent that other individuals are displaced from the merit level of participation in America's political, economic, and social institutions, they violate the individualist ideal.

6. So long as the civil rights legislation remains on the books, persons who are displaced from jobs, professional schools, etc., simply because someone else was admitted on account of race, sex, or ethnic origin can legitimately claim unequal treatment before the law.

7. Unequal treatment before the law is prohibited by the Constitution.

8. Therefore, either the civil rights legislation must be rescinded or the reverse discrimination program must be invalidated.

9. To rescind the civil rights legislation would allow blatant discrimination and hence, is impossible.

10. Therefore, reverse discrimination programs are constitutionally suspect.

In the above progression, the sixth premise requires the most extensive discussion. The argument begins with the antidiscrimination principle, which disfavors classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected.[11] Civil rights advocates have

11. *See* Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

used the antidiscrimination principle to convince legislatures that people should not be denied the right to participate in the major aspects of American life on the basis of race, sex, or ethnic origin. These civil rights laws have survived court challenges that such laws are unconstitutional infringements on the rights of contract, property or state prerogatives. Having established the antidiscrimination principle, are we not being inconsistent, and hence, denying equality before the law, when we insist on quotas or other similar reverse discrimination programs? Dworkin might argue that an important difference is being overlooked because the white majority is the discriminator and the black minority is the victim of discrimination—that this is a relevant difference, and equal treatment before the law requires quotas. The illogic of this response may be shown by the following illustration.

Suppose a university has deliberately discriminated against blacks from 1940 to 1960. Suppose we could identify ten blacks per year for twenty years, a total of 200 blacks who have been victims of discrimination. In 1960, one of the blacks sues and proves that the university has discriminated. Suppose the court rules as follows:

1. The university must cease and desist in its discrimination. From 1961, qualified blacks will be admitted.

2. To compensate for the 200 blacks denied admission in 1940 to 1960, the university must admit between 1961 and 1980, 200 blacks who would not otherwise qualify for admission.

Let us assume that space limitations require that those 200 blacks replace 200 whites who would have been admitted. Although the first part of the decision surely seems correct, the second part of the decision is surely incorrect. The link that connects recompense to the injured party has been broken. The injury was suffered by the 200 qualified blacks denied admission between 1940 and 1960, while the benefit is derived by 200 blacks who do not qualify for admission, but nonetheless, are admitted between 1961 and 1980. The burdens are not carried by the 200 whites who were less qualified, but nonetheless, were admitted between 1940 and 1960. Rather, the burdens are carried by the 200 qualified whites denied admission between 1961 and 1980. This remedy is wrong because equal protection under the law is being denied. By selecting some members of the victimized group for benefits, and by placing the sole burden on selected members of the majority group, equality before the law is violated. America's treatment of native American Indians, blacks, and other minorities is a sad and tragic blot on our history that cannot be erased. Something can and should be done for the descendants of these groups, but quotas are not the solution. Taking the university case again, let us admit that racism has contributed to a milieu

in which many blacks have inferior educational opportunities, resulting in a far smaller proportion of blacks who go on to college than ought to go. Dworkin would correct this situation by forcing universities to set a quota for black admissions. But this solution severs the connection between merit and the distribution of burdens and benefits. A university facing such a quota system will admit the best qualified blacks from the pool. What can Dworkin say to the other blacks who receive no opportunity for college? Can he show that those selected derived this benefit because they had suffered the most from past discrimination? Of course not! If harm from past discrimination is taken as the criterion, then it is indeed more plausible to believe that those blacks who are least qualified for admission from the university's point of view are in fact most qualified. The quota solution is likely to reward those who suffered least and to provide no remedy to those who have suffered most from the effects of past discrimination. What about the burdens? First, it should be noted that the punishment for a collective harm falls on the shoulders of only a few individuals—specifically, those qualified individuals from the majority who are denied university admission. The procedure is a denial of equality before the law and is unfair in and of itself. The situation is even worse when we realize that in applying the quota, the university will drop those whites who are least qualified, many of whom may themselves have suffered disadvantages. Not only do we select a small group for punishment, but that group is composed of individuals who may have benefited least from past discrimination against the minority. Something is wrong.

IV. Conclusion

Dworkin's thesis that rights ultimately underlie judicial reasoning is an important one, worthy of a book which develops this idea and then applies it to specific problems within the philosophy of law. Regrettably, this book allows previous articles to substitute for the required analysis. As a result, the presentation of the thesis is in danger of being lost, the arguments for it are less convincing, and the application of the thesis to central problems is inconsistent and obscure. *Taking Rights Seriously* does not take rights seriously enough.