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Draft: 24 January 2007
(*Not for citation*)

A Critical Examination of Dworkin's Theory of Rights

Ronald Dworkin has argued that rights are best understood as 'trumps' against utilitarian and other collective justifications for laws. In this paper I show that in his early work Dworkin proposed two distinct theories of rights as trumps. The first, which I call the shielded-interest theory, holds that certain fundamental rights protect important human values from collective political justifications. The second, which I call the filtered-preference theory, holds that the purpose of rights is to trump laws that are based on 'external' utilitarian preferences such as racist or 'moralistic' prejudice (whereas laws based on 'personal' utilitarian preferences are legitimate). After explaining the two theories of rights as trumps, I will argue that they are inconsistent and show that in Dworkin's later work he abandoned the filtered-preference theory and adopted a revised theory in its place. I contend that each version of the theory of rights as trumps is flawed.

One of the basic philosophical questions that underlies Dworkin's work on rights is whether individual political rights can be reconciled with utilitarianism; this was a pressing issue in the 1970s when Dworkin was writing the essays later published in *Taking Rights Seriously* (1977). His initial response is to propose a symbiotic relationship between rights and utilitarianism. He provisionally grants the legitimacy of legislatures enacting law on utilitarian grounds; he then defines the essence of rights as opposing (trumping) utilitarian justifications in certain ways (i.e. by 'shielding' important human values and by 'filtering out' external preferences). In virtue of this opposition from rights (and of the enforcement of rights by courts, which unlike legislatures are not captive to the people's utilitarian preferences), utilitarianism is refined and made legitimate. As utilitarianism lost favour in the philosophical community, the question that was the impetus for Dworkin's initial formulation of his theory of rights receded in importance. Although Dworkin eventually abandons this symbiotic view of rights and utilitarianism, he retains the structural idea of rights as trumps against collective justifications.

I. Rights in Dworkin's Early Work

1. The Shielded-Interest Theory

In *Taking Rights Seriously* [hereinafter *TRS*] Dworkin calls individual rights 'political trumps held by individuals'.[1] This is not a theory of ordinary legal rights--the rights

[1] TRS xi.

under existing statutory and common law--but of political rights against the government (which may or may not be constitutional rights). In the preface to *TRS* Dworkin offers this general definition:

> Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury on them.[2]

A claim to a right is formulated in this way: A has a right to X *even if* it would further the general welfare to deny X to A,[3] where X is some opportunity, resource, or liberty.[4] The 'even if' in the formulation is crucial; the hypothetical conflict with society's general interest is what gives intelligibility to the claim to a right.[5] I call this the shielded-interest theory because it conceives of rights as forming a protective barrier around certain individual interests. In the Reply to Critics of *TRS* (published with the paperback edition), Dworkin states that rights function as trumps against any type of collective goal.[6] In the individual essays in *TRS*, however, Dworkin discusses collective justifications for laws almost entirely in terms of utilitarianism.[7] The idea of rights defended in the essays is, Dworkin says, '*parasitic on the dominant idea of utilitarianism*, which is the idea of a collective goal of the community as a whole.'[8]

Dworkin originally propounded the shielded-interest theory in the essay 'Taking Rights Seriously', which was first published in 1970 in the New York Review of Books and later as the title chapter of *TRS*. He does not argue in this essay for the existence of particular rights.[9] Rather, he assumes that individuals have fundamental 'moral' rights against the government, such as the right to free speech, and observes that in some political systems these are also legal rights adopted in the constitution.[10] A right is 'fundamental' if it is necessary to protect a person's 'dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence'.[11] The

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[2] TRS xi.

[3] '[A] claim of political right is a claim to a trump over the general welfare for the account of a particular individual. When someone claims a right of free speech, for example, he claims that it would be wrong for the state to prohibit him from speaking on some matter even if the general welfare would be improved by preventing him from speaking.' TRS 364.

[4] See TRS 91.

[5] 'The hypothetical nature of the claim is important. We emphasize the special injustice of torture, for example, when we speak of a right against torture, because we claim that torture would be wrong even if it were in the general interest'. TRS 364.

[6] TRS 365.

[7] Cf. TRS 365 ('I give special place to the claims of a trump over general utilitarian justification, in the explicitly political chapters of this book, because I am discussing political decisions in communities in which the general collective justification is utilitarianism.')

[8] TRS xi (italics added).

[9] See TRS xii-xiii.

[10] TRS 184-85.

[11] TRS 198.

values protected by fundamental rights have an objective character, but the shielded-interest theory does not attempt to define their normative basis or to describe them in detail.

Dworkin claims to reject the balancing model of rights--the model that 'recommends striking a balance between the rights of the individual and the demands of society at large'.[12] Although this model is widely accepted and 'established in our political and judicial rhetoric',[13] Dworkin says it is 'false' and that the balancing metaphor 'is the heart of its error'.[14] But in fact Dworkin accepts an approach to rights that is similar to the balancing tests employed by the U.S. Supreme Court. According to Dworkin the government can curtail the exercise of a fundamental right in order to prevent substantial harm to others or to society.[15] Similarly, the Court holds that limitations on fundamental rights may be justified by a compelling state interest.[16] At times Dworkin appears to set the threshold higher than the Court. He says, for example, that the state can prevent the exercise of the right to free speech 'when there is a *clear and substantial risk* that [the] speech will do *great damage* to the person or property of others, and no other means of preventing this are at hand, as in the case of the man shouting "Fire!" in a crowded theatre'.[17] Despite strong claims such as this, Dworkin allows for reasonable restrictions on the time, place, and manner of the exercise of a right. Moreover, he cites approvingly to a test developed by Judge Learned Hand which states (in Dworkin's words) that 'we must discount the gravity of evil by the likelihood of reaching that evil'.[18] This test was adopted by the U.S. Supreme Court in a landmark free speech case and has been widely used in balancing inquiries; as Judge Hand articulated the test, the potential evil of speech was to be weighed against the benefits of the regulation at issue.[19]

What the shielded-interest theory rejects could be called *sheer* balancing, i.e. the idea that a right can be overcome whenever the relevant considerations regarding a proposed law or policy tip the balance to the general interest.[20] In his review of *TRS* Joseph Raz said that Dworkin's arguments amount to two truisms: that rights matter and that they may defeat other considerations.[21] Responding to Raz in the Reply to Critics of *TRS*, Dworkin accepts Raz's characterization of the logic of his theory. Dworkin points out that some rights are more important than others; these require a correspondingly stronger argument for the general interest if they are to be defeated.[22] He also suggests that we

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[12] TRS 197-98.
[13] TRS 198.
[14] TRS 198.
[15] TRS 200-04.
[16] E.g., McConnell v. FEC, 540 U.S. 93, 205 (2003).
[17] TRS 204 (italics added).
[18] TRS 195.
[19] See Dennis v. United States, 341 U.S. 494 (1951), *aff'ing* 183 F.2d 201 (2nd Cir. 1950) (opinion by Hand, J.).
[20] See TRS 91, 169-70.
[21] Raz, 'Prof. Dworkin's Theory of Rights' (1978) 26 Political Studies 123, 129.
[22] TRS 365-66.

should reserve the term right to refer to important interests[23]--those that have a certain 'threshold weight against collective goals'.[24] Dworkin says it would be 'pointless' to use the term right to refer to any individual interest that overrides *some* collective interest; this would 'inflate grotesquely' the number of rights and make the appeal to a right banal.[25] But Dworkin emphasizes that this would only be *pointless* and not *wrong*, because where one sets the threshold weight of a right is a matter (at least in part) of stipulation.[26] Here Dworkin is focused in the rhetorical value of rights; when he returns to the structure of his argument he gives this as his central claim: '[n]o alleged right is a right (on my account) unless it overrides *at least a marginal case* of collective justification'.[27] Thus, the shielded-interest theory has as its logical center Dworkin's definition of a right as a political trump: the existence of a right entails that an argument for the general welfare is not a sufficient ground for limiting the right. A limitation on a right is not justified because it produces some marginal gain in the general welfare; 'special grounds are needed for justifying any interference' with a right.[28]

When expounding the shielded-interest theory in *TRS* Dworkin generally supposes that the arguments for the general welfare are utilitarian arguments. At times he seems to say that a claim of right takes priority over all utilitarian justifications. When considering provocative political speech, for example, he states: 'It may be that abridging the right to speak is the least expensive course, or the least damaging to police morale, or the most popular politically. But these are utilitarian arguments in favour of starting one place for another and *such arguments are ruled out by the concept of rights*'.[29] Elsewhere he states that certain 'utilitarian reasons are irrelevant, because they cannot serve as grounds for limiting a right'.[30] In the overall argument, however, Dworkin does not claim that rights always trump utilitarian justifications; his position is that utilitarian arguments must have sufficient weight to overcome rights.

In the end, Dworkin's rhetoric about the importance and weight of rights is not matched by the logic of the shielded-interest theory. As Raz notes, 'almost always Dworkin sounds as if he meant to say something much more far-reaching than these truisms'; however, '[n]owhere does he say clearly and unambiguously anything more than that rights have some weight however little and may override some considerations which aren't themselves rights'.[31]

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[23] TRS 365.
[24] TRS 92.
[25] TRS 365.
[26] TRS 366. See also TRS 92 ('We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency'.).
[27] TRS 366 (italics added).
[28] TRS 188.
[29] TRS 203.
[30] TRS 201.
[31] TRS 126.

2. The Filtered-Preference Theory

Dworkin originally developed his second theory of rights as trumps—which I call the filtered-preference theory—in a series of essays in 1976 and 1977. Unlike the shielded-interest theory, the filtered-preference theory does not assume the existence of any particular rights. Instead, rights result from refining utilitarian justifications by excluding certain types of preferences. This can be pictured as a filtering process; hence the label I have given the theory. The essay that outlines this theory in its most general form is 'What Rights Do We Have?' (first published in 1977 as a chapter in *TRS*), which concerns the relationship between liberty and equality.[32]

In that essay Dworkin begins by arguing that liberty can legitimately be constrained only on the basis of certain limited types of argument, and he gives the following 'crude typology' of political justifications.[33] Arguments of *principle* constrain liberty in order to prevent distinct injury to an individual. Arguments of *policy* seek to realize a state of affairs in which the community as a whole, not just certain individuals, will be better off as the result of a constraint on liberty.[34] There are two basic types of arguments of policy. *Utilitarian* policy arguments hold that the community is better off when citizens as a whole have more of what they want (even if some have less). *Ideal* policy arguments, in contrast, are those that seek to bring the community closer to some objectively true ideal, whether or not citizens desire the improvement. These ideal arguments, according to Dworkin, conflict with the liberal conception of equality whenever the ideal in question is 'controversial within the community', for a basic canon of liberalism 'prohibits a government from relying on a claim that certain forms of life are inherently more valuable than others'.[35]

Initially, Dworkin observes, utilitarian policy arguments appear secure from liberal objections because they treat the wishes of every member of the community equally; no one is given a bonus or discount because he is more or less worthy than another or his views more or less deserving of respect.[36] But this appearance of egalitarianism is illusory because utilitarianism counts both *personal* and *external* preferences in its calculations of the general welfare. Personal preferences are for the assignment of goods and opportunities to oneself.[37] External preferences are for how goods and opportunities are to be assigned to other people. If someone morally disapproves of certain conduct

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[32] See also 'Social Sciences and Constitutional Rights—the Consequences of Uncertainty' (1977) 6 Journal of Law and Education 1; 'Reverse Discrimination' (originally published in 1976 in the New York Review of Books and republished as chapter 9 in TRS); 'Bakke's Case: Are Quotas Unfair?' (originally published in 1977 in the New York Review of Books and republished as chapter 14 in *A Matter of Principle* (1985)).
[33] TRS 274.
[34] TRS 274.
[35] TRS 274.
[36] TRS 275. See also TRS 234.
[37] TRS 275.

and seeks on that basis to constrain the liberty to engage in it, this will be counted as a preference in the general utilitarian calculation.[38] Thus utilitarianism may violate the liberal conception of equality by letting in moral judgments through the back door, in the form of a 'moralistic' preference. And if racists in a community wish to deny opportunities to members of minority groups, then utilitarianism will count these preferences as well. Dworkin concludes that utilitarian calculations should be based only on personal preferences if they are to figure in arguments that justify constraint of liberty; justifications based on racist, moralistic, or other external preferences are illegitimate.[39]

Although Dworkin seems to assume that moralistic or racist prejudice would be illegitimate in any political setting, the filtered-preference theory is not directly concerned with the *content* of external preferences. Instead, Dworkin argues that to count *any* external preference makes utilitarianism self-defeating. He cites to Bentham for the proposition that utilitarianism means that everyone is to count for one and not more than one.[40] The racist counts as more than one because he has preferences for both the distribution of goods to himself and the denial of goods to others. This results in double-counting, and the resulting distribution is 'not utilitarian at all'—at least in the sense of each person counting as one.[41] This argument excludes racist and moralistic preferences not because of their content but because of their *externality*. It commits Dworkin to the proposition that even self-denying, altruistic preferences (to have less of a good in order for someone else to have more) lead to the corruption of utilitarianism.[42] Such preferences 'may no more be counted in a defensible utilitarian argument than less attractive preferences rooted in prejudice rather than altruism'.[43]

Dworkin argues that personal (i.e., self-regarding) preferences 'rightly make up the general welfare';[44] they can legitimately be relied upon to constrain liberty and ground law-making. He states: 'The vast bulk of the laws which diminish my liberty are justified in utilitarian grounds, as being in the general interest or for the general welfare; if as Bentham supposes, each of these laws diminishes my liberty, they nevertheless do not take away from me any thing that I have a right to have'.[45]

Dworkin's interpretation of utilitarianism is coupled with a theory about the institutions of political democracy. The institutions that are best suited to implement egalitarian preference satisfaction are democratic ones. But democratically elected

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[38] TRS 274.
[39] TRS 276.
[40] See TRS 234. In 'What Rights Do We Have?' Dworkin states that he is summarizing the argument about double counting in 'Reverse Discrimination' (chapter 9 of TRS), which is made at pp. 231-38.
[41] TRS 235.
[42] TRS 277.
[43] TRS 277.
[44] 'Social Sciences and Constitutional Rights—the Consequences of Uncertainty' (1977) 6 Journal of Law and Education 1, 10.
[45] TRS 269.

legislatures are incapable of separating external from personal preferences.[46] The legislature is like a computer that automatically registers all voter preferences and translates them into law.[47] Whether this feature of democratic legislatures is a flaw is an issue on which Dworkin is not clear. Dworkin states that there is nothing wrong with external preferences *per se*; there are both 'good' and 'bad' external preferences, and it is to be expected that citizens will vote on the basis of external preferences (and that this is proper at least insofar as the external preferences are good).[48] In the Reply to Critics of *TRS* Dworkin states that elected representatives 'are subject to constraints about how far preference utilitarianism provides a justification for their decisions', but he does not clearly state which preferences they should disregard.[49] The overall structure of the argument for the filtered-preference theory suggests that having a democratic legislature to calculate *all* preferences in a society is a proper first step in working out the principle of equality.[50] This would seem to imply that the elected representative's duty is to enact law on the basis of the prevailing preferences in society, not to exclude the external preferences. But however Dworkin conceives the duty of the legislators, he insists that the legislature as a whole will inevitably include all of society's utilitarian preferences in its calculations. The task of filtering out external preferences falls to the courts, as we will see next.

Bringing together the different strands in the argument, Dworkin proposes a 'general theory of rights':

> The concept of an individual political right … is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.[51]

The reference in this passage to 'prohibiting decisions' refers to judicial review of legislation to enforce constitutional rights. Dworkin thinks that independent courts, which are insulated from society's prejudices expressed through electoral politics, should have the power to overturn decisions based on utilitarian justifications corrupted by external preferences.[52]

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[46] TRS 234, 276.
[47] See Dworkin, A Matter of Principle (1985) [hereinafter AMP] 366.
[48] TRS 357-58.
[49] TRS 358.
[50] See section II for further analysis of this point.
[51] TRS 277.
[52] See AMP 70 ('Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself.')

The last point can be seen in a passage from an often overlooked essay published in the same year as *TRS*,[53] in which Dworkin describes how the components of the filtered-preference theory of rights work together:

> [A]ny political judgment about what makes the community better as a whole must count the impact on each particular person as having the same importance. As Bentham said, 'Each man [and woman] to count for one and none for more than one'.
>
> The political process in a democracy is meant to translate that requirement into legislation through the institutions of representative democracy. The welfare economists have worked out a theory to how that is achieved. Each individual, through his votes and other political activity, registers or reveals a preference. The political process is a machine which is calculated, though imperfectly, to reach decisions such that, though some individuals suffer and others gain, the overall preferences of all the people, considered neutrally with the same consideration for the preferences of each, is improved.
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> In a community which has a settled prejudice of one sort or another, however, whether it be prejudice against blacks, against homosexuals, or against political views, the machine will inevitably break down because there is no way of excluding these preferences based on prejudice from affecting the process. If prejudicial preferences are counted, then the personal preferences of those against whom the prejudice acts are not counted equally in the balance; they are discounted by the effect of the prejudice. Therefore constitutional rights are needed.
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> There is a high antecedent probability that the political judgment reached about a particular matter will not fairly reflect the kind of preferences that rightly make up the general welfare, but will give influential expression to preferences based on prejudice. One reason constitutional rights of one sort or another are created is to guard against the influence of prejudice.[54]

Dworkin concludes by stating that '[t]he key point of constitutional rights is that rights are based on antecedent probabilities.' This refers to the antecedent likelihood that the background prejudices—i.e., external preferences—in society will corrupt utilitarian justifications for laws. [55]

Because the filtered-preference theory is based on antecedent probabilities, application of it can yield both *positive* conclusions that a law violates rights as well as *negative* conclusions that a law does not violate rights. A few examples demonstrate this crucial point. Dworkin employs the filtered-preference theory to justify both (i) striking down laws that impose racially segregated education and (ii) upholding affirmative action programs that provide preferences to racial minorities.

In *Brown v. Board of Education*,[56] the U.S. Supreme Court found that racial segregation in schools violated the right to equal protection of laws. Dworkin crticises the Court's rationale and proposes another one based on the filtered-preference theory.

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[53] Dworkin, 'Social Sciences and Constitutional Rights—the Consequences of Uncertainty' (1977) 6 Journal of Law and Education 1.
[54] Ibid. 10.
[55] 'Social Sciences and Constitutional Rights', at p. 10.
[56] 347 U.S. 483 (1954).

The Court in *Brown* was confronted with the 'separate but equal' test for public facilities that it had adopted in 1896,[57] but did not explicitly overrule it. Instead, relying on studies by psychologists and social scientists showing that segregated schooling caused feelings of inferiority in black children, the Court concluded that segregation causes poorer educational performance and held that separate educational facilities are inherently unequal.[58] Dworkin doubts that courts generally have the capacity to analyse causal hypotheses based on statistical correlations such as those cited in *Brown*, and he thinks that, in any event, 'it is wrong to use numbers to adjudicate constitutional rights'.[59] He suggests that, instead of relying on a causal judgment about statistics the Court should have made an 'interpretive' judgment that recognized the existence of background racial prejudice in communities that maintained segregated schools. The Court could then have overruled the laws requiring segregation because they were the product of external preferences.[60]

Dworkin also relies on the filtered-preference theory to argue that it is constitutionally permissible for a person's minority status to count as a positive factor in educational admissions processes. In response to the claim that affirmative action programs violate the right to equal treatment of members of the majority race, Dworkin replies that there is no background prejudice against the majority and thus no antecedent likelihood of corrupt legislation.[61] We find another example of the capacity of the filtered-preference theory to yield a negative conclusion in 'What Rights Do We Have?' Here Dworkin suggests that the U.S. Supreme Court's decision in *Lochner v. New York*[62] to strike down a law that limited the hours per week that could be worked in bakeries was incorrect. The bakeries had challenged the law by claiming it violated their right (and their employees' right) to freedom of contract. Dworkin states that 'the alleged right did not exist' if (as he suspects) the law at issue was not based on antecedent prejudices.[63]

From the passages quoted above and Dworkin's contemporaneous writings we can extract three basic components of the filtered-preference theory:

> F1: A law violates rights if and only if it is motivated by external utilitarian preferences. (F1 has this corollary: A law motivated solely by personal utilitarian preferences does not violate rights.)
> F2: Democratic legislatures automatically translate all utilitarian preferences, both external and personal, into law.
> F3: Courts should strike down laws motivated by external preferences.

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[57] Plessy v. Ferguson, 163 U.S. 537 (1896)
[58] Brown, 347 U.S. at 691-92 & n. 11.
[59] 'Social Sciences and Constitutional Rights', at p. 8.
[60] Ibid. 11.
[61] TRS, 237-39 ; AMP, 301.
[62] 198 U.S. 45 (1905).
[63] TRS, 278 (italics added).

It might be thought that F1 express the filtered-preference theory of rights, while F2 and F3 are separate components of a complementary institutional theory. But the filtered-preference theory is not applicable in any political system; it is a particular theory of rights that entails a particular view of institutional responsibilities in a democracy where utilitarianism is the background political justification and which has a system of judicial review of legislation.[64]

3. Inconsistency Between the Shielded-Interest and Filtered-Preference Theories

According to the filtered-preference theory, rights never come into conflict with utilitarian justifications for law--that is, with the general welfare conceived in utilitarian terms--so long as utilitarian calculations depend only on personal, self-regarding preferences. The shielded-interest theory, however, does not allow for distinguishing between personal and other preferences. According to the shielded-interest theory, rights are potentially in conflict with *any* collective justification for law, including utilitarian justifications based only on personal preferences. Suppose, for example, that the legislature bans the publication of newspapers on the ground that excessive demand for newsprint is driving up the price of paper.[65] According to the filtered-preference theory, the ban would not violate rights because it is based solely on personal preferences regarding how much people want to pay for paper. But according to the shielded-interest theory incrementally reducing the price of paper is not a strong enough justification (Dworkin would surely argue) to support such a strong burden on the right to free speech. Thus, the filtered-preference theory holds that the newspaper ban does not violate rights while the shielded-interest theory holds that it does. Though Dworkin recognized tension between his rights arguments and attempted to resolve it,[66] the two theories of rights as

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[64] See TRS ix.

[65] Raz uses a similar example in 'Prof. Dworkin's Theory of Rights' (1978) 26 Political Studies 123.

[66] Dworkin says the essays in TRS were 'written separately and therefore contain, as a group, overlappings and differences in emphasis and detail'. TRS xiii-xiv. In three places he indicates that the theory propounded in 'What Rights Do We Have?' is only one possible ground of rights and is not meant to be exclusive of other methods of arguing for rights. TRS xiv, 272, 356. But this claim is not consistent with the uses to which Dworkin puts the filter theory, which include arguing that affirmative action programs do not violate rights precisely because they are not based on antecedent prejudices. (See notes 61-63 and accompanying text.) At one point Dworkin made a partial retraction of using the filter theory to generate such negative conclusions. Replying to a critic in 1984, Dworkin states that his treatment of Lochner v. New York in 'What Rights Do We Have?' had seemed to endorse the view that utilitarian justification not tainted by external preferences are necessarily legitimate; he then remarks the argument there is incorrect. See Marshall Cohen ed., Ronald Dworkin and Contemporary Jurisprudence (Duckworth London 1984) 282. But Dworkin had argued in the same form and at greater length that affirmative action programs do not violate rights because they are not motivated by external preferences; he never retracts these arguments and they appear in publications after the 1984 retraction regarding Lochner. See, e.g., *A Matter of Principle* (1985), ch. 14.

In 'Hard Cases' (chapter 4 of TRS), Dworkin develops a complex taxonomy of rights at pp. 90-93, and in the preface to TRS he relies on this classification to draw distinctions between 'Taking Rights Seriously'

trumps as expounded in *TRS* are in basic conflict.

II. Rights as Trumps and Dworkin's General Theory of Law

A consideration of Dworkin's theory of rights in relation to his general theory of law sheds light on both. In the Introduction to *TRS* Dworkin sets out his ambition to offer a theory of law that is both normative (in that it provides a moral justification for law) and conceptual (in that it defines what law is).[67] Claiming that Bentham was the last Anglo-American philosopher to offer such a general theory, Dworkin says that the essays in *TRS* provide 'the main structure for a distinct theory of law'.[68] The normative part of a general theory of law, according to Dworkin, must include a theory of (i) legislation, (ii) adjudication, and (iii) compliance, i.e. whether and when citizens are obligated to obey the law.[69] A theory of legislation includes both (a) arguments that justify the authority of the group that creates statutory law and (b) a theory of legislative justice, which 'describes the law they are entitled or obliged to make'.[70]

Dworkin's theory of rights as trumps is primarily an aspect of what he calls the normative part of the general theory of law, and it plays a key role in the component that he calls legislative justice. The dominant theory of legislative justice since Bentham has been utilitarianism, according to Dworkin, and he does not propose to discard it.[71] But Dworkin wants to reconcile utilitarianism with the notion that 'individuals can have rights against the state that are prior to the rights created by explicit legislation'.[72] Bentham, of course, rejected this goal; he thought that rights derived from positive law alone and denounced the idea of extra-legal rights as pernicious, anarchical nonsense.[73] The conflict between utilitarianism and individual political rights is straightforward. If the guiding political goal is to produce the greatest amount of pleasure (or preference satisfaction) for the entire community, then the interests of an individual may be ignored or even purposefully harmed in pursuit of the 'greatest good of the greatest number', and for no other reason than the general welfare. Dworkin's solution to this conundrum was the filtered-preference theory of rights.

His crucial move was to accommodate utilitarianism at an intermediate stage in working out a theory of legislative justice instead of adopting it, as Bentham had done, as a foundational political and ethical theory. In a letter to Voltaire, Bentham said that his object was to trace out a new model for laws with a central moral idea: 'I have built

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and 'What Rights Do We Have?' See TRS xii-xiv. The distinctions are highly technical and will not be analysed here; in my judgment they do not resolve in the inconsistency noted above in the text.

[67] TRS vii-viii.

[68] TRS xiii.

[69] TRS vii-viii.

[70] TRS viii.

[71] See TRS ix-xi.

[72] TRS xi.

[73] See Jeremy Bentham, *Anarchical Fallacies*, ___.

solely on the foundation of utility'.[74] Dworkin could say instead: 'I have built solely on the foundation of equality'. For Dworkin the principle that government must treat each person with equal concern and respect is 'fundamental and axiomatic'.[75] Equality is 'the source both of collective goals and of the special limitations on their authority that justify more particular rights'.[76] Dworkin treats preference-satisfaction utilitarianism as an appropriate derivation from equality, though only as an intermediate stage in political justification (see I.2). Utilitarianism, according to Dworkin, has a basically egalitarian cast,[77] and his theory of rights excludes the external preferences that threaten to corrupt it. The result of the operation of the filtered-preference theory against background utilitarianism is 'refined' or 'restricted' utilitarianism. Rights, as it were, make utilitarianism safe for democracy.

The theory of rights as trumps is also connected to the conceptual part of Dworkin's theory of law, which in his early work was concerned with a critique of positivism as represented by HLA Hart. In *The Concept of Law* (1961), Hart pictures a legal system as consisting in rules expressed in statutes and precedent and validated by a 'rule of recognition' that identifies authoritative legal institutions with the power to create legal rules.[78] Hart had recognized that legal language is inherently open-textured, leaving certain cases (call them 'hard cases') that cannot be resolved by the straightforward application of a rule; he described the judge in such cases as an interstitial legislator who has discretion to form a new rule or extend an old one.[79] Dworkin attacks the view of law as a 'system of rules' and Hart's view of the discretion of judges. He proposes a distinction between rules, which have an 'all-or-nothing' character,[80] and principles, which reflect moral judgment and have a dimension of weight.[81] Principles direct judges toward 'right answers' in hard cases, which means that the role of courts is to enforce the parties' pre-existing rights rather than to exercise discretion and create new rules.[82] For Dworkin law consists not just of rules clearly laid out in statutes and case holdings but also in principles, and both give rise to legal rights.[83] Dworkin made a further conceptual distinction between principles and policy.[84] Policies are 'propositions that state goals'

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[74] Quoted in Gerald Postema, *Bentham and the Common Law Tradition* (OUP 1986), ___.
[75] TRS xv.
[76] TRS xv.
[77] AMP 360.
[78] Hart, *The Concept of Law* (Oxford University Press 2nd ed. 1994) 100-110, 124.
[79] Ibid., 126-29.
[80] TRS, 124.
[81] TRS, 126-28.
[82] TRS, 101. See also 'Is There Really no Right Answer in Hard Cases?', AMP, ch. 5.
[83] Thus in *Riggs v. Palmer*, ___, wherein a man who had murdered his grandfather was not allowed to inherit under his will, the result was not an instance of the exercise of judicial discretion (as in Hart's view) but the *correct* interpretation of the parties' rights under existing law (which included the principle 'no man shall profit from his own wrong'). See TRS, ___.
[84] TRS 82.

and concern the general welfare of society;[85] principles are 'propositions that describe rights', and rights are defined as 'individuated political aims'.[86] Dworkin calls courts 'the forum of principle' (thus courts are also the forum of rights);[87] legislatures are by implication the forum of policy.

Dworkin's arguments in *TRS* often depend on a strict division of labor between the two forums.[88] For example, in hard cases judges are able to reach right answers because their responsibility is to enforce individual rights, not to make policy decisions about the general welfare.[89] Dworkin's theory of rights as trumps draws on the conceptual apparatus developed in his critique of Hart, including the concept of a right as an 'individuated political aim' set against the general welfare. The shielded-interest theory, as we have seen, protects rights against collective justifications for law. And in the filtered-preference theory the division of labor between the forum of policy and forum of principle is crucial: Legislatures are presumed to translate all of voters' preferences into law, and the role of courts is to filter out external preferences by striking down the laws motivated by them.

After the publication of *TRS* a number of developments in Dworkin's thought altered his theory of rights as trumps. In responding to critics he clarified and modified certain views. (The difference between clarification and modification in Dworkin's work is not always clear. In the preface to *Law's Empire* he notes, 'I have made no effort to discover how far this book alters or replaces positions I defended in earlier work.'[90]) More importantly, Dworkin substantially changed his approach to utilitarianism. In *TRS*, as we have seen, he had reconciled the two traditionally warring ideas. He accommodated utilitarianism by arguing that court-enforced rights would refine it, and he thereby gave both ideas a central place in the theory of legislative justice. Shortly after the publication of *TRS* he broke that truce and began to advocate a system that, if adopted, would displace utilitarianism's role in the theory of legislative justice.

That system is called 'resource egalitarianism', and he developed it in four articles bearing the title 'What is Equality?' Parts I and II of the series, first published in 1981, propound resource egalitarianism as a theory of economic justice. Parts III and IV, first published in 1987, explore the consequences of resource egalitarianism for general political theory, including the theory of rights and questions about the proper function of institutions in a democracy. The four articles were republished in *Sovereign Virtue: The Theory and Practice of Equality* (2000), and they form the theoretical core of that work.

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[85] TRS 90.
[86] TRS 90-91.
[87] AMP 70.
[88] See TRS ix (The 'overall goal' of highest average welfare 'might be advanced more securely by assigning different types of questions to different institutions according to some theory of institutional competence, rather than by supposing that all institutions are equally able to calculate the impact on overall welfare of any particular political decision'.).
[89] TRS 115.
[90] *Law's Empire* (Harvard 1986) viii.

Another development that affected the theory of rights articulated in *TRS* was Dworkin's theory of law as interpretation in *Law's Empire* (1986). This theory superseded much of the vocabulary and conceptual apparatus of his early work, which had informed the theory of rights as trumps. In section IV, I will analyse the concept of rights in *Sovereign Virtue*, *Law's Empire* and other later work. In the next section I will consider Dworkin's restatement of the filtered-preference theory in an essay that responds to criticisms by Hart.

III. Dworkin's Restatement of the Filtered-Preference Theory

Dworkin restated the filtered-preference theory of rights in the second half of his 1981 essay 'Do We Have a Right to Pornography?'[91] The essay was republished in *A Matter of Principle* (1985), and the second half was republished under the title 'Rights as Trumps' in an edited collection in 1984.[92] Much of Dworkin's restatement consists in responding to criticisms made by Hart in his 1979 article 'Between Utility and Rights'.[93]

Dworkin's argument for rights as trumps 'seems to endorse utilitarian arguments purified of external preferences'.[94] This is how Hart described the arguments in *TRS*, and other critics understood Dworkin's arguments in a similar way. Responding to Hart and other critics, Dworkin denied that he had argued *in favour* of refined utilitarianism and claimed that he had only argued *against* unrefined utilitarianism.[95] This denial does not seem consistent with Dworkin's approach to utilitarianism in his early work. The principle of equal concern and respect was said to be the source of both (i) collective goals (i.e. the preference-satisfaction utilitarianism described in *TRS*) and (ii) the limitations on collective authority that justify more particular rights.[96] Thus Dworkin presented utilitarianism as an appropriate derivation from the principle of equality (at an intermediate stage). He said that most laws that diminish a person's liberty are justified on utilitarian grounds.[97] When expounding the filtered-preference theory, he treated personal utilitarian preferences as legitimate grounds for law-making, referring to them as '*the kind of preferences that rightly make up the general welfare*'.[98] This suggests that Dworkin endorsed (with qualification) a subjectivist conception of the common good--subjectivist because it aggregates individual preferences (wants, desires, etc.). As Raz remarked, one must be at least a partial utilitarian to accept Dworkin's theory of rights in *TRS*.[99] The critics seem to be correct in concluding that Dworkin endorsed refined

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[91] 1 Oxford Journal of Legal Studies 177 (1981).
[92] Jeremy Waldon ed., *Theories of Rights* (OUP 1984).
[93] HLA Hart, 'Between Utility and Rights' (1979) 29 Columbia Law Review 828.
[94] Hart, *op. cit.*, 845 n.43.
[95] See AMP 370 and TRS 357.
[96] TRS xv.
[97] TRS 269.
[98] 'Social Sciences and Constitutional Rights', at p. 10 (italics added).
[99] 'Prof. Dworkin's Theory of Rights' (1978) 26 Political Studies 123, ___.

utilitarianism--i.e., preference-satisfaction utilitarianism purged of external preferences--as a legitimate and acceptable theory of political justification.[100] After the publication of *TRS* Dworkin himself adopted a less conciliatory approach to utilitarianism; this can be seen in his development of resource egalitarianism (surveyed below in section IV).

Hart's 1979 article included a trenchant critique of refined utilitarianism and Dworkin's concepts of external preferences and double-counting. He argued that 'external' preferences are not counted twice in utilitarian calculations; and that to count external preferences does not corrupt utilitarianism and is in fact required by utilitarian premises. Ignoring them would result in *under*counting. Hart contended that in seeking to eliminate the counting of external preferences, Dworkin's true objection was not to their *externality*, but to their liberty-denying or respect-denying content.[101]

Dworkin's 1981 essay reiterates the basic structure of the filtered-preferences theory and elaborates upon his egalitarian interpretation of utilitarianism. If (Dworkin supposes) there is a community that includes Sarah who has certain preferences and a group of Sarah-lovers who want Sarah's preferences to be satisfied, then all of these preferences are reported to the legislature.[102] A preference, Dworkin argues in response to Hart, is not like a vote, which a citizen could choose to cast *either* for Sarah's benefit *or* for his own.[103] All preferences are accumulated in the legislature's 'giant calculation', and a citizen who reports external preferences increases the role of his preferences overall without diminishing (except trivially) the impact his personal preferences.[104] If utilitarian calculations are allowed to include the preferences of Sarah-lovers, or the preferences of Nazis who want to deny goods and opportunities to Jews, or the preferences of moralists who disapprove of homosexual conduct, then utilitarianism would become corrupted and lose its egalitarian cast.[105] In this essay Dworkin calls these 'political' rather than 'external' preferences. He suggests that societies which accept utilitarianism as a general background justification should adopt a 'right to political independence', which protects people from racist and similar prejudices, and a 'right to moral independence', which excludes moralistic preferences.[106] Both rights function as trumps against the unrestricted utilitarian justifications that would otherwise count these preferences.[107]

Despite similarities between the structure of argument in *TRS* and the 1981 essay, the latter work ends up taking a different view of external/political preferences. External preferences in *TRS* were defined as preferences for how goods and opportunities should

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[100] Dworkin claimed Hart had said that he viewed refined utilitarianism as the 'best' system of political justification. AMP 370. But Hart had said only that Dworkin 'endorsed' refined utilitarianism. See 'Between Utility and Rights' 845 n.43.
[101] Ibid. 841-42.
[102] AMP 361.
[103] AMP 366.
[104] AMP 366.
[105] AMP 361-65.
[106] AMP 364.
[107] AMP 364.

be distributed to others. In *TRS* Dworkin classed altruistic preferences--i.e. 'self-denying preferences … for less of a certain good on the assumption, or rather proviso, that other people will have more'--together with moralistic and racist preferences. He argued that these altruistic motives, 'however noble', are 'parasitic upon external preferences' and 'may no more be counted in a defensible utilitarian argument than less attractive preferences rooted in prejudice rather than altruism'.[108] In the 1981 essay, Dworkin states that someone may have been led to suppose 'that what I condemn is any political process that would allow any decision to be taken if people's reasons or supporting one decision or another are likely to lie beyond their own personal interests'.[109] He denies that this is his position and treats it as obviously wrong, noting that it would not allow a democracy to support social welfare programs or foreign aid, or to vote with 'a disinterested sense of fairness'.[110]

Dworkin states that what he condemns is 'a political process that assumes that *the fact that people have such reasons* [of fairness] is itself part of the case in political morality for what they favour'.[111] He seems to locate the pertinent error in the viewpoints of individuals. He distinguishes between those who *express* 'their own political preferences in their votes and arguments, and those who *'appeal to* the popularity of these preferences as providing an argument in itself' for what they want.[112] On this account, an illegitimate preference is one that includes an appeal to *the fact of the preference being held* as a further reason for it to be enacted; the question of legitimacy does not seem to turn on whether the preference is 'external' in the sense of involving a desire for how goods and opportunities should be distributed to others (as in *TRS*).

Dworkin claims Hart did not appreciate this distinction and suggests that his analysis of rights in *TRS* contributed to Hart's misunderstanding.[113] That analysis focused on the background prejudices of the community as a whole because it concerned a constitutional system with judicial review of legislation. The value of such a system is that it protects minorities the antecedent likelihood of corrupt legislation.[114] A political decision is illegitimate if the 'majority' finds certain ways of living to be inherently wrong or degrading and the legislature then counts '*the fact that the majority thinks them so* as itself part of the justification' for a decision to limit the freedom of others.[115]

This focus on the legislative process is sharply different from the focus on individual viewpoints above, and not just a matter of emphasis shifting according to context. On this account, the pertinent error lies not in the individual but in the reasoning of the representative legislature or in the political process as a whole. According to the new

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[108] TRS 277.
[109] AMP 368.
[110] AMP 368.
[111] AMP 368.
[112] AMP 368.
[113] AMP 368.
[114] AMP 368.
[115] AMP 368.

conception of illegitimate preferences in the 1981 essay discussed above, the individual has control over whether his engagement in political debate is legitimate because he can choose whether to appeal to the popularity of his own position. But on the account that focuses on the legislative process, the individual has no control over the issue of legitimacy. Even if the individual holds a viewpoint as a principle of justice, the legislature might choose to act on the basis of the political popularity of that viewpoint--and thus act on the basis of the unrestricted utilitarianism that Dworkin rejects.

The two conceptions of external/political preferences are inconsistent. Dworkin can conclude that a given political viewpoint is legitimate or not according to which conception of preferences he chooses to analyse it. When Dworkin discusses the debate that led to the decriminalization of homosexual conduct in Britain in the 1960s, he argues that those who favoured liberal reform made their argument by an an appeal to *justice* rather than 'the fact that many people want justice'.[116] But this does not answer the question of whether the *legislature* acted on the basis that reforming the law was politically popular. Dworkin does not consider this possibility. But if the legislature acted on that basis, its action would be illegitimate according to one of Dworkin's conceptions of external/political preferences. Furthermore, it is also possible that (at least some of) those who opposed reform of the law on homosexual conduct declined to appeal to the popularity of their own position for reinforcement. Dworkin also fails to consider this possibility. It seems that Dworkin chooses to characterize viewpoints as illegitimate preferences--as including an appeal to the fact of their being held--only when the substance of the view constitutes moralistic, racist, or similar prejudice.

If this is the case, then Hart was correct to conclude that Dworkin's true objection was not to the *externality* of certain preferences but to the respect-denying or liberty-denying content. And if that conclusion is correct, Dworkin would need to change his argument in order to confront racism and paternalism directly. In *TRS* Dworkin was committed to a comprehensive form of liberalism, in which no 'controversial' ideal can be used to restrain liberty and the government is forbidden to from relying on the claim 'certain forms of life are more inherently valuable than others'.[117] Although Dworkin suggests that such liberal positions are derived from the principle of equality, he offers little direct argument in favour of them or in opposition to paternalism. Instead, his strategy for opposing moral judgment is the filtered-preference theory, in which moral claims are rejected *indirectly* through arguments about process fairness, double-counting, etc. Raz claims that Dworkin offers no argument in *TRS* 'to explain why action on ideals not endorsed by most or by all is inconsistent with respect and concern'.[118] Raz notes that such a principle is 'far from obvious', and that it would imply that governments may not 'design schools, foster cultural institutions, etc., unless they thereby satisfy the personal

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[116] AMP 369.
[117] TRS 275.
[118] 'Prof. Dworkin's Theory of Rights' (1978) 131.

preferences of those they govern'.[119] In later work Dworkin does take up the arguments about liberalism and paternalism directly and in much more detail than he did in *TRS*.[120] One of the results is that Dworkin forms a view of liberalism that is more nuanced and less comprehensive than the one articulated in *TRS* and other early work; the later view accepts various kinds of benign or 'surface' paternalism.

Hart made two further objections to Dworkin's theory of rights. He pointed out that if there are no background moralistic, racist, or similar prejduices for rights to trump, then rights would cease to exist: they would wither away, like the state in Marxist theory.[121] Hart also noted that rights would not exist in a society ruled by a tyrant who does not purport to promote the common good, because it would be impossible to make a claim of right as something opposed to the general interest.[122] Dworkin conceded both points.[123]

Taking Hart's example of a ruler who banned all religious practice in a community of devout believers, Dworkin says it would be proper to call this 'insane or wicked' or to describe it as 'wholly lacking in the concern for his subjects which is the most basic requirement that political morality imposes on those who govern.'[124] But, Dworkin claims, it is incorrect to describe such a ban on religious practice as a violation of rights. Rights are trumps against the *general* welfare: 'We need rights, as a distinct element in a political theory, only when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies'.[125] Dworkin says that we do not need the idea of rights to condemn the wicked acts of a Nero or Hitler—tyrants who do not even purport to promote the general welfare.[126]

The framers of the Universal Declaration of Human Rights (UDHR), proclaimed in 1948 by the General Assembly of United Nations, took a different view. In their language the disregard of *human rights* by recent regimes had resulted in 'barborous acts which have outraged the conscience of mankind'.[127] The rights in the UDHR are proclaimed as 'a common standard for achievement for all peoples and nations'.[128] In the Reply to Critics of *TRS* Dworkin had suggested that some rights could plausibly be called human rights because arguments for them would be available against 'any collective

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[119] Ibid.
[120] See, e.g., 'Liberal Community' (first published as an article in 1985 and republished as ch. 5 of *Sovereign Virtue*).
[121] 'Between Utility and Rights', 840.
[122] Ibid.
[123] See AMP 369-71.
[124] AMP 370-71.
[125] AMP 371.
[126] AMP 370.
[127] UDHR, Preamble ('*Whereas* disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind …')
[128] UDHR, Proclamation.

justification reasonably likely to be found in political society'.[129] But when this claim is read in light of the later reply to Hart, it is clear that Dworkin would not find such arguments or the language of rights helpful against a tyrant who does not purport to act for the collective welfare.

Dworkin continues his response to Hart with an argument that seems inconsistent with both (i) the idea of universal human rights and (ii) Dworkin's own understanding of rights in the shield theory:

> [Hart's] objections ... suppose that whatever rights people have are at least in large part *timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development*, like interests in the choice of sexual partners and acts and choice of religious conviction. That is a familiar theory of what rights are and what they are for, and I said that I would not give my reasons, in this essay, for thinking that it is in the end an inadequate theory of rights.[130]

Dworkin insists that a theory of rights must be 'relative to other elements of a political theory'; that rights come in 'complex packages of political theory' which include the background justification and some description of the way rights trump that theory's conception of the collective welfare.[131]

Are these claims consistent with the shielded-interest theory?[132] It seems not. That theory assumes that people have a set of basic political rights (whether or not they are constitutionally recognised) that protect important human values. The description of rights in 'Taking Rights Seriously' (ch. 7 of *TRS*)[133] fits the idea in the above passage that rights 'protect enduring and important interests' that are 'fundamental to human development'. Perhaps Dworkin's rejection of the above description of rights turns on the claim (implicitly attributed to Hart) that rights are 'timeless' and correspond to interests 'fixed by human nature'. But in any event, it is difficult to see how the rights protected by the shielded-interest theory are *relative* to the background political theory, in the sense that the content or substantive character of the right is responsive to the tenets of the background political theory. In the filtered-preference theory, on the other hand, the content of rights shifts in response to the content of people's external utilitarian preferences. Particular rights are the upshot of excluding those preferences. There is a right to view pornography in a community that bans pornography on the ground that

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[129] TRS 365.
[130] AMP 370.
[131] AMP 370.
[132] Dworkin says that it does not follow from the argument that rights are relative to the background theory that there are 'no rights that any defensible package must contain--no rights that are not in this sense natural rights'. AMP 370. But he says the argument for such rights must proceed in a rather different manner from the argument for the right to moral independence. AMP 370.
[133] TRS 198.

viewing it is wrong or degrading--but not in a community where such paternalistic motives are not prevailing.

As we have seen in this section, Dworkin maintained the filtered-prefrence theory in the face of vigorous criticism. As noted above, Dworkin republished his 1981 defense of the filtered-preference theory in an edited collection in 1984 and again in 1985 in *A Matter of Principle*. After 1985, however, Dworkin apparently abandons the filtered-preference theory; he does not recur again to the notion of double-counting and ceases to focus on the externality of utilitarian preferences. In the next section I argue that he adopted a revised version of the filtered-preference theory that focuses on the content of certain motivations for laws and is not tied to a utilitarian framework.

IV. Rights in Dworkin's Later Work

In this section I show that in Dworkin's later work the basic elements of the shielded-interest theory remain intact. Dworkin extends this concept of rights to trump collective justifications other than utilitarianism, but for this the theory requires no structural modification. Dworkin evidently abandons the formal structure of the filtered-preference theory, including the concept of external preferences and the reliance on utilitarianism as a background justification; although he does not state this explicitly he ceases to speak of rights in these terms after 1985. In *Law's Empire*, *Sovereign Virtue* and other later work Dworkin's discussion of rights shares the concern of the filtered-preference theory with (i) racist and similar prejudices, and (ii) paternalistic judgments. But in the later work rights *directly* trump laws motivated by these grounds no matter what the background political theory, and without any reliance on the process-oriented arguments the filtered-preference theory. I call Dworkin's revised approach the excluded-grounds theory of rights.

1. Resource Egalitarianism

In *TRS*, as we have seen, Dworkin addressed questions about the normative theory of law in terms that assumed utilitarianism as a background justification. His search for a theory of rights was conducted, as Hart put it, in 'the shadow of utilitarianism'.[134] Although Dworkin argued that the principle of equal concern and respect was the source both of collective goals and rights that serve as limitations on those goals,[135] he observed in the Introduction to *TRS* that 'the promise of unity in political theory' was incomplete in that book and needed to be defended elsewhere.[136] 'In particular,' Dworkin wrote, in a passage that seems to reflect the growing influence of Rawls's critique of utilitarianism in *A Theory of Justice* (1972), 'it must be shown how the same conception of equal concern

[134] 'Between Utility and Rights', ___.
[135] TRS xv, 368.
[136] TRS xv.

that justifies the trade-offs characteristic of economic collective goals also justifies exemptions, in the form of economic rights, for those who suffer most from those trade-offs'.[137] This remark foretold—in a general sense—Dworkin's development of the theory of equality of resources, which he also calls resource egalitarianism.

The theory of resource egalitarianism is complex, but an understanding of its basic elements—which I will outline here—is needed in order to grasp developments in Dworkin's general theory of law and theory of rights. The theory's features and Dworkin's argument for it can only be crudely summarized here. Dworkin posits a community of newly arrived immigrants on a desert island as a model for considering fairness in distribution material goods. Any initial distribution must pass the 'envy test', such that no person will envy the resources distributed to anyone else.[138] To meet that test, Dworkin proposes an auction of the island's raw materials in which everyone is given an equal share of clamshells as currency for bidding and purchasing resources.[139] After the auction, subsequent transfers of resources take place, in general, by means of trading under free market conditions. The auction and free market, in principle, allow people to obtain resources and enjoy goods in proportion to the value they place upon them;[140] however, they do not ultimately achieve the goal of treating people equally. One reason is that people have talents of varying type and degree that result in great disparities in earning power, which allow some people to amass much more resource wealth than others. These disparities in talent and earning power can arise from different factors, but many of these are the result of luck or nature (e.g. injury or disability) rather than any wise or unwise choice. Dworkin's solution to this problem is to apply the envy test to possession of talent; thus, no one should receive greater resources because of his innate talent or fewer resources because of a handicap.[141] Dworkin proposes a system of taxation to redistribute the excess wealth produced by innate talent and toward those with handicaps or other similar disadvantages.[142] The rates for taxation and redistribution are selected according to a hypothetical market for insurance to cover unemployment and underemployment.[143] Similar hypothetical insurance markets are employed for purposes of redistribution required by other sources of unfairness similar to unequal talent.

The purpose of Dworkin's model is to display the principles of fairness that should apply to our world, even though the existing distribution of resources has not resulted and never will result from any such initial auction.[144] Dworkin calls the desert island model the 'ideal ideal world' and acknowledges we can never reach it.[145] But he thinks we

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[137] TRS xv.
[138] Sovereign Virtue [hereinafter SV] 67-68.
[139] SV 68.
[140] SV 68-70.
[141] SV 90.
[142] SV 91.
[143] SV 103-109
[144] SV 163.
[145] SV 172.

ought to move from our 'real real world' to an 'ideal real world' in which equality of resources is achieved so far as possible.[146] The principles by which the transition is to be achieved add another layer of complexity[147] that need not detain us here.

2. Resource Egalitarianism and Rights

Dworkin addresses the implications of resource egalitarianism for the concepts of liberty and rights in 'What is Liberty? Part III' (1987), republished as the chapter 'The Place of Liberty' in Sovereign Virtue. He describes the argument in 'The Place of Liberty' (which runs over 60 pages) as 'complex' and 'dense'; [148] my summary will focus only on certain main themes and omit many details. The scope of the argument in 'The Place of Liberty' and its precise relation to Dworkin's earlier writings on liberty and rights are unclear. In a footnote there is a familiar-sounding disclaimer: 'I make no effort here to discover how far my argument qualifies or expands my discussion of liberty in my book *Taking Rights Seriously*'.[149] In the introduction to the essay, he states that its sole aim is to defend the theory of equality of resources against the claim that it infringes liberty.[150] Despite this limited aim, the thesis defended in the essay is very broad. Dworkin concludes that 'liberty and equality cannot conflict, because equality cannot even be defined except by assuming liberty in the first place'.[151]

That conclusion reflects the basic strategy of the argument, which starts from the idea of the initial auction of resources and proceeds as follows. In order for people to know how to value items for purchase in the auction, Dworkin argues, they need to able to predict whether and how they will be permitted to use their resources.[152] If, for example, someone wants to use clay to make a politically satirical sculpture, he will value clay less if the government later bans political satire.[153] Thus, the auction should proceed under certain assumptions about what liberties and constraints the community will have, and those conditions should endure through time.[154] Dworkin argues that 'an ideal distribution [of resources] is possible only when people are legally free to act as they wish except so far as constraints on their freedom are necessary to protect security of person and property, or to correct certain imperfection in markets (or other auction-like

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[146] SV 172-75.
[147] See SV 172-80.
[148] SV 121, 123.
[149] SV 134 n. 9. Following the quoted sentence, Dworkin cites specifically to pages 240-58 in TRS, which comprise chapter 10, 'Liberty and Moralism', which primarily addresses the famous Hart-Devlin debate. The text of the note as a whole, however, suggests that he is drawing a distinction between the theory of rights as trumps in general as presented in *TRS* and *A Matter of Principle* and the new approach in 'The Place of Liberty'.
[150] SV, 120.
[151] SV, 382.
[152] SV, 156.
[153] SV, 152.
[154] SV, 143-47, 149.

distributive mechanisms)'.[155] This ideal is reflected in a 'constraint/liberty baseline'; Dworkin assumes that 'any adequate baseline would have legal constraints forbidding assault, theft, deliberate damage to property, and trespass, of the sort that are common to the criminal and civil laws of all developed legal systems.'[156]

Dworkin develops a complex argument showing what kinds of liberties must be assumed in order for the auction of resources to respect equality, which can only be summarized here. The argument engages principles that operate similarly to the two theories rights as trumps in his early work. The principle of *abstraction* provides that no constraints on liberty can be justified on grounds of 'personal morality' or 'moral virtue'.[157] The principle of *independence* precludes constraints based on racial prejudice or similar feelings of contempt. Like the filtered-preference theory, the principle of independence allows for race to be a positive factor in educational admissions programs; it not only allows but encourages laws that are designed to eliminate the disadvantages imposed on minority groups by systematic prejudice.[158] Although these principles share the concerns of the filtered-preference theory regarding racist and moralistic judgment and resemble the rights to moral and political independence Dworkin proposed in 1981 (see section III), they do not rely on notions of externality or double-counting.

The principle of *authenticity* reproduces the key features of the shielded-interest theory: it recognizes that there are certain 'morally important'[159] liberties related to the authentic development of one's beliefs and personality, such as freedom of expression, religion, and association.[160] These liberties are more important than others entailed by the principle of abstraction; thus they are given stronger protection against the demands of security.[161] The principle of authenticity 'would in principle allow no constraint, either before the auction or after it, on opportunities to form, to reflect on, or to advocate convictions, attachments, or preferences'.[162] But the principle must yield to the needs of security on 'occasions of dramatic emergency'.[163] Free speech, for example, must be protected 'except in the case of undeniable and overhanging danger'.[164] These claims about the strength of the principle of authenticity resemble earlier remarks about the importance of fundamental rights in the shielded-interest theory, the exclusion of balancing, and the need to show a substantial risk of great harm to limit the freedom of speech; but just as the shielded-interest theory turned out to be consistent with standard balancing tests in U.S. constitutional law and to allow reasonable restriction on the time,

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[155] SV 145, 152-53.
[156] SV 149.
[157] SV, 155
[158] SV, 161-62
[159] SV, 123.
[160] SV, 158-61.
[161] SV, 123, 127, 158-61, 181.
[162] SV, 160
[163] SV, 160.
[164] SV, 160.

place, manner of speech, the principle of authenticity presumably allows such limitations.

3. Rights in *Law's Empire*

Law's Empire does not include a sustained discussion of rights at an abstract level, but at various points in the book Dworkin relies upon both the shielded-interest theory of rights and the excluded-grounds theory that I sketched at the beginning of this section. The book is famous for its theory of law as interpretation, which has been discussed and analysed at length in the debates about the nature of law. An aspect of the book that has received less comment is its reliance upon the theory of resource egalitarianism, which Dworkin originally published in the two 1981 articles but which did not appear in book form until *Sovereign Virtue* (2000).

The well-known critique of positivism in *Law's Empire* resembles that of *TRS* but relies on a different vocabulary and conceptual apparatus. Perhaps the most important conceptual development in *Law's Empire* is Dworkin's theory of law as an interpretative practice. Dworkin argues that that all legal cases (not just hard cases) involve a search for the best interpretation of past legal decisions, which include cases, statutes, constitutional provisions, and the political structure itself.[165] All these constitute the 'pre-interpretative' materials; law itself is interpretation of those materials. Legal claims and decisions are 'interpretative judgments' in an 'unfolding political narrative'.[166] This interpretative process has two dimensions, fit and justification. Any proposed interpretation must pass a threshold requirement of fit or consistency with past decisions.[167] From the set of eligible interpretations, a judge relies on his convictions about political morality, justice and fairness to make the law 'the best it can be'.[168] The dimension of fit remains relevant at the stage of justification: the degree to which a proposed interpretation fits the past materials counts in its favor, and the judge is throughout led by the goal of producing a decision that, ideally, contributes to the overall coherence of the past decisions.[169] When this interpretative process is carried out, we have 'law as integrity'.[170]

This summary is inadequate for engaging fully with Dworkin's arguments about the nature of law, but it raises an important issue related to the theory of rights. Judges, Dworkin claims, are to seek the best interpretation of past decisions and to make law the 'best it can be'. (This goal corresponds at least in some respects to the 'right answer' of *TRS*.) But what are the ends by which this process of interpretation is guided? Does law serve any particular goals or purposes of a society such that a particular interpretation can be selected as the best instantiation of those goals or purposes? Throughout *TRS*

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[165] Law's Empire [hereinafter LE], 258, 265-66.
[166] LE, 225.
[167] LE, 256.
[168] LE, 258.
[169] LE, 256.
[170] LE, 225-26.

Dworkin had assumed that the background political justification was utilitarianism and had based his arguments about individual rights on that assumption; but in *Law's Empire* he acknowledges other types of political justifications.

For Dworkin the bedrock principle for political justification remains equality of concern and respect, and a political theory is legitimate to the extent that it is based on that principle.[171] He identifies three plausible 'conceptions of equality': (i) a libertarian conception based on protecting what individuals have acquired; (ii) welfare-based conceptions, which include utilitarianism; and (iii) theories that focus on outcomes defined not in terms of welfare but in terms of 'goods, opportunities, or other resources'.[172] Dworkin's theory of equality of resources is included in the third category, and his discussion of the various types of political justification can be read as a précis of the first two 'What is Equality?' essays.[173] Resource egalitarianism emerges from the discussion as the superior background justification. Dworkin states that under resource egalitarianism people have rights that (i) protect 'fundamental interests', and (ii) secure 'each person's independence from other people's prejudices and dislikes.'[174] These are, in essence, the shielded-interest theory and the excluded-grounds theory.

This discussion of background political justification is the crucial prelude to Dworkin's analysis of constitutional interpretation. This analysis centers on the same two cases that Dworkin relied upon ten years earlier in developing the filter theory of rights: *Brown v. Board of Education*, which condemned racial segregation in education, and *California v. Bakke*, which upheld affirmative action admissions programs. Dworkin continues to call rights trumps against collective justifications or strategies, including the three 'conceptions of equality' in the last paragraph.[175]

After considering various theories to explain U.S. law in the area of racial equality, Dworkin settles on what he calls the 'banned sources' theory as the best justification for the law. Dworkin concludes that racial segregation is unconstitutional because it is based on background racial prejudice[176] and that affirmative action in admissions is constitutional because it is not based on such prejudice and does not work to the disadvantage of minorities.[177] The 'banned sources' theory is basically equivalent to what I called the excluded-grounds theory above. Whereas the filtered-preference theory was directed against utilitarianism, the banned sources theory applies to various types of collective justifications. Dworkin writes, 'Most conceptions of equality, including utilitarianism and resource egalitarianism, make the public interest, and therefore proper

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[171] LE, ___.
[172] LE 297.
[173] LE 297-98.
[174] LE 307.
[175] LE 381. 'We distinguished between the overall, collective strategies the government uses to achieve the general interest, as a matter of policy, and the individual rights it recognizes, as a matter of principle, as trumps over these collective strategies.'
[176] LE 388.
[177] LE 396.

policy, sensitive to people's tastes, preferences, and choices.'[178] He argues that certain decisions of policy, such as whether to use public funds on a sports stadium or opera house, should be based on how preferences are distributed in the community.[179] But the banned sources theory rejects certain motivations for laws. Dworkin argues that 'preferences that are rooted in some sort of prejudice' against traditionally disadvantaged groups, including racial and religious minorities and homosexuals, cannot be used to justify policies that work to the disadvantage of those groups.[180] This claim replicates the filter theory's exclusion of racist and moralistic motivations; but it excludes mention of altruistic preferences or any reliance on the notion of double-counting. In *Law's Empire*, the focus is on the *content* of the excluded preferences not on their *externality*.

4. Political and Human Rights in *Is Democracy Possible Here?*

Dworkin's most extended discussion of rights at an abstract level since the 1987 article published as 'The Place of Liberty' in *Sovereign Virtue* is in his recent book *Is Democracy Possible Here*? (2006). Dworkin adds to his theory of rights in two dimensions. He propounds a theory of human dignity as the normative foundation for rights, which is explained in more detail and depth than the principle of equal concern and respect that served as the basis for Dworkin's theory of rights in previous work. And Dworkin for the first time unambiguously embraces a concept of human rights.

Dworkin sets forth two 'axiomatic' principles of human dignity: the principle of intrinsic value and the principle of personal responsibility. Every human life has 'intrinsic potential value':[181] a life may succeed or fail, and this is a matter for objective, not subjective judgment.[182] It is important for every life to go well; when it does not this is a thing to regret, like injustice.[183] The second principle holds that each person 'has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him'.[184] A person may choose to defer to the judgment or authority of others, but he must not allow others to impose values on him without his endorsement.[185]

The two principles of human dignity form the normative foundation for two types of rights: political rights and human rights. Dworkin describes political rights in much the same way as the shielded-interest theory of his early work. Although most legitimate state action involves trade-offs that benefit some and burden others in order to increase overall general welfare, some individual interests are so important that it would be wrong

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[178] LE 384.
[179] LE 384.
[180] LE 384.
[181] Is Democracy Possible Here? [hereinafter IDPH] 9.
[182] IDPH 9.
[183] IDPH 9.
[184] IDPH 10.
[185] IDPH 10.

to sacrifice them.[186] Political rights protect these 'particularly important interests' and the responsibility people have 'to identify and create value in their own lives',[187] functioning as trumps against 'the kind of trade-off argument that normally justifies political action'.[188] Government may not abridge the right to free speech, for example, even if that would improve the overall welfare of the community.[189] The concept of political rights also holds that 'people have a political right not to suffer discrimination because their race has been despised'.[190] Although Dworkin does not elaborate, it is safe to assume that this claim is shorthand for excluding other types of motivations for laws addressed in the discussion of rights in *Sovereign Virtue* and *Law's Empire*. Thus the concept of political rights seems to embrace both the shielded-interest and the excluded-grounds theories.

Human rights, according to Dworkin, are 'special and very important kinds of political rights'.[191] They also derive from the two principles of human dignity and are characterised by their seriousness and weight: 'We use the concept of human rights to describe the most basic and universal of all rights; there is no more serious complaint against a government than that it has violated human rights'.[192] Dworkin proposes that the fundamental human right--from which other human rights derive--is the right to be treated with 'an attitude that expresses the understanding that each person is a human being whose dignity matters'.[193] It is not the degree of importance of the *interest protected* that distinguishes political from human rights; both protect the same interests rooted in human dignity.[194] And Dworkin claims we should not look to 'grades of damage that governments inflict' to determine whether human rights have been violated.[195] Rather, the distinction is to be found in the nature of the opposition to individual interests: the test Dworkin proposes is whether state action that is contrary to human dignity is in 'good faith'. The violation of *political* rights results when a state erroneously--but in good faith--favours the general welfare over an individual dignity interest. Violations of *human* rights, in contrast, arise from 'acts that show only contempt for or indifference to human dignity'.[196]

'Good faith' as a term of art in U.S. and British law typically refers to a subjective state of mind. But Dworkin gives the term an objective aspect in describing what he calls *baseline* human rights: 'These rights forbid acts that could not be justified by any intelligible interpretation of the ideas that people's lives are of equal intrinsic value and

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[186] IDPH 31.
[187] IDPH 32.
[188] IDPH 31.
[189] IDPH 30.
[190] IDPH 31.
[191] IDPH 33.
[192] IDPH 28.
[193] IDPH 35.
[194] IDPH 34-35.
[195] IDHP 35.
[196] IDPH 35.

that they have a personal responsibility for their own lives'.[197] Any act of genocide, for example, would violate human rights.[198] Other acts that violate baseline human rights include restricting religious exercise to one official religion, punishing heresy and blasphemy, and 'deny[ing] in principle the right of free speech'; all these are wholesale denials of the principle of personal responsibility.[199] The concept of human rights also imposes a requirement of consistency that 'forbids any government to act toward anyone in a way that contradicts *its own understanding* of [human dignity]--the understanding embedded in its own laws and practices--because that contradiction would just as dramatically deny respect for the humanity of its victims'.[200]

This theory of human rights suggests that Dworkin now accepts what he denied in his 1981 reply to Hart: that it is appropriate to assert rights against tyrants who do not purport to act for the general welfare.[201] Though he then rejected the idea of 'timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development',[202] Dworkin now asserts that human rights are 'timeless'[203] and that they are 'the rights that all human being have just because they are human'.[204] Still we may question whether the test of good faith truly distinguishes human from political rights. Any violation of a human right would be also a violation of a political right. Dworkin identifies 'contempt and indifference' to human dignity as the state of mind that results in human rights violations. But this is very close to--if not essentially the same as--attitudes or motivations already addressed by the concept of political rights.[205] The excluded-grounds aspect of political rights protects people from discrimination on grounds such as race and religion; state action motivated by these attitudes is a violation of political rights.

At several points Dworkin discusses another property of human rights that offers a ground for distinction from political rights. He holds that a nations's violation of human rights may justify invasion of that nation or other serious responses such as trade sanctions.[206] On occasion Dworkin claims that a certain act would not justify invasion in

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[197] IDPH 36.

[198] 'It would not excuse a nation from genocide if its leaders believed that it was good for the people slaughtered to die so that they could be converted to the true faith in heaven. No one who understood the principle of people being in charge of their own lives could think that that policy respected that principle.' IDPH 35.

[199] IDPH 38.

[200] IDPH 36 (italics added).

[201] Cf. AMP 369-71. See notes 130-33 and accompanying text.

[202] AMP 370.

[203] 'We cannot claim that human rights were made obsolete by September 11 because we believe such rights to be timeless'. IDHP 28.

[204] IDHP 29.

[205] IDHP 32.

[206] See IDHP 33-34 ('Violations of even important political rights do not ordinarily justify other nations' invading the offending nation or deliberately damaging its economy. Writers are now in jail in Germany, for example, for charging that the Jews largely invented the Holocaust. Americans might criticize

arguing that it is not a human rights violation.[207] There are a number of problems with this position. With regard to the internal coherence of Dworkin's theory, this test does not seem to fit with what he calls the consistency requirement. Surely the standards for invading a country or imposing trade sanctions must be general and objective and not depend on whether that country is living up to *its own* ideals regarding human dignity. Moreover, under the 1945 United Nations Treaty war is forbidden except in cases of national self-defense and threats to international peace and security. Some nations have argued that humanitarian intervention may be legal even when (as Dworkin seems to be contemplating) the threat against persons is internal to a nation, but most international law scholars reject this position and it seems contravene the express wording of the U.N. Treaty.

Dworkin could respond that international law is in this respect unjust and that it may be morally justified to invade a country in order to end human rights violations. Even so, the legality of humanitarian intervention would have a bearing on such a moral justification and at least needs to be discussed in this context, especially considering that the very term human rights gained much of its currency in international political discourse from the United Nations. (The U.N.'s Universal Declaration of Human Rights, precursor to many later statements of human rights in treaties and constitutions, was proclaimed in 1948, three years after the original U.N. Treaty). Moreover, if humanitarian intervention is morally justified, the case for invasion would not depend on an assessment of whether a nation is acting in good faith (whether judged objectively or subjectively)--the test that Dworkin proposed for judging human rights violations--but on the scale and scope of human rights violations. We would have to consider precisely what Dworkin rejected as a test: the 'grades of damage that governments inflict'.[208] We must conclude that whether or not the violation of a right justifies invasion is not a proper criterion for deciding whether to class it as a human right.

A final problem with Dworkin's theory of human rights is that to the extent that the allegation of the violation of a human right connotes a wrong that is graver than the violation of a political right, this seems to be an aspect of popular speech rather than legal or theoretical political discourse. In many nations--and throughout Europe--the concept of human rights is largely continuous with political and constitutional rights.

Germany for infringing in that way what we take to be a very important political right of free speech, but no one would think that this give the United States grounds for invading Germany or for imposing trade sanctions against it. When other governements violate what we take to be not only political but human rights, however--when they jail and torture their critics or systematically hunt out and kill members of a minority religion or race--we at least contemplate the possiblity of grave sanctions to try to stop these crimes.').

[207]When discussing capital punishment in the United States Dworkin argues that the practice does not constitute violation of a human right because there are good faith (though flawed) arguments to support it; he adds that 'it would be preposterous for other nations to invade Texas or Florida to stop the practice, even if they were powerful enough to succeed'. IDHP 40.

[208] IDHP 35.

Various provisions of the European Convention of Human Rights are routinely applied in legal decisions, not only in the European Court of Human Rights in Strasbourg but in the courts of member states as well. Many nations recognize those rights--and the Strasbourg court's interpretation of them--as part of their domestic jurisprudence of constitutional rights. Under the United Kingdom's Human Rights Act 1998 some provisions of the ECHR are treated as part of domestic law; as such they form legal grounds for reviewing administrative decisions and executive action and are principles used to interpret Parliamentary legislation.