

11-1-1979

## Voltaire and the Cowboy: The Letters of Thurman Arnold

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### Recommended Citation

Susan Sherwin, "Voltaire and the Cowboy: The Letters of Thurman Arnold", Book Review of Voltaire and the Cowboy: The Letters of Thurman Arnold by Gene M. Gressley, ed, (1979) 5:3 DLJ 810.

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# Reviews

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*Voltaire and the Cowboy: The Letters of Thurman Arnold*. Edited, with an Introduction, by Gene M. Gressley. Boulder: Colorado Associated University Press, 1977. pp. xiv, 552, Price: \$15.00

Who was Thurman Arnold? A flamboyant character from Laramie, Wyoming, who first achieved national prominence in the late 1930s when, at that time a professor at the Yale Law School, he published his brilliant and provocative *The Folklore of Capitalism*. A man equally at home in the world of action and the world of ideas, who went on to become, successively, Franklin D. Roosevelt's man in charge of trust-busting, a judge on a federal circuit court of appeal and senior partner in a firm of corporation lawyers in Washington but did not cease stirring people up by public speeches, articles in learned journals and letters to newspapers. A true and lifelong son of the West who was once aptly described as "a cross between Voltaire and the cowboy, with the cowboy predominating" (p. vix).

And how did Professor Gressley, a respected historian of the West, come to collect and edit these many-faceted letters? Because he was able to induce Arnold, the boy from Laramie, to give his papers to the Archives of the University of Wyoming, which has its seat at Laramie. Feeling that "it is in his letters that the real Thurman Arnold comes closest to being revealed" (p. xi), he himself undertook the task of selecting from over 17,000 of them those that to him seemed the most revealing. To them he added a long and perspective-giving Introduction that sheds a good deal of light on this fascinating man.

And why did a reviewer for the volume turn up in far-away Halifax, Nova Scotia? Because I have always wanted to know what made Arnold tick, and hoped that this book might give me some kind of an answer. In the troubled and depression-ridden thirties when I was a young law teacher looking for ideas "to set all things right" he became, with the publication of his *The Symbols of Government* and *The Folklore of Capitalism* — both of which I reviewed, ecstatically, for the *Canadian Bar Review*<sup>1</sup> — one of my gods. Although I have always been somewhat disappointed by what

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1. (1936), 14 Can. B. Rev. 278; (1938), 16 Can. B. Rev. 417

has always seemed to me to be the decline from grace of his later career — particularly his ending up with the Washington law firm — I have never ceased to wonder what “Arnold the man” was really like. His own autobiography, *Fair Fights and Foul* (latest edition, 1965), did not give me much help; for it was, as he himself put it in the preface, “not greatly personal . . . [but] an attempt to bring up to date the ideas expressed in my *Folklore of Capitalism*.” Do the letters in *Voltaire and the Cowboy* give me what I have been looking for?

Not really — despite the help given me by Professor Gressley in this bulky, carefully edited and attractively produced book. In his Introduction of more than 90 large and quite closely printed pages he has from time to time written passages that do indeed give me a vivid picture of Arnold the man. As for the letters themselves (about 400 pages), he has organized them under headings that correspond with eight significant periods in Arnold’s life (each of which he has in the introduction explored and put in its larger social context) — for example, III, The Yale Law School: 1930-1936; VII, The McCarthy Years: 1949-1955 — and he has appended to them informative notes that always explain who Arnold’s correspondent was and also, where necessary, how the letter came to be written. What then was my problem? First, I found the book awkward to hold; it was not, as I had hoped, one to be browsed through in an armchair; it has, in true scholarly fashion, to be put on a table and studied. Second, once I was past the early, personal, letters (I, College and Career: 1910-1918), the people to whom the letters were written and the issues raised were so many and various that I just became muddled. And finally, to be quite truthful, I — a Canadian insufficiently versed in the American scene — found myself so unfamiliar with so many of the events and ideas referred to that I was unable to appreciate the “Arnold nuances” that any reasonably intelligent American reader would catch at once. In a word, Professor Gressley has done a good job and it is my fault that I did not get from the letters what I had hoped.

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*Criminal Law*. By Alan W. Mewett and Morris Manning. Toronto. Butterworths, 1978. Pp. xlii, 577. Price: \$65.00

A few years ago in the austere calm of the pages of the *Journal of the Society of Public Teachers of Law* an argument briefly fluttered concerning the utility of textbooks.<sup>1</sup> Professor William Twining began the controversy by answering his own question: *Is Your Textbook Really Necessary?* with, as I understand him (and in reading what Professor Twining has to say I am as much impressed by the style and dash as I am informed by the substance), a highly qualified, "Yes, but . . . ." Professor T. B. Smith in a subsequent issue of the same journal ventured to reply, "Yes, if . . . ." <sup>2</sup> One thing I believe Professor Smith was clear about was that his own writings satisfied all relevant tests (and I would hesitate to question the excellence of his judgment on that issue) though he was less sure that the rest of ours had done so.

I do not propose to enter this controversy, for I should feel (or quickly be made to feel) like a ship's fender pressed between a supertanker and the main wharf of Halifax Harbour. But, what I am going to say is that the absence of *any* textbook on a given legal subject is a decided and serious drawback. Certainly I found on arriving in Canada last summer to teach criminal law that this was so. It was not that I wanted a ready made set of lectures that I could pass on with minimal effort to my students (I cannot, by the way, rid myself of the English habit of referring to students as a species of property), but that I required a ready way to orient myself so that I could quickly pass on to what interested me. In the same way I required a map of Halifax to tell me where to find this and that though it would be for me to work out the best route and choose the places that seemed most likely to repay a visit.

The various annotated Codes were of some help but in a way (and I intend no disrespect for their editors) were not unlike a street index without the accompanying map. Fortunately, publication of *Criminal Law* by Professor Alan Mewett and Mr. Morris Manning was then expected "any day now", but since I know well enough that publishers use this expression rather as hospitals use "satisfactory" to describe a patient whose condition is entirely unknown, I thought it prudent to contact the publishers, Messrs.

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1. (1970-71), 11 J.S.P.T.L. 81

2. *Authors and Authority* (1972-73), 12 J.S.P.T.L. 3

Butterworths. Their response was exceedingly civil. They offered what they had, the first half in page proofs, and I gratefully accepted. These saw me through to the end of the first semester; now that I have the remainder I am tolerably confident of my ability to survive the second.

There is then — for judge and practitioner, for teacher and student — a need for an ordered account of the criminal law of Canada. If this book did no more than provide that ordered account in passably decent prose it would be welcome and assured of success. In my view Mewett and Manning have done much more. They have written, and written well, a scholarly account of the criminal law in Canada, never seeking to avoid difficulties, always prepared to offer a rationalisation or a solution.

Of course, few books are beyond the reach of the grubby hand of criticism. I hope mine will not be seen as carping and, in truth, I offer the following comments more as suggestions for the authors to consider in the preparation of the second edition than as indications of serious shortcomings in the first.

In Chapter 1 I think the authors should have included a specific section devoted to the scope and interpretation of the Code. In Chapter 1 and elsewhere many observations are made on both, but the subject seems to me so important as to require some detailed observations at the outset. Clearly, as the authors are well aware, the Code is not the comprehensive source of law (there are, for example, other federal statutes), nor is it the exclusive source of law (since s. 7(3), for example, provides an escape hatch into the common law for certain purposes). Nevertheless, just how comprehensive and exclusive is the Code? What is the relationship with the common law? Whose common law? How is the Code to be interpreted? I ask these questions because I do not think that Canadian courts have always been aware of their importance, let alone resolved them. Sometimes the impression I get from a particular case is that the court thinks that the Code is no more than a convenient restatement which was never really intended to alter the common law. Thus it is assumed by some Canadian courts (the example I take happens not to concern the substantive criminal law but it does concern the Code) that there is a right of personal search incident to arrest. Yet the Code says nothing about this whatever. There are detailed and rigorous provisions on search of premises, some provisions on particular powers of personal search, but not a word on any general right to search upon arrest though some courts

and the police evidently assume that such a power exists. Presumably the reasoning is (and you have to guess at it) that personal search on arrest is justified via the s. 7(3) escape hatch. But is it? Can s. 7(3) be used to *create* rights of search of which the Code says nothing?

The Code presents formidable problems of interpretation. It has no fixed vocabulary of terms; the approach to criminal liability is far from consistent (mischief, for instance, has a more narrowly defined *mens rea* than murder); and it has been subject to the vicissitudes of constant amendment and re-amendment. Dickson J. properly identified the starting point when he said in *Johnson v. the Queen*:

We are concerned here with a Code. We start with the Code and not with the previous state of the law for the purposes of inquiring whether the Code has made any change. On the plain meaning of *our* [my italics] Code the facts of this case show the commission of an indictable offence . . . .<sup>3</sup>

The injunction is obviously right but where do we go from there? If the provision in the Code is unclear, how far is it permissible (or necessary) to resolve the matter by other internal evidence in the Code, or is it permissible to resort *instanter* to “the common law”?

To illustrate this point, and to make another, it is worth considering recklessness in the context of the Code. When academics use the expression “recklessness” they mean by that a consequence subjectively foreseen though not desired by the actor. Recklessness in this sense is discussed by the authors (p. 89) and quite properly so. Recklessness in ordinary usage, however, can mean different things. The trouble is that “recklessness”, unlike “intention”, is not a neutral word. It is possible to say that an actor intentionally brings about a consequence without any implication that his conduct is good or bad, lawful or criminal. But when we say that an actor recklessly brings about a consequence the ordinary implication is that his conduct must be bad rather than good, criminal rather than lawful. “Reckless” is an emotive word while “intent” is not. “Reckless” may then be used (a) only as an index of foresight (an actor is reckless if he foresees the risk of harm); (b) only in the pejorative sense (an actor is reckless if his conduct viewed objectively is highly unreasonable or unjustifiable); or (c) to combine both notions (an actor is reckless if he foresees the risk

3. (1977), 37 C.R.N.S. 38 — at 379 (S.C.C.)

and, in the circumstances, it is highly unreasonable or unjustifiable for him to take that risk).

How is it used in the Code? Restricting the inquiry (as in the first place I think it must be) to the internal evidence, it is surely clear that in s. 212(a) (ii) (murder) and s. 386(1) (mischief) “reckless” is used only in the pejorative sense of highly unreasonable; in these provisions the word is not used as an index of foresight because each provision *separately* specifies the index of foresight. Thus for mischief the actor must foresee that he “will probably cause the occurrence of the event” and be reckless about that occurrence; for murder the actor must intentionally cause bodily harm knowing that it “is likely to cause . . . death” and be reckless about that occurrence. Turning to the use of “reckless” in connection with criminal negligence, the relevant provision (s. 202) does not separately specify any index of foresight. What deduction is to be drawn from that? And the issue is of course further complicated by the addition of “wanton *or*” before “reckless” in the definition of criminal negligence.

In their discussion of this matter in Chapter 4 the authors remind themselves (quite rightly) that interpretation is “constrained by what the Code says”, but preface that with the (safety-valve) observation, “it is clear that in Canada *at least* one is *first of all*” constrained by the Code (p. 103). The italics are mine and I am bound to ask: where do the authors plan to go second of all? What they do, I think, is to resort to *a priori* reasoning (not necessarily wrong in itself) and conclude that “reckless” here does not require proof of subjective foresight and that an actor is reckless where —

he has not foreseen the consequence but his act (or omission) is such as to increase substantially the likelihood of the risks materializing (p. 103).

I would, respectfully, agree with that conclusion but have reached it by a different route. Since “reckless” appears in s. 202 without any index of foresight it is my submission that the rational deduction on the internal evidence provided by the Code is that foresight is not required.

The authors then suggest that “wanton” and “reckless” are not the same things. Since “or” is normally disjunctive this can hardly be an improper suggestion and it enables the authors to say that “wanton”

indicates that the accused has foreseen the risk he is creating and

chooses to act . . . in spite of the risks being created by his act.  
 . . . (p. 103)

If the authors are right then an indictment alleging only wanton disregard would require proof of foresight, but an indictment alleging only reckless disregard would require no such proof. This would be an odd — though not impossible — interpretation of the legislation. To resolve the puzzle it must, I suggest, be permissible to have regard to the history of this provision. It made its debut in the 1955 revision and we may look at its genesis. Stephen had always thought that negligence should suffice to support a charge of manslaughter provided it was of a sufficiently high degree, a matter he was disposed to leave to the jury. The original Code was by no means clear on the matter; the Royal Commission thought the matter ought to be clarified and hence s. 202. Now the important point here is that the Commission sought only to *clarify* the law and not to *alter* it; it was their intention to provide a formula that would encapsulate the law as it had been stated in England in cases such as *R. v. Bateman*<sup>4</sup> and *R. v. Andrews*<sup>5</sup> so that death caused by a high (gross, criminal) degree of negligence would suffice for manslaughter. Arguably “wanton or reckless” was not the happiest expression to make this clear but it becomes clear enough in the end. Thus the “or” in “wanton or reckless” is no more disjunctive than the “or” in the Yorkshire expression, “Hell, Hull or Halifax” (the Halifax being the one in the West Riding and not Nova Scotia) to denote places of the same (highly undesirable) class. This view is further supported by the use of “shows” — as the authors point out, the use of this word implies a rejection of the distinction between advertent and inadvertent negligence, a point which has not previously been given sufficient attention (p.104). In one sense, by the way, s. 202 helpfully clarifies the law. The negligence must exist in relation to endangering life and safety. It is thus clear that the jury must have regard not only to the greater risk of harm but also to the risk of greater harm.

I hope the point I have made so far (always assuming it is discernible) has not been unduly laboured. What separates me from the authors is merely a matter of degree. They are well aware of the Code and the interpretive problems it poses; I would want to increase the emphasis by dealing with the implications of a codified

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4. (1925), 94 L.J.K.B. 791 (C.A.).

5. [1937] W.N. 69 (C.A.).



system at or about the beginning of the book. I would wish to make it plain beyond a peradventure that answers must be found in the first place within the four corners of the Code, and how harmony of interpretation might be achieved; and then to explain how far it may be permissible to consult other sources (the history of the Code, for example), when it becomes permissible to have regard to the common law, and what is meant by common law. "Common law" cannot mean the common law as it is understood by English courts since the development of all law involves choices and Canadian courts are entitled (bound?) to make choices most suited to Canadian needs.

Now for some smaller issues. I think that *R. v. Bernard*<sup>6</sup> (referred to at pp. 74, 78) was a questionable extension of the *Meli v. The Queen*<sup>7</sup> principle; it was not part of Bernard's "plan", or of any act intentionally or recklessly done to the victim, to run over the deceased. In the discussion of recklessness (p. 89, and where it is discussed as a general concept), it is not clear whether the authors think a person *ought* to be accounted reckless where he foresees a consequence as probable or even if he foresees it as merely possible. The authors picked up the decision of the English Court of Appeal in *R. v. Quick*<sup>8</sup> but do not discuss its possible implications on the meaning of disease of the mind. *R. v. Deakin* is discussed in connection with assault (p. 476),<sup>9</sup> but receives no mention in connection with the general discussion of transferred *mens rea* (p. 275), though it seems to me to suggest that in Canada the doctrine of transferred *mens rea* applies only (i) where the Code makes express provision for it (as it does in, for example, sections 212(b) and 228), or (ii) where the crime is one of basic or general intent. The decision by the Manitoba Court of Appeal is clearly right on (i) but questionable on (ii). Since the Code makes some express provision for transferred *mens rea*, does this have any implication in relation to offences where no express provision is made?

The reader should not be misled into thinking that because two-thirds of the book is devoted to general principles, specific offences are neglected. Obviously much of what is said on general principles concerns specific offences. Nevertheless some of the

6. (1961), 130 C.C.C. 165 (N.B.C.A.)

7. [1954] 1 All E.R. 373 (P.C.)

8. [1973] 3 All E.R. 347 (C.A.)

9. (1974), 16 C.C.C. (2d) 1 (Man. C.A.).

chapters dealing with specific offences need to be expanded. The ten page treatment of the theft, for instance, is a bit on the short side; students and practitioners will look forward to more detailed guidance in the second edition.

What I have had to say has been mostly by way of suggestion. The only weaknesses of the book (and they need to be remedied) are that the index is woefully inadequate and there is no table of statutes. Both are tedious to prepare but essential. A dozen bright students (with which the U of T abounds) could make a good job both in short order.

I have said enough to make it clear that Mewett and Manning have written a very good book and they will enjoy (if enjoy is the right word) the privilege of producing many subsequent editions. Anyone who wishes to study and understand the criminal law of Canada cannot afford to be without it; if he is intimidated by the cost he has my assurance that it is worth taking out a second mortgage on his house to raise the purchase price.

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*Taking Rights Seriously*. By Ronald Dworkin. London: Gerald Duckworth & Co. Ltd., 1977. Pp. xv, 293. Price: \$29.50

*Taking Rights Seriously* makes an important contribution to philosophic theories of law and justice. Dworkin presents a comprehensive general theory of law which is both normative and conceptual. It includes, among other things, theories of (1) legislation involving questions of legitimacy and legislative justice, (2) adjudication involving theories of controversy and jurisdiction, and (3) compliance involving theories of deference and enforcement. Moreover, the whole theory of law is itself seen as part of a more general theory of justice within a yet broader social and political theory.

He develops this comprehensive theory through a methodology which focuses on "hard cases" as crucial tests for competing theories of law. He argues that we must acquire a clear view of the underlying principles and intentions of our laws in order to know

how to resolve the hard cases where the law appears to be vague or contradictory. In fact, it is the very existence of such hard cases which he takes to be decisive in arguing against the leading alternative theory of law, namely legal positivism.

Dworkin's own theory, once developed, is then applied to a series of socially significant contemporary legal problems. Through appeal to pressing issues, he makes explicit some practical implications of the principles he propounds. While this combination of theory and application increases interest and understanding, it is regrettably done with a rather awkward shift in style and perspective. Unfortunately, the book still reads rather like the series of articles it was originally written to be — the theoretical ones coming from law journals, and the practical ones from a more popular forum, *The New York Review of Books*.

Dworkin's main argument turns on the fundamental claim that our legal structures embody and reflect an underlying theory of justice which is more basic than any actual institutions. He rejects the theory of legal positivism, by considering a particular formulation of it by H.A. Hart, and by arguing more generally that no amendments to this version can be adequate. He characterizes legal positivism as having at least these essential features: (1) a belief that the law of the community is a finite set of rules for determining punishable behavior; (2) a presumption that there is a finite decision procedure for determining if a rule is a law by investigating its origins; and (3) an analysis of legal obligation that says that these established laws constitute a citizen's legal obligations.

Dworkin rejects this widely accepted analysis of the concepts of law and legal obligation because of its inadequacy in accounting for the specific kinds of arguments and appeals which lawyers and scholars must use in resolving those tricky disputed cases of legal rights and obligations. In hard cases, the outcome cannot be settled by examining statutes. Appeal is made to principles and not just to documented legislation. The positivist conception denies this possibility, for it can neither explain nor even describe the role of extra-legal standards in interpreting the concepts of law, legal obligation, and legal right, and hence it is an inadequate theory of law.

Similarly, Dworkin argues that utilitarian interpretations of these concepts of law and legal right and obligation are also unacceptable. Utilitarian conceptions would have these hard cases resolved by

appeals to policies, *i.e.* collective goals, but they cannot account for decisions in favour of individual rights in the face of some competing collective goal. Yet surely the law must protect individual rights at times when they conflict with some collective goal. In contrast, Dworkin's theory gives highest priority to arguments from principle which protect an individual's fundamental rights even in the face of widely held collective goals. The alternative he proposes is a rights-based theory which affirms that an individual can have rights against the state which are prior to any rights or obligations created by explicit legislation. This theory allows that individuals have rights that may be relevant in adjudication other than those explicitly cited in legislation, a possibility which neither legal positivism nor utilitarianism can account for. In particular, Dworkin argues that individuals have a right to equality which he identifies as a right to equal concern and respect.

The result of acknowledging the fundamental importance of a commitment to this natural right is quite dramatic for jurisprudence. It implies that individuals can have rights to specific judicial decisions even if there is no explicit law or precedent determining that decision. Judicial decisions must reflect such principles as well as existing legislation; where the latter is inadequate, judges should recognize that someone may, nonetheless, have a right to win. Such decisions are required when supported by compelling arguments of principle which establish the existence of the relevant right.

Utilitarian concerns for collective goals being reflected in policy are appropriate to consider in drafting legislation, but even here, Dworkin thinks there is a limit on the range of legitimate legislation. It too must reflect the individual's basic right to concern and respect, and any legislation aimed at policy should ensure that the goals sought do not violate this fundamental right.

An individual's right to equal concern and respect is the underlying principle which directs judges in hard cases and restricts legislatures in all cases. Hence, it's own legitimacy must be established. In order to do this, Dworkin must build a general theory of justice that turns on this right at its most basic level. For this purpose, he appeals to the theory of justice developed by John Rawls in *A Theory of Justice*.<sup>1</sup>

Dworkin shares Rawls' view that justice is characterized by the

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

two principles which require (1) that every person is entitled to the largest liberty compatible with a like liberty for all, and (2) that inequalities be permitted only if they are in the interest of the worst-off members of society. But Dworkin wants to go further than Rawls and explain why these principles do in fact capture the concept of justice. He notes that Rawls' argument is elliptical and that the force of the social contract which he appeals to is not made explicit. In attempting to spell out its role, Dworkin sees it as an intermediate stage of a yet deeper political theory underlying the two principles cited, and it is the deeper theory to which Dworkin appeals.

He argues that the deep theory of political morality on which Rawls' theory rests must be deontological rather than teleological. It is one in which an individual has rights so fundamental that it is unjustified to fail to provide whatever service they specify even if such services run contrary to any other goals that the specific political theory may establish. The social contract which Rawls invokes in his argument is significant because it grants everyone a veto; it makes individual rights more powerful than any social goal or duty might be. But the individual rights of the deep theory which Dworkin perceives are abstract and not specific. The fundamental right is not to liberty nor to equality with respect to distributive justice. Rather it is the very abstract right "to equal concern and respect in the design and administration of the political institutions that govern them" (p. 180). This right is a precondition to the original position Rawls employs: it is theoretically prior even to Rawls' social contract and to his two principles of justice, *i.e.* the latter make sense only if persons have such a right. It serves as the formulation and guiding principle for all dilemmas of justice, since the right to equal concern and respect is the foundation not only of our theory of justice but also of a proper theory of law; it is the basis of our institutions of legal justice.

The normative case for his position is the abstract argument that ultimately legal authority rests on a morally correct theory of justice. That theory must have this fundamental right as its central principle, and hence everything built on top of it, including our specific legal institutions and statutes, must preserve and reflect this right in order to maintain their authority.

The argument is complicated, though, by his attempt also to provide a descriptive analysis of the role of this commitment to rights in practice. For this task, he uses his repeated appeal to the

resolution of hard cases by the courts. He tells us that judges can decide hard cases by appeal to principles, ultimately resting on rights, but cannot rely on policy or goal-based decisions if they run counter to individual rights. But what grounds does he have for believing that judges are justified in deciding according to principle rather than law or precedent? One important ground he relies on repeatedly is that the U.S. Constitution requires it. That is fine for American jurists, but it is unclear how helpful it is for those of us seeking either a general theory of law or a specific set of jurisprudence beliefs applicable also in countries like Canada where there is no constitution guaranteeing individual rights. The law does not itself require appeal to individual rights, yet Dworkin still thinks rights play a crucial role. For us, there is nothing to fall back on other than the normative arguments. Since he argues that citizens must have rights against the state, appeal to the constitution is really just a means of appealing to these morally entrenched rights. Without such a constitution, one must get by without these intermediary steps. By frequently switching ground between normative and descriptive analyses of the role of individual rights in the law, he complicates his argument unnecessarily. It would be preferable to separate the two kinds of argument entirely.

It should be noted that Dworkin does not seem to share an increasingly widespread concern that the courts frequently overstep their authority. Many jurists are becoming appalled by the increasing tendency of judges, primarily American ones, not just to rule on the law, but also to set moral norms, specific policy proposals, and even administrative decisions (specifying details of "adequate institutional care", for instance). Dworkin allows judges whatever authority is necessary to protect the fundamental right of each citizen to equal concern and respect. He does not seem to think that the use of this authority will involve undue meddling in matters more properly dealt with in the legislature. He does not specify any limits to be set on the increasing tendency of judges to make moral decisions, though presumably the limit of that decision-making power rests on the limit of the right to equality, since he does not authorize judges to make any *further* moral decisions. But the right itself is a vague one which leaves room for much disagreement about its actual scope. His attempt to resolve it by leaving policy matters to the legislatures is problematic because of the difficulty in separating issues of individual rights and collective goals, especially given the tendency of rights to conflict with other rights.

When Dworkin does get down to specific hard issues, as he does in the latter half of the book, he is at his most engaging. He deals with civil disobedience, reverse discrimination, homosexuality, censorship of pornography, and liberty. All of these essays were written for general audiences and focus on important contemporary issues in order to develop further his notion of a theory of justice resting on a right to equality.

For instance, in the chapter on reverse discrimination he considers the *DeFunis* case,<sup>2</sup> an affirmative action case involving the use of race as a criterion for admission to law school; his task there is to distinguish the relevant notion of equality which must be invoked in order to explain why affirmative action cases may be legitimate and yet cases of ordinary discrimination, like the *Sweatt* case,<sup>3</sup> are not legitimate. Here, as elsewhere, Dworkin argues that equality is the key right, but he stresses that we must be careful that we use the relevant concept of equality. People are not entitled to equal treatment in all matters whereby all receive equivalent benefits, burdens and opportunities; rather they have a right to treatment as an equal which guarantees equal concern and respect. The fact that some people are admitted to law school does not ensure that everyone else who seeks admission should be granted it. Criteria of evaluation are appropriate for discriminating amongst applicants so long as the interests of all are considered fairly and sympathetically. Acceptable criteria to employ can be determined by considering equally the interests of all affected. This will mean that it is legitimate for a community to use intelligence as a criterion for admission if it has reason to believe this policy reflects its general interests. Hence, it may also use race when it serves *legitimate* broad interests.

But here Dworkin runs into a complication. If race is allowed in the *DeFunis* case to promote the interests of a disadvantaged minority, why not also in the *Sweatt* case where a Texan Law school argued that majority prejudice indicated more interests would be served by a policy of excluding blacks? This difficulty arises from a too simple conception of utilitarianism. Dworkin argues that this simple notion of measuring preferences, though it counts everyone's preferences equally, is actually counter-equalitarian, since it really allows multiple votes for the interests of particular persons

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2. *DeFunis v. Odegaard* (1974), 94 S. Ct. 1704

3. *Sweatt v. Painter* (1949), 70 S. Ct. 848

whenever people care about other people's interests. To handle this problem Dworkin introduces a distinction between personal and external preferences, where a personal preference is for one's own enjoyment of goods and opportunities and an external preference involves the assignment of goods and opportunities to others. The argument, then, is that external preferences allow multiple preferences for how a particularly favoured or disliked individual is to be treated and this preference scheme is not egalitarian. It allows the interests of one person to be given much more weight than the interests of another. Policies dependent on external preferences necessarily violate the individual's right to treatment as an equal.

In contrast, the affirmative action policies need not be defended on the grounds of external preferences. They are supported by ideal arguments which justify a policy in pursuit of a social ideal of a more equal society. Decisions made in accordance with a policy shaped by such ideal grounds, a policy intended to result in a society closer to an ideal society, still can respect each individual's right to equal concern and respect. Some individuals will be disappointed, as would be the case whatever selection criteria are employed, but all are treated as equals, and the disappointment of any is a genuine subject of concern. Therefore, reverse discrimination can be relevantly different from ordinary discrimination and may, under certain conditions, be justifiable even though other forms of discrimination are illegal.

I find Dworkin's analysis in this and the other cases of social problems to be insightful and powerful. He uniformly defends a "liberal" position but not as a reflex reaction. Rather his political and social views evolve from a well-developed moral perspective in which the criteria for deciding public policy are carefully ordered. First, he recognizes one fundamental right of all persons, namely the right to equal concern and respect relative to everyone else. With that in mind, the government can form policies and legislation reflecting its varying interests, all to be enforced by a reliable judicial institution. The only constraint on laws and policies adopted is that they not violate anyone's basic right to equality. If they should do so, either deliberately or inadvertently, the responsibility falls to the judiciary to correct that overextension of power. Otherwise courts must proceed as the legislature directs. Each has a rightful authority and they jointly guide citizens in their legal



obligations. But all levels of legislative and judicial institutions must ensure that individual rights are indeed taken seriously.

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