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The Rights and Wrongs of Taking Rights Seriously

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BOOK REVIEW

TAKING RIGHTS SERIOUSLY, by Ronald M. Dworkin. Cambridge: Harvard University Press, 1977. Pp. 293. $12.00.

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In his long awaited book, *Taking Rights Seriously*, Ronald Dworkin offers a collection of some of his most interesting and well known essays on the theory of law. Certain familiar pieces have been revised and others retitled; only two of the pieces have not previously appeared in print. Dworkin's purpose was to blend the essays as "chapters" in a cohesive work, and his efforts were surprisingly successful. Nevertheless, the pieces may be read with profit independently and in any order since the first essays generally do not anticipate arguments developed later in the book.

The book's main arguments, often subtle and complex, have been elegantly crafted and patiently, yet efficiently, developed; the issues raised are sharply focused. Dworkin is skilled at highlighting what is at stake in rendering alternative accounts of legal and moral experience. *Taking Rights Seriously* is a marvelously imaginative and vigorously argued book.

Taken as a whole the essays purport to set out a theory of law. According to Dworkin, an adequate theory of law should contain both analytic and normative elements. The analytic or conceptual element sets forth the minimum conditions which must be satisfied for law to exist; the normative element describes what "the law ought to be, and how familiar legal institutions ought to behave."[1]

Competing theories of law can be classified by the answers each provides to these conceptual and normative questions of law and by the relationship that each theory asserts exists between the two components

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1. R. DWORKIN, TAKING RIGHTS SERIOUSLY vii (1977).

of the theory. Accordingly, one might distinguish among at least four general theories of law: (1) Legal Positivism, (2) Natural Law Theory, (3) Legal Realism, and (4) the Rights Thesis. Legal positivists claim that there is no necessary connection between the conceptual and normative elements of the theory. Above all else, positivists have insisted on distinguishing between law as it is and as it ought to be.[2] In contrast, natural law theorists argue that more than a contingent relationship exists between morality and the truth conditions of statements of law. Substantive natural law theorists assert that propositions of law cannot be true if they conflict with standards of critical morality. Procedural natural law theorists emphasize the relationship between morality and standards of law making rather than the substantive moral requirements of particular legal rules or judicial decisions.[3] Legal realists are skeptical about the normative force of rules generally, and therefore they neither assert nor deny the existence of a conceptual relationship between standards of law and morality.[4] In proposing the Rights Thesis, Dworkin intends to claim territory somewhere between positivism and natural law theory. He rejects both the positivists' tenet that there is no necessary connection between law and morality as well as the claim that the morality that is part of the law is rooted in the moral ontology of natural law doctrine.

Dworkin identifies positivism with utilitarian moral theory. Although the positivists of the nineteenth century were also utilitarians, one need not be both a utilitarian and a positivist. According to Dworkin, the most forceful version of positivist legal theory is developed in H.L.A. Hart's *Concept of Law*[5] and in other of his essays, and it is Hart's version of positivism that Dworkin criticizes. With respect to the normative aspect of the theory Dworkin's target turns out to be a modern formulation of Bentham's utilitarianism influenced by neoclassical welfare economics. In this essay, I will examine critically Dworkin's arguments against both positivist jurisprudence and utilitarian normative theory. In neither case are his arguments ultimately convincing.

I

HART'S JURISPRUDENCE

Like other positivists before him (especially Bentham, Austin, and Kelsen), Hart insists on the structural similarity but logical separability

2. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

3. L. FULLER, THE MORALITY OF LAW (rev. ed. 1977).

4. By virtue of their general skepticism about the binding nature of rules, certain legal realists might be said to assert that a relationship does exist between legal and moral rules in that both function as guides to action for those who consult them.

5. H.L.A. HART, THE CONCEPT OF LAW (1961).

of law and morality. Unlike Austin, against whom a good many arguments in his book are directed, Hart finds the "key to the science of jurisprudence," not in the notion of the orders of sovereigns, but in the concept of rules and in the important distinctions that he develops among different kinds of rules.

Positivism is motivated in part by two overriding concerns: (1) the search for a standard by which to distinguish genuine from spurious pronouncements of law; and (2) the desire to explain the normative force of law without attributing its normative authority either to an alleged substantive moral content of valid law or to the procedural morality of lawmaking.

Austin believed that orders backed by threats of a sovereign properly so called constituted the range of valid law. A sovereign properly so called is both internally supreme and externally independent. He has secured the habit of obedience from his political inferiors and is not himself in the habit of obeying anyone. That is, he has no political superiors. For Austin moral law is the order of a Deity; thus, law and morality are structurally similar but logically distinct. The obligatory nature of law, for Austin, depends on the competence or authority of the sovereign to make law. That, in turn, is neither a function of his moral right to do so nor of the substantive morality of his pronouncements. Rather, the sovereign's authority is measured by the obedience accorded him by virtue of the threats of penalty his orders convey.

Hart's positivism is widely viewed as an advance over Austin's because Hart's notion of a rule, and the distinctions he draws among rules, better explain the normative force of law and provide a more accurate account of the standards by which we actually identify the law of a given community. The notion of a rule (in Hart's sense) as central to the concept of law advances our understanding of the binding nature of law because rules are both descriptive and normative. The descriptive element captures the social component: the convergence of behavior that exists when we claim that a group of individuals do something *as a rule*. The normative or prescriptive component provides members of the community with reasons for acting and with a basis for criticism should the conduct of some diverge from the norm. Rules differ from the habits of obedience on which Austin's jurisprudence rests because only the former can provide reasons for action and grounds for criticism.[6]

In Hart's view, a rule is authoritative or binding within a community when the majority of its members view the rule from an internal

6. This is not to say that threats of sanction which help assure compliance with the sovereign's orders cannot provide individuals with reasons for acting. Still, the mere fact that the bulk of the populace complies with a rule as a matter of habit does not, in itself, provide such a reason.

point of view.[7] For rules to be perceived from an internal point of view, it is not enough that individuals act in the manner prescribed by the rules because behavior that conforms to the dictates of a rule need not be rule-governed. Behavior is rule-governed when members of the community adopt a certain critical attitude toward the rules. The presence of such an attitude is in turn expressed in certain social behavior—usually by members of the community citing the rule as among the reasons for their actions or as among the grounds on which they justify criticizing divergent behavior. Because it restricts the realm of obligations to those imposed by rules to which as a matter of *actual practice* the community has adopted an internal point of view, Hart's account of the obligatory nature of law is a kind of conventionalism. This is a feature of Hart's position to which we will have occasion to return in connection with the discussion of his account of the obligation of judges to enforce rights under the law.

In every mature legal system, Hart argues, we can distinguish rules that impose obligations, such as penal statutes, from other rules that confer power, such as those governing the making of wills. Rules of the first sort, *primary rules*, restrict the scope of personal freedom; because they confer power on private or public persons, rules of the other sort, *secondary rules*, expand rather than contract the scope of political liberty.

The signature of a legal system is the existence of a rule of recognition. The rule of recognition, though a secondary rule in Hart's sense, does *not* confer power on anyone.[8] Instead, it is a benchmark, the standard by which the validity of rules inferior to it is to be determined. The standard of validity it asserts may be simple—"The law is whatever is written on the rock by the brook"—or complex, as are constitutions in political democracies. For Hart, law exists in the union of primary and secondary rules; in particular, law exists when there are specific rules of obligation and a rule of recognition by which officials can determine the validity of rules subordinate to it.

We might summarize the conceptual aspect of Hart's theory of law by its adherence to the following basic tenets: (1) the law is a species of rules; (2) the authority of rules is a function of their validation under a

7. Hart actually proposes two tests for determining the authority of rules. According to the second test, a rule is authoritative if it is valid under a "higher" rule of recognition. For convenience, I will refer to this second test as the standard of systematic authority, in contrast with the standard of internal acceptance that I am now discussing in the text.

8. Hart's distinction between primary and secondary rules is ambiguous. At times he draws the distinction in terms of liberty-limiting (primary) and liberty-granting (secondary) rules. At other times he distinguishes between primary rules and rules about primary rules. At still other times he appears to distinguish between primary rules of obligation and rules of authoritative determination or between primary rules and all other legal rules. The distinction that Hart seeks is, I believe, best captured by either of the last two alternatives.

rule of recognition; (3) rules so identified, together with the rule of recognition, exhaust the law of any community; (4) we speak of legal obligation and right only with regard to such rules; and (5) because the authority of legal rules is a function of their validation by a rule of recognition, it is not a function of their *moral* authority or weight.

Hart does not explicitly propose a theory of adjudication—that is, an account of how judges do or should resolve disputes. Nevertheless, in his criticisms of other theories of adjudication, in particular those advanced by legal realists and mechanical jurisprudense, he suggests such a theory.[9] Indeed, one could argue that a particular theory is forced upon him by his commitment both to the model of rules and to an exhaustive test for identifying authoritative sources of law. What interests us here is the feature of the theory that can be characterized as judicial discretion: the authority (but not the unrestrained license) of judges to apply extralegal standards to resolve legal disputes in hard cases.[10]

Rules are framed in general terms and cases will naturally arise in which the extension of a rule is unsettled. In some of these cases an argument that the rule applies to the facts may seem natural and appropriate. In other cases, uncertainty over the extension of the general terms may press the court to make a controversial judgment on the applicability of the rule to the facts of the case at bar. Because the very applicability of the rule is at stake, the judge cannot find solace in his obligation to apply the law to the facts. He must go beyond the law (the rules) to settle the question of the applicability of the rules to the case at hand.

In other cases, discretion will be required, not because the extension of the rule is unsettled, but because two conflicting rules seem equally well suited to the facts. In yet other cases, no settled rule or line of cases seems to dictate a particular resolution. We might say that such cases involve gaps in the law, which must be filled by judges exercising, through their discretion, a legislative authority.

Though, as I shall argue later, gaps in the law are not, strictly speaking, entailed by commitment to a rule of recognition, they are a natural consequence of most such rules. This is because a rule of recognition defines all and only those standards binding on judges. Though different rules of recognition provide richer or poorer source materials, novel cases will arise in which the available sources binding on judges are inadequate to the task. In resolving such disputes, the judge must have the authority to apply extra legal standards in a reasoned, defensible manner. Hence, implicit in Hart's positivism appears

9. H.L.A. HART, *supra* note 5, Ch. 7.

10. *See* Part III *infra*, for a discussion of judicial discretion.

to be a theory of adjudication that combines judicial obligation to enforce preexisting rights in easier cases with judicial discretion to create new rights in more difficult cases.

II

DWORKIN ON HART'S JURISPRUDENCE

In the chapter entitled "Model of Rules I," Dworkin attempts to undermine Hart's contention that the law of a community is a subset of its rules. Dworkin rightly notes that "hard cases," including those in which gaps in the law exist, are often decided by appealing to standards other than rules—in particular by appealing to principles and policies. For Dworkin, the distinction between rules on the one hand and policies and principles on the other is a logical or categorical one. Rules apply to the facts of a case in an all or nothing fashion; principles and policies do not. Rules, where applicable, *compel* decisions; principles and policies merely provide *reasons* of certain weight for deciding a case in one way rather than another. Furthermore, though an argument based on a principle may be overcome in a particular case, it may remain a valid principle of law. Perhaps we would view it as a less weighty principle than we did before, but we would not be prepared on those grounds alone to argue against its authority. If an argument based on a suitable rule is overcome, however, our belief that the rule was valid must have been erroneous. Or, at the very least, we must be prepared to qualify the rule.

Dworkin discusses only two actual cases in which the result was controlled *not* by settled rule but by broader principles. In one case, *Riggs v. Palmer*,[11] the Court held that the right of a beneficiary to inherit under a valid will did not apply to instances in which the beneficiary murdered the deceased in order to inherit. The controlling standard in the case was the moral principle that a person ought not profit from his own wrongdoing—itself an element of an even more general moral prohibition against unjust enrichment.

At issue in *Henningsen v. Bloomfield Motors*,[12] the other case Dworkin uses to support his claim, was the extent to which an automobile manufacturer might limit by contract its liability for defects in its product. Relying on a set of conflicting principles—including an alleged special obligation of automobile manufacturers to consumers, the right to contract, and the general reluctance of courts to enforce unconscionable contracts—the court held that the manufacturer could not limit its liability for potential defects in its product.

For Dworkin, *Riggs* and *Henningsen* are instances of a wider class

11. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).
12. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

of cases that support the contention that policies and principles, as well as rules of law, figure in judicial decisionmaking. Much of his argument turns on Dworkin's account of the phenomenology of judicial decisionmaking.[13] Dworkin notes that in appealing to principles and policies as the bases of their decisions judges do not perceive themselves as exercising a special authority to extend beyond the law to resolve the case. There is no compelling reason, therefore, for viewing such standards as extralegal. At least, such standards must be presumed to be legally binding until they are otherwise discredited. Dworkin concludes that in adjudicating hard as well as simple cases judges do not exercise discretion. Instead, they typically consult standards other than rules which, as judged by their own conceptions of what they do, are legally binding on them.

After establishing that principles and policies provide binding standards of law and distinguishing principles from rules, Dworkin argues, in "Model of Rules I," that no single rule of recognition is capable of capturing all authoritative standards of law. In large part this is because no single rule is capable of assigning appropriate weights to various principles. The assignment of appropriate weights is necessary if, at any given moment, the rule of recognition is to be capable of identifying a community's existing legal standards.[14] Dworkin argues further that because the principles and policies that figure in judicial decisioumaking are standards of morality—what Dworkin has come to call standards of "political morality"—the conceptual distinction the positivist draws between law and morality simply cannot be sustained. Apparently everything the positivist holds dear must be abandoned.

Dworkin is advancing four distinct but related arguments. By arguing that policies and principles are authoritative standards of judicial decisionmaking, he intends to establish that: (1) the model of rules—the contention that the law of a community may be identified with a subset of its rules—is inadequate; (2) it is impossible to formulate a single rule of recognition for identifying all and only authoritative standards of law; (3) the distinction positivists draw between law and morality—the logical separability thesis—cannot be sustained; and (4) judges do not exercise judicial discretion in resolving hard cases.

A defender of Hart's version of positivism might attempt to rebut Dworkin's conclusions in several ways. The quick response is simply to deny that principles and policies are authoritative because they are not rules. While it is true that judges appeal to principles and policies to resolve difficult cases, in doing so they exercise discretion. This answer, however, simply begs the question in an uninteresting and unilluminat-

13. R. DWORKIN, *supra* note 1, Ch. 4.
14. *Id.* at 39-45.

ing way by presupposing the model of rules. Instead, our imagined positivist might agree with Dworkin that including principles and policies as authoritative legal standards binding on judges makes it impossible to identify authoritative standards under a rule of recognition. The positivist could then argue that principles and policies cannot be legal standards for the very reason that only those standards that are identifiable as valid under a rule of recognition may be law. This answer must also be rejected because it presupposes that in every legal system there will be a rule of recognition by which all and only legal standards can be identified.

Alternatively, the positivist might simply deny the truth of the phenomenological claims on which the argument rests. He might challenge the empirical component of the argument—in particular, Dworkin's contention that his is an account of how judges typically view their role. Perhaps more judges than Dworkin would have us believe acknowledge their legislative functions.

To my knowledge little research on this aspect of the argument has been done; and difficult research it would be. Even if judges felt they were forced on occasion to exercise legislative authority, it would be hard to glean such acknowledgment from their opinions—especially since the traditional conception of the judicial role makes this sort of candor inappropriate. In short, arguments based on the phenomenology of decisionmaking are inconclusive; judicial perceptions are questionable data from which to develop a theory of law and to criticize alternative proposals. This point is as telling against Dworkin's own theory as it is against those responses sympathetic to positivism examined here.

In one way or another these responses seek to avoid Dworkin's conclusions by denying the truth of the premises from which he draws them. In contrast, the positivist might accept Dworkin's argument that principles figure in judicial decisions but deny the conclusions he draws from it. That is, one sympathetic both to Dworkin's argument and to Hart's version of positivism could argue as follows: First, he might acknowledge that principles and policies can be binding on judges. He might point out, however, that Hart's notion of a rule need not be as narrow as Dworkin takes it to be. Certainly Hart meant to include as law standards of behavior that do not fit neatly the interpretation of a rule that Dworkin takes to be Hart's—for example, common law principles and settled custom.[15] Whether Hart in fact advocates the narrow notion of a rule Dworkin attributes to him is a matter of textual interpretation. Nevertheless, even if Dworkin is correct in attributing to Hart and to positivism generally a narrow concept of rule, the question

15. *See* Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

remains whether the existence of principles as authoritative standards is incompatible with more basic features of both Hart's account and of positivism generally. Does the existence of principles force abandonment of features more fundamental to positivism than the model of rules?

Dworkin's view, as noted above, is that the existence of principles and policies as authoritative standards requires the abandonment of the rule of recognition, the logical separability thesis, and judicial discretion. A positivist sympathetic to Hart's account might argue against Dworkin that there must be a rule of recognition for distinguishing legal from other principles and policies[16]—that even if Dworkin is correct in arguing that the law includes certain moral principles, not every moral principle is a legal principle. Therefore a test for distinguishing legally binding from other moral principles must be fashioned. Such a test might constitute a rule of recognition in Hart's sense. Thus, the existence of binding principles may force amendment but not abandonment of the rule of recognition.

Moreover, this sort of positivism should be able to maintain the judicial discretion thesis as well. If we can fashion a rule of recognition for identifying *both* legal rules and principles, then even though the conception of authoritative standards of law will be richer for its inclusion of principles and policies, it will nonetheless be exhaustively determinable under the rule of recognition. Once again, where the authoritative standards are exhausted, judicial discretion must begin.

Finally, the status of principles as authoritative standards does not by itself undermine the logical separability thesis because the question of whether moral principles figure among the standards binding on judges is not in itself crucial. We may agree with Dworkin that they do so figure. The interesting question, however, concerns the *source* of their authority. Principles of morality may be legally authoritative either because of their merits—as principles of a correct moral theory—or by their being identified as authoritative under a particular rule of recognition. If principles are legally binding because they are morally correct, then the logical separability thesis would have to be abandoned. If, however, a moral principle is binding as law because it may be identified as such under a rule of recognition, its authority is not a function of its moral merits but of its pedigree. If the authority of all such moral principles as law is a function of their identification as law by a particular rule of recognition, the relationship between law and morality is not necessary but merely contingent—that is, it will

16. *See* Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHILOSOPHICAL Q. 151 (1971).

depend on the particular rules of recognition that characterize particular legal systems.

Dworkin does not argue in "Model of Rules I" that the authority of principles and policies is a function of their moral merits. He argues only that such principles can be authoritative standards. But a convincing argument against the separability thesis requires more; it requires a demonstration that the legal authority of certain moral principles is in some sense a matter of their merits.[17] The plausibility of this entire line of defense frankly seems to turn on the possibility of constructing a rule of recognition that is capable of identifying all and only legal rules, principles, and policies. Only if such a rule may be constructed might one advance a positivist theory very much like Hart's. Because such a rule of recognition would identify all authoritative standards, judicial discretion would be required where binding standards were exhausted. Moreover, the legality of authoritative moral principles would be a function, not of their merits, but of their identification as law by the rule of recognition—thus maintaining the logical separability thesis. The arguments that Dworkin presents in the chapter entitled "Model of Rules II" bear on the question of whether such a rule of recognition in Hart's sense can in fact be constructed. Because so much seems to hinge on these arguments, I will examine them with particular care.

Since the rule of recognition is the ultimate rule of the system, its authority as law cannot be established by referring to yet another rule. Such a reference would render the rule of recognition inferior to the rule by which its validity was determined, and the same questions would arise with respect to the "higher rule." The authority of the rule of recognition must be established by other means. Hart's view is that the authority of the rule of recognition is constituted by its acceptance by those who apply it—in particular, judges. The conditions of its authority thus coincide with the conditions of its acceptance by officials as a standard of obligation and action.

For the rule of recognition to be binding and thus a source of judicial obligation, officials, especially judges, must apply it from an internal point of view. This acceptance must be expressed both in social practice (the conventional rule)[18] and in a critical moral or psychologi-

17. Having failed to show that the legal authority of moral principles is a function of their truth as moral principles, Dworkin argues next that the authority of the rule of recognition itself must be a function of its defensibility within a true moral theory of law. *See* note 21 and accompanying text *infra*.

18. In the following discussion I use the phrases "conventional rule" and "authoritative by convention" in a general sense to contrast them with rules of critical morality whose authority or normativity derives from their truth as principles of morality. I do not mean to suggest that rules of conventional behavior are conventions in the narrow sense of that term, that is they are essentially arbitrary. Nor do I mean to imply that rules of conventional morality are authoritative by

cal attitude toward that practice (the internal aspect of the rule). Officials, in other words, must each accept from an internal point of view the very same social rule. The social rule itself is constituted by convergent behavior. Dworkin argues, however, that although judges may agree in the vast majority of cases on what the rule of recognition requires of them (and so their behavior may in general converge), they may disagree dramatically over what the rule requires in other categories of cases—for example, on the question of the authority of precedent. If judges were asked to specify in all its detail the rule that their judicial behavior instantiates, they would likely give greatly divergent answers. Absent widespread agreement on which rule their behavior exemplifies, there can be no single rule of recognition whose authority may be derived from actual practice. If there is no rule of recognition whose authority derives from conventional behavior, then there is no single social rule of recognition that officials may accept from an internal point of view. If there is no single social rule, then there is no single rule from which judicial obligation may derive.

I will refer to Dworkin's argument as the argument from controversy. It is easy to see that this argument against Hart's rule of recognition is different from the previous arguments which rested almost entirely on the controversial nature of principles and their authority as law. Here the foundation of the argument is Hart's own standard for the existence of a binding social rule of recognition.

In response to the argument from controversy one might propose any of the following: (1) There is not one but many rules of recognition in a community. (2) The actual rule of recognition is constituted by the area of agreement among officials. (3) The rule is constituted by both the areas of agreement and disagreement, but is binding only with regard to matters on which there is substantial agreement. (4) There is but one binding rule of recognition, though its authority is not, strictly speaking, constituted by shared social practices or attitudes.

The first response is not really open to a defender of Hart's positivism because the rule of recognition is designed to provide a determinate answer to the question of what the authoritative standards of law in a particular community are. The second response merely restricts the rule of recognition so that it cannot exhaustively determine the legal standards of a given community. The first response commits the posi-

stipulation as are certain mathematical conventions. The relationship between rules of conventional morality and conventions generally begs for further analysis. Still, the distinction between rules of conventional (positive) morality and critical morality is a sensible and important one. Rules of the former type purport to *summarize* general behavior. They are *true* if the description is accurate, false if otherwise. In contrast, the truth of principles of critical morality depends on their justification within a comprehensive moral theory. The *authority* of the former, at least in Hart's view, depends on their *acceptance* as norms of evaluation. The authority of the latter depends on their *truth*.

tivist to too much law, the second to too little. The third response implies that what is binding on judges in those very hard cases in which the authority of the rule of recognition itself is at issue is a matter of judicial discretion. Where no agreement about requirements of the rule exists, no judicial obligations are imposed. Thus, the judge is free to determine what the law is. In such cases, judicial discretion is particularly problematic because it implies that the judge has the authority to determine both what the law is in a particular case and what his general obligations are under the rule of recognition. Still, the positivist might argue that uncertainty in the rule of recognition does exist and that so long as it does there will be uncertainty about the extent of judicial obligation or authority. In most instances, however, the area of disagreement will narrow over time as behavior converges. Eventually, the rule of recognition in an actual legal system will approximate the ideal of identifying, in a more stable fashion, the law of a community.

This response to Dworkin seems to require that Hart abandon the position that the validity of the rule of recognition, itself the ultimate source of judicial obligation, can be firmly established as a matter of existing social practice. Where there is controversy about the requirements of the rule, there is disagreement; where there is sufficient disagreement, Hart's conditions for the existence of a rule of recognition that expresses conventional practice are not satisfied.[19]

In contrast, the fourth alternative maintains that there is but one correct, though controversial, rule of recognition. That a single rule of recognition can be demonstrated to be valid apparently allows the positivist to maintain the logical separability thesis, because the authority of all standards of law will be a function of their identification by this rule.[20] It also enables the positivist to identify in a determinate manner the authoritative standards of law, thus making discretion inevitable. The fourth response requires, however, that the positivist abandon the validity-as-social convention argument.

The general problem for Hart may be posed as follows: By what test is the authority of the rule of recognition to be established? The authority of a rule may be a function of (1) its pedigree or source (as is the case with rules inferior to a rule of recognition); (2) its acceptance as authoritative in existing practice (as Hart claims is the case with the rule of recognition itself); or (3) its objective merits (as, for example, the natural theory law maintains). The positivist rejects the first source of authority for the rule of recognition; the argument from controversy undermines the second. We are apparently left with the third—that is,

19. The force of this objection is that one may no longer be able to conceive of the rule of recognition as a settled, authoritative rule of law.

20. The failure of the separability thesis is discussed in the text accompanying notes 21-26 *infra*.

that the authority of the rule of recognition is a matter of moral argument.

This conclusion implies that Hart's tenet of a non-controversial rule of recognition, whose existence is merely a social fact, must be abandoned. Even more important, it means that the logical separability thesis fails because the rule of recognition, if it is to be authoritative, must itself be *justified* as part of a larger moral theory of law. The truth conditions of certain propositions of law, in other words, will include statements that refer to a more encompassing moral theory.[21]

Undaunted, the defender of Hart's positivism might now pursue yet a fifth defense. He could note first that Hart does not impose any logical constraints on the rule of recognition. Hence, that the rule of recognition may refer to moral as well as social facts should not prove particularly troublesome. Rules of the form "the law is whatever is morally correct" and "the law is whatever is written in stone" may both be equally good candidates for rules of recognition. The only legitimate constraint on the rule is that it must provide the standard by which the identity of valid law is determined. If "the law is whatever is morally correct" can be a rule of recognition, then Dworkin's argument does not establish the impossibility of a rule-of-recognition based positivism because there is no necessary incompatibility between positivism and moral theories of law. Whether a community has adopted a moral rule of recognition is an empirical question rather than an analytic one. This argument suggests that Dworkin has established only that in communities which recognize social policies and moral principles as authoritative standards of judicial decisionmaking the relevant rule of recognition will include as law moral as well as other propositions.

This defense is not, in fact, as promising as it initially appears. First, that Hart does not impose logical constraints on the rule of recognition does not mean that no constraints are in order. For in the absence of logical constraints the rule of recognition can be easily trivialized. Every theory of law—positivism, natural law theory, legal realism and others—attempts to provide a standard by which the law of a community can be identified. Using Dworkin's terminology, this standard constitutes the conceptual aspect of the theory. If every standard advanced by competing theories may constitute a rule of recognition simply because it provides a criterion for identifying law, then there can be no meaningful conceptual differences among theories of law. In the end, each is just a type of positivism, with its form—natural law-type, realist-type, even positivist-type—depending on which particular standard of identification the theory proposes. If positivism is true just because we cannot imagine a theory that does not advance a stan-

21. That is, the authority of the rule of recognition itself is a matter of critical morality.

dard for identifying the law of a community and because any standard qualifies as a rule of recognition, then the truth positivism reveals is neither interesting nor important. To avoid triviality, the standard of identification that the rule of recognition constitutes must be distinguishable from alternative principles of identification.

Second, if the rule of recognition is to contain elements of a community's morality, the elements must be of that community's conventional morality—not an abstract critical or reflective morality. For only a community's conventional morality falls within the positivist concept of a rule of recognition rooted in actual practice. That is because the rule of recognition is supposed to assert a concrete social fact about the community—namely that the relevant authorities have accepted this particular rule in order to identify authoritative standards of law. The question is whether a rule that uses reflective morality to identify the authority of law can constitute a rule of recognition. Rules that identify legality with substantive morality may themselves purport to be making a claim of critical morality or describing conventional practice. If such a proposition purports to be a statement of critical morality, then it cannot qualify as a rule of recognition in Hart's sense, because principles of critical morality are not constituted by convergent behavior. If, on the other hand, it purports to describe a social convention, then its intrinsic controversial nature requires that its authority as well be determined by substantive moral argument. In short, a principle that identifies legality with substantive morality, may constitute a rule of recognition in Hart's sense only if the principle purports to describe existing social practice. But then its essential moral character will be to no avail in answering Dworkin's criticism. Dworkin's point is that any social rule of recognition, regardless of its content, will be controversial and therefore will require substantive argument. If anything, the rule we are envisioning would be more controversial than most and in at least as much need of justification. Any rule of recognition, even one that identifies legality with critical morality, must be justified by appealing to a critical moral theory of law. Thus, the logical separability thesis must fail.

For all that, I am not convinced by Dworkin's arguments, and I will now suggest two other defenses open to the positivist. Let me begin by conceding that for positivism to be true the rule of recognition must exist as a social convention. Any other test of its authority will prove the validity of Dworkin's contention that law is ultimately embedded in a more encompassing moral theory. Consider Hart's argument. Hart actually makes two distinct claims concerning the conventionality of the rule of recognition: first, he argues that the rule's authority is derived from convention; second, he advances a particular

theory of conventions that sets forth the conditions that must be satisfied for a rule's authority to be a matter of convention.

The theory of conventions that Dworkin attributes to Hart seems to require noncontroversiality as a condition of conventionality. Where the scope or extension of a rule is uncertain, controversy may be generated. If the controversy is serious, the rule cannot be said to constitute a convention within the community. It is really Hart's theory of conventions that Dworkin assails. Only indirectly do his arguments undermine Hart's more significant claim: that the rule of recognition is conventional.

The more modest conclusion that we ought to draw from Dworkin's arguments against the rule of recognition is that if the rule of recognition expresses a conventional practice, Hart's arguments fail to show this. Hart's arguments may fail either because the rule of recognition is not a convention or because his theory of conventions is inadequate to establish that it is. Dworkin has established the latter. It remains open to argument whether the rule of recognition is conventional.[22] Resolution of that problem, however, depends on the development of a theory of conventions that allows for controversy within the confines of the requirement that conventions be constituted by social practice.

Hart's view is that the authority of the rule of recognition derives from its acceptance by judges in practice as the standard by which the identity or authority of subordinate rules or principles of law is determined. The most persuasive interpretation of Dworkin's argument from controversy is that the arguments one advances to support a controversial position about the requirements of a rule invariably appeal to abstract or critical moral principle. That the character of the controversy calls for substantive moral argument to determine the requirements of the rule suggests that the rule itself cannot constitute a convention. Rather, the authority of the rule, at least in the eyes of the interested parties, is a matter of deeper moral argument.

Whether a rule, the requirements of which seem to call for substantive moral argument, can nevertheless constitute a rule of recognition in Hart's sense depends on how we understand the concept of moral or social convention. We can distingnish between two notions of moral convention, both of which can be contrasted with what we take to be critical or abstract morality. In one sense, a community's conventional morality may consist of the rules it has adopted as standards of moral evaluation. The existence of the rules is in turn exemplified by convergent behavior among the populace. The authority of the rules is

22. I am grateful to David Lyons for bringing this line of defense to my attention and for helping me to develop it.

a matter of their being adopted as standards of evaluation. Because members of the community do not take a critical or reflective attitude toward such rules, a rule that generates serious controversy does not constitute a rule of that community's conventional morality. I will call this conventionality in the first sense. In contrast, we can imagine a more complex type of conventional morality. A community's morality may be conventional in this second sense if members of the community adopt a critical or reflective attitude toward the rules even though the authority of the rules is rooted in convergent social behavior. Rules of this sort may be both controversial and conventional. They are conventional in that their authority is ultimately derived from their acceptance in practice; they are controversial because individuals in general adopt a reflective attitude toward them. Such rules will generate controversy because members of the community will disagree about whether the rules that exist in practice closely approximate what, on reflection, different persons take to be deeper moral truth. Because members of the community expect the rules to be supportable by and to be reflective of moral ideals, appeals to abstract, critical morality to determine the requirements of the rules would be natural. Such appeals would not undermine the conventionality of the rules because their authority ultimately is rooted in society's acceptance of them as standards of evaluation. Were members of the community to stop applying a rule as a standard of evaluation, the rule would cease to be authoritative *as a rule of conventional morality*, even if the rule accurately stated a true principle of critical morality. Nevertheless, a rule that ceases to be authoritative as a matter of convention may be authoritative for other reasons—for example, because it is a true principle of morality. Rules that are conventional in either of the two senses discussed above may be distinguished from rules of critical morality whose authority as standards is entirely a matter of their truth.

With these distinctions in mind, I propose to reconcile Dworkin's and Hart's arguments. Dworkin's argument from controversy seems so compelling because he reads Hart as claiming that the rule of recognition is conventional in the first sense. Rules that are conventional in this sense simply are not controversial because they do not require deeper argument. If the rule of recoguition is conventional in the second sense, however, Dworkin's arguments are not nearly so compelling. Dworkin argues that because the authority of the rule of recognition cannot be a matter of convention in the first sense, its authority must be a matter of substantive moral argument. But this dichotomy ignores the plausible alternative that the rule of recoguition is conventional in the second sense. The authority of the rule is rooted in actual practice, though it remains responsive to substantive moral argument. In short, Dworkin has not demonstrated the nonconventionality

of the rule of recognition, so much as he may have demonstrated the complex character of its conventionality.

The positivist might also adopt the following more aggressive counterargument: By focusing on the concept of law exclusively in terms of judicial behavior in the United States—and to a lesser extent in England—Dworkin's arguments appear to be more conclusive than in fact they are. Dworkin wants us to take his arguments as descriptive claims about the general concept of law, but, if anything, his arguments highlight particular (perhaps peculiar) features of judicial behavior in constitutional democracies. In contrast, positivism is a general theory about the *concept* of law; it does not purport to be a full and accurate description of legal practice in any particular legal system. The question then is whether Dworkin's arguments, focused as they are on judicial behavior in the United States and in England, preclude the truth of positivism so understood. For two very different reasons they need not.

On the one hand, Dworkin's arguments may fail simply because positivism, when understood in its starkest form, is merely the denial of the existence of more than a contingent relationship between law and morality. As an essentially negative thesis, positivism cannot be shown to be false by counterexamples. Counterexamples of the sort Dworkin offers demonstrate at most that in some legal systems law and morality are interwoven. The positivist may well agree that such systems of law exist, but deny that they exist everywhere or that this interweaving of law and morality is a necessary feature of law. To prove positivism wrong would thus require a demonstration that it is impossible to conceive of law without substantial moral content. Dworkin's examples fall short of doing that.

One need not accept this essentially negative characterization of positivism. One might instead require that positivism make affirmative as well as negative assertions. Positivism would then include all positive theories about the minimal condition of law consistent with the logical separability thesis. Hart's version of positivism can be described as one such theory.

Suppose that following Hart we were to construct a system of social control that consisted only of primary rules of obligation and a secondary rule of recognition. Suppose further that in such a system policies and principles did not figure in judicial argument in the same way that rules did. When faced with cases in which the extension of a rule was unsettled, or one in which a gap in the law seemed to exist, judges would be forced to exercise a kind of restricted discretion. Litigants would grow to expect that in difficult cases there would be no reason to anticipate, let alone demand, a decision in their favor. If the rule of recognition itself were in doubt, members of the official community would experience a kind of uncertainty as to what the law required

of them, though this uncertainty would dissipate over time as one interpretation of the rule gained favor and allegiance. Dworkin provides no sufficient reason for denying the appellation "legal system" to such a scheme of social control.[23] That policies and principles simply do not constitute part of what is viewed as law, that judges claim to be exercising discretion, and that the rule of recognition's validity is never completely settled all indicate that such a legal system might be very different from our own, but no more than that. Perhaps we could envision an even more minimal "legal" system—for example, one that is motivated by a scientific interest in discovering the law on a particular question and based on a non-adversarial model.

Ultimately the most valuable way to read Dworkin's arguments is not as narrow criticisms of positivism but as illustrations of both the weaknesses of the minimalist conception of law and the advantages of the richer theory. In this view, Dworkin's arguments do not concern the concept of law as much as they concern the motivations one can advance for particular conceptions of law. It may be that a richer theory of law that emphasizes the role of moral principle and social policy in judicial decision is better able to deal with issues of social dissent in ways compatible with a still larger political philosophy.[24] A legal system that conforms to the richer theory may also be better equipped to enforce individual political rights, especially those not explicitly recognized by existing legal rules. Moreover, such a legal system may more closely approximate the political ideal that cases be decided on the basis of preexisting rights. In short, legal systems that conform to the richer theory may be better equipped to take individual political rights seriously.

That all of this may be true is something to which the positivist may willingly assent. For it is clearly the very point of positivism that those of us who live in legal systems rich in sources of law and free from judicial license are indeed fortunate for exactly the reasons Dworkin emphasizes. Nevertheless, there are persons not nearly so fortunate—those who are subject to iniquitous rules of law. The very point of positivism is that such oppressive systems of social control may be legal systems nonetheless.

If my assessment of the underlying character of Dworkin's arguments is correct, then the focus of the argument has shifted to a scrutiny of motivations for competing theories of law. We have moved from the

23. Dworkin might argue that the system of social control we are imagining could not be a legal system precisely because it does not root the authority of the rule of recognition in deeper moral argument. Such a response would beg the question, however, for we are trying to conceive of a system of social control without this feature and then consider whether we are willing to call it a legal system.

24. *See* R. DWORKIN, *supra* note 1, Ch. 8.

conceptual to the normative. And if we are to allow Dworkin to argue from particular normative motivations to a richer conception of law, we should permit the positivist to use a similar strategy in defense of a more minimal account. Among the normative motivations that positivists offer for the more minimal conception of law is that it would be misleading to identify the authority of law with the authority of morality, for in doing so one may mistakenly impute *moral justification* to valid law simply by virtue of the law's validity.[25] Perhaps what distinguishes the positivist from Dworkin should not be characterized as primarily a disagreement about the concept of law. Rather, the conflict seems more deeply rooted in disagreement about the appropriate normative motivations for a particular conception of law.[26]

If Dworkin's arguments fail to undermine either positivism generally, or Hart's form of it, they succeed in uncovering weaknesses in the arguments that Hart advances. More importantly, Dworkin's arguments highlight precisely what is at stake at the level of conceptual analysis and normative motivation in the complex debate between positivism and other theories of law. These are accomplishments one ought not take lightly.

III

DWORKIN'S THEORY OF ADJUDICATION

Reading Dworkin's arguments as being largely normative rather than descriptive best explains the motivation for the theory of adjudication that he presents in the chapter entitled "Hard Cases." If we are to understand the thesis advanced in "Hard Cases," we must look beyond Dworkin's doubts about positivism. Dworkin's theory of adjudication can be best understood when examined in relation to his underlying theory of political rights.

Dworkin calls his theory of adjudication the Rights Thesis. Though the Rights Thesis consists of a complex set of interrelated subtheses, I will concentrate only on certain of its basic tenets. The following propositions are central to the Rights Thesis: (1) even in hard civil cases[27] the effect of a judicial decision is to enforce a right of one of the litigants; (2) the right enforced is a preexisting right; (3) preexisting

25. *See* H.L.A. HART, *supra* note 5, Chs. 7 and 9.

26. The issue raised here is the extent to which a particular conception of law may be motivated by normative considerations. The ultimate question that Dworkin raises is the viability of the distinction between analytic and normative jurisprudence.

27. Since the Rights Thesis maintains that prior to the decision in every case one of the parties has the legal right which the decision enforces, it is applicable only to "zero sum cases"—those in which one party's victory necessarily implies the other party's loss. In this sense, criminal cases are not zero sum. When a defendant is found innocent, the government does not lose by thereby being found guilty. In contrast, tort cases always present a situation where one of the parties must bear the loss.

rights derive from political morality; (4) there is a uniquely correct answer in every case; and (5) by virtue of 1 - 4 above, judges never exercise judicial discretion in the strong sense.

A. The Rejection of Policies

One intriguing aspect of the Rights Thesis is the rejection of policy arguments as a basis for judicial decisionmaking in hard cases. The rejection of policies is curious for the following reason: The argument against positivism rests in part on the notion that the model of rules provides inadequate authoritative standards and consequently forces judges frequently to exercise discretion. The addition of standards of social policy and moral principle enriches the domain of authoritative standards and thus restricts even further the realm of judicial discretion. If judicial discretion begins where authoritative standards end, the rejection of policies as authoritative standards impoverishes a judge's resources and, on first glance at least, increases the likelihood that judges will be required to exercise discretion.[28]

The rejection of policy must be motivated by deeper aspects of Dworkin's overall thesis. In particular the rejection of policies seems, on close inspection, to be related to an important argument that Dworkin does not explicitly make in the book but which is central to his general thesis—that citizens have the right to have decisions in civil litigation determined by settled law. Citizens are entitled to decisions that enforce preexisting rights. Dworkin's view is that decisions based on policy arguments violate this fundamental political right.

Dworkin distinguishes between principles and policies in the following way: "Arguments of principle are arguments intended to establish an individual right; arguments of policy are intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals."[29] He defines a (political) right as "an individuated policital aim."[30] In contrast, "a goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals."[31] Because rights are individuated aims, having a right entitles one to its enjoyment, even if no other political aim is served or if other political aims are disserved.

Goals and policies state nondistributive collective ends. Principles and rights are concerned with individual claims, either as constraints on the pursuit of collective goals or as ends in themselves. So under-

28. This point is further developed in Nickel, *Dworkin on The Nature and Consequence of Rights*, 11 GA. L. REV. 1115 (1977).

29. R. DWORKIN, *supra* note 1, at 90.

30. *Id.* at 91.

31. *Id.*

stood, the distinction suggests an argument for preferring principles to policies as the basis for decisions in hard cases. Were one to contend that the effect of a decision is to enforce an already existing right, one would argue that the right in question is derived from some principle. Only principles, in this view, state individuated aims; and it is an individuated claim that a litigant in a hard case is pressing.

But this argument moves too quickly. First, we can distinguish between rights and the grounds on which they are based. Though Dworkin emphasizes the relationship of rights to principles, he would not want to argue that policies cannot give rise to a system of rights. One certainly can argue for a theory of rights based on both considerations of principle and policy.[32] However seductive this argument may be, which moves from the definition of the key terms to a substantive conclusion about the inappropriateness of policy based decisions in hard cases, it cannot be taken seriously. There is little reason to believe that Dworkin means to take it seriously, although he seems on occasion to trade heavily on the definitions of key terms.

Dworkin's more profound arguments against policy as a basis of decision in hard cases seem to rely on the assertion that the effect of a judicial decision based on policy is to announce or create new rights and thus the decision violates the right to a decision based on existing rights. Dworkin advances two arguments, neither of which adequately justifies the rejection of policy. In the first argument, Dworkin relies on his view of policies as statements of nondistributive collective goals. Pursuing the collective goal may require a set of rights, but no individual has a right under the policy until a particular program for pursuing the goal has been fashioned. That is, in the absence of the intermediate step of an institutional scheme developed to promote the policy, rights cannot be generated from policies. In contrast, because principles individuate claims, they give rise to rights *directly*.

This argument fails for several related reasons. First, consider a moral principle that Dworkin claims informs judicial decisionmaking: a person ought not profit from his own wrongdoing. This prohibition may be cast to state either a principle or a policy. That is, the general moral prohibition against unjust enrichment may be expressed as the principle that a person ought not profit from his misdeeds, or as the policy that the profits of the wicked ought to be minimized. Put this way the distinction Dworkin is after may be too fragile to support the defense of principle and the rejection of policy.

Second, goals as well as principles may state individuated political aims or rights in precisely the sense that Dworkin claims policies are

32. The utilitarians purport to do exactly that—arguing for a theory of rights that is based on a goal of maximizing social utility.

incapable of doing. For example, the goal of economic efficiency endorses only Pareto superior reallocations of resources. It follows that each person has a right to his present level of welfare. Any policy that fails to preserve at least the present welfare level of any individual cannot, by definition, be Pareto superior and would not be recommended as efficient.[33]

More generally, an argument from policy need not create rights in any way other than the way in which arguments from principle do, nor, indeed, in any way other than the way in which decisions in hard cases generally do. Whether an argument from policy is viewed as creating, rather than enforcing, rights is a function, not of the logical character of policies, but of the nature of the particular policy, the extent of its entrenchment, and its historical support. If, in deciding difficult torts cases, courts tend seriously to consider economic efficiency (*i.e.* policy), a case in which this policy is decisive does not create new rights in any way peculiar to the concept of a policy. A policy of avoiding unnecessary resource expenditure is as much an element of conventional moral sense as is the principle that one ought not to retain unjust enrichment. Thus, consideration of economic efficiency in hard cases is not any more problematic because a policy is being invoked than is the appeal to the prohibition against unjust enrichment[34] unproblematic because a principle is being applied. Because the nature of the argument involved in applying principles to resolve these hard cases does not differ from that involved in applying well-entrenched policy considerations, policy arguments generally do not create rights in any different way than do arguments from principle. Therefore there is no reason to claim that policies ought to be rejected on these grounds alone.

Perhaps in rejecting policies, Dworkin has another argument in mind. This argument depends on the distinction between two senses in which decisions in hard cases may create rights and duties. In the weak sense, a decision in a hard case creates rights and obligations simply because the result departs from precedent. Because of its inherent difficulty, a hard case forces departure from precedent and thus requires a novel resolution of the issues. In turn, the novel resolution creates new rights and duties. The previous argument demonstrates that both principles and policies create rights and obligations that are novel in the weak sense. In a second and stronger sense, whether a decision en-

33. A distribution is Pareto optimal when resources are allocated efficiently. Any further redistribution is capable of enhancing the welfare of one person only by diminishing the welfare of others. Pursuit of an efficient or Pareto optimal distribution requires endorsement of only those reallocations that are Pareto superior to previous allocations. A new allocation is Pareto superior to a prior allocation only if under the new allocation at least one person's welfare is enhanced and no one's welfare is diminished. A distribution is Pareto optimal if there are no distributions Pareto superior to it. Thus, efficiency entitles everyone to at least their current level of welfare.

34. *See* Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

forces or creates rights depends on whether the decision reached in a hard case can be justified as stating accurately what the parties are already entitled to, or whether the decision instead must be justified on the very different ground that the rights and duties expressed in the decision serve some general policy.[35] The issue is whether a decision in a difficult case may be "reconstructed" so as to describe existing rights or whether it can only be conceived of as announcing new rights. In this view, Dworkin objects to decisions that cannot be rationalized so as to state a litigant's right prior to a decision, but which instead must be understood as creating that right simply because doing so promotes a policy. Thus, policy arguments, such as appeals to efficiency or general welfare, need not be rejected in judicial arguments—at least to the extent that such considerations might help a judge determine the rights litigants already have. Policy considerations are to be rejected as the basis of judicial decisionmaking in hard cases only to the extent that the result is based solely on an attempt to serve policy. For example, considerations of cost avoidance might be appropriate to a decision in a hard case that seeks to clarify the extent to which a plaintiff is entitled to protection from inefficient conduct. In contrast, a decision that establishes a plaintiff's right against the defendant simply because that result is the more cost efficient arrangement of rights and liabilities would be objectionable.

With this argument Dworkin concedes too much. First, he concedes the criticism that appeal to policy is generally no more suspicious in judicial argument than is appeal to principle—provided that the purpose of the appeal is to resolve questions concerning already existing rights and duties. This line of argument admits that policies can give rise to rights and that they can do so directly in the context of judicial decisions. But if policies can create rights in the same way that principles do, then policies cannot be rejected on the ground that they create rather than enforce rights. Indeed, this concession throws into doubt the viability of the distinction between principles and policies—at least to the extent that the distinction holds that principles give rise to rights directly, whereas policies require the intermediate step of an institutional scheme.

In addition, the target of Dworkin's criticism seems to have shifted from the logical character of policies to instrumentalism in the law. His criticism is not that policies ought to be rejected because they create

35. This construction of the argument against policies was brought to my attention by Ronald Dworkin in correspondence concerning an earlier draft of this article. The new argument deemphasizes the temporal component. This is an essential difference between the new argument and other ways of capturing Dworkin's objection. It is of no consequence that rights and duties are new in the sense of never having been announced before. What is important in this view is whether the decision can be rationalized as stating a right within a larger political theory or whether the decision, since it cannot be so rationalized, creates rights.

rights; rather, he objects to policy considerations only if and when they are employed to create rights. Dworkin objects not so much to a category of standards as to a category of decisions—in particular, those decisions that cannot be rationalized as describing already existing rights.

Dworkin's target therefore is a theory of adjudication such as the one proposed by advocates of economic analysis. The latter contend that considerations of economic efficiency do not simply contribute to an account of an individual's rights in a given case. Rather, they believe that efficiency is *the* standard by which decisions ought to be reached and the criterion by which legal rights and duties therefore ought to be fixed. If this is the theory of adjudication Dworkin means to attack, he has my full support. But if so, then the focus of his attack is instrumentalism in the law and the questions of judicial competence it generates, not the appeal to policy per se.[36]

Further, the distinction between acceptable and unacceptable uses of policy cannot be pressed too hard. Dworkin's view seems to be that it is legitimate to appeal to policy to determine an individual's rights, though it is illegitimate to confer rights in order to serve a policy. This argument relies on the distinction between the rights an individual has prior to a decision by virtue of policy considerations and those he has because a decision was reached to serve a policy. The distinction may simply collapse, however, in that case in which the prevailing theory of political rights is utilitarian.

Finally, suppose for a moment that the arguments on both sides of a case are equally good so that neither litigant can claim with confidence that he possesses the disputed right prior to the decision. In such an event, there should be nothing objectionable in deciding the case so as to further a general policy. Thus, the legitimacy of appeals to policy considerations—even where such considerations create rights in the strong sense—depends on whether the decisions in all hard cases may be plausibly treated as describing already existing rights and duties. Dworkin argues that in fact all cases, however difficult, involve preexisting rights of litigants. His view is that in every case one of the litigants is entitled to a favorable decision. The purpose of the litigation is to resolve the dispute over this question of right. But if Dworkin is right about the nature of litigation, then policy considerations that create rights in the strong sense are not so much objectionable as they are functionless. If, however, Dworkin is wrong about the nature of adjudication in hard cases, then right-creating policy considerations would seem unobjectionable.

36. George Fletcher advances this line of argument against economic analysis of torts. *See* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

The general difficulty with Dworkin's views about policy thus become apparent. Contrary to the prevailing interpretation of Dworkin's position, in one sense he believes that reference to policy arguments is appropriate in hard cases. The legitimacy of such reference is restricted, however, by the nature of judicial inquiry in which they figure. Policy considerations can be invoked if they bear on questions of the preexisting rights of litigants to a decision; policy considerations are not legitimate insofar as they are employed to create new rights. If Dworkin is correct in arguing that all decisions involve the preexisting rights of litigants—or at least that all decisions may be redescribed accurately to appear that way—then one of two conclusions follows: Either reference to policy is always legitimate, or the objectionable aspect of such reference is made superfluous by the nature of adjudication which is to enforce, rather than to create, rights. If, however, Dworkin is mistaken about the nature of adjudication in hard cases, then some cases cannot plausibly be described so as to state an already existing right. In that event, policies that create rights are not merely defensible, they are required. If neither litigant has a right to a favorable decision, then the decision must create new rights.[37] The category of policy arguments which Dworkin is apparently objecting to is therefore either rendered empty by the nature of adjudication in hard cases or else it is required by it.

B. Judicial Discretion and the Right Answer Thesis

In an early article, *Judicial Discretion*,[38] Dworkin distinguishes among three types of judicial discretion. The first and second types involve what Dworkin considers weak senses of discretion, while the third is a troublesome and objectionable stronger type. In the first sense, a judge's decision involves a certain degree of discretion because it is not subject to review. In the second sense, a decision involves discretion because it requires judgment. A judge must determine whether a case falls under an authoritative standard, and in doing so his decision may generate controversy over the appropriateness of the application of the standard to the facts of the case. Cases that call for judgment and reflection require that judges exercise this type of discretion. Dworkin distinguishes judicial discretion in the strong sense from both discretion in the first and second senses. Discretion in the strong

37. The force of this analysis derives from its demonstration that Dworkin's argument against policies relies heavily on his argument for right answers in hard cases. The views that he presents against policy are not, therefore, independent and cannot be used to support the position that in all cases one or the other litigant is entitled to the decision. On the other hand, one might view Dworkin's arguments as normative—that it would be better to decide cases on the basis of policy if doing so requires the creation of new rights and not the enforcement of existing rights. But again the issue turns on whether there are in fact already existing rights in all hard cases.

38. Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963).

sense entitles a judge to reach decisions on the basis of nonauthoritative standards, and thus it begins where legal standards end. Discretion in this sense alone implies judicial legislation. Judicial discretion is judgmental so long as a judge is required merely to determine the appropriateness of applying an authoritative standard to the facts of a case at hand. Judicial discretion becomes legislative when a judge must reach a decision without the guidance of authoritative standards.

Judgmental discretion is a feature of all adjudicatory systems in which decisions involve reasoning from standards. Judicial discretion in the strong sense—that which involves the application of nonauthoritative standards—is made necessary by those adjudicatory schemes in which the set of authoritative standards is at any time fixed and thus inadequate for some cases that arise. Positivism is the theory that all adjudicatory schemes are of the determinate standard variety.[39]

One consequence of judicial discretion is a theory of the rights of litigants according to which litigants in noncontroversial cases are entitled to a resolution based on settled law, whereas litigants in controversial or hard cases have no such rights. Dworkin believes, however, that litigants in all cases have those rights to which only litigants in simple cases are entitled under the positivist's theory of law. In Dworkin's view, litigants in all cases are entitled to a decision as a matter of law. Dworkin's right answer thesis—that in every case there is a uniquely correct answer as a matter of law—eliminates the basis for judicial discretion and thus supports the right of litigants to have their cases resolved on the basis of settled law. The right answer thesis complements Dworkin's arguments that policy should not be considered in judicial decisionmaking. Because policy considerations, in Dworkin's view, can be invoked to create rights, they are incompatible with the theory of adjudication according to which disputes are resolved on the basis of preexisting rights or settled law.

Though the theory that a uniquely correct answer exists in every case implies that judges are never free to exercise discretion in the strong sense, the absence of judicial discretion does not imply that uniquely correct answers exist. The absence of discretion in the strong sense requires only that the standards from which judges reason be authoritative and that they not be of the judges' own making. The application of authoritative standards is compatible with a diversity of judicial opinion about what the law requires in particular cases. This is just another way of emphasizing the distinction between discretion in the strong sense and judgment. The right answer thesis, on the other hand, not only requires that the judge apply authoritative standards but

39. For a different view, *see* text accompanying note 40 *infra*.

also asserts that one and only one judgment about the relationship of the standards to the facts of the case is ultimately defensible.

To argue against judicial discretion in the positivist sense one need only argue that judges must reach decisions by appealing exclusively to authoritative standards and that at least some arguments which purport to be arguments from such standards may be identified as indefensible. If we want to take seriously the distinction between discretion and judgment we must include some requirement of defensibility; otherwise, arguments about discretion will simply become arguments about judgment and vice versa. To be avoidcd is the dismissal of all considerations of substantive discretion as mere extended exercises of judgment. Hence, we need a theory to distinguish defensible from indefensible "exercises of judgment," though the theory need not single out only one exercise of judgment as nltimately defensible. The important point is that the absence of strong discretion is compatible with unresolvable uncertainty about the correct answer in a given case. Thus, the right answer thesis may fail because of the considerable latitude in the exercise of defensible judgment.

The same point also may be put in broader philosophical terms. The right answer thesis concerns the metaphysics of jurisprudence, whereas the theory of discretion is about the epistemic obligations of judges. The former is an ontological thesis; the latter is an epistemological one. Because these two theses are concerued with different kinds of philosophic matters, they can be independent of each other.

The right answer thesis could fail because it may be impossible to defend the premise that, in the application of binding standards to the facts of hard cases, only one exercise of judgment is correct. Failure of the right answer thesis for this reason wonld not require the exercise of discretion in the strong sense. One also might argue that the right answer thesis fails because it may not be possible to redescribe the decision in every case as enforcing already existing rights. In some cases the arguments on both sides may be equally compelling or equally inadequate. In cases of this sort there may be no right answer because the standards that are binding on judges simply fail to generate one. The question then arises whether the failure of the right answer thesis in cases of this sort would imply judicial discretion in the strong sense.[40]

40. I do not contend that the right answer thesis actually fails, for I am not as much concerned with its truth as with the logic of its relation to the theory of discretion.

One should distinguish between two senses in which hard cases might be said to have right answers. In one sense, a decision is the right one if it is the one called for by law. Difficult cases that are unresolvable on substantive grounds nonetheless might have right answers simply because the law provides a procedure for resolving them on other grounds. In a second sense, a case has a right answer if the decision is required by binding substantive standards. A hard case that is unresolvable on the merits of the litigants' arguments would not have a right answer in the second

The prevailing wisdom is that if authoritative standards fail to generate an answer, the judge must exercise discretion in order to produce one. In my view, whether the absence of a right answer implies judicial discretion depends on the nature of the rule of recognition that exists in a particular community. For it is possible to design a rule of recognition that provides a procedure for settling disputes that are not otherwise resolvable on the basis of existing authoritative standards. For example, a rule of recognition could require that in cases in which the arguments on both sides are inadequate to support a claim of existing right, the judge must decide the case so as to serve a particular policy—*e.g.*, the general welfare. Such a rule would deny the judge authority to decide the case on some other grounds—for example, so as to advance equality in wealth distribution. If a rule of recognition may be fashioned to include a procedure for resolving hard cases of this sort, the absence of right answers would not require judges to exercise discretion in the strong sense.

While such a rule of recognition would confer on both litigants the right to a particular procedure for resolving disputes that cannot be settled on the merits, it would not confer on either of the litigants a preexisting right to a decision in his favor. In addition, because such a procedure might call for an appeal to right-creating policy, the mere reference to policy is not an indication that discretion is involved. Indeed, one could imagine a rule that established procedures for resolving such cases that required judges to create rights in order to serve certain policies. Moreover, if such a rule is a plausible component of a rule of recognition, the standard interpretation of positivism—that it requires discretion in the strong sense—must be abandoned. For whether a legal system authorizes judicial discretion depends on whether there are fixed procedures of this sort for resolving cases in which no right answer exists as a matter of substantive merit. Though judicial discretion is a natural consequence of most rules of recognition, it is not a logical consequence of either the concept of a rule of recognition or the theory of legal positivism.

If, as Dworkin claims, all cases have right answers in the sense that they enforce the preexisting rights of litigants, then judges have no authority to reach beyond the law to provide a decision. The prevailing view, however, is that the absence of preexisting entitlements implies judicial discretion—that the absence of rights and discretion are two

sense, though the case might have a right answer in the first sense. In the second sense, the right answer thesis concerns the rights of litigants to decisions based on substantive standards of law. In the first sense of the right answer thesis, this is not the case. Instead, a right answer would be one arrived at by applying those procedures applicable precisely to cases where no right answer in the second sense exists. It is clear that Dworkin's right answer thesis employs the second sense of right answers only.

sides of the same coin. If I am correct, the absence of right answers may imply a good deal less.

IV
DWORKIN'S POLITICAL MORALITY: RIGHTS AND PREFERENCE UTILITARIANISM

The theory of rights that Dworkin proposes in *Taking Rights Seriously* is fragmented and incomplete. The book does not advance a general theory of moral or legal rights. Instead, Dworkin focuses on the category of claims and the logic of arguments that one can advance against political institutions—in particular, legislatures and courts in constitutional democracies. His primary concern is the nature of justification in political argument. By focusing on the nature of political argument in constitutional democracies that are governed by the liberal conception of equality, however, Dworkin takes a good deal for granted. Nevertheless, what he says about the nature of political morality is both interesting and controversial.

The political philosophy that Dworkin advances as an alternative to the simple utilitarianism of the ruling theory consists of the following elements: (1) restricted utilitarian considerations; (2) moral ideals; (3) the right to treatment as an equal; and (4) those rights derivable from the right to treatment as an equal. All such considerations may figure in political argument, though, in Dworkin's view, considerations of utility may not figure in judicial argument in the sense we have already discussed. Though considerations of utility and moral ideals enter into political debate, arguments based on political rights nearly always trump them. Political rights are the trump cards of political arguments which might otherwise be carried by utilitarian or other considerations. That is the essence of what it means in Dworkin's view to take rights seriously.

The basic tenet of Dworkin's political morality is the right to equality of concern and respect. Dworkin claims that this right is both the standard from which other less fundamental rights are to be derived and the principle by which utilitarianism is to be restricted:

> Citizens governed by the liberal conception of equality each have a right to equal concern and respect. But there are two different rights that might be comprehended by that abstract right. The first is the right to equal treatment, that is, to the same distribution of goods or opportunities as everyone else has or is given . . . . The second is the right to treatment as an equal. This is the right not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.[41]

41. R. DWORKIN, *supra* note 1, at 273.

As between the right to equal treatment and the right to treatment as an equal, Dworkin's theory of political rights takes the latter as fundamental:

> [T]he right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and the more restrictive right to equal treatment holds only in those special circumstances in which, for some reason, it *follows* from the more fundamental right.[42]

If there is a concrete or particular right to equal treatment, it enjoys the same status as other political liberties, because Dworkin proposes a general justification of personal liberties according to which "individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights."[43] Because we are entitled only to those liberties or substantive equalities that are required by the right to treatment as an equal, the burden of the theory is to provide a defensible conception of the entitlement to concern and respect that is comprehended by the right to treatment as an equal. Only when we establish what the right encompasses will we be able to know what substantive political liberties it confers.

Dworkin understands the "right to concern and respect in the political decisions about how goods and opportunities are to be distributed" to mean that

> Government must treat those whom it governs with concern, that is, as human beings capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived . . . . [Government] must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.[44]

In explaining further what the right encompasses, Dworkin denies that it requires that any particular individual's preferences be satisfied by government. Rather, he insists that the right requires only that the government take into account the interests of those who will not benefit from a particular policy. "But when their interest is taken into account it may nevertheless be outweighed by the interests of others who will gain from the policy, and in that case their right to equal concern and respect, so defined, would provide no objection."[45]

Because individuals make life plans and may be frustrated should

42. *Id.* (emphasis added).
43. *Id.* at 273-74.
44. *Id.* at 272-73.
45. *Id.* at 273.

their plans fail, in shaping policy, government must take each person's preferences seriously. This is the first component of the right to concern and respect. But because it does not entitle anyone to a benefit or to the satisfaction of his preferences, this right ensures only that each person's interests will not be ignored or unjustifiably discounted. The second component of the right to concern and respect is a restriction on the kinds of justifications that governments may offer to support distributions. It is a "theory of respectful reasons"—government cannot deny a benefit to someone on the ground that the individual is not as worthy as a person as others are. When joined, the two components of the right to concern and respect require that every person's preferences ought to be taken seriously in political argument and that a person should neither be rewarded nor penalized because of the popularity of his life style. The first principle defines the extent to which the right requires that an individual's preferences figure in political argument. The second states a theory of reasons, or a restriction on the reasons, which may justify social, economic, or other inequalities that are subject to the control of the political process.

The primary consequence of the right to treatment as an equal is a restriction on the extent to which preference utilitarianism may figure in political argument. The argument for this restriction is based on a distinction that Dworkin draws between personal and external preferences. An individual's preferences are *personal* if they "state a preference for the assignment of one set of goods or opportunities to him,"[46] while preferences are *external* if "they state a preference for one assignment of goods or opportunities to others."[47]

Traditional preference utilitarianism takes account of both external and personal preferences in determining which policies governments ought to adopt. Dworkin's claim is that the inclusion of external preferences in the utilitarian calculus violates the right to treatment as an equal. Treatment as an equal requires that each person's interests count equally. In Dworkin's view, the inclusion of external preferences has the consequence of either increasing or reducing the weight given to each individual's interest. Consideration of external preferences must therefore be rejected as a violation of the requirements of equal concern and respect.

To substantiate his claim, Dworkin considers two examples. One involves racist external preferences, the other, altruistic external preferences. In the first instance, we are to suppose that individuals who are not themselves sick prefer, on racist grounds, that scarce medical resources always be allocated to white rather than to black persons.

46. *Id.* at 275.
47. *Id.* at 275.

Countenancing the external preferences of racists means that the likelihood of a black securing medical aid will be diminished because the preferences of others discount the strength of his preferences.

In Dworkin's other example, we are to suppose that a community must decide whether to support construction of a pool or a theater. If the citizens who do not themselves swim prefer to support the pool because they admire athletes, the net effect, Dworkin argues, is a form of double counting of the preferences of swimmers and a consequent discounting of the preferences of actors and theatergoers. In either case, the right to equality of concern and respect—in the sense that each person's preferences are given equal consideration—is violated.

This argument is confused. For there to be double counting, something must be counted twice. But this does not occur. No single individual receives two votes; no individual preference is counted twice. All preferences of all persons are counted—each as one. That some persons have external preferences on some matters about which others do not does not mean that preferences are being either counted twice or discounted. Perhaps Dworkin's personal-external preference distinction is just an awkward way of raising a different and difficult issue: not which preferences of an individual should count, but *whose* preferences should count.[48] Though this is an enormous question, the problems it raises cannot be conceived of specifically or even fundamentally as threats to the right to treatment as an equal.

Contrary to Dworkin's view, the right to treatment as an equal requires that we consider the content rather than the logical character of preferences. If we are to rule out the racist's preference, it is because: (1) the racist's *grounds* for preferring that whites rather than blacks receive medical aid are illegitimate because they violate minimum standards of respect for others; (2) the *content* of the racist's preference, because it is racist, violates standards of respect; or (3) a *policy* that is based on preferences whose content is racist would itself violate standards of respect. Dworkin's mistake is in thinking that we can rule out preferences on the basis of their logical character—whether they are

48. This is a difficult problem for utilitarianism. Suppose a local government is deciding whether to permit the construction of a fast food outlet at a heavily travelled intersection. Whose preferences should the government consider? Those individuals who may eat at the restaurant? Those who use nearby streets which are bound to become more heavily trafficked? Neighborhood residents? Members of the community at large? Owners of similar fast food outlets in neighboring communities? We might not take into account everyone's preferences, but we would do so for reasons other than that their preferences are external. That is, we might want to ignore the preferences of other fast food outlet owners even though their preferences are personal. On the other hand, we might consider the preferences of people who live in the community at large even though their preferences are external. The personal-external preference distinction may only seem plausible because it appears to be related to the more difficult problem of whose preferences ought to count. But even here, the problem is not best understood in terms of the logical character of preferences.

personal or external—rather than on factors relevant to their content. His gambit—that external preferences violate the right to concern and respect because they involve double counting—fails. It is not a question of which preferences one counts; rather, it is a matter of their content or of the normative character of the reasons one advances in support of them.

Dworkin's troubles do not end with the personal-external preference distinction. Dworkin seems to believe that personal preference utilitarianism—utilitarianism restricted by the right to treatment as an equal—satisfies his conception of the right to concern and respect. So understood, Dworkin emerges as a utilitarian of sorts. Because the book is advanced as a criticism of utilitarianism, we can assume that this is a conclusion Dworkin would be anxious to avoid. While I do not mean to ascribe any form of utilitarianism to Dworkin, I do mean to show that there is ample textual support for such a conclusion and that Dworkin's particular conception of the right to equality of concern and respect is inadequate to establish that he is not a utilitarian.[49]

Dworkin argues that individual political liberties become part of the political package only because of the practical impossibility of distinguishing external from personal preferences. He writes that "[t]he concept of an individual political right . . . is a response to the philosophical defects of utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not."[50] Political rights are the hedge against a utilitarianism that takes external preferences seriously.[51] Exclusion of external preferences would simply lead to a restricted utilitarianism. Thus, a natural consequence of Dworkin's right to respect and concern is a form of utilitarianism.

The question remains whether Dworkin's conception of the right to concern and respect is rich enough to support a broader independent theory of political rights. Unfortunately, Dworkin's defense of individual political liberties hangs on a mere contingency. There would be no need for political rights were we capable of sorting personal from external preferences. Because Dworkin believes that the impossibility of distinguishing external from personal preferences is a practical problem rather than a conceptual or logical one, a political sovereign with Herculean powers would be able to sort through individual preferences

49. Professor Gertrude Ezorsky has advanced similar arguments in an as yet unpublished manuscript. Professor Ezorsky's arguments, unlike mine, seek to ascribe utilitarianism to Dworkin as the moral theory that follows naturally from Dworkin's principle of equality of respect and concern.

50. R. DWORKIN, *supra* note 1, at 277.

51. Dworkin's view is that once a system of political rights becomes the trump card of political argument it is perfectly permissible to count external as well as personal preferences. Any undesirable consequence of external preference voting will be trumped by the personal rights of those who would otherwise lose out.

and reach political decisions solely on the basis of personal preferences. Such a political arrangement would treat as basic only two dimensions of morality: utilitarianism and the right to treatment as an equal. The result would be a restricted utilitarianism with no additional political rights.

Even personal preference utilitarianism, however, is compatible with a good deal of substantive inequality. A system in which everyone votes only their personal preferences may tend to endorse concentrations of wealth and may burden members of social, economic, and racial minorities. This is not a matter of external preferences, but of simple arithmetic.

One might argue that the burdens borne by minorities violate in some way their right to equal concern and respect and that political entitlements must be conferred on minorities to enable them to secure that right. But the losses imposed on them cannot be a function of a defective utilitarianism that discounts their preferences by including external preferences of social and racial majorities. Rather, the frustration of the minorities' preferences is the result of a personal preference calculation.[52]

The theory of political liberties, then, cannot be a response only to a defective utilitarianism. It must be a response to a political morality that takes only preferences seriously. Individual political liberties are not simply hedges against an inadequately refined utilitarianism. They are not moral entities which could be done away with if only we could more adequately sort through our preferences. A theory of rights is one way of recognizing that preference calculations are but one dimension of moral argument. No matter which preferences are calculated, no matter what the tally is, it is wrong to act in the way individuals voted if doing so would unjustifiably harm others.

Liberal political doctrine usually derives from a fundamental commitment to a principle of liberty. This commitment may be captured by a presumption in favor of liberty or by an alleged natural right to liberty. Particular political liberties are derived from the interplay of these and other fundamental principles, for example, the harm principle or the principle of utility. Dworkin does not deny an intimate connection between liberty and liberalism. He does, however, deny the existence of a basic right to liberty—understood as freedom from constraints. The burden of his argument is to derive an independent theory of political liberties from a principle other than liberty as license. To this end, he introduces the right to equal concern and respect which he argues is more basic to liberal thought than liberty itself. Dworkin's

52. We could not fault such results on the ground that the calculation procedure violated Dworkin's concept of the right to treatment as an equal.

conception of the right to equal concern and respect emerges, however, as inadequate to the task he has set for it. His conception of the right consists only of restrictions on either the kinds of utilitarian calculations that can be employed in political argument or on the kinds of reasons which may justify political inequalities. This conception of the right, therefore, is too weak to serve as the basis of an independent theory of political liberties. I do not doubt that a richer, more powerful conception of an individual's basic right to treatment as an equal could generate a theory of political liberties. If Dworkin has such a conception in mind, however, it failed to emerge from the arguments developed in *Taking Rights Seriously*.

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