Book Reviews

Title VII Blues


Reviewed by Robert N. Covington†

Professor Gould has written exactly the book one would expect from him: articulate, persuasive, impatient with doctrines and remedies that would compromise in any way the opportunity of blacks to share in the bounty of the American economy. Issued two days after Supreme Court decisions that reject much of what the author advocates regarding the treatment of seniority under Title VII, the book could well prove to be the opening volley in a battle for congressional reversal of those holdings. Whether or not it serves that function, the book is required reading for all those who seek to understand the stance of the Title VII plaintiff's bar.

For this is a plaintiff's book. The stance taken by organized labor on racial discrimination is characterized in the Introduction as “ambivalent,” “unsympathetic,” reflective “not merely [of] the attempt to mislead but also [of] considerable naivete.” The attitudes of critics more sympathetic than Professor Gould to union conduct, such as Derek Bok and John Dunlop, are labeled “pernicious.” We are thus given fair warning: though this book was written by William Gould, professor of law, scholar, and analyst, it was written also by William Gould, plaintiff's counsel in Detroit Edison and a veteran of other major Title VII battles.

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3. W. GouLD, BLACK WORKERS IN WHITE UNIONS 15 (1977) [hereinafter cited by page number only].
4. P. 16.
5. P. 18.
8. In addition to being involved in litigation, Professor Gould served at one time as a consultant to the Equal Employment Opportunity Commission (EEOC). His work there centered on seniority issues and is described in part at pp. 72-74.
The warning is needed. The exposition of doctrine is never inaccurate, save as intervening decisions may have made it so, but there are emphases and omissions that would be troubling if the book purported to be wholly analytical and objective. The first chapter, for example, is headed “Overview of Constitutional Law in Race Relations.” It is devoted to school desegregation cases. Washington v. Davis, in which the Supreme Court held that the Constitution forbids only intentional employment discrimination by local governments, not unintended discriminatory impacts, is never mentioned. (There is a passing reference to the decision some seventy pages afterward.) Later, the relief afforded by the Detroit Edison trial court is applauded vigorously in the text, while the reader must flip over to the footnotes printed at the end of the book to discover that this portion of the decree was significantly modified by the Sixth Circuit.

Part I of Black Workers is an exposition of the substantive and procedural law of employment discrimination, with greatest emphasis on Title VII. That this portion of the book would be obsolescent on the day of publication was very nearly inevitable. Any writer publishing a sizeable work in this field risks the appearance of major new opinions between the time the manuscript goes to the publisher and the day the book comes from the press. Even so, Professor Gould has suffered more than most. Two days before his book was released, the Supreme Court issued two opinions interpreting section 703(h) of the 1964 Civil Rights Act (Act), the provision that makes compliance with a bona fide seniority system an affirmative defense to discrimination charges.

Seniority systems often prove to be stumbling blocks for blacks seeking advancement, particularly for those of age thirty and over. They are also of great importance to many unions. Hence, these systems can be of pivotal importance in litigation between minority

12. The Sixth Circuit nullified the district court’s award of punitive damages and set out more restrictive guidelines for computing awards of back pay, seniority, and job transfer upon remand. 515 F.2d at 308-10, 314-17. The trial court had also awarded relief to craftsmen “who had been deterred from applying” for jobs at Detroit Edison because of the company’s discriminatory reputation in the community. The Sixth Circuit, however, stated that “there was no allegation that [Edison’s discriminatory] reputation actually deterred anyone from applying.” Id. at 312. The Supreme Court recently held that incumbent employees who are deterred from applying for promotion or transfer by awareness of discriminatory company attitudes may be entitled to relief, but the opinion adds that proof is likely to be difficult. International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1868-69 (1977).
13. See note 1 supra (citing cases).
groups and unions. Well over half of Chapter Four of *Black Workers*, the chapter outlining the circumstances under which unions and employers are liable for Title VII violations, deals with seniority problems. The discussion relies primarily on circuit court opinions, which had uniformly invalidated facially neutral seniority systems that perpetuated the impact of pre-Act racial discrimination. In the recent *Teamsters* decision, the Supreme Court announced a contrary rule. Though it acknowledged that section 703(h) protects only "bona fide" seniority systems that incorporate no intentionally discriminatory differences in treatment, it rejected the contention that "bona fide" excludes any system that perpetuates pre-Title VII discrimination:

To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted. It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose. We cannot accept the invitation to disembowel § 703(h) by reading the words "bona fide" as the Government would have us do. Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

Moreover, in a companion case, the Court held that a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." Thus, although such a past act might be "relevant background evidence" of currently disputed practices, standing alone it was "merely an unfortunate event in history which has no present legal consequences."

That Professor Gould will disapprove of both holdings seems clear. At one point he argues:

17. *Id.* at 1863.
18. *Id.* at 1863-64 (footnotes omitted).
20. *Id.*
The only defense for a system which jeopardizes the black worker's assuming his rightful place is business necessity. Quite clearly, the erosion of white seniority rights, while posing serious human-relations problems which might conceivably erupt into violence or sabotage, has never constituted a business necessity within the meaning of Title VII.\textsuperscript{21}

The trouble with this argument is that it equates the "plus points" white workers acquire by virtue of seniority with the "plus points" derived from test scores and diplomas, the use of which by employers was limited by the Griggs decision\textsuperscript{22} to instances of demonstrated business necessity. Section 703(h) is the source of both the testing and seniority defenses; its language juxtaposes permission to employ bona fide seniority systems and permission to utilize professionally developed, nondiscriminatory ability tests.\textsuperscript{23} Because of this juxtaposition of language, Professor Gould would seem to have a good point in saying that test scores and seniority credits should be similarly treated. But there are two compelling reasons to the contrary.

First, while the two defenses are codified in the same section, they appear in the statute as the result of separate legislative struggles. The testing defense was championed by Senator Tower of Texas to counter a ruling by a hearing officer for the Illinois Fair Employment Commission.\textsuperscript{24} The hearing officer had concluded that a preemployment intelligence test used by Motorola, Inc., placed members of minority groups at a "competitive disadvantage" and thus might be unlawful. Tower argued that employers should be free to use such tests as a means of ensuring the competency of workers. The language pertaining to the seniority defense in section 703(h), on the other hand, resulted from arguments by Senator Hill of Alabama (an opponent of the statute) that white workers would lose "vested" seniority rights because of Title VII.\textsuperscript{25}

Second, and more fundamentally, the two defenses serve different

\textsuperscript{21} P. 81.
\textsuperscript{23} Section 703(h), 42 U.S.C. § 2000e-2(h) (1970), provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.
\textsuperscript{24} See 110 Cong. Rec. 13492-93 (1964).
\textsuperscript{25} See pp. 68-71.
functions. Education and testing credentials, properly used, can offer an employer the means to structure a more efficient and productive work force. Seniority can serve a similar purpose by awarding promotion or job retention to the more experienced, but it does not necessarily lead to such an outcome. Moreover, seniority systems limit—at times severely—a management's privilege to make decisions about relative employee merit. No surprise, then, that it is the union, not the company, that seeks seniority systems. It seeks them for the purpose of protecting the worker's "investment" of time in his job. If one deprives management of the privilege of utilizing tests that discriminate against blacks but that do not (demonstrably) contribute to selecting the best workers, it is hard to argue that management is much worse off than before. But if one deprives a white worker of his "rank" within a seniority system by merging it with a seniority system into which blacks have been segregated, that worker's position is at least potentially worsened. The injustice to the black worker is equally grave in each instance, but in the case of testing, one can remedy the inequity while still permitting the most appropriate use of that device. In the case of seniority, however, remedying the inequity requires taking away a level of arguably legitimate protection.

Though Professor Gould's view that seniority systems perpetuating pre-Act (or pre-charge) discrimination are unlawful has not prevailed, the Court has taken a position much like his on the extent to which the federal district courts may order reform of seniority credits as a remedy for post-Act discrimination. And the remedy-centered chapters (notably Chapters Five and Six in Part I and Twelve and Thirteen in Part III) are the best of Black Workers. The former chapters provide a quick review of the content of several important decrees in litigation between minorities and unions. The latter chapters analyze how half a dozen or so decrees have worked in practice. The most detailed treat-

26. The importance of such systems varies, of course, from industry to industry. In some construction situations, the hiring hall is far more significant to members as a source of job security. For the bulk of manufacturing, transport, and merchandising workers, however, seniority benefits—protection from lay-off, eligibility for promotion, first choice on overtime demands—are much of what the union has to sell. For some older workers, certain seniority issues may be even more important in collective bargaining than are wage rate issues.

27. "Legitimacy" is hard to judge in this context. Few white workers with pre-Act seniority credits are likely to have participated in setting up such systems, and even those who did are unlikely to have had racist motivations. Nonetheless, insistence on maintaining preferential seniority treatment has racial overtones.


ment is of the Seattle building trades decree,\textsuperscript{30} on which we have heard from Professor Gould before.\textsuperscript{31} His conclusions are that aggressive, carefully tailored judicial decrees can accomplish a great deal, but that most minority plaintiffs have not received adequate relief.\textsuperscript{32} This inadequacy he attributes to judicial reluctance to interfere in matters that are the subjects of collective bargaining (a carry-over, perhaps, from attitudes developed in National Labor Relations Act (NLRA)\textsuperscript{33} litigation, in which deference to judgments of the National Labor Relations Board (NLRB) is traditional); inadequate monitoring of compliance with decrees (whether by the Equal Employment Opportunity Commission (EEOC) or by special masters); bad judgment by the EEOC and the Department of Labor in working out settlement decrees in major industry-wide cases; and complexities inherent in the workforce structures of many industries. The author provides illustrations of each of these factors, most often in the context of the construction trades, which are the principal focus of Chapters Ten through Thirteen. The illustrations are well chosen and convincing. The case for detailed provisions for changes in membership requirements, overhaul of apprenticeship programs, and close supervision of compliance with decrees is overwhelming.\textsuperscript{34}

The single chapter dealing with remedy and enforcement problems in nonconstruction occupations, Chapter Fourteen, is disappointing in comparison. Only the UAW receives anything like the depth of treatment accorded the building trades. There are, however, valuable insights into the role of internal union politics in the industrial unions—insights that explain in part the lack of black employee enthusiasm for merging minority locals with their white counterparts and the difficulty blacks have experienced in getting started up the ladder of international officeholding. Particularly good is the analysis of how a well-organized black caucus can serve the interests of its members, not only


\textsuperscript{32} Professor Gould is at his best in explaining why the initial decrees, requiring dissemination of information to prospective black workers, new standards for apprenticeship training, and the creation of an advisory committee to coordinate and monitor progress, had to be strengthened from time to time in response to inertia as well as to active opposition from union leaders. See pp. 345-62; cf. EEOC v. Local 14, Int'l Union of Operating Engineers, 553 F.2d 251, 256 (2d Cir. 1977) (remanding for revision sweeping district court order and admonishing lower court that proper decree “should interfere with the defendant's operations no more than is necessary”).


\textsuperscript{34} Pp. 281-362.
by its own activity, but by providing a forum within which black leaders
surface and obtain experience. 35

Chapters Seven through Nine continue an ongoing debate over the
proper roles of the NLRB and of arbitrators in the struggle against
discrimination. Professor Gould argues that the NLRB should be more
vigorous in denying certification to discriminatory unions 36 and more
imaginative in applying unfair labor practice doctrine to racist union
conduct. 37 His criticisms and suggestions regarding arbitration center
on two points. First, Professor Gould urges that arbitrators should be
more aggressive in employing Title VII doctrine and remedies. 38 Many
arbitrators now do so when interpreting contracts that include anti-
discrimination clauses, but relatively few are willing to take the extra
step of reading such a clause into a contract. Second, Professor Gould
argues for allowing third-party intervention in the handling of some
grievances, principally those involving minority group members. 39
The third parties important to his thesis would be civil rights groups, al-
though other possible third parties are mentioned (in the case of
wildcat strikes, for example). 40 This proposed inroad on the principle
of exclusive representation of a bargaining unit's members by a single
labor organization is unlikely to be greeted with enthusiasm by most
in the field. Not only would it create the possibility that unions might
take civil rights grievances less seriously, passing the buck to a probably
less experienced representative, but it could also introduce into arbitra-
tion proceedings issues foreign to the original contract negotiations.
Whether arbitrators would find such disputes susceptible to traditional
procedures and doctrines is open to doubt. 41

The assault on the exclusivity principle continues in Chapter Nine,
Gould's critique of Emporium Capwell Co. v. Western Addition Com-
munity Organization. 42 He argues that the decision unduly restricts
the opportunity for workers represented by a recognized union to en-

35. See, e.g., pp. 388-93 (discussion of Chrysler situation).
36. Pp. 163-66. The NLRB has recently moved in the opposite direction, indicating
that it will no longer provide a special procedure for handling objections to certification
based on discriminatory practices. See Handy Andy Inc., 228 N.L.R.B. No. 59, 94 L.R.R.M.
41. Professor Gould responds to similar criticisms at pp. 233-34. In the final analysis,
only trying the Gould prescription would allow us to determine whether the disruption
of arbitration would be, as he urges, minimal. Intervention is, of course, allowed in a
large number of judicial settings as well as in NLRB proceedings. Studies of attendant
problems in those settings might be helpful.
42. 420 U.S. 50 (1975), rev'g Western Addition Community Organization v. NLRB, 485
F.2d 917 (D.C. Cir. 1973).
gage in concerted extra-union activity protesting management practices that are the subject of union negotiations or grievance handling. Under *Emporium Capwell*, an employer may, without violating the NLRA, discharge employees who continue to act in this fashion after being warned of the possibility of discharge.\(^{43}\) The author suggests that Congress and the courts have followed too slavishly the guiding principles of exclusivity and majority rule.\(^{44}\) One must agree that the combination of the two principles in the Taft-Hartley Act\(^{45}\) and its interpretations can prejudice the interests of minorities within unions. The suggestions offered by *Black Workers* for modifying these principles do not, however, seem particularly attractive. The argument that the NLRA should protect from discharge individuals who persist in extra-union protests unless their union can demonstrate that it has been “pressing to do its utmost on the racial issue”\(^{46}\) has been roundly condemned.\(^{47}\) Similarly unconvincing are Professor Gould’s suggestions for maintaining sufficient black presence in internal union affairs when a black local is merged into a larger white local.\(^{48}\) He mentions, for example, apportioning union offices between the races.\(^{49}\) Some courts have done this on a purely transitional basis when merging formerly racially segregated locals.\(^{50}\) But a union officer kept in his post by virtue of judicial decree seems unlikely to have the clout or prestige needed for truly effective representation.

To differ with a few specifics in *Black Workers* is not, however, to counsel inactivity. There are analogies, both in government and in the private sector, to the problem of remedying underrepresentation of minorities, and means have been devised for protecting the interests of outnumbered classes and groups. One regrets, for example, that Professor Gould did not explore the potential of cumulative voting requirements in elections for local union governing boards.\(^{51}\) Admittedly, laws requiring these or similar devices would be an additional interference in union affairs, and such intrusions are never achieved without political difficulty. But interference that aims to ensure that

\(^{43}\) See 420 U.S. at 56, 60-70.

\(^{44}\) See, e.g., pp. 255-67.


\(^{46}\) P. 263.

\(^{47}\) See, e.g., 87 Harv. L. Rev. 656 (1974) (criticizing court of appeals opinion in *Emporium Capwell*). The arguments against such protection are that alternative remedies are available, that permitting this sort of self-help can undermine collective bargaining, and that the standard of review of NLRB action adopted by the court of appeals would be difficult to apply.

\(^{48}\) Pp. 131-35.

\(^{49}\) P. 132.

\(^{50}\) Pp. 129-34.

\(^{51}\) He mentions one instance in which it was rejected by a court. Pp. 131-32.
minority groups within unions have the opportunity to seek political power might well be more tolerable than the more direct interference one finds in manning tables, numerical membership goals, and the like. Cumulative voting would also offer a facially neutral means of addressing the problem, one that could be used not only by racial minorities, but also by women, groups speaking foreign languages, or even Republicans. Such a provision, applicable to locals of one hundred or more active members, added to Title I of the Landrum-Griffin Act,\textsuperscript{52} should be workable. But despite Professor Gould's inattention to such alternative reforms, one must be grateful to him for emphasizing that short-term gains realized by minority group members in litigation must find a solid base in the internal structure of the union movement in order to endure.

The principal diagnosis offered by \textit{Black Workers} is clear: America's minority workers have made progress, but it has been too little progress, and too slow in coming. More is urgently needed. Because this is so clearly what one would have expected from the author in the first place, there is a danger that it may not receive the attention it merits. The diagnosis offered in \textit{Black Workers} is compelling. The prescriptions are less so. Nonetheless, the book succeeds in identifying many of the necessary ingredients for more permanent solutions to black workers' problems: devices to ensure political power for the minorities within unions; procedures to keep the requirements of judicial decrees in the forefront of future planning by union defendants, rather than sidelined as problems that one hopes will disappear; more apt administration by agencies fighting employment discrimination; greater sophistication on the part of blacks now holding office in the organized labor movement; and, always, continued pressure by individual as well as governmental plaintiffs to prevent principles of liability and concepts of remedy from freezing into inflexibility.

\textit{Black Workers} is not always easy reading. There are awkward passages and production flaws\textsuperscript{53} as well as substantively troublesome or incomplete sections.\textsuperscript{54} But the spirit of the book, its forthright advocacy of needed reforms, and its vivid descriptions of past successes and failures under Title VII more than compensate for its drawbacks. On balance, reading it is a rewarding and provocative experience, one that should be shared by all practitioners in the labor relations field.


\textsuperscript{53} See, e.g., p. 68 (referring to Senator Lister Hill of Alabama as "Senator Lester Hill"); p. 255 ("Justice Marshall's view that an employer would not persist in following a pattern of discrimination and class actions and the potential for repeated misbehavior in an endless variety of circumstances.")

\textsuperscript{54} See, e.g., p. 398 supra.
Importing Justice


Reviewed by Phillip E. Johnson†

According to the dust jacket of Denial of Justice,† Professor Lloyd Weinreb has been a federal prosecutor in the District of Columbia, a United States Commissioner in Boston, and a “first-hand observer of the French criminal process.” Evidently Weinreb, like many other Americans, liked what he saw in France better than what he saw in Washington and Boston. The argument of Denial of Justice is, quite simply, that the adversary system of criminal prosecution as we know it in the United States should be replaced with a new system based on continental European procedures and institutions.

Weinreb’s premise, as the title of the book implies, is that our existing ways do not work and cannot be made to work. He blames much of our failure on the fact that we rely on a single institution, the police, both to maintain order in the community and to investigate crimes in preparation for trial. He argues that no single agency can perform both functions adequately, and that the very quality that is most useful to the police in their peacekeeping function—the ability to respond instantly and instinctively in emergency situations—makes them unsuited to conducting investigations that are both thorough and fair. The policeman is trained and equipped to deal with crime as it happens, not to collect all the evidence whether or not favorable to the prosecution, nor to interview the witnesses without violating their rights, nor to make an unbiased determination of the facts.

Misuse of the police is not the only fault that Weinreb finds with American criminal justice. He notes, as have many others, that our courts tolerate enormous and seemingly pointless delays, that pretrial screening of charges is often perfunctory, that we rely to an enormous and indefensible extent on bargained pleas of guilty, and that our jury trials take the adversary system to the point of absurdity. The

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I. L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977) [hereinafter cited by page number only].
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system, moreover, is constructed so as to maximize lawyers' opportunities to delay, manipulate, and obscure the issues to be decided. It is not a system anyone would design if his object were to get at the truth as expeditiously as possible consistent with protecting the rights of the defendant and the witnesses.

The solution Weinreb proposes for the shortcomings of American criminal justice practice is a wholesale shift to procedures borrowed from continental Europe. The police would continue to patrol the streets, respond to emergencies, make arrests, and conduct immediate on-the-scene investigations of crimes. Further investigation, including interviewing witnesses, collecting evidence, and conducting lineups and scientific tests would be the task of an investigating magistrate invoking the authority of legal process rather than the threat of force.

The magistrate's investigation would replace existing pretrial procedures, including indictment, preliminary hearing, and arraignment. The magistrate's interviewing of witnesses would take place in a formal hearing, far removed from the intimidating atmosphere of the police station. Defense counsel and the prosecutor might be present, but the magistrate would control the proceedings and counsel would be limited to respectfully correcting his errors and making sure nothing was forgotten. Upon completing his investigation, the magistrate would prepare a thorough report and find the defendant guilty or not guilty. A defendant found guilty by the magistrate would stand formally accused and have a trial before a mixed panel consisting of a presiding judge, two lawyers, and seven lay persons. The presiding judge, having studied the magistrate's file, would summarize the evidence, call the witnesses, and generally take the leading role in the proceedings. Other members of the court would ask questions and participate freely, unlike our mute jurors. The prosecutor and defense counsel would play a subordinate and supplementary role, much as at the magistrate's hearing.

Much of what Professor Weinreb would like to accomplish is appealing. Our criminal justice procedures would seem as absurd to us as they do to foreigners if we were not so used to them. It sometimes appears that, to an American, a fair trial is one in which the defendant has a reasonable chance of escaping conviction no matter how overwhelming is the case against him. We purport to revere the privilege against self-incrimination but openly coerce guilty pleas by rewarding those who plead guilty with more lenient sentences. We purport to require proof beyond a reasonable doubt but unashamedly rely on the testimony of confessed criminals who have been promised
immunity from prosecution or leniency in sentencing. Our appellate courts reverse convictions for trivial reasons but leave sentencing to the unguided discretion of trial judges. One could go on and on. Nothing could be healthier for the American criminal bar than to immerse itself in the study of comparative criminal procedure and thus discover that ours is not the only or even the best way of doing things. In this respect Denial of Justice may perform a real service.

Yet Weinreb does not make a convincing case that American criminal procedure is wholly without redeeming virtues, or that the defects that it assuredly has would be materially improved by importing new institutions from continental Europe. There are three basic defects in his argument. First, his criticism of American practices is oversimplified to the point of being unfair. Second, he fails to examine whether the faults that he identifies in the American system are also to be found in other countries that follow Anglo-American rather than Continental procedures. Finally, Weinreb holds out as an alternative to the American system not Continental procedure as it currently works out in practice, but rather an idealized description of how the Continental system is meant to work. The reader is told next to nothing about how the institutions and procedures Weinreb advocates have worked out when they have been tried in practice.

In describing the faults of American criminal procedure, Weinreb has understandably tried to avoid becoming bogged down in detail, with the unfortunate result that he gives ample ammunition to any well-informed defender of the status quo who wishes to charge him with oversimplification. His argument about the unsuitability of the police for criminal investigation, which is crucial to the thesis of the book, appears to imply that serious crimes are investigated by patrolmen on the beat, although Weinreb clearly knows better. In fact, the specialist detective squads that perform criminal investigations in most American police departments are not responsible for general peace keeping or order enforcing. Besides the police, there exist other agencies, such as the F.B.I. (which Weinreb briefly mentions), that specialize in investigation. It is not uncommon for a local district attorney in the United States to have a staff of investigators supplementing the police. Although Weinreb makes clear that investigation by a magistrate should be superior to investigation by a patrolman, he does not explain why it is superior to investigation by the F.B.I. or Scotland Yard.

Again, Weinreb argues that pretrial proceedings in the United States are not worth much, to support his proposal that they be re-
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placed by hearings before an investigating magistrate. Summing up
the process of prosecutorial screening, indictment, preliminary hear-
ing, and arraignment, he states disparagingly that “since the initial
proceedings accomplish nothing, no one takes them seriously; since
no one takes them seriously, they accomplish nothing.”2 This sweep-
ing dismissal may be justified with respect to some localities, but my
experience with California pretrial criminal practice persuades me
that this need not be so. As I have observed it, prosecutorial screen-
ing is a rigorous process that weeds out a great many cases that the
police would like to charge as felonies, and preliminary hearings are
often full-fledged adversarial contests. In Professor Weinreb’s home
state of Massachusetts, defendants at preliminary hearings have exten-
sive rights to cross examine witnesses and to put on affirmative de-
fenses, and the prosecutor must satisfy the magistrate that he has suf-
ficient evidence to avoid a directed verdict for the defense measured
by the reasonable doubt standard.3 This hardly sounds like a worth-
less proceeding.

Weinreb’s description of American criminal process is equally cen-
sorius and one-sided when he discusses the trial. Undoubtedly some
features of our system encourage counsel to attempt to manipulate
and mislead, and we treat jurors like idiot children. But Weinreb
himself concedes that the tricks of adversary practice ordinarily do
not govern the outcome; indeed, we have seen again and again in
the past decade of social conflict that juries can set aside prejudices
and publicity and decide cases on the evidence presented in court.
The idea of having a strong trial judge take control of the conduct
of the proceedings away from counsel and then sit with the jury and
direct its deliberations is an appealing one—until one thinks of some
of our more biased and domineering judges.

One charge that Weinreb does not level at the American criminal
justice system is that it has a tendency to convict the innocent. On
the contrary he asserts, based on what evidence I do not know, that
conviction of the innocent is at an irreducible minimum.4 This con-
cession is surprising in the midst of an otherwise sweeping condem-

2. P. 60.
   Ann. Laws ch. 276, § 38 (Michie/Law. Co-op 1968)).
4. We can reasonably claim that we have avoided convictions of persons who are
   incontestably not guilty, the “wrong man,” as much as we practicably can. Appalling
   as such occurrences are, they are very rare and almost always attributable to a
   nonsystemic fault peculiar to the case, like malicious abuse of the process or a
   coincidence against which we cannot effectively guard.
   Pp. 4-5.
nation. I would have thought that there is more than a little to be said for a process that hardly ever convicts an innocent defendant but nonetheless manages to keep the prisons of the country full to the bursting point, whatever its faults in other respects. I wonder if countries that rely on Continental, nonadversarial procedures are in so fortunate a position.

Even if Weinreb's highly critical assessment of the American criminal justice system were entirely justified, he would still have failed to establish that the faults of our system are the result of our refusal to adopt European models of investigation and trial. To do so he would have to examine the extent to which the failings of criminal justice in the United States are also to be found in Great Britain, Canada, Australia, and New Zealand: countries that share with us a common legal tradition and have in many respects similar institutions. If these countries have police forces that behave in a reasonably lawful and civilized manner, if they can bring cases to trial without months and years of pointless delay, if they are not forced to rely on assembly line plea bargaining, and if they hold members of the Bar to standards of honesty and candor at least as high as those practiced by encyclopedia salesmen, then perhaps our faults flow from something other than our failure to imitate the institutions of France. Unless this comprehensive comparison is made, it is impossible to be sure that the glaring defects of American criminal process are not better explained by such factors as our ethnic and racial differences, the traditional lawlessness of our people and our officials, and our insistence on using the criminal law to combat every form of socially disapproved conduct. A change in the form of our institutions is not going to help anything very much if the real problem is one of cultural traditions and unrealistic objectives.

The third major problem with *Denial of Justice* is that Weinreb freely engages in the practice of comparing the sordid reality of one country with an idealized description of another. When writing about American criminal process Weinreb stresses the negative to the point of being unfair. When discussing his proposed Continental alternative, however, Weinreb scarcely hints that inquisitorial procedures may have some defects of their own and may not perform as they were intended due to the inevitable corruption, arrogance, and inefficiency of officials. An example is the danger that investigating magistrates charged with solving crimes might develop a pros-

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ecutorial bias and not be as neutral and disinterested as they ought to be. Weinreb momentarily takes note of this possibility: “Experience in other countries suggests that while prosecutorial bias is not an inevitable feature of an investigating magistracy, it ought to be taken seriously into account.”6 But the point is then dismissed with his observation that, in any event, the magistracy would certainly be more neutral than the police. This is hardly reassuring, since Weinreb proposes to give his magistrates far greater authority than we have ever been willing to entrust to the police. One would like to have some elaboration of the experience in European countries that demonstrates that magistrate bias is a problem that ought to be taken seriously into account. Again, Weinreb casually states that magistrates could complete investigations of most crimes in a day or two.7 He does not tell us whether countries such as France and Italy, which follow the kind of system he advocates, in fact do succeed in meeting such a rigorous time schedule. Of course they do not. It is true around the world that governmental bodies move more slowly in practice than they do in theory.

Even if Weinreb could prove that the French system actually works better in France than the Anglo-American system works in the United States, he would still be a long way from proving that we can solve any of our problems by importing French institutions. There is simply no reason to believe that those institutions would work for us as they do for the French, or that we would not soon succeed in perverting them as thoroughly as we have perverted our own. At an early point in the book Weinreb articulates this insight, as he observes that French criminal procedure “is profoundly affected by the concept of L’État, the State, as an entity whose authority is not to be questioned,”8 a concept that he recognizes is as foreign to us as eating snails. He then acknowledges that French procedures “would not work out in the same way in this country, where ‘the authority of the state’ is not a reason for doing anything.”9 Having made this disarming confession,

6. P. 127.
7. P. 134.
8. P. 12.
9. Id. Indeed, Weinreb explicitly disclaims reliance on foreign experience as a motive for his proposals.

“Continental” criminal procedure provided a direction for my thinking; in particular, the opportunity several years ago to observe closely all aspects of French criminal process helped me to visualize possibilities unlike those with which I was familiar. The reason for adopting a model like the one I have outlined, however, is not that something similar has worked acceptably elsewhere, but that that is where our own principles and experience lead.

P. x.
he thereafter ignores it and proceeds to argue that we should adopt institutions borrowed from the French, without discussing how prevailing American cultural attitudes and traditions might affect the performance of those institutions. But the point illuminates a fundamental flaw in Weinreb's whole approach to comparative criminal procedure, and it cannot be dismissed with an offhand concession. As Mirjan Damaska explained in a penetrating article in this law journal, European and Anglo-American attitudes toward authority and structures of government differ profoundly in ways that have the greatest significance in shaping legal institutions and practices. Europeans tend to value theory, hierarchical organization, and central authority; we stress pragmatism, checks and balances, and decentralization. As Damaska explains, the basic differences in the criminal justice systems reflect these underlying societal values. Given these differences in philosophy, there is simply no way that the institutions of one system can be transported to the other without undergoing profound and possibly self-defeating change.

As an example consider the office of investigating magistrate, the creation of which is the principal proposal of Weinreb's book. Weinreb explains hardly anything about this official other than that he will be neutral and disinterested and that he will have the authority to conduct investigations and question witnesses, including the defendant. He does not describe how such a class of Mandarins is to be recruited, appointed, trained, or supervised, except to say that the magistracy would be a "legal career" with "specialized preparation." This is a serious omission, because the term "magistrate" has a quite different meaning in France than in this country. Our magistrates are typically either elected or appointed through a process of political patronage, and they are not necessarily lawyers. Like other judges they are not members of any bureaucratic hierarchy, and they do pretty much as they please subject only to the sanction of reversal. If officials of this sort were to undertake the principal responsibility for the investigation of crime, the results would be ludicrous. Every magistrate would have a different idea of what was important, none would have any significant investigatory training, and no one would be responsible for setting policy, disciplining the incompetent, or promoting the proficient.

12. P. 145.
Obviously Weinreb has something very different from an American municipal court judge in mind when he writes of an "investigating magistrate," but he leaves it to the reader to guess just what he does intend. In fact, the American official most nearly comparable to his investigating magistrate is not any of our judges, but rather the United States Attorney. The United States Attorney's principal function is not appearing in court as an advocate, but rather investigating crime with the aid of the F.B.I. and the grand jury and determining who is to be prosecuted. The United States Attorney does have the authority to question witnesses and prospective defendants by invoking the grand jury process; he is not a local cop with general peacekeeping functions; and, in theory at least, he is supposed to be as concerned with protecting the rights of the innocent as convicting the guilty. He is subject to supervision in everything he does from his superiors in Washington, who can overrule or supersede him at any point. He is not "neutral or disinterested" but neither is an investigating magistrate who, unlike an American judge, has a responsibility to solve crimes and uncover evidence of guilt. When Weinreb speaks of an investigating magistrate he is describing an official who has rather more in common with an American prosecutor than with an American judge.¹³

Whatever the title of the investigator, he would of course be an American sharing the attitudes and prejudices of his countrymen. He would not be perceived as "neutral" or "disinterested" by the defendant or defense lawyer because he would represent the authority of the state, and we perceive the criminal process as a contest between the individual and the state. He would be tempted to take short cuts and abridge rights to satisfy the public demand that he solve crimes and see to it that the guilty are punished. Defendants would constantly try to hamstring him with time-consuming motions and hearings, and they would sometimes obtain support from higher court judges who are themselves former practicing lawyers distrustful of governmental authority. The political and cultural conflicts that have made our criminal process what it is would not go away, and they would go to work to transform the alien system.

There are many things to be learned from the study of foreign methods and institutions, but one of them is not that we can discard our own traditions and make a fresh start with borrowed ideas. There is always a value in perspective, in seeing that other people are able

¹³. In Germany, the public prosecutor conducts the pretrial investigation, and Germans apparently find this system quite satisfactory.
to do very well without some things that seem indispensable to us. If we study the practices of other countries, rather than their pretenses, we may also take comfort in the fact that denial of justice is a part of the human condition everywhere, and if some countries seem to be better at dealing with it than we are there are many others that are still worse. Perhaps we should marvel that our criminal justice system manages to work even as well as it does, given the enormous amount of crime it is expected to deal with and the hopelessly conflicting objectives with which it is saddled. We cannot realistically expect our narcotics detectives both to succeed in suppressing the heroin traffic and to avoid making searches that a judge on subsequent reflection might consider to be based on unreasonable suspicions. We cannot expect to conduct trials promptly and efficiently as long as we give criminal defendants so many legally protected rights, including the right to inquire at length into the legality of every aspect of the criminal investigation. Our problems are largely home grown; they result both from the conflicting demands we place on the criminal justice system and from our conflicting attitudes about governmental authority. We can no more import our solutions than we can export our problems.
Principles, Positivism, and Legal Theory*


Reviewed by David Lyons†

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

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

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

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

2. P. xi.

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

4. Dworkin uses philosophical machinery very efficiently. His essay Constitutional Cases, at pp. 131-49, is a particularly good example.
"descriptive" aspect of the ruling theory of law) is a substantial part of the book. It is well known and widely accepted and is apparently the motivating basis for developing an alternative theory of law; so it will receive most of my attention. I will then consider briefly Dworkin's own theory. But first we should review the doctrines of two outstanding legal philosophers, John Austin and H.L.A. Hart—Hart because Dworkin treats his theory as the high point of positivism and Austin because Hart's ideas emerge primarily from a critique of Austin's classical version of legal positivism.

I. Classical and Contemporary Positivism

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

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

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

Hart, who is not a utilitarian, defends positivism, but nevertheless

7. J. Austin, supra note 5, at 34-38, 127-29.
rejects Austin’s conception of law. The idea that laws are a sovereign’s orders backed by threats misrepresents even what Hart calls “primary” rules of law, those rules that impose obligations and that are the basis for Austin’s analysis. More important, Austin’s conception obscures “secondary” rules, which do not purport to lay down obligations but are designed to confer on individuals the power to make their own legally enforceable arrangements, such as contracts and wills. Further, laws cannot be validated by tracing them back to issuance by a sovereign. We must refer instead, in Hart’s view, to those secondary rules that define public offices and confer legal powers on their occupants, if we are to distinguish the official from the private acts of those individuals. Such secondary rules are an essential element of legal systems and are ignored by Austin’s analysis.

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

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

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

10. Id. at 77-120.
11. Id. at 253.
that something qualify as valid law. It is therefore initially an open question whether one should obey a particular law, that is, whether an act that is legally required or prohibited should actually be done or omitted. Given further information, one might answer that question, perhaps quite readily. But the question is not an empty one, because the validity of a law is logically independent of its morality. The criteria of validity of a legal system may, but need not, incorporate a moral test. The morality involved here is not positive or conventional morality, but critical morality, that is, moral judgments that are binding by virtue of their supposed correctness.

II. Dworkin's Critique of Legal Positivism

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

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

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

all laws, as well as all contracts, may be controlled in their op-
eration and effect by general, fundamental maxims of the common
law. No one shall be permitted to profit by his own fraud, or to
take advantage of his own wrong, or to found any claim upon his
own iniquity, or to acquire property by his own crime.\(^\text{15}\)

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

The principle that was decisive in *Riggs* was said to be drawn from
the common law. But principles need not have been so recognized in
order to play a role in judicial decisions. In *Henningsen v. Bloom-
field Motors, Inc.*,\(^\text{16}\) for example, the court declined to enforce a con-
tract limiting the liability of an automobile manufacturer for defec-
tive products. The following was included among the court's con-
siderations:

> In a society such as ours, where the automobile is a common and
>necessary adjunct of daily life, and where its use is so fraught
>with danger to the driver, passengers and the public, the manu-
facturer is under a special obligation in connection with the con-
struction, promotion and sale of his cars. Consequently, the courts
>must examine purchase agreements closely to see if consumer and
>public interests are treated fairly.\(^\text{17}\)

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

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

\(^{14}\) 115 N.Y. 506, 22 N.E. 188 (1889).
\(^{15}\) Id. at 511, 22 N.E. at 190.
\(^{16}\) 32 N.J. 358, 161 A.2d 69 (1960).
\(^{17}\) Id. at 387, 161 A.2d at 85.
his own wrong was weighed against considerations favoring the literal interpretation of statutes and was deemed to weigh more. In Henning-
sen, the principle that automobile manufacturers have a special ob-
ligation was likewise weighed against considerations favoring the lit-
eral interpretation of contracts. But the decisions in Riggs and Hen-
ningsen did not discredit or require modifications in the principles
that statutes and contracts should be literally construed. In other
cases, these principles may prevail over contrary considerations, with-
out requiring that the weaker principles be qualified or invalidated.

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

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

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

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

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

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

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

18. Dworkin concedes this general point in No Right Answer?, supra note 3, at 82-83.
19. See J. Austin, supra note 5, at 191; H.L.A. Hart, supra note 9, at 121-32.
assumption would be mistaken: one can reject the model of rules, yet accept the doctrine of judicial discretion; conversely, one can accept the model of rules, yet reject the doctrine of judicial discretion. We have already observed that one can acknowledge the existence of legal principles without believing that such principles eliminate all indeterminacies in the law and with them any occasion for the exercise of judicial discretion. Conversely, systems of hard and fast rules can be complete and internally consistent, yielding determinate answers to all questions that arise under them.

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

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

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

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

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

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

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

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

22. P. 92.
23. H.L.A. Hart, supra note 9, at 92.
ployed by officials, and the reason is simple: unlike other legal rules, the rule of recognition may be said to exist only by virtue of the actual practice of officials. Nothing else determines the content of this rule. The tests for law in a system are whatever officials make them—and Hart suggests no limits on the possibilities.

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

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

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

25. P. 40.
But suppose I am wrong about Hart’s meaning and that Dworkin is more nearly right. Suppose that Hart really wishes to restrict the tests that could be incorporated into a rule of recognition and, specifically, to exclude tests based on judicial reasoning of the sort that Dworkin describes. This restriction would have no bearing on positivism as a type of legal theory. Such restrictions on the rule of recognition would not be a natural outgrowth of, but rather an arbitrary limitation upon, the underlying positivist idea that law is determined by social facts, such as the facts of official practice. I shall therefore continue to interpret Hart in accordance with this tenet of positivism.

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

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

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

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

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

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

III. The Rights Thesis and Its Ramifications

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

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

The Rights Thesis says "that judicial decisions in civil cases, even in hard cases . . . characteristically are and should be generated by
principle not policy."\textsuperscript{27} The term "principle" is used here in a narrow, normative sense, one that Dworkin mentioned but did not use in his critique of positivism:

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

Principles and policies are "the major grounds of political justification."\textsuperscript{29}

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

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

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

\textsuperscript{27} P. 84. 
\textsuperscript{28} P. 82; see also p. 22. 
\textsuperscript{29} P. 83.
those principles or policies that are needed to justify the limited class of decisions directly relevant to the case at bar. They seek systematic consistency in their decisions, and so they seek that organized set of principles and policies that provides the best possible justification of the maximum number of past decisions plus any other decisions that they would be prepared to make. Furthermore, these principles and policies are expected to justify political decisions generally, including those reflected in constitutional arrangements, legislation, executive orders, and the like. The principles and policies included in this set are supposed to express not only the personal convictions of the judges, but also the convictions of the community as a whole. When judges decide cases by appealing to such a system of principles and policies, they invoke what Dworkin calls a “political theory.” The elements of such a theory are accorded the status of law. They are taken by judges to be embedded in the system and to be preestablished doctrine, enforceable like ordinary rules.

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

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

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

\textsuperscript{30} The term “justified” is sometimes used in a relatively weak sense, which defines justification to mean consistency with more basic norms of a system of values. In this sense one might speak of “justifying” political decisions that discriminate against blacks, for example, by showing that they serve a racist ideology that is held, on independent grounds, to be embedded in a political system. Dworkin appears to use the term “justified” in a stronger sense, which requires that the principles and policies found embedded in the law themselves be morally defensible. Dworkin’s usage is indicated in several ways. For example, his concern to justify the use of coercion and the imposition of burdens or deprivation of benefits seems to presuppose the stronger sense of justification, as does the fact that the justificatory role of principles and policies is, in Dworkin’s view, the basis for finding them embedded in the law (rather than the other way around). For confirmation of this interpretation, see Dworkin, \textit{Seven Critics}, 11 Ga. L. Rev. 1201, 1258 (1977).
that is sufficiently just to be taken as settled for reasons of fairness."\textsuperscript{31}

It follows that Dworkin’s theory of law, which seeks both to describe our system and to prescribe for it, does not apply to systems of which these assumptions cannot be made. I confess that I am less ready than Dworkin to assume that they are true of our own system.

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

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

Dworkin’s argument may be summarized in the following way. Fairness (and fairness alone) requires that like cases be treated alike—that new cases be decided like past cases. When hard cases are decided, this similarity of treatment can be achieved only by applying to the new case the considerations that justify the decisions in past cases. We might think that these considerations could be either principles or policies. But fairness does not require the continued appli-
cation of policies, only the continued application of principles. Thus the use of one case as precedent for others can only be explained if we suppose that cases are decided by principle, not policy, since it is only in the application of principle that fairness requires us to be consistent. Further, since fairness requires that we treat like cases alike, and deciding cases by appeal to principles rather than policies is the only way to do so, judges should do just that.

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

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

There is, perhaps, some limit to the arbitrariness of the distinctions the legislature may make in its pursuit of collective goals. Even if it is efficient to build all shipyards in southern California, it might be thought unfair, as well as politically unwise, to do so. But these weak requirements, which prohibit grossly unfair distributions, are plainly compatible with providing sizeable incremental benefits to one group that are withheld from others.\(^3\)

(Dworkin makes a controversial assumption here, namely, that distributive justice is relatively indulgent.\(^3\) Without that assumption, his argument collapses.) As Dworkin continues, however, he shifts from speaking of the legislature to speaking of government in general (which, of course, includes the courts):

There can be, therefore, no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises. . . . I mean that a responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret, but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well.\(^4\)

\(^{32}\) P. 114.
\(^{33}\) Taken literally, Dworkin's passage implies that only gross unfairness on the part of the legislature is morally unacceptable on grounds of fairness. It is not clear that such a contention is coherent, and so I have interpreted the passage more loosely.
\(^{34}\) P. 114.
Principles, Positivism, and Legal Theory

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

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

As Dworkin allows, both principles and policies can argue for rights. Principles lay down rights directly; policies do not. Policies set out goals, but these, Dworkin assumes, do not entail any rights. Yet policies can be used to argue for rights, and legislation based on policies often creates rights. To use Dworkin's example, if legislation to subsidize aircraft manufacturers is enacted, the manufacturers acquire certain rights. Policies thus provide arguments for political decisions that create rights. In this respect, their operation is no different from the operation of principles in hard cases. For hard cases are those in which the rights to be enforced are not identical with those enforced in past cases. One must distinguish, in dealing with hard cases, between the general considerations used to justify judicial decisions and the specific results of applying those considerations in particular cases. When principles are applied, the rights that they assert are more abstract than the concrete rights that are actually enforced in the case at hand. Those principles therefore operate, like policies, by providing reasons for enforcing certain rights in a hard case.
So the fact that judicial decisions adjudicate rights does not show that principles alone, and not policies, can account for them. A possible source of confusion here is the fact that fairness itself can be thought to involve the right to be treated as well as others have been treated in the past. But this right should not be confused with an abstract right that the court may have recognized by invoking it to decide the earlier case. That an argument of fairness is relevant in succeeding cases does not at all tend to show that the considerations on which the initial decision was based themselves concern rights rather than social goals.

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

I conclude that the Rights Thesis requires further argument. Whether it can survive more direct appraisal remains to be seen.\textsuperscript{35}

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

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

\textsuperscript{35} Serious doubts are raised in R. Summers, Two Kinds of Reasons of Substance in Common Law Cases (unpublished paper read to World Congress on Philosophy of Law and Social Philosophy, Sydney-Canberra, August 14-21, 1977).
that both strands of our political morality rest on more fundamental rights.

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

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

Consider first Dworkin’s general conception of utilitarianism. He defines the general welfare in terms of the existing preferences of current members of the community. But utilitarians take into account the interests of all humans (and some would include other animals), regardless of political boundaries. And, just as they are concerned about the distant consequences of human behavior, as well as its im-
mediate effects, utilitarians do not neglect the interests of those who are as yet unborn. Thus Dworkin’s analysis of utilitarianism is far too narrow.

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

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

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

37. P. 155. See also Rawls, Outline of a Decision Procedure for Ethics, 60 PHILOSOPHICAL REV. 177 (1951).
system of law cannot justifiably be disapproved by a member of the community in question. If its system of law were based on the goal of promoting total welfare, for example, one would be obliged to accept that goal, since any other judgment would be unjustified.

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

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