

REASON AND FIAT IN LAW

by

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ABSTRACT

In this thesis I argue that contemporary legal philosophy provides an inadequate analysis of central indeterminacies in law. I focus on "judicial discretion" as central to current analysis. Positivists, such as H.L.A. Hart, argue that it is the contingencies of human society that give rise to uncertainty in the application of law. Therefore, they believe that judges must be given discretionary powers. Ronald Dworkin, an American philosopher, believes that judges should not be given such powers. For him, it is the positivists' conception of law that is amiss. He believes that once the institutions of law are correctly appraised, the need for judicial discretion will be seen as a conceptual fault arising from a positivist analysis.

In order to provide a critical framework in which to assess this debate, I outline the Causal Theory of Law developed by Professors S.C. Coval and J.C. Smith. If the attention given the concept of judicial discretion represents a concern with subjective elements in law, then the attention given the concept of a rule represents a concern with objective elements in law. In a tentative way, one might interpret the question at issue as being: "Is law ultimately an affair of reason or will?" Other questions follow: "Is this a false dichotomy?" "Must law be a combination of both authority and power, rational argument and official fiat?" I address these questions indirectly through an examination of Ronald Dworkin's legal philosophy. I find that Dworkin fails to understand the nature and complexity of the problems that he confronts. He believes that legal systems can be designed so that authority and power, legitimacy and efficacy never compromise each other. He does this, however, by giving precedence authority. The causal Theory interprets such resolutions as "disjunctive". Dworkin's resolution betrays his inability to appreciate the complexity of the

problem. He also obscures the nature of the problem by his "rights thesis", which interprets the issue involved as primarily a question of normative political theory. However, his conception of normativeness is ambiguous and requires analysis.

I argue, against Dworkin, first, that indeterminacy in law is a problem for institutional design, and second, that to argue that this design problem is normative is to take a view that is overly narrow and ultimately misleading. I conclude that those involved in the philosophical debate surrounding indeterminacy in law erroneously think that the solution will take a disjunctive form: One side or the other, of the antinomy between reason and fiat in law must be rejected. In line with the Causal Theory, I argue that once this problem is seen as one of institutional design, the problem takes on an entirely new shape. It becomes one of management and experiment. The function of the law is to help manage the political affairs of society, and also to provide opportunities for individual and group initiatives. Man is limited in his experience and knowledge. In the design of legal institutions man's abilities are not infinite; he can hardly be expected to foresee all eventualities. But such indeterminacy remains a matter of degree, relative to man's knowledge and his ability to use it. The legal enterprise, as does the scientific, can proceed without a completely worked out set of agreements, or system of beliefs. What is essential is an understanding among the participants as to how such sets will be developed. The core remains empirical.

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REASON AND FIAT IN LAW

The casus improvisus is always with us: and in ninety-nine cases out of a hundred it must be settled before Parliament can act. The appeal is not made to laws, for there are none, but to law: call it what you like -- the common law, the principles of jurisprudence-- anything from jus divinum to common sense, from recta ratio to a square deal: it is one and by and with that stuff that judges have to work, and they must do so not as bondmen but as free.

--Lord Shaw¹

Introduction:

'Hard cases', difficult cases where neither statute, precedent, nor custom provide clear direction, threaten the impartiality and objectivity of the judiciary. Hard cases point to the inevitable indeterminacy of law. If the task of judging is to settle disputes in accordance with the law in force, then in some sense the law must exist prior to a judicial decision. Some philosophers argue that since the law is not clear in hard cases, it makes no sense to call upon it to justify any decision --vague directions are no directions. Such philosophers argue that it would be more honest to admit that discretion is in fact being exercised.

Louis L. Jaffe is of the opinion that, "judges, whatever their philosophy, will...occasionally innovate. If the judges can be persuaded to allow underlying policy questions to be brought out into the light, these questions would then become arguable and, in that way, subject to a higher degree of rational consideration and control." ²

The rational status of a legal system has generally depended on an assessment of the judge's reasoning in making decisions. More specifically, the focus of attention is on the way decisions are justified. It has been generally assumed that to admit discretion into the legal system would ultimate-

ly undermine its rationality and objectivity. This assumption is implicit in the philosophy of Ronald Dworkin. His task has been to demonstrate, appearances to the contrary, that law is a determinate structure which has no place for discretion.

The admission of discretion into law is, to Dworkin, a matter for normative political theory. Discretion in law is part of the larger problem of institutional design. Dworkin's argument could be extended; he could argue that questions of institutional design are themselves part of normative political theory. To take a position on the essential nature of law is, in Dworkin's eyes, to take a normative position. On this issue there is, strictly speaking, only an internal point of view. Dworkin therefore criticizes the assumption of Benthamite philosophy that the question of what the law is and the question of what the law ought to be are independent of one another. Having questioned this assumption, Dworkin believes that there are good grounds for getting from the premiss that the law ought not to be discretionary and indeterminate to the conclusion that the law can and does in fact operate without being discretionary and indeterminate. I propose to examine Dworkin's philosophy of law³ in order to determine the correctness of his rejection of Bentham's distinction. I will argue that Dworkin finally abandons this position but that he does not realize it.

Dworkin's chief antagonist is H.L.A. Hart. Hart has argued that questions of what the law is and what the law ought to be are separable. He argues that the exigencies of human life make it impracticable to provide a legal system that denies discretion to judges. In the end, the dispute between Dworkin and Hart can be reduced to the question of how the law is to be augmented and elaborated in situations where the law provides only vague directions. Dworkin argues that law is to be extended by judges only on the basis of arguments of principle. Hart argues that such extensions will also necessarily involve policy questions at some level of analysis.

I argue that ultimately Dworkin's distinction between arguments of policy and arguments of principle breaks down; and I argue, further, that law can remain a rational and objective enterprise even when policy arguments are permitted in adjudication.

PART ONE of this thesis outlines the Causal Theory of Law⁴, developed by Professors S.C. Coval and J.C. Smith. This theory provides the necessary context in which to analyze Dworkin's arguments. When Dworkin's arguments are reformulated in terms of the language of the Causal Theory, it is easier to demonstrate their weakness.

PART TWO of this thesis examines the subjective element in law -- judicial discretion. An analysis of Dworkin's paper "Judicial Discretion", is used to develop the philosophy of law regarding this subject.

PART THREE primarily concerns the problem posed by judicial discretion in the design of legal institutions. Dworkin would resolve this problem by denying discretion to judges and by augmenting the system with "principles". The implications of such a resolution are examined.

PART FOUR considers whether or not a legal system can be designed in a way that does not permit discretion and still remain a practical and realistic enterprise. The core of Dworkin's legal philosophy, his rights thesis, is challenged. It is found to be ambiguous and fragmentary.

PART ONE: The Causal Theory

It is basic to the judicial process to declare whether or not a certain line of conduct is permitted, forbidden, obligatory or optional. If the law is to facilitate this process it must provide legal materials which are consistent, complete, and independent. The traditional 'sources' of law (statutes, precedents, customs, and procedures) often provide materials which are neither consistent, complete, nor independent. Consistency is a necessary condition for coherence, and therefore for comprehensibility. Logical necessity forms the parameters of the comprehensible; it forms the basic syntax of one's conceptual language. Legal materials framed in a contradictory fashion can hardly hope to direct the judicial process. Completeness is also a requirement of legal materials: If judges are required to ground their decisions on the law then the law must, in some sense, provide judges with materials sufficient to resolve all cases; otherwise, they must resolve such cases according to their own lights. Independence is also a requirement of legal materials, for without it a case could never be settled other than through the arbitrary exercise of judicial power: At some point a line must be drawn between law and other social practices. Questions of legal entitlement should be resolvable without the involvement of extra-legal issues. Consistency, completeness, and independence are formal properties or virtues of system. Without them, systems provide incomprehensible, insufficient, and indeterminate guidance.

The traditional sources of law, insofar as they provide inconsistent, incomplete, and contingent materials, can not serve satisfactorily as the basis for a legal system. One can try to rearrange these legal materials; but then the choice of criteria arises which, in turn, may lead to the charge that one is usurping the traditional legal authorities and sources of law. Legislation, precedent, and custom can not be basic to the conception of how law works, how it fac-

ilitates the normative qualification of conduct. Even under "ideal" conditions of an enlightened despot, laws are not likely to always provide direction in a consistent, complete, and independent way. Laws can hardly be expected to display these systematic virtues, given the usual conditions under which they arise: conditions of (a) legislative change and compromise, (b) judicial dissent and flux in judicial opinion, and (c) ambiguity in custom's unwritten prescriptions. Given considerations such as these, it is desirable to develop an alternative to the view that legal science is concerned only with the systematic rearrangement of these materials.

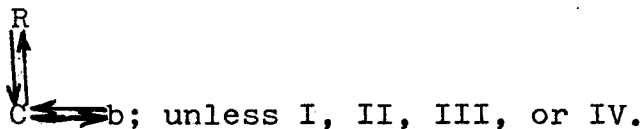
The Causal Theory of Law, developed by Professors S.C. Coval and J.C. Smith, provides one such alternative. It argues that the traditional sources of law will be inconsistent, incomplete and contingent. This is perhaps an infelicitous way of characterizing the argument of this theory. What the theory argues is that there are mechanisms internal to the law which enable it to generate decisions even when the material input of the system can not help but be inconsistent, incomplete, and indeterminate.

The Causal Theory offers "a model of judicial decision-making where the judge is entitled to rely on existing rules of law until they result in an anomaly in terms of the various goals reflected in the legal order. If the so-called policies function as standards, they function as second order rules in a logical manner, much the same as first-order rules. When the policies do not function as standards, they are merely high order descriptive statements of the teleology of the law which furnish the criteria of relevancy in applying the existing rules of law."⁵

The model of legal reasoning advanced by the Causal Theory is explicated through its concept of a rule. This concept of a rule is conceived as a "theory" of how judicial inferences should be made, according to the legal system. The formal structure of a rule is elicited by arguing that law,

conceived as a public and purposive institution, will maximize certain values. These values will thus find expression in terms of the official policy and theory of the system. The Causal Theory elucidates the prescriptive element in law. Value and policy are embedded in the concept of a rule. It is by extending the concept of a rule in this way that the theory is able to provide a model of law and legal reasoning which is an advance over theories which must posit the "black box mechanism" of discretion in order to augment the rule structure of law.

The following diagram is the Causal Theory's schematization of the form of a rule:



R = a regulation (with (a)-type properties).

C = behavior prescribed or proscribed by R.

b = substantive goal of the legal system.

= causal relation.

= teleological or biconditional relation.

I, II, III, or IV = a set of ceteris paribus or exception generating clauses.⁶

The fundamental or basic form of a rule is biconditional: "(a) \rightleftarrows (b)". This is the schematic form of the basic policy or strategy of law. The basic policy of law is to exclude from its purview those cases in which (a)-type and (b)-type considerations are incompatible and to license only those cases in which (a)-goals and (b)-goals are compatible.⁷ (b)-type considerations involve the interests and values embodied in the law of a community; (a)-type considerations involve the methods and practices used to satisfy and realize such interests and values. The Causal Theory argues that it is the nature of the legal enterprise to systematically avoid disjunctive conflicts between the (a)-goals and the (b)-goals of the system. Regulations (R's) are instituted in order to achieve

(b)-goals, by prescribing and proscribing behavior (C) which, other things being equal (ceteris paribus), is necessary for the achievement of those (b)-goals. This practice of instituting (R's) is seen as necessary, given the nature of the world and the nature of human beings; it is necessary for the achievement of fundamental human needs and interests. Therefore, this practice and its "invoking rules" must be protected from other social practices and variants which serve other basic interests, which at times conflict with the interests embedded in law.

The law must therefore be separable from other social practices such as politics, morality, and religion, if it is to function. It is thus a fundamental precept of law that value shall be ordered in a way that serves the basic interests and goals of the society, as embodied in its basic law. The legal system can not effectively fulfill this precept if it allows its invocation procedures to be controlled in an extra-systematic fashion or allows disjunctive situations to arise which could undermine those procedures. The body of a practice (its application) and its invocation are managed separately, according to the Causal Theory. The theory argues that one can expect to find, internal to the law, procedures for clearly determining the existence of a law (its rule of invocation) and procedures for conflict resolution (its ceteris paribus clauses). While the invoking rule only allows one to identify law, no matter how anomalous, it is the generative structure of law (ceteris paribus clauses and anomaly resolving rules) that provides the remedy for such defects. Obscurities arise when one argues that gaps or defects (hard cases) do not exist because the law has the means to remedy them. The generative structure of law would not make sense unless anomalies were detectable at some level in the structure exhibited by the traditional sources of law. The important issue for the Causal Theory is the difference between how the legislature and the judiciary modifies legal prescriptions

rather than whether or not the judiciary is to be allowed to modify the law. By adding another dimension to law, the deep (second-order) structure of generative rules, the theory is able to account for certain systematic defects such as inconsistency (conflict) and incompleteness (relevancy; decidability) in terms of surface structure, while at the same time maintaining the integrity of the system as a whole.

By maintaining a clear invoking rule, the system can always answer the question "What is law?" --e.g., that which is enacted by the Queen in Parliament. By establishing a set of exception generating clauses, the system can accommodate itself to unforeseen contingencies in a systematic and orderly way (that is, in an (a)-like fashion). The basic law or constitutional law of a community represents the basic policy of that community. It is the function of the courts to see that this basic law is systematically applied and elaborated. The ceteris paribus clauses ensure that the law will promote the (b)-goals of the system maximally, in an (a)-like way. The exceptions generated by these clauses are thus the particularizations of the basic policy of the legal system. The matrix of hierarchically ordered values of a legal system represents the product of applying and elaborating social policy. The matrix also plays a central role in the process of policy application and formation. The Causal Theory transforms the process of resolving conflicts between rules into a process of ordering goals within the matrix of the legal system. Or even more precisely, the theory makes more perspicuous the profile and nature of the matters actually at issue in such conflicts.

The basic law can not anticipate all eventualities; the generality of its language is a function of its purpose. The constitutional process can do little more than state general policy. Legislatures must augment this structure. The concrete expression of this is the matrix of values embedded in the workings of law. The matrix involves both a static and a dynamic ordering of goals. The basic goals have a more in-

intrinsic value and therefore acquire a place in the higher part of the matrix and are found to be more stably ordered; other goals have a more instrumental nature and therefore acquire a place in the lower part of the matrix and are found to be more dynamically ordered. Instrumental goals tend to be particularizations of higher goals in the matrix; for example: The right to picket by a worker on strike can be seen as a particularization or extension of his liberty in the pursuit of happiness (economic well-being). The Causal Theory reveals a systematic development, application, and inclusion and exclusion of goals in the practice of law. 'Order' is the keynote of this theory: (b)-goals are ordered (a)-ly, unless I-IV; therefore, the legal system must order its (b)-goals; the result is the matrix of ordered goals (including second-order goals) and the anomaly-resolving rules.

Since the practice of law depends on both the nature of the world and the nature of man, it follows that the practice could break down when the nature of either changes in a manner that was not anticipated when the law was formulated. However, the law can anticipate the general kinds of breakdown that will occur, thus reducing the indeterminacy of such proceedings. The Causal Theory provides for this "highly foreseeable" matter by embedding ceteris paribus clauses in the structure of a rule: Ceteris paribus clause I, " $\neg(R \rightarrow C)$ ", excludes those cases where the nature of man is involved in a way which makes the demand that one comply with the rule, $(R \rightarrow C)$, irrational, given the causal rationale of the system --e.g., infancy, insanity, and desuetude. Ceteris paribus clause II, " $\neg(C \rightarrow b)$ ", excludes those cases where the nature of the world is involved --e.g., physical impossibility. Ceteris paribus clause III, " $(C \rightarrow b)$ ", but also something worse than b", excludes those cases where serving the (b)-goal involved, jeopardizes a higher (b)-goal in the matrix --e.g., a conflict between the law of crimes and the law of wills regarding someone who had murdered for the purpose of

taking more quickly under the will of the victim. Certain forms of official abuse may also be construed as cases of this form. Radical abuse, such as the corruption of an entire regime, may call for another excepting clause: Ceteris paribus clause IV, " $R \rightarrow C \rightarrow -b$ ", excludes those cases where the practice, as a whole, is serving a (b)-goal not wanted by the community --e.g., cases such as the Nazi regime in Germany.

The Causal Theory of Law provides legal philosophy with strong grounds for believing that the division between natural lawyers and positivists rests, to some extent, upon their disregarding the generative structure of law. This forced natural law theories to argue that "true" law has no defects or gaps; while it forced positivist theories to grant broad discretionary powers to judges. The Causal Theory avoids both extremes.

PART TWO: Judicial Discretion

Considered separately, the following demands (A, B, and C) are often placed upon a legal system --they are thought to be, at least prima facie, necessary for the completeness of the legal system, enabling the standardization of socially required conduct:

"(A) Principle of unavailability: Judges must resolve all cases submitted to them within the sphere of their competence."⁸

"(B) Principle of justification: A judicial decision requires a ground or reason and judges must state the reasons for their decisions."⁹

"(C) Principle of legality: Judicial decisions must be grounded on legal norms."¹⁰

These three demands can be summarized as:

"(D) Judges must resolve all cases submitted to them within the limits of their competence by means of decisions grounded on legal norms."¹¹

"(E) Every obligation implies the possibility of performing the obligatory action."¹²

By adding (E) to (D) the following proposition can be inferred:

"(F) Judges can resolve all cases submitted to them within the limits of their competence by means of decisions grounded on legal norms."¹³

But (F) implies:

"(G) The set of all legal norms contains normative grounds for the solution of any case submitted to a judge."¹⁴

Carlos E. Alchourron and Eugenio Bulygin argue that from (A), (B), and (C) the Postulate of Completeness, (G), can be deduced. "This means," they argue, "that the requirement (which positivists) express (in (A), (B), and (C)) presuppose the truth of this postulate. But the postulate is true only in exceptional instances; that is, in relation to closed systems, such as penal law, that contain the rule of closure nul-

lum crimen. When applied to the majority of legal systems, the postulate (G)....is false. Hence it follows that the three principles (A,B, and C) are jointly inconsistent."¹⁵

It is demand (C), the principle of legality, that these authors find vulnerable. This principle, they argue, "is bound up with the ideologies of Positivism and Liberalism."¹⁶ Early positivists tried to provide legal systems with extensive codification. Legislation could not, however, anticipate every contingency and therefore could not provide a 'complete' legal code. Without such a code, the principle of legality could hardly be insisted upon. "Indeed, many an attack on positivism," write Alchourron and Bulygin, "has had as its sole aim widening the set of admissable (valid) norms by integrating it with customary law, moral principles, natural law judicial precedent and the like. But the next step is to ascribe to the set that has been enlarged in this way the same characteristic that it had before --in the positivist conception-- that of being closed".¹⁷ Such enlargements add to the normative completeness of the law but they do not necessarily close it to the possibility of judicial discretion.

Dworkin's objective is to put forward a "liberal" theory of law.¹⁸ In his paper, "Judicial Discretion", he is primarily concerned with the problem of normative completeness. Even here a species of 'disjunctivism' arises between Dworkin and the positivists (Hart in particular): Dworkin prizes completeness above coherence. He would rather ensure that the system be efficient to its assigned tasks --the achievement of justice-- against the possibility that the system would thereby be reduced to incoherence and to the danger of inconsistency through the vagueness of its operations. Hart, however, would prefer consistency over and against completeness when the two come into conflict. If one is to make any sense out of Hart's introduction of judicial discretion into his theory of the legal system, then it must be viewed as an attempt to augment his basic system. His basic system

emphasizes the virtue of consistency. This emphasis threatens the completeness of the system; therefore, the system is augmented by judicial discretion. Such augmentation, of course, threatens to set up a rival authority to that of the legal order. It is at this point that Hart's theory is most vulnerable; and it is here that Dworkin begins his attack. It is worth stating, in broad terms, the nature of the dispute: The demand for consistency is often expressed in the negative thesis that the rule of law is not rule by fiat; it is not arbitrary. Arbitrary rule is most likely to result in an incoherent authority. The positive thesis is extremely hard to explicate, and legal systems seem to come short of the (ideal) goals set for them --justice, for example. Completeness would seem to be the harder virtue to achieve; but this is not clearly so, especially if one is willing to reduce one's standards of consistency. Both the positive and negative theses are expressed in the opening lines of Dworkin's paper, and which if not carefully considered almost alone allow him to win the case for completeness as against consistency:

"To the layman", writes Dworkin, "a lawsuit or a trial is an event in which a judge determines a controversy by application of established principles [this is his positive thesis], rather than new principles to dispose of the case [this is his negative thesis]."¹⁹

The ideal of completeness is emphasized in the very next sentence:

"He [the layman] knows that individual judges may fail this ideal of justice...."²⁰

"Ideals" are the parameters of completeness for a system. Also in speaking of "this" ideal, Dworkin does not seem to appreciate the complexity of his first sentence, specifically its negative thesis. In the abstract of his paper, "Dworkin on Judicial Discretion", G.C. MacCallum sees Dworkin's basic argument to be as follows:

"If persons subject to an official's decision are en-

titled as of right to some particular decision --viz., the 'correct' decision--, then the official has no discretion. There are such entitlements in all relevant judicial cases. Therefore, judges have no discretion in these cases."²¹

"Interest" is a relative thing. The most fruitful interpretation of MacCallum's remarks is that he sees Dworkin's main concern to be the problem of normative completeness in a legal system. When viewed against the backdrop of the problem of consistency and Hart's position, one wonders if any argument for the completeness of a legal system can be coherently established: namely, that "there are such entitlements in all judicial cases." It must be in this sense that this argument is the only "interesting" one to be found in Dworkin's paper. The "rationality" of a system which claims such "completeness" is being questioned.

Dworkin's main target is 'judicial discretion'. This suggests that he does not see the larger generic and systematic problem of indeterminacy in law. In his preference for completeness (trying to assure justice, to assure that one's rights and entitlements are recognized) Dworkin fails to realize that Hart's emphasis on consistency (in conflicts between the two) is, in its own way, trying to assure these very same ends. He demands control of decisions by public standards, developed in the community and the profession over time, rather than control by the systematic device of a rule of recognition.²² This demand may merely exchange private prejudice for public prejudice, judicial discretion for public discretion. This again suggests that Dworkin does not fully appreciate the larger systematic questions of institutional design. Dworkin can not see how goals "enter" the legal system. Hart's use of his rule of recognition will not do --otherwise, he would not have allowed judges discretion. The recognition procedures for goals and their ranking in law, becomes the central preoccupation of Dworkin's legal philosophy. Positivists believed that in admitting goals into law (other than

under the discretion of judges) one jeopardized other highly valued aspects of the system; namely, the principle of democratic theory that popular rule is required because obligation must be based on some form of consent, and the rationality that finds retroactive laws essentially absurd. Positivists therefore argued for judicial subordination and the rejection of vague law.

The central issue concerns the development or discovery of a systematic structure that will resolve conflicts which arise out of the need for both consistency (clarity) and completeness (decidability) in a legal system. It is desirable both to achieve one's goals and to know when they have been achieved: these are the reasons why completeness and consistency are accounted virtuous. Both are highly prized, and any theory that allows one to be traded off against the other will fail to be fully satisfactory in practice. Thus Hart and Dworkin fail in different directions. The form of an acceptable theory is thus more complex than is contemplated by either of these authors. They believe that a static, once-and-for-all resolution is possible. What is in fact required is the development of the inner dynamic of the law. The Causal Theory, outlined in PART ONE, offers a realistic alternative.

It is to the credit of Common Sense brands of philosophy that the zeal for logical consistency is tempered. Dworkin's "layman" represents this point of view. However, a better way of exhibiting the full force of such common sense arguments is to take them to be asserting the existence of a prima facie case. With such cases argument begins. Presumption of correctness is established, and the burden of proof is placed upon those who would challenge that correctness.

The prima facie case behind much of Dworkin's "layman" is that in combining both the function of legislation and the function of adjudication one threatens the legal system with a form of incoherence, the possibility of inconsistency. To es-

establish this position one need only imagine a two-person society: The Citizen could hardly be expected to follow the orders of the Governor if it were not possible to discover what those orders were until after he had 'disobeyed' them. The language in which normative discourse is framed is severely strained in such contexts. From this prima facie position the argument would continue: This incoherence is the threat posed by judicial discretion. In order to prevent it, the judge must be supplied with sufficient legal materials to provide a legal remedy for each case brought before his court. This is to say, that the generic case must be resolved in the legal system (that is, elaborated in a general and abstract way), so that the judge, through the exercise of his skill and training need only apply it to the specific concrete case: i.e., the system must be complete. Judicial discretion thus seems, paradoxically, to threaten the completeness of the system, when initially it was introduced by Hart primarily to augment an incomplete structure. Thus one arrives again at Dworkin's crucial second premiss and must ask:

How can one establish that there are always sufficient legal materials (a body of entitlements) such that the system need never be augmented by judicial discretion? (Remember, that the prima facie argument is that introducing 'judicial discretion' into a legal system can result in internal contradictions through the creation of a competing authority.) Dworkin's argument in "Judicial Discretion" seems to be singularly unhelpful. It is in his paper, "Hard Cases", that one finds Dworkin's answer. "Hard Cases" will be considered in PART THREE of this thesis. At this point, my primary concern is Dworkin's conception of the differences between his and Hart's positions and the character of the general problem with which they are involved.

Positivists correctly argue that their system does not necessarily lead to internal contradictions. In this way, positivists manage to resist increasing their system's com-

plexity, and thereby maintain a degree of simplicity in the design of their legal system while achieving a form of completeness. Simplicity of design is of course desirable, because it makes it easier to comprehend and to apply the system in practice. To reject judicial discretion because it has the possibility of leading to an incoherent structure seems extreme to positivists --especially when such a rejection threatens to erode the basic consistency of their system and its attendant clarity through the erection of vague and possibly incoherent standards.

Dworkin argues that judicial discretion should be rejected, even if this involves sacrificing a degree of consistency by allowing public standards to affect judicial decisions. In the analysis of this position it will be crucial to understand exactly how Dworkin would have such "public standards" determined and elaborated in adjudication. In fact, Dworkin would want to argue that he sacrifices none of the virtues of consistency found in the positivist model of law, but rather provides a more consistent structure without sacrificing the elements of law valued by positivists. But the argument is long and quite involved. At this point, it would seem that at best Dworkin has only substituted public for judicial discretion -- as was said before. Yet, by allowing such vague standards a role in adjudication, he has assured the judge sufficient materials to resolve all cases brought before him. But this increases the uncertainty as to what those decisions will be, and so jeopardizes the coherence and consistency of the legal system.

Dworkin has yet to establish his second premiss. This premiss amounts to the claim that judges never make law but only find it. Embedded in this claim is the prima facie case about the ultimate incoherence of combining the functions of legislation and adjudication. "Ultimate" in the sense that it cannot serve as the basis of a systematic presentation; i.e., it attacks the 'independence' of the system. Dworkin, howe

ever, does not establish in any significant way, that his second premiss is correct. He says that judges say they find law and do not make it. He says that "laymen" expect judges to find law and not to make it. He argues, along with Hart, that our normative language would not be applicable to a system that generally had judges making rather than applying law --even for Hart, judge-made law is the exception and not the rule. Of course, the correctness of all that Dworkin says depends on the correctness of his second premiss; mainly, that there are always sufficient legal materials to resolve any case. Granted, mankind has a lot invested in the correctness of these views. The radical argument of the Realist, however, is still possible: The layman and the judge are mistaken and normative language is in fact not applicable to legal systems. All that Dworkin has done is to show the internal connections of a structure that is questioned as a whole. He has shown that if certain items are to be removed from the concept of law then this entails that other items must also go. The radical argument continues: What must be produced is a system which can effectively achieve its goals without sacrificing either consistency or completeness. Neither Hart nor Dworkin, so far in this analysis, produces such a system. At best, Dworkin reduces the persuasiveness of some of the Realist's more positive programs (for example, those which emphasize the descriptive-empirical study of the judicial process).

What is instructive is that the radical, Realist rejection of system, opposed by both Hart and Dworkin, has led to a deeper understanding of the complexities involved in designing a legal system. In rejecting the theory for the practice of law, the Realist has challenged theory to respond satisfactorily to practice. Of course, the complete rejection of theory on the part of some Realists consigns that view ultimately to dogmatic isolation. The work of theorists who reject practical problems, on the other hand, can expect to suffer from neglect. Dworkin does not fully appreciate the issue

behind the Realist's position (the radical argument) or Hart's position (the argument from hard cases). Especially when his argument for his second premiss seems to amount to the following:

'We have a lot invested in the view that persons subject to an official's decision are entitled as of right to some particular decision in all relevant judicial cases. This is a view as to what the law is and ought to be like. Because we have so much invested in this view, we can not give it up.'

In fact, Dworkin's latest defence of his theory ends in a similar stance.²³ But this is not the issue. It is rather the correctness (the rationality) of this view that is questioned. Even though some Realists, in their enthusiasm to show that law was not the embodiment of Necessity, may have suggested or even openly advocated the feasibility of radical alternatives, their criticism of existing theory was to the point. Theory to the Realist did not have any apparent application, and in fact often retarded the practice of law.

In Dworkin's later paper, "The Model of Rules",²⁴ the problem of whether or not normative completeness can serve as a realistic ideal takes on a different shape. The problem that begins to emerge is not so much whether or not the legal system must be augmented but rather how it is to be augmented. Dworkin's arguments, however, are not definite enough, in this paper, to resolve this issue. But he does refine his concept of discretion and thus his dispute with Hart. He argues that judges exercise discretion in two senses only. He distinguishes among three senses of judicial discretion: 'discretion-1', that judges must exercise judgement; 'discretion-2', that judges have the last word; 'discretion-3', that judges are not controlled by standards dictating a particular decision.²⁵ He finds that legal philosophers have a difficult time distinguishing between discretion-1 and discretion-3.²⁶ This is hardly surprising, for this 'inability' is in fact part of Dworkin's substantive argument. This is brought out clearly

if one interprets Dworkin as arguing that in order to make sense out of positivist claims one must posit a third sense of discretion. Unless Dworkin is understood in this way, a contradiction seems to arise in his presentation of the term 'discretion'. First, he writes:

"The concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority."
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But when he writes about discretion-3, he says:

"We use 'discretion' sometimes ... to say that an official ... on some issue ... is simply not bound by standards set by the authority in question."²⁸

In order to make sense of these passages, one must understand Dworkin to be arguing that if 'discretion', as used by positivists, is to make any sense then it must be used in the sense of discretion-3. It does not seem to make sense to speak of "law" where there is no authority purporting to govern decisions. And judicial action, as judicial action, does not make sense other than as the application of law. It would therefore seem to follow that judicial discretion-3 is not exercised by judges -- simply because there is no such third sense. The argument seems to be that the positivist thesis, which amounts to establishing judicial discretion-3, can only make sense in terms of the other two senses of discretion; senses which in no way attack the fundamentals of the legal system. Thus, adapting Dworkin's argument, the positivist thesis is either trivial or incoherent. It is of course incumbent upon Dworkin to demonstrate that it is possible to explain the phenomenology of judicial decision without positing discretion-3. In part, Dworkin is challenging the positivist belief that there is no alternative to admitting judicial discretion-3 into the legal system. PART THREE of this thesis considers Dworkin's alternative.

The more difficult part of Dworkin's argument, in "The

Model of Rules", is his claim that it is the positivist conception of law as a "system of rules" which leads the positivist to the error of supposing that judges must exercise discretion-3.²⁹ The nerve of his argument is that law, conceived as a system of rules, is insufficient to the task of explaining how judges decide questions of law, especially in hard cases; such a system must be augmented by the positivist with some form of judicial legislation. Dworkin, however, augments rules by principles and pictures law as a system of entitlements. Dworkin's distinction between rules and principles is crucial to his account. Principles, unlike rules, Dworkin argues, have a dimension of weight and therefore do not function like rules in an "all-or-nothing" way, but are balanced one against the other.³⁰ Dworkin's conception of a rule is that of a rule-of-thumb. Principles and not rules are central to his concept of law. He rejects the view that his and Hart's positions differ only in emphasis.³¹ He believes that there are fundamental differences between their views. He rejects the positivist concern with the "independence" of law, arguing for a "connection" between "law" and "morality". In rejecting discretion-3, Dworkin has had to supply the judge with sufficient legal materials of a type (principles) which would allow the judge to provide a "legal" remedy for each case brought before the court. In order to do this he has had to question Hart's conclusions which were supposedly based on standards of clarity and decisiveness. Thus, his attack on Hart's rule of recognition and its role in the legal system. Hart's and Dworkin's approaches are the same in this respect: each is willing to sacrifice certain features of the legal system in order to achieve the goals of the legal system. They differ in respect to the features each is willing to sacrifice. Dworkin's prescription would deliver a shabby product. Hart's prescription would deliver a better product; however, delivery would not be assured.

The issue that emerges between Hart and Dworkin does

not so much concern the completeness of the legal system, as it does its augmentation. It is only in his paper, "Hard Cases", that this issue clearly emerges.

PART THREE: Hard Cases

A. The Rights Thesis

(i) Principles and Policies

Dworkin's paper, "The Model of Rules", provided philosophy with a strong critique of positivism, but it did not offer an adequate alternative. There were crucial questions, but no sound answers. Of the positivist theory of obligation Dworkin writes:

This theory holds that a legal obligation exists when (and only when) an established rule of law imposes such an obligation. It follows from this that in a hard case -when no such established rule can be found- there is no legal obligation until the judge creates a new rule for the future. The judge may apply that new rule to the parties in the case, but this is ex post facto legislation, not the enforcement of existing obligation.

The positivists' doctrine of discretion (in the strong sense) required this view of legal obligation, because if the judge has discretion there is no legal right or obligation -no entitlement- that he must enforce. Once we abandon that doctrine, however, and treat principles as law, we raise the possibility that a legal obligation may be imposed by a constellation of principles as well as by an established rule. We might want to say that legal obligation exists whenever the case supporting such an obligation, in terms of binding legal principles of different sorts, is stronger than the case against it.

Of course, many questions would have to be answered before we could accept that view of legal obligation. If there is no rule of recognition, no test for law in that sense, how do we decide which principles are to count, and how much, in making such a case? How do we decide whether one case is better than another? If legal obligation rests on an undemonstrable judgement of that sort, how can it provide a justification for a judicial decision that one party had a legal obligation? Does this view of obligation square with the way lawyers, judges and laymen speak, and is it consistent with

our attitudes about moral obligation? Does this analysis help us to deal with the classical jurisprudential puzzles about the nature of law?

These questions must be faced, but even the questions promise more than positivism provides. Positivism, on its own thesis, stops short of just those puzzling, hard cases that send us to look for theories of law. When we reach these cases, the positivist remits us to a doctrine of discretion that leads nowhere and tells nothing. His picture of law as a system of rules has exercised a tenacious hold on our own imagination, perhaps through its very simplicity. If we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices.³²

Dworkin's most complete answer to these questions is to be found in his paper, "Hard Cases".³³ His alternative to the positivist model of law is based on his "Rights Thesis". The thesis holds "that judicial decisions in civil cases ... characteristically are and should be generated by principle not policy".³⁴ According to the rights thesis, "judicial decisions enforce existing political rights....Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions."³⁵ Coval and Smith argue that Dworkin's conception of a principle is ambiguous between that of a second-order rule and a value or goal of the legal system.³⁶ It is this confusion that leads Dworkin to distinguish between principles and rules on the basis of their mode of affecting decisions: "Rules" operate in an "all-or-nothing" fashion and at certain points they do not offer any further guidance. Conversely, "principles" can always provide direction; however, their influence depends on their weight and they must be balanced against competing principles.

Dworkin believes that rules can not provide sufficient

guidance in all cases because there is always the possibility of vagueness and the need for interpretation. When the wording of a rule provides vague or ambiguous directions, questions arise as to how judges should and do proceed. The working assumption is that the guidance provided by rules comes to an end in a specified way, while the guidance provided by principles is pervasive.

Law is not primarily an affair of rules to Dworkin, but rather one of principles³⁷; rules can be "generated" by either arguments of policy or arguments of principle. While it is permissible for rules to be generated in the legislature by both sorts of argument, it is only permissible for rules to be generated in the courts by arguments of principle. The conception of a rule in "Hard Cases" is that of a rule-of-thumb: In most situations, following the exact wording of the rule is more-or-less successful, more-or-less acceptable. This conception of a rule definitely does not have the systematic character of the rules found in the Causal Theory. In the Causal Theory, a rule is related to the legal system as a whole. In Dworkin's theory rules are merely convenient devices. They can not be flexibly adapted to new situations, but must be replaced by entirely new rules. Dworkin is resistant to theories that attempt a systematic explication of law. His reasoning is not clear --perhaps it arises from his belief in the viability of his own theory of law as an affair of principles. On Dworkin's theory, rules and standards (policies or principles) are separate and are not seen as part of an integral unit. His treatment of rules as rules-of-thumb requires no explication because of its simplicity; but his treatment of principles does require explication --he must show how the abstractions of principle can provide concrete guidance, specifically in "hard cases". (It is worth remembering that Dworkin's conception of principles is ambiguous between second-order rules and values, and his conception of a rule is so crude that it can not but fail to provide a chal-

lenge to his conception of principles. The concept of a rule developed by the Causal Theory is a substantial challenge to Dworkin's thesis.)

It is too simplistic to say merely that Hart in his theory augments rules by discretion or policy, while Dworkin augments rules by principles. Their differences seem to be merely a matter of emphasis -- both see the need for augmentation. They differ in their conception of how law is to be extended in hard cases. For Hart, the concept of rules, and its attendant utilities of clarity, datability, and regularity, represents that feature of law that should have priority in hard cases. This is not to say that he does not see law as a purposive structure. He argues that the goals of a complex system such as law will necessarily involve indeterminacies in their application. This shows indirectly that clarity is one of the desiderata of the utilities valued in law. For Dworkin, rules are secondary and dependent artifacts of the law; legal standards are primary. Dworkin sees the utilities of having clear and datable regulations. Yet Dworkin sees his differences with Hart as more than a matter of emphasis. In order to substantiate his claim he further refines his conception of positivism. Where positivism would allow rules to be augmented by considerations of "policy", Dworkin would only allow considerations of "principle" to affect decisions in hard cases. This distinction between principle and policy must be carefully appraised.

"Principles," writes Dworkin, "are propositions that describe rights; policies are propositions that describe goals. But what are rights and goals and what is the difference between them? [Rights can be distinguished from goals] by fixing [i] on the distributional character of claims about rights, and [ii] on the force of these claims, in political argument, against competing claims of a different distributional character. ...[This] formal distinction does suggest ... that we discover what rights people actually have by looking for arguments that would justify claims having the appropriate

distributional character. But this distinction does not itself supply any such arguments."³⁸

Dworkin has reversed the natural order of analysis: Certain states of affairs are treated as "rights", not, as Dworkin would argue, because the benefits and burdens of maintaining them are universally distributed, but rather because they are valued so highly. It is because they are valued so highly that they are treated as "rights", and demand universal support. Of course Dworkin recognizes this when he says that his "distinction does not itself supply any such arguments." But if it does not, then what is its use? Perhaps one can use his distinction to identify the rights persons "believe" they have, but surely not to identify the rights they do have. Rights must be based on those states of affairs that are in fact highly regarded by the community. Thus, a person may be mistaken about his rights and so mistakenly attribute a universal distributional pattern to them. The substantive principles must be established before the formal analysis can make sense. Human and civil rights would be such principles and could be identified with the highest aims of a society's morality. This would give good reasons for attaching a universal distributional character to such aims.

For Dworkin, the distributional character of "goals" is not universal, but differential. "In each case distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall."³⁹

(ii) Majorities and Minorities

Unlike legislators, who must stand for election, judges are relatively independent of such democratic controls. Legislation can always be supported by some such argument as the following: It is readily conceded that, other things being equal, there is a need for the procedure of majority-voting as a minimally acceptable decision-making device; therefore,

there are sound reasons for demanding compliance with majority programs, other things being equal. It is Dworkin's view that such arguments are not available to support the decisions of an independent judiciary, especially in hard cases. When questions of rights arise, he believes that judges may have to decide against a majority benefit. It is never clear, however, that the protection of rights is not in fact a great benefit to the majority, representing higher, more long-term, interests. Dworkin fails to elaborate his examples of "policy" arguments to the degree where such issues could be clarified. Some mechanism, such as majority-voting, is central to Dworkin's conception of how "arguments of policy" generate decisions regarding social welfare. The result of such a procedure is not always acceptable. Nevertheless, it forms the central decision-making procedure in a democracy. Through this mechanism the official policy of a society is created, and the society's corporate will finds expression. The rationality of such a procedure, and the policy arising from its use, will depend on how it is limited; that is, how policy is allowed to be modified in its application. "Arguments of policy" essentially serve to establish a majority benefit. Policies are programs or standards which arise from social practices based on majority-rule. Such practices would be legislatures, elections, and referendums. A "sound" policy argument would advance a standard acceptable to a majority of citizens.

In democratic theory standards effected on the basis of arguments of policy have a strong prima facie appeal. Yet, given the nature of the human condition, such majority decision will not always be "correct". Normally judges can follow the wording of a statute, arguing that it represents official policy. Simply following official policy in cases where the policy is uncontested can be based, argues Dworkin, on an "argument of principle". He writes that "unoriginal judicial decisions that merely enforce the clear terms of some plainly valid statute are always justified on arguments of principle, even if the statute itself was generated by policy."⁴⁰ The

"principle" involved must be this: If a standard is generated by a "recognized" social mechanism and is uncontested, the judge can infer that to follow the standard is to produce a majority benefit. He may also assume the system, as a whole, is sound and healthy. But what makes this a "principle"? In an adversary system, such as common law, judges traditionally do not initiate new lines of investigation. The judge decides between the parties to a dispute, on the basis fact and the law as presented by competent advocates. To designate such standards as principles, rather than as policies, has no virtue. In hard cases standards would be challenged; consequently, the inferences and assumptions they allow would also be challenged.

It is recognized in democratic theory that majority-procedures will not always provide correct decisions. Conditions of uncertainty and bias can lead to honest error or outright abuse. Majority rule can degenerate into majority tyranny. If the practice of majority rule is to be rationally acceptable, it must be willing to be openly challenged. After all, official policy is only given the presumption of correctness.

The criterion Dworkin uses to identify "arguments of principle" would seem to be those arguments that seek to establish acceptable grounds for limiting majority rule and for augmenting it. Dworkin finds this practice in the institution of rights. Apparently, arguments which seek to limit majority rule demand a basis independent of the majority decision-making procedure. Initially, the demands of justice, human dignity, and equality seem to provide alternative grounds for deciding cases. Perhaps in normal cases, the justice, fairness, respect for human dignity and equality of democratic proceedings are implicit and unchallenged. In hard cases the character of proceeding in accordance with majority rule is called into question. It appears that the distinction between "rights" and "goals" reduces to the difference between normal cases and hard cases. What is implicit in the justification of normal cases is forced to become explicit in hard cases.

Legal practices and institutions are premised on the

belief that they should and do pursue generally acceptable ends through generally acceptable means. The legal enterprise openly admits to its limitations and is amenable to modification. Perhaps one of the reasons for apprehension over judicial discretion is that it does not seem open to challenge. As previously mentioned, the Causal Theory argues that the law can be systematically challenged at four points. At these points the law allows exceptions to be written, thus allowing change while preserving the integrity of the system. Dworkin, in arguing for the institution of rights, suggests that some extra-systematic challenge to a rule of recognition, which is in the form of majority standards, is not only possible but must be recognized.

To be critical and justificatory of majority practices, Dworkin believes, the institution of rights must have a morally independent basis. The positivist doctrine, which separates law as it is from law as it ought to be, prevents the elaboration of the law's justificatory theory. Insofar as the practice of rights can be clarified, and its effects on the general system of law predicted, there is nothing preventing its integration with the basic system of rules. Majority rule will not always produce decisions in accord with society's more basic program. This requires judges to find alternative grounds for their decisions. This is a very general form of the problem of indeterminacy in the application of any system of standards. The constitutional process is the fundamental level of political activity; it finds its expression in the basic goals and ordering of the matrix. One's legislative rights and adjudicative rights are derived from this process. Dworkin argues that the question of rights is integral to the judicial process. The "integralness", however, is made ambiguous by his denial of a clear and systematic entry procedure. Obscurity arises from his view that a rule of recognition is incompatible with a system which allows considerations of rights and principles full play. Apparently he believes that, by accepting a rule of recognition, one is committed to the requirement that basic

rules of logic and ethics be ruled upon by positive law.

(iii) The Collapability of Principles and Policies

Dworkin distinguishes principles from policies in three ways. They differ in distributional character, in force, and in the direction offered in adjudication. Principles and rights, unlike policies and goals, promote states of affairs which are distributed universally. This asymmetry becomes a major bifurcation in Dworkin's philosophy of law: "The bulk of the law -- that part which defines and implements social, economic, and foreign policy -- can not be neutral. It must state, in its greatest part, the majority's view of the common good. The institution of rights is therefore crucial because it represents the majority's promise to the minorities that their dignity and equality will be respected."⁴¹

This does not seem so crucial once one remembers that there are several majorities and minorities in modern democratic states. A man can belong to several majorities and minorities simultaneously. What Dworkin describes as the practice of rights is in fact part of the defeasible conditions used in elaborating the society's official policy. Common goals do not compete with individual rights because all policy is constitutionally premised on a recognition of rights. The Causal Theory shows that such "conflicts" can be reduced to an ordering problem, contingencies which the system has provided for. The constitutional protection of rights represents a basic government policy. Thus, it is proper to demand special arguments to circumvent it. For Dworkin, there are "only three sorts of grounds that can be consistently used to limit the definition of a particular right."⁴² Such limitations must be consistent with the essential nature and purpose of the institution, which is to protect human dignity and equality. He does not see, however, that these limitations call into question his characterization of rights and goals. This distributional asymmetry between rights and goals can be reduced to the relative order of these standards in the matrix. There

are three specific grounds upon which rights can be legitimately compromised.

"First, the government might show that the values protected by the original rights are not really at stake in the marginal case (non-paradigm case), or are at stake in some attenuated form. Second, it might show that if the right is included the marginal case, then some competing right in the strong sense...would be abridged. (Dworkin distinguishes between rights in strong and weak senses. In the former, interference is wrong. Perhaps one has a right, in the strong sense, to drink oneself to death, and it would be wrong for others to interfere. As a prisoner-of-war, one has a right, in the weak sense, to attempt escape. One has no duty to not try, and others have no duty to not interfere.) Third, it might show that, if the right were so defined, then the cost to society would not be simply incremental but would be of a degree far beyond the cost paid to grant the original right (paradigm right), a degree enough to justify whatever assault on dignity or equality might be involved."⁴³

The matrix of values exposed by the Causal Theory provides a general account of these three "grounds", for they touch upon standard adjustments occurring within the legal system. The first argues that a right is not compromised if the values the right seeks to promote are not really being attacked. In effect, the government's action is more or less consistent with the (b)-goals of the system. The second argues that certain values can not be compromised merely by a claim equal in weight. That claim must also be equal in kind if it is to succeed. This authorizes the government to restrict the rights of individuals to protect equal distribution of such rights throughout the population. There is nothing magical in such authorization; in allowing governments such licence, citizens are indicating their high regard for certain standards. "Equality in kind" between standards can be equated with "having the same relative standing in the matrix".

rights. The "force" of such claims must generally defeat appeals "to any of the ordinary goals of political administration."⁴⁶ Again, this "force" can be explained by explicating the relative position of values in the matrix of the legal system. There does not appear to be any substantial difference in the nature of these two sorts of political aims as Dworkin tries to argue.

Besides the difference in distributional character and the force of claims to rights and goals, a third distinction remains to be examined. Dworkin argues that if all judgements made by courts were entirely justified on arguments of policy, the "gravitational force" of the practice of precedent could not be accounted for.⁴⁷ Dworkin distinguishes between the "enactment force" and the "gravitational force" of political decisions. Decisions based on policy have only "enactment force", while decisions based on principle also have "gravitational force". The enactment force is limited to the words of a decision. Dworkin argues that it is too simplistic an account of precedent to say that judges, "when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce the rule so that the benefit may be achieved."⁴⁸ He is vague about the way in which such policy arguments establish the existence of a community "benefit". He is not thinking about arguments which claim that a particular decision is in accord with the system's matrix of values. Thus, it is not clear what he means by a "benefit". He writes: "The gravitational force of a precedent may be explained by appeal not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike."⁴⁹

If the enactment force of a decision means that the decision enforces a pre-existing ordering of values in the matrix, then what is added by insisting that like cases ought to be treated alike? Is this not just to reiterate that all cas-

When seen in terms of position within the matrix, the third ground becomes more intelligible. The third ground demands that if the values protected by the institution of rights are to be sacrificed to other "kinds" of values represented in the legal system, then the compromise must be one of significance. This third argument demands that simple utilitarian functions be restricted with regard to these values. This third ground reveals a concern with systematic adjustments taking place within the legal system. This inner structure is made explicit in the Causal Theory. Measurement of various utilities involved will have to be cognizant of the structural relationships of the legal system, and specifically the ordering of goals within the matrix.

Dworkin argues that rights, unlike goals, are not "subordinate to some conception of aggregate collective good."⁴⁴ But this is not clearly so: First, one can see that "goals" are political aims low in the matrix of the legal system, and therefore more dynamically ordered and less stable than aims characterized as "rights". Second, if certain rights are granted, on the mere contingent ground that one is human, then (other things being equal) there is little that could happen that would require the original grant to be revised. Since the attribute of "humanness" is distributed universally throughout the class of agents addressed by the legal system, differential considerations rarely, if ever, arise. The "rights" of animals, the unborn, the insane, and demigods raise embedded questions of policy. This suggests that Dworkin's distinction can not bear close scrutiny, for upon closer examination the universality of the rights involved depend upon implicit contingent premises. He argues that rights may be compromised by policy when "a goal of special urgency" is involved.⁴⁵ However, it is never clear how such "compromises" are settled on the basis of principle rather than policy. At such junctures, he contends that he is arguing not about the "distributional character" but about the "force" of claims to

es ought to be determined according to the ordering of values as set out in the matrix? Questions of fairness can be reduced to questions concerning the system's criterion of relevance: It was mentioned that, according to the Causal Theory, standards (policies and principles) can function as either second-order anomaly resolving rules or as high order descriptive statements of the teleology of the law providing the criteria of relevance of the legal system. It is ambiguous between these two functions to simply argue that courts must apply the principle of fairness, that like cases be treated alike. The system must supply examples or paradigms of what constitutes fair and equal treatment, and what constitutes valid exceptions to such central cases. If it does not, standards of fairness will have no content.

Even here, where the issue seems most clearly one of "principle", policy considerations are necessarily involved. Once one sees that policies (lower-order aims) relate to principles (higher-order aims), the difference between the gravitational force and the enactment force of a political decision collapses. Behind the question of "gravitational force" is the general matter of relevance and the teleology of the system. Dworkin thinks the enactment force is found in decisions based only on policy because he can not see the connections between such lower-order aims as "goals" and such higher-order aims as "rights". Since Dworkin's distinction between policy and principle fails to maintain its basis in distributional character, in the force of a claim, and in the gravitational/enactment dichotomy, his rights thesis, that judges decide only on the basis of principle, is seriously undermined. The way he arrives at his rights thesis is instructive.

"Arguments of policy", writes Dworkin, "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument

of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of antidiscrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle."⁵⁰

The mechanism of majority-rule is central to Dworkin's conception of a common goal. The core idea is that a subsidy to aircraft manufacturers must be based, either directly or indirectly, on a working political majority. The will of a majority can change, or a new majority can be formed on the basis of a different program. Thus conceived, the ground of policy is forever shifting. But rights appear to have a firmer basis, being embedded in such concepts as fairness and equality.

"Judges do not decide hard cases in two stages," writes Dworkin, "first checking to see where the individual constraints end then setting the books aside to stride off on their own. The institutional constraints they sense are pervasive and endure to the decision itself."⁵¹ Goals, which are generated by arguments of policy, fail to provide institutional constraints which "endure to the decision itself", because judges are not equipped to assess the mood of the political majority. Also, the goals of a majority would accept can not be predicted accurately enough to provide the guidance required to decide hard cases. This leads him to adopt a general theory of law which holds that the adjudication is primarily concerned with rights or principles, and only secondarily with goals or policy. Dworkin's examples are overly complex; as an alternative, the following situation focuses on essentials:

Imagine a community developing standards for allocating its educational tax money. Fifty-one percent might vote in block to appropriate all funds for their neighborhood only, leaving nothing for other neighborhoods. This would be a "policy". One can easily imagine other forms of distribution.

The community can also develop a "different" standard. It may put the issue before its members in a restricted form. It may hold that the money for education is to be distributed equally to all neighborhoods, and the majority determines only the "level" of spending. This would be a "principle". The crucial question remains: how does a community determine whether a particular vote will be a question of "policy" or one of "principle"? The answer must be in the relative importance of the standard involved; thus, its position in the matrix will determine its standing as a "principle" or a "policy". When Dworkin asserts that judges must decide on the basis of principle, the most he can mean is that they must consider the quality of their decisions as controlled by standards very high in the matrix. Consequently, any decision a judge makes in one case will require him, and other judges in later cases, to show relevant cause for any departures from an established line of judgement. When considering conflicts in "policies" (lower-order values), resolution will obviously be found by referring to "principles" (higher-order values). Little more is involved in Dworkin's claim that the issue is one of principle rather than policy. It makes good sense to argue that judges will also have to elaborate strong lines of policy. But how are restrictions placed on majorities? If one looks at the hierarchy of courts, administrative bodies and legislatures culminating in the constitutional process, it is clear that ultimately there is no restriction on the "majority". The more important the standard, the higher and more intransigent is the mechanism by which it can be altered. The restriction placed on the majority is one of form: It must consider goals in a certain order. Certain changes must inevitably be constitutional or revolutionary. The institution of rights is more than a "promise" of respect by the majority to the minorities. It is based on the recognition that minority resistance and violence can irreparably alter the body politic. It is good policy for society to place high value on

peace and harmony among its citizens--to attend to what has traditionally been called fraternity.

(iv) Background Rights and Institutional Rights

"The rights thesis has two aspects," writes Dworkin. "Its descriptive aspects explains the present structure of the institution of adjudication. Its normative aspect offers a political justification for that structure."⁵² These two aspects of Dworkin's thesis are not separable: The rights thesis holds that judges should, and in fact do, carry out their calculations with the "intention" of enforcing the genuine institutional rights of those who come to their courts.⁵³

For Dworkin, the judge can not simply accept legislative announcements as unquestioned articles of faith. It is generally held that responsibility for one's beliefs is not transferrable. The judge must have good grounds for applying statutes. When those grounds no longer hold, then a good case exists for not applying legislative statutes. Judges take office, believing in the general justice and acceptability of legal institutions. They therefore presume that there is a prima facie case for both the procedures of law and the general body of statutes, precedents, and customs. In hard cases judges are called upon to make the grounds for this prima facie case explicit. In hard cases it is these grounds that are questioned. It would seem that if a judge could be shown that a particular rule of law was contrary to the assumed grounds that motivated him to accept his office, then he could be forced either to apply the rule, to resign his office, or to revise his conception and justification of his office. The crucial question is: How are such arguments to be advanced and defended?

Dworkin argues that such questions can not be answered independently of some particular conception of morality. --political, religious, or personal. This is part of his rejection of positivism and utilitarianism, which he interprets as try-

ing to answer these questions independently of a moral context. The most general criterion of correctness arising from Dworkin's analysis of the judicial process is one of coherence: The theory that can justify the largest body of legal materials coherently is to be preferred.⁵⁴ The assumption is that substantial portions of the legal system are correctly decided.

The judge thus begins by accepting the legal institutions of his society as just, thereby assuming that there is a prima facie normative case for justifying their existence. If there is general acceptance then the judge has good cause to believe that the morality of enforcing society's laws is sound. The general strategy of Dworkin's judge is to use existing laws and legal institutions as grounds for establishing a general theory which in turn can be used to justify such laws and institutions. The circularity is superficial, because of the presuppositional nature of the argument. It presupposes that there is a justification, a sound normative case, for accepting the institution and applying its laws. It still remains problematic as to just how such "institutional support" is to be conceived. Dworkin writes that:

"If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to justify the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior."⁵⁵

For Dworkin, such a 'test' is a problem of normative political theory: "The test of institutional support provides no mechanical or historical or morally neutral basis for establishing one theory of law as the soundest."⁵⁶ He sees him-

self as arguing against the assumption of moral philosophy "that duties can not be controversial, in principle."⁵⁷ If a judges duties are vague and controversial, it does not follow that he has no duties, such that he may exercise discretion-3. Interpreting this 'test' as one of normative political theory, Dworkin can not accept Hart's position as neutral. Dworkin's "theory identifies a particular conception of the community's morality as decisive of legal issues: that conception holds that community morality presupposed by the laws and institutions of the community."⁵⁸

"The Constitution," writes Dworkin, "fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like whether a particular statute respects the inherent equality of all men."⁵⁹

Since majority rule can become majority tyranny, it is always possible that one dissenting individual may be "correct" as to his rights and the legislature and the judiciary "wrong". In a responsible and representative democracy there is hardly any reason to deny that possibility. In terms of the Causal Theory, the considerations involved here are of the following form: Majority practices are accepted ways of establishing acceptable social policy (b-goals). In effect, it is an (a) that tends to get a (b). Dworkin believes that when it gets a non-(b) or a net-negative-(b), the majority practice (the invoking feature of the system) must be circumvented by considerations of rights. This appeal to rights, the general body of principles, is never elaborated in a systematic way. How seriously can rights be taken? Surely rights can not be taken so seriously as to allow individuals a veto. When there is a conflict of conceptions as to what an individual's rights are, it is the society in the form of its officials that must make the final judgement. The alternative is anarchy. At the same time this is not to deny that any society must base its institutions on the conception of what the greater part of its members consider good government. An individual's sense of right

and good, however, is not always properly informed and one must also not assume that an individual's values can be fixed independently of the institutions and practices of his community. There are individual interests to be sure; but one's conception of what is to be a valued social order must be the product of interpersonal exchange. It can not remain a matter of purely individual choice, but must involve some extrapersonal conception of social morality.

A claim to something as of right is conditional upon accepting that anyone in similar circumstances would also have a similar right. This view however is spurious if it is taken to suggest more than that one's set of rights must be internally consistent. If one's claim to a right is based on the ground that one is "human" or a "citizen" then it would be self-contradictory to deny respect to another who was making a similar claim on similar (bona fide) grounds. It seems to be a part of the 'grammar' of rights to argue that once the grounds or standards for making a claim are met, the right must be granted. But the business of recognizing rights becomes complicated once one discovers that rights and other goals of special urgency can come into conflict. Claims to a right can also be framed in more negative terms: the claim to equality before the law might be interpreted as a demand that all discriminations between persons in a court be based only on the law's criterion of differentiation and that all other criteria be considered irrelevant. Criminal activity, as defined in law, becomes a sufficient criterion to differentiate a person from others. The relevance of a distinction depends on the particular context and purpose of the practice involved.

The right to a fair trial has two sides: (1) That the law be applied fairly. (2) That the law be fair. The first requires that decisions be justified in terms of the rules of the practice. The second demand has always been more controversial in the philosophy of law. The practice of rights also has these two facets: First, it allows one to justify claims

to a right by referring to what others are claimin as of right. (Dworkin's formal definition seems to be of this sort.) Second, it allows one to justify claims to a right by arguing that the practice of rights, if it is to make sense at all, depends on granting that right. The former justification is given in terms of the practice, while the latter is given as a justification of a practice. To say that someone has a right to something, in law, is to say that someone has a justifiable claim according to the rules and practices of the legal system. Dworkin wants this to be a normative claim. He makes a claim to a right in law parasitic or contingent upon the justification of the entire practice, as it bears upon the particular case before the court. He is not denying that one can justify a claim relative to a practice, but he does not distinguish it from the justification of a practice.. Thus, he fails to show that he is primarily concerned with the normative weight being attached to particular claims. It is this that suggests that Dworkin is primarily setting forth a normative rather than a descriptive theory of law. When judges answer the question "What is law?" their answer is normative and not descriptive: judges must judge. To deny judges the power to exercise judgement is to usurp the function of judicial office. This is a tautology; the implications for law in having judges are oten obscured. To say, as Dworkin does, that a judge "must...rely upon the substance of his own judgement at some point, in order to make any judgement at all,"⁶⁰ or that a judge most rely on his own judgement is "at some level inevitable,"⁶¹ is to point to the tautology that judges must be allowed to exercise judgement. What Dworkin is pointing to is the problem of justifying a practice, and he is arguing that certain criticisms of judging are not critical of a particular performance relative to the practice, but rather strikes at that which consitutes the practice itself. That judges must at some point exercise judgement is a consitutive principle of the practice of having judges. The standards which differentiate judgements as good,

bad, poor, right, wrong are individuating principles of the practice.

That judges must decide normative questions means that they must make normative judgements. Dworkin believes that the crucial question is not the idea that the community's morality counts but the idea of "what counts as the community's morality" in judicial decisions.⁶² It is considerations such as these that led Dworkin to develop a normative theory of law. Appearances to the contrary, the judicial search for the law as it is, is subject to the norms of judicial office that judges are obliged, through accepting and holding office, to apply the law in accordance with, what Dworkin calls, the political morality of the community. Dworkin in this matter accepts a "constructionist approach".⁶³ Such an approach argues for maximum integration and consistency in a person's conceptual framework. This framework is to give precedence to one's strongest intuitions regarding the correctness of specific beliefs and actions. Intuitions which are inconsistent with this basic framework are not to be acted upon until they can be consistently integrated. Dworkin is never clear about the mechanism for such adjustment.

Dworkin does, however, admit that judicial "mistakes" will be a factor in such conceptual integration. But if such judicial errors are to be sensibly construed, there must be some account of what judges should do and what the errant judge failed to do. It would thus appear that any examination of "the nature of the judicial process" must make some assumption concerning the constitution of correct judicial behavior. Such basic assumptions will have to rest on some a priori conception of institutional purpose and character; Dworkin does notice this. Such assumptions, therefore, can not be purely observational, and thus not descriptive -- some premisses must be assumed. Dworkin endorses the view that, in some sense, a society's political and legal institutions must be embedded in the moral and political conscience of its citizens. He is never

explicit about how exactly such "embedding" is to take place. One must assume that the processes of legislation and the constitutional process does not represent a form of embedding sufficient for his purposes. Dworkin is led to argue that law, at least in western democracies, is based on a "rights-based deep theory of political morality":

He writes that "on the constructive model, at least, the assumption of natural rights is not a metaphysically ambitious one. It requires no more than the hypothesis that the best political program, is one that takes the protection of certain individual choices as fundamental, and not properly subordinate to a goal or duty or combination of these. This requires no ontology more dubious or controversial than any contrary choice of fundamental concepts would be, and, in particular, no more than the hypothesis of a fundamental goal that underlies the various popular utilitarian theories would require. ...[A]ny rights-based theory must presume rights that are not simply the product of deliberate legislation or explicit social custom, but are independent grounds for judging legislation and custom. On the constructive model, the assumption that rights are in this sense natural is one assumption to be made and examined for its power to unite and explain our moral convictions, one basic programmatic decision to submit to the test of coherence and experience."⁶⁴

Using the language of the Causal Theory, one might think that in advancing the practice of rights over that of majority practices, Dworkin was taking a disjunctive position: i.e., that when the morality of the legal institution (b-goals) conflict with clear procedural requirements (a-goals) then the morality must be given precedence. Fundamentally, there is no reason why any (b)-goal (right) can not be incorporated into the practice of law, given that the society is willing to make the necessary adjustments of priorities in the matrix. A more cogent interpretation of Dworkin's argument for the practice of rights, however, is that he is arguing that the (a)-goals of

the system should be designed in such a way as to leave the legal system open to the possibility of extra-systematic change. In order to do this Dworkin wants the basic criteria of law to be embedded in the citizenry's political conscience. A meta-theoretic question would be whether a society would ever want such a theory; would it want to arrange its institutions in this way? The more crucial question is: How would such an embedding be carried out? One would think that all revolutionary governments are premised on the grounds they used to justify their own government. If ultimately judges are to justify their decisions on a hypothesis of the citizens' political morality, extracted from the structure and the written record of the society's legal institutions, then, unless one is able to lead a successful revolution, such decisions are the substance of one's right to a particular judgement. This is not to say that all judges would necessarily arrive at the same conclusion on any particular case. The question of the uniqueness of judicial decisions will be considered in PART THREE (B). In PART FOUR the rationality of Dworkin's "design" will be examined.

Legal institutions, asserts Dworkin, are only partially autonomous. In certain cases, citizens "are expected to repair to general considerations of political morality when they argue for...rights."⁶⁵ Because of this, Dworkin distinguishes between background rights, which "provide a justification of political society in the abstract, and institutional rights, [which] provide a justification for a decision by some particular and specific political institutions"⁶⁶ Since Dworkin argues that political institutions are 'partially autonomous', it follows that it is always possible to have an institutional right overturned by some background right. One would also think that when Dworkin develops a theory which purports to ensure that one's "rights" would be recognized, that he was offering a substantive rather than a formal criterion. He only offers a program for elaborating the basic political morality of a

society; it does not guarantee that that "morality" will be acceptable to more than a working political majority. He lacks a firm conception of the causal basis animating the legal enterprise.

Dworkin has at best exchanged one black box mechanism, the discretion of the judge, for another, the conscience of the citizenry. The theory is ultimately subjective in spirit. The standard of what constitutes a 'correct' decision is so vague and nebulous as to hardly supply any datable and effective public control of the judicial process. It is questionable whether a society would want to create an office with such responsibilities, especially when it does not seem that it could realistically be performed. If there is any such office, it is not judicial but legislative. In interpreting the function of the legislature and the judiciary, a judge may have to develop a characterization of the society's political conscience in order to resolve the case before him. But this does not eliminate the discretionary aspect of the system. Mechanistic rules may still operate in judicial decisions, but it is questionable if he has totally eliminated them. One must ask: If mechanical procedures are admitted into law, does this entail that judges must have discretion?

B. Open Concepts and Indeterminacy in Law

"About seventeen years ago," writes Noel B. Reynolds, "Edgar Bodenheimer prophesied that both the positivist and the realist position on uncertainty in law were 'leading the science of law into a blind alley'...."⁶⁷ It is important to understand how Dworkin and Hart perceive the nature of such 'uncertainty in law'. Otherwise, their purported solutions to this problem make little sense. To Hart, such uncertainty can only be eliminated by giving judges discretionary powers. To Dworkin, uncertainty results from the positivist analysis which assumes that, if a question is controversial, then it can only be resolved by the exercise of discretion.

In Hart's view, it is the "human inability to anticipate the future which is at the root of [the law's] indeterminacy...".⁶⁸ For Hart, "uncertainty at the borderline is the price to be paid for the use of general classifying terms in a form of communication concerning matters of fact. Natural languages, like English, are, when so used, irreducibly open textured. It is, however important to appreciate why, apart from its dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. ...[W]e labor under two connected handicaps.... The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim."⁶⁹

Hart's courts must, as a matter of material necessity, exercise a creative function very much "like the exercise of delegated rule-making powers by an administrative body."⁷⁰ A theory that denies such discretion to judges would, in Hart's eyes, be unrealistic, impractical, and irrational.

"It may well be," writes Hart, "that terms like 'choice', 'discretion', and 'judicial legislation' fail to do justice to the phenomenology of considered decisions: its felt involuntary or even inevitable character which often marks the termination of deliberation on conflicting considerations. Very often the decision to include a new case in the scope of a rule or to exclude it is guided by the sense that this is the 'natural' continuation of a line of decisions or carries out the 'spirit' of a rule. It is also true that if there were not also considerable agreement in judgement among lawyers who approached decisions in these ways, we should not attach significance and value to them or think of such decisions as reached through a rational process. Yet however it may be in moral argument, in

the law it seems difficult to substantiate the claim that a judge confronted with a set of conflicting considerations must always assume that there is a single unique, correct resolution of the conflict and attempt to demonstrate that he has discovered it."⁷¹

This is the core of Hart's theory of adjudication that Dworkin wishes to challenge. Dworkin believes that it is always meaningful to speak of such decisions as judgemental rather than as discretionary. In a mature legal order, he believes that it is always reasonable to assume that there is an unique correct resolution of any conflict in law. Central to resolving the deadlock between Hart and Dworkin is the notion that laws are 'indeterminate'. Dworkin argues that judges in difficult cases will base their decisions on a characterization of the legal enterprise as a whole. However, this characterization will be 'contested'. Both Hart and Dworkin are looking at the same phenomenon and both see a certain 'indeterminacy' or 'contestedness': But Hart is led to posit judicial discretion, while Dworkin denies it. The contestedness of a concept is central to Dworkin's distinction between abstract and concrete rights. Abstract rights are concepts which admit to more than one conception. Therefore, the users of such concepts can entertain rival conceptions. Concrete rights are concepts which admit to only one conception. It is never clear, however, if the abstractness or concreteness of a concept, and consequently its degree of contestedness, is a feature of the concept itself or a function of the context in which it is used, and the purpose for which it is used. Dworkin writes:

If the rights thesis is to succeed it must demonstrate how the general distinction between arguments of principle and policy can be maintained between arguments of the character and detail that do figure in legal arguments. ...[The] distinction between abstract and concrete rights, suitably elaborated, is sufficient for that purpose. ...
An abstract right is a general politi-

cal aim the statement of which does not indicate how the general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract. Politicians speak of a right to free speech or dignity or equality, with no suggestion that these rights are absolute, but with no attempt to suggest their impact on particular complex social situations.

Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. Suppose I say, not simply that citizens have a right to free speech, but that a newspaper has a right to publish defense plans classified as secret provided this publication will not create an immediate physical danger to troops. My principle declares for a particular resolution of the conflict it acknowledges between the abstract right of free speech on the one hand, and competing rights of soldiers to security or the urgent needs of defense on the other. Abstract rights in this way provide arguments for concrete rights, but the claims of a concrete right is more definitive than any claim of abstract right that supports it.⁷²

In what sense are concrete rights more "definitive"?

The concrete right of the newspaper to print such materials is not as clearly acceptable as the abstract right of free speech. Dworkin must mean more than that concrete rights are more "detailed" and therefore their relevance to various fact situations are clearer. Also, it is not clear that the resolution of the abstract right of free speech and "the urgent needs of defense" in the form of a "concrete right" constitutes a principle as opposed to a policy.

As Dworkin would have it, "what an individual is entitled to have, in civil society, depends on both the practice and the justice of its political institutions."⁷³ Ultimately, one's legal rights are embedded in the political morality presupposed by the laws and legal institutions of one's society.

This political morality is, for Dworkin, a contested concept that admits to various conceptions. Thus the rights embedded in that morality would also be contested. If this position is to serve as a touchstone for his theory, one wonders how Dworkin could argue that all disputes in (civil) law are questions of the rights of individual parties involved, such that each case has an unique solution. W. Gallie, whom Dworkin cites for support, argues "that there are disputes centered on [contested concepts]...which are perfectly genuine: which, although not resolvable by arguments of any kind, are nevertheless sustained by perfectly respectable arguments and evidence. This is what I mean by saying that there are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."⁷⁴

Dworkin's example of a dispute centered on a contested concept is that of a chess official who must decide if a certain player's behavior constitutes an infringement of the rule that players who annoy other players must forfeit the game. To determine if particular conduct constitutes a breach of this rule, the judge must characterize the game in a way that excludes certain behavior as unacceptable under the rule. If the game is characterized as one of intelligence, then can it be further characterized as a game like poker which includes psychological intimidation? The official must postulate a theory of the game's character, detailed enough to help him distinguish between alternative conceptions of the game.

"The hard case," writes Dworkin, "puts a question of political theory. It asks what it is fair to suppose that the players have done in consenting to the forfeiture rule. The concept of a games character is a conceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. It supposes that a player consents not simply to a set of rules, but to an enterprise that may be said to have a character of

its own; so that when the question is put -- to what did he consent to in consenting to that? -- the answer may study the enterprise as a whole and not just the rules."⁷⁵

If one characterizes, as do Dworkin and Gallie, the central normative and appraisive concepts of political and moral philosophy as essentially contested, then the assumption that these concepts are such as to command universal assent and are uniquely describable is questionable:

"To do one's duty in a particular situation involves," writes Gallie, "some reference to what any other rational being would do 'in a similar situation'. But many of our duties arise out of our adherence to one particular use of an essentially contested concept, e.g., social justice. Now the question arises: Shall reference to such adherence be counted as a necessary part of any 'similar situation'? If so, then the universality criterion of duty is rendered trivial: if no, anyhow in many very important issues, it becomes inapplicable."⁷⁶

Gallie distinguishes two senses in which we may be said to understand a concept or theory: "First, the 'logical' sense, in which to understand it means (a) to conform to, and (b) to be able to state, the rules governing its proper use; and second, the 'historical' sense, in which to understand it means to know (something about) the whole gamut of conditions that have led to, and that now sustain, the way we use it. ...

"The connection [between these two senses] is most tenuous, when the appropriate use of a concept would appear to mean simply, its use for deductive purposes.... In this kind of case clarification or improved understanding of a concept would naturally be taken to mean improvement in one's skill and confidence in using it -- thanks to, e.g., a full and clear statement of the rules governing its use. But clearly this account will not serve for all concepts, and in particular not for appraisive concepts. ...[To] appraise something positively is to assert that it fulfills certain generally recognized standards. ...[Clarification of appraisive concepts] must

include, not simply considerations of different uses of a given appraisive concept as we use it to-day, but considerations of such instances as display its growth and development."⁷⁷

There is an ambiguity in this analysis between a term's classificatory and evaluative uses. Art, social justice, democracy, and law can be ambiguous between these two uses. While Hart emphasizes the classificatory use of concepts, Dworkin and Gallie emphasize the evaluative use. A judge, in applying law, must do both. He must consider whether certain conduct falls within a given class of actions and whether such conduct falls below a given standard of required behavior. Contested concepts are contested not simply because their vague or ambiguous meaning (or use), but also because the referents of these terms are complex social phenomena, historical institutions, practices and movements. Also, one is tempted to believe that beneath the sophistication of Dworkin's and Gallie's analyses there is merely a plea for tolerance. At best, they forstall the radical argument that differences in evaluation are ultimately reducible to a conflict of taste, temperament, and interest. At most, Dworkin succeeds in showing that the indeterminacy of legal standards is not as great as the jurisprudential literature suggests. But he has not eliminated the possibility for choices leading to discretion. In fact the judge's decision to accept Dworkin's rights thesis is itself a policy decision -- an act contradictory to the rights thesis itself. Policy decisions are inevitable at some point in the judicial process; even if it is taken to the extreme of arguing that judges make policy decisions only concerning the question of their acceptance or resignation of office -- as judges, judges can not refuse to judge. The issue of the system's efficacy, and thus policy questions, inevitably arises. But is this an issue for the judiciary, rather than the legislature or the constitutional process?

C. Uniqueness of Decisions and the Design of Legal Institutions

How is legislation to be distinguished from adjudication;

the legislator from the judge? Dworkin argues from democratic theory that judges are "politically" subordinate to legislators. He argues further, contrary to some theories of law, that judges are not "conceptually" subordinate in their manner of decision-making to legislators; this is his rights thesis.⁷⁸ When judges decide on the basis of principle, Dworkin believes that they can act independently of the legislature. But once the distinction between principle and policy is collapsed, the distinction between judges and legislators can not rest on a conceptual basis. Perhaps one might distinguish between them on the basis of the administrative facilities available to each. Such a division does not imply fundamentally different modes of decision.

Rolf Sartorius writes: "The view that judges are entitled to exercise legislative discretion implies that judges are entitled to base their decisions on their own perceptions of desirable social policy. ...[A] 'legislator' who is not entitled to appeal to anything other than pre-established authoritative standards is simply not a legislator."⁷⁹ It is not always easy to grasp the implications of such arguments. Both legislators and judges hold official positions, which have responsibilities for which they are accountable. Both must exercise 'judgement' in performing their official roles. Views like those held by Sartorius and Dworkin still harbor the belief that legislation is essentially arbitrary -- an expression of will rather than an exercise of reason. Dworkin dedicates a major part of the section, "Hard Cases", to the argument that a judge must depend on "the substance of his own judgement at some point in order to make any judgement at all."⁸⁰ The judge's function is to judge. This function is constitutive of the office of judgeship. Those who argue against judicial activism sometimes go to the extreme of arguing that judges, on specific issues, should defer their judgments to some other body. At this extreme, such arguments deny judges their very office. If it is their office to apply the law, then they must exercise judge-

ment as to its nature. To deny judges such a role is either to usurp their office or to deny certain principles the status of law. Perhaps constitutions and bills of rights are merely guides and reminders to legislators of the possible consequences of their acts. But this is not, as Dworkin rightly claims, "a realistic piece of common sense, but a competitive claim about the true content of a contested event."⁸¹ In short, it amounts to being a judgement, albeit at a very high level. Of importance is this: at what point must a judge rely on the substance of his own judgement? Admittedly the constraint placed on judges is greater than on legislators. But this is a difference of degree, not kind. These doubts are raised by Hart in his consideration of Dworkin's philosophy. Hart writes:

Much that Professor Dworkin says in developing this conception of the unity of law with its justificatory theory seems to me well taken against some incautious descriptions of what judges do, and against some hasty claims as to what they should do, in those cases where particular parts of the law offer no clear guidance. ... Nonetheless, anyone considering this theory...must, I think, be visited by doubts on two main scores. The first is the latitude that Professor Dworkin permits himself, and which he would allow to courts, in drawing the line of distinction between what is to be taken as settled law from which the guiding justificatory principles are to be derived and what is to be taken as unsettled law which provides the hard cases to be decided by reference to the principles so derived. ...

More important is the doubt whether Professor Dworkin has established something which is central to his case: that a judge will not frequently be faced with alternative equally correct ways of applying Professor Dworkin's theory when...he tries to extract from the existing law the principle or principles that will yield the correct decision in a hard case. ...I find it difficult to believe that...just one principle or set of principles can be shown to fit the existing settled law better than any other."⁸²

The answer to Hart's first doubt is: the criterion

Dworkin uses to distinguish between settled and unsettled law is simply a theory which recognizes that a larger segment of the law as settled is to be preferred over a theory that recognizes a smaller segment as settled. This criterion is implicit in Dworkin's analysis of "mistakes" in law. He believes that judges "must limit the number of events disposed of in this way."⁸³ Sartorius, who believes that he is developing a legal theory similar to Dworkin's, provides a more explicit criterion. "The obligation of the judge is to reach that decision which coheres best with the total body of authoritative legal standards which he is bound to apply. The correct decision in a given case is that which achieves 'the best resolution' of existing standards in terms of systematic coherence as formally determined...by some supreme substantive principle.... It is the distinctive feature of the institutionalized role of the judiciary, in contrast to the legislative branch, that it may not directly base its decisions on substantive considerations of the value of competing social policies."⁸⁴

Sartorius posits a "recursive" definition of the rule of recognition, identifying authoritative legal standards as: "(1) The statutes enacted by a particular legislative body; (2) The principles and policies embedded in(1); (3) 'Extralegal' principles and policies directly or indirectly incorporated into the law by either (1) or (2). ...The actual filling out of such an ultimate criterion would be complex and demanding, ... if it is indeed a practical possibility at all...."⁸⁵ It is sufficient for Sartorius that this definition make theoretical sense. But he does not appreciate fully that the transactions between the theory and the practice of any institution are intimately intertwined. The Causal Theory argues that laws are written in such a way as to prevent disjunctive choices arising between an institution's theory and practice. Both Dworkin and Sartorius assume that the bulk of the law is justifiable and acceptable. Even if Dworkin's theory were elaborated in this manner, Hart's second doubt could still be raised. Hart could

argue as follows:

What does the judge do when he has to choose between two decisions, both of which achieve equally "the best resolution" of existing standards? What are the arguments to show that this situation never, or rarely, arises in mature legal systems? If Dworkin has addressed this issue, then it must arise from his argument that legal concepts are often "contested concepts". Concepts, such as the "purpose" of a legislative statute and the "principles" embedded in the positive rules of law, are essentially contested. He argues that the manner in which judges arrive at one conception as the 'true' content of a contested concept is an exercise of judgement and not discretion. The exact manner is not mechanical and requires a certain amount of training and a degree of skill. Dworkin describes the development of such justificatory theory as the process of "referring alternatively to political philosophy and institutional detail. [The judge] must generate possible theories against the broader institution. When the discriminating power of that test is exhausted, he must elaborate the contested concepts that the successful theory employs."⁸⁶

"It is important to see, however," writes Dworkin, "that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions...."⁸⁷

The justification of decisions based on contested concepts are likely to be controversial. Neither are such judgments likely to be unique, in the sense that other judges might plausibly come to a different decision. This difference is ascribed, not to the exercise of discretion, but to the exercise of judgement. One suspects that, for Dworkin, it is more important, for determining the propriety of a particular decision, to know how the judge made his decision than to know what decision he made. One wonders if the assumption behind Hart's doubts is not that a "correct" decision is one that is "unique", in the sense that all judges would arrive at the

same conclusion. Continuing the argument, how could one criticize a decision as being "incorrect" if there were no unique solutions in this sense? Since a choice would exist how could discretion be denied?

Sartorius argues that "the issue about the existence of uniquely correct decisions is to some extent a red herring. For the argument to the conclusion that judges must exercise discretion in the strong sense can just as well be made, not in terms of cases in which there does not exist a uniquely correct decision, but simply in terms of cases where after honest intellectual effort the judge has been unable to identify a uniquely correct decision. The judge must decide in one way -- he can not suspend judgement-- and, by hypothesis, in such a case authoritative guidance is not sufficient to lead him to a particular decision."⁸⁸

This is a problem of institutional design: law must be designed with the capacities of citizens and officials in mind. It does not seem far or just to place obligations on judges which they could hardly fulfill. Yet this is what Sartorius would argue. "Institutional norms which channel judicial decision-making behavior into lines that it would otherwise not take are means for assuring that such efforts will be maximal, and that the consequences of failure to exert them will be minimal."⁸⁹ By not admitting discretion to judges (even in cases which render the practice of adjudication, in terms of pre-existing standards, absurd or perverse) Sartorius believes errors will be minimized and successes maximized. Just as the system will imprison a number of innocent persons and allow a number of guilty ones to escape, it will also allow a few judges to be censured even when they could not possibly have done better. The question of discretion to Sartorius is not one of purely 'fact', nor is it one of strictly 'value'. Rather, it is a question of 'institutional design'. Just as one can not expect large industrial projects to be engineered to avoid every possible accident, so one can not expect to have

social institutions designed to avoid all possible error. One may, however, demand a more precise definition of what constitutes a "fair risk" in such forms of employment. A certain degree of circularity may be attached to this demand. Questions of fairness are relative to the criterion of relevance used in such decisions. At this point, Dworkin's argument can be illuminating. Judges do not decide on the basis of available legal materials and then ask if it is fair; rather, fairness is integral to their decisions.⁹⁰ Yet, Dworkin obscures this point by his general theory of law. He believes that the principle or doctrine of fairness is formally independent of questions of institutional design and of a practice's general criteria of relevance. One might argue for a policy of fairness: that distinctions used in making judgements be substantiated by arguments that support the criteria of relevance. To insist that questions of "fairness" point at the consistency of application, not the criteria of relevance, adds nothing to the analysis. If case A and case B are exactly the same, but are decided differently, then the question is not "Is it unfair?" so much as, "Why is it unfair?". It is unfair because there is no relevant criteria mentioned in the latter case to support distinguishing the two cases. The demand for relevant criteria in distinguishing between cases which are decided differently follows from the judge's obligation to apply the law. How could he be applying the same law, in two cases which are decided differently, if he can give no relevant distinction? Dworkin's emphasis on fairness obscures more precise questions of institutional design and reasoned argument in judicial decisions.

The ultimate form of Hart's criticism of Dworkin's theory is that, from Dworkin's description, there is no evidence that a case will not arise which is undecidable. In fact, at some point, Hart would argue, discretion will have to be exercised --a choice will exist. Hart would concede that Dworkin's criticism of his position, in The Concept of Law, regard-

ing specific "incautious descriptions of what judges do" as justified. But he would argue that his position is essentially correct; only that the area of discretion is much narrower than he had imagined. It all depends, writes Hart, "on the claim which Professor Dworkin makes... that when hard cases arise, equally plausible hypotheses as to what the latent law is will not be available."⁹¹ What is the judge to do at this point? Must he not turn to his own sense of right, equity, fairness, and justice? Dworkin might respond that a judge in such a position is informed by the community's sense of justice in reviewing existing legal materials and institutional structure. If any choice is left to the judge then it would be misleading to call it an exercise of discretion rather than one of judgement. But in what way would calling such choice "discretion", be misleading; for by hypothesis, the judge has exhausted all standards of what constitutes a just decision, and therefore the judgement can not be one of principle. For behind Dworkin's claim (that when a judge follows the rights thesis he will be able to decide on the rights of the parties involved) is the broader claim that the law is always able to provide guidance sufficient to make each decision strictly determinable. Hart points out that Bentham would interpret Dworkin's thesis as a continuation of Blackstone's fiction-- that judges do not make law but only apply it. Sartorius would argue that the question is structural, and is part of the problem of institutional design.

At best, the law can only provide very general and abstract principles to aid the judge in such cases. The guidance they provide can be, in particular situations, insufficient and incomplete. Hart finds ... "it difficult to believe that among these, just one principle or set of principles can be shown to fit the existing settled law better than any other."⁹² Dworkin's technique of adjudication essentially provides a method of "closure". It allows judges to "close" openings in the fabric of law where gaps or conflicts appear.

Hart tends to argue that Dworkin's technique does not provide any assurance that it will be able to close every opening, and that the following "entitlement" is not well founded: "The law may not be a seamless web", writes Dworkin, "but the plaintiff is entitled to ask (the judge) to treat it as if it were".⁹³

Hart's argument assumes that a judge's impartiality and objectivity require that he not be a political or moral actor. But this is one of Dworkin's central claims. It is not so much that judges must supplement laws, but how and when they do this. The law provides sufficient guidance (principles) to at least inform the judge how he may execute such tasks, so it is sufficient to say such judgements are substantiated by the legal system. To Dworkin's mind, how the judge arrives at the juncture of choice determines whether that choice will be an exercise of judgement or one of discretion. That any judicial choice is criticizable is evidence of its judgemental character; but by hypothesis discretion is non-criticizable. That the law finds a decision between two sides of a case equally acceptable (or equally unacceptable) is problematic for the judge, especially since he can not suspend judgement. The dilemma it poses for the theory of adjudication is well known. In fact, it is the problem posed by the three premisses elaborated in PART TWO:

"(A) Principle of unavailability: Judges must resolve all the cases submitted to them."

"(B) Principle of justification: A judicial decision acquires a ground or reason and judges must state the reasons for their decision."

"(C) Principle of legality: Judges must ground their decision on legal norms."

In PART TWO it was argued that these three principles are jointly inconsistent, and that the principle of legality was vulnerable and rooted in a liberal ideology. Dworkin believes that, once principles are admitted into the framework of law, the principle of legality will be rationally acceptable.

Hart is not convinced by this addition. Dworkin's emphasis on how decisions are grounded seems misplaced, for what is at issue is the question of institutional design, which can not be reduced entirely to a question of normative political theory. Dworkin will not acknowledge a need for some formal rule of recognition. He does not see how principles can be "recognized" in a formal sense by their "pedigree", because he believes such questions are essentially normative, not mechanical. Sartorius says that, with regard to acts such as civil disobedience, Dworkin will not admit that "the interface between individual moral judgement and justified institutional response ...may not be able to be closed."⁹⁴ He continues: "In most general terms the picture here is that of men deliberately creating a legal system (norms plus officials charged with their application) with the intent of putting others in the position of having to make second-order decisions about their behavior which will channel that behavior into desirable directions that it would not otherwise take."⁹⁵

To Sartorius, the dilemma of adjudication posed by endorsing principles (A), (B), and (C), is one of institutional design. To Sartorius, it is more secure to insist on all three principles, including the principle of legality. The generalization that a judge will be able to determine when the law creates a situation requiring him to exercise discretion is not empirically sound. The argument is similar to Mill's argument against paternalism: since most interferences with another person's liberty, on the ground that one was protecting that person from harming himself, are often ill-conceived or ill-founded, it is best not to allow any interference at all. With this in mind, one could imagine a case arising wherein one "could" not interfere because of the prohibition against paternalism (supported perhaps by law), while in fact one "ought" to interfere. This is the reasoning behind Sartorius' argument.

Institutional norms which channel judicial decision-making behavior into lines

that it would not otherwise take are means for assuring that such efforts will be maximal, and that the consequences of a failure to exert them will be minimal. I thus conclude that it is always appropriate to criticize a judicial decision which cannot be justified in terms of extant legal standards, even one reached in a case where, by hypothesis, no one decision could be justified in this manner. Rather than being perverse or absurd, this position is merely a special, and especially important application of my general structural account of relationships between individual conduct and social norms....(T)here is a sense in which the principle that 'ought implies can' breaks down....It all hinges upon the judge being able to reliably identify...exceptions to the institutional decision that a judicial decision is to be justified solely in terms of pre-existing legal standards(if) it is...admitted that attempts to identify cases for which there is no one legally correct result would more often than not be mistaken, then it makes good sense never to permit appeals to the exceptional case to justify overt judicial legislation. Insofar, as there are cases where judges could not, or, on direct utilitarian grounds, should not, conform their behavior to their institutional role, they are, or should be, creators as well as appliers of law. But to describe them in the latter way is to describe their individual conduct as political actors, not their institutional role as members of the judiciary.⁹⁶

Sartorius sees too little formal structure in law.⁹⁷

Coval and Smith write: "Unless the legislature is to pre-empt the function of the courts, some means have to be provided within the legal system to deal with these highly foreseeable matters. Otherwise the law will be a totally irresolute institution at these points. Conversely, where the courts do not fully recognize the highly structured decision-system, integral to the law, from which anomaly resolving decisions come, then the courts are in danger of not seeing the limits of the law and thus are in danger of pre-empting the legislature."⁹⁸

To these authors, it is enough of a problem of institutional design "to write laws which deal with known and quite probable eventualities--but not necessary, although possible, to write ones which do deal with every conceivable choice which could face us. We foreclose upon too much when we write such laws. Decidability is not worth that much."⁹⁹

Decidability is a desideratum in the design of a system of adjudication, but not an absolute requirement. Another desideratum is that judicial decisions conform to our considered and most strongly held moral views; perhaps, as Dworkin would have it, the political morality implicit in the system as a whole. Dworkin in fact supplies his theory with a substantive "grundnorm". He suggests "one favored form of argument for political rights, which is the derivation of particular rights from the abstract right to concern and respect taken to be fundamental and axiomatic."¹⁰⁰ Dworkin even argues that "the idea of a collective goal may itself be derived from that fundamental right".¹⁰¹ Clearly both Sartorius and Dworkin continue to take a disjunctive position: decidability versus morality, one or the other. Hart is not convinced by Dworkin's approach. He believes that cases would still arise which were undecidable. Dworkin finds legal systems which admit such cases morally objectionable. Hart is forcing him toward a Natural Law position and, insofar as Dworkin accepts such a position, Dworkin becomes heir to the traditional critique. Unlike Hart and Dworkin, Sartorius takes the middle ground. To him the problem is one of institutional design, but he is oversimplifying. The Causal Theory is a better theoretical response as it recognizes the nature and complexity of the task.

In reacting to Hart's criticism, Dworkin has recently accepted a solution similar to that of Sartorius. Dworkin argues that, in a mature legal system, the probability of a tie case will be very low. Mature legal systems, he argues, are "thick with constitutional rules and practices, and dense with precedents and statutes....(G)iven the complexity of legal ma-

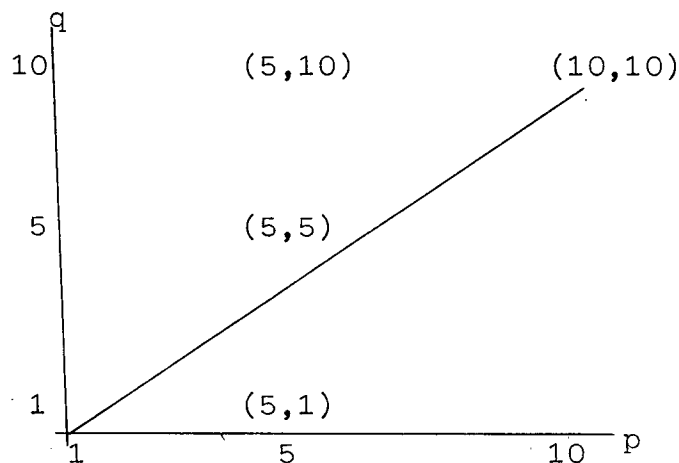
materials at hand, judges will, if they think long and hard enough, come to think that one side or the other has, all things considered and marginally, the better case. This further instruction will be rational if the antecedent probability of error in a judicial decision seems to be greater than the antecedent probability that some case will indeed be, in fact, a tie, and if there are advantages of finality or other political advantages to be gained by denying the possibility of the cases in law." Dworkin concludes that "judges might do well to reject (the recommendation that the legal enterprise be amended to allow for tie cases) if their system is sufficiently complex."¹⁰²

Perhaps Dworkin has finally accepted the problem as one of institutional design. But if so, he does not seem to realize that he has undercut his rights thesis and its distinction between policy and principle. A judge must consider arguments of policy to determine if his system is "complex" enough to deny the possible existence of a tie case. After the distinction between principles and policies collapses, the rights thesis is seen as a claim about the high relative ordering of standards controlling the judicial process.. The rights thesis is a partial explication of those standards. The following story illuminates a distinction that Dworkin's analysis seems to cloud. Martin P. Goldberg writes:

"There is a sad tale about two farmers disputing the ownership of a bean patch. They appeared before the Emir, who summarily ordered that the farmers be decapitated and took the land for himself. Now the Emir brought the matter to an end, but he did not settle the farmers' dispute."¹⁰³

There is a difference between 'settling' and 'ending' a dispute. Consider a hypothetical legal system that has only one rule: (R1) decide in favor of the side who presents the better case relative to the two goals p and q. That is, for any case, if the value of q minus the value of p yields a negative number, then p wins. The following diagram could repre-

sent this legal system.



Such a system would have a decision procedure for any point (case) not on the diagonal, for all cases which do not yield zero (0) as a result. Any side favoring p would win in cases which fell below the diagonal, but would lose in cases appearing above the diagonal. It would be able to "settle" such disputes on the basis of the rule. Cases which fell on the diagonal could not be "settled". Hart argues that no matter how 'mature' the legal system, such cases will be rare. So he believes it is reasonable to deny such cases exist. One can easily produce rules which cover every eventuality. In terms of the artificial example stated, one could say, "in case of a tie, always choose p". Or, one could write into Dworkin's legal system: "Always choose the more important 'standard'; in case of a tie between a 'right' and a 'goal', choose the 'right'." Coval/Smith find such "full-board solutions" so obvious and so easy to produce that one can expect such solutions to exist in any legal system. But such solutions do not necessarily 'settle' disputes, although they certainly 'end' them. If the rule (R1) (that the case supporting p wins only when it outweighs q) is established from empirical evidence, then "full board solutions" do not necessarily have that rationalization. In fact, such rules as "choose p in a tie" are mechanical--

they allow the judge to avoid questions he is neither administratively nor politically equipped to address. The case for having mechanical rules can have an empirical basis, but the rules themselves are mechanical and their rationalization is parasitic on an empirical argument for the system as a whole. If Hart is correct, then it must be in regard to the necessity for such mechanical rules at some point in the system. Such rules will not 'settle' cases, but will only 'end' them--to that extent the law will be 'discretionary' or 'arbitrary'. But Hart does not appreciate that such mechanical rules make judicial discretion unnecessary--their application remains a matter for judgement. Dworkin recognizes that such mechanical rules will be required in practice less frequently than Hart had thought. But Dworkin believes that, by denying discretion to judges, he has eliminated discretion from the legal system. Mechanical rules just transfer the issue to the legislative or constitutional levels of the system; they do not 'settle' any problem.

Legal systems are a compromise between authority and power. A constitutional amending mechanism keeps authority (government) in line with power (people). A poorly designed amending formula may result in revolution. If one finds a certain government empirically and ethically sound, then it deserves support. But the amending mechanism can be quite amoral and completely formal, remaining purely a question of pedigree. The Constitution of the United States has no normative restriction attached to its amending formula. Its people can inaugurate a system as virtuous or as vicious as they please.

The question of good reasoning in the design of legal institutions will be considered in the next part of this thesis. But presently certain conclusions can be formed. Positivists argue erroneously that, once indeterminacy is admitted into law, then judges must be given discretionary power to close gaps as they arise. However, those who agree with Dworkin do not appreciate the larger systematic problem of indeterminacy.

They feel they have resolved it by showing how the system avoids judicial discretion. Judges provide a consolidating function in the law by organizing law into a consistent and coherent whole. When questions of 'obligation' arise, moral-like considerations will become relevant. But to simply say that the issue is 'normative' only scratches the surface. The Causal Theory clearly shows that the law provides much more definitive and detailed guidance. At some point the judge may face a question concerning the general justice of the legal system; the mechanical amending formula would take it out of the judge's hands and put it in the constitutional process. The judge can not restrict what the constitutional process is allowed to declare. Dworkin's rights thesis would argue that the judge must establish a theory 'justifying' why it is ever proper to follow rules inaugurated by such a process. But one must recognize a fine distinction here. This "justifying theory" does not justify the decision. It is a way of arriving at a decision; it provides the system's ultimate justification. It does not foreclose on constitutional change. It can not lift itself up by its own boot-straps. When Hart argues that such 'final principles' must be simply 'accepted', he must have something like this in mind. A legal system is not viable if it is nowhere open to constitutional change and criticism. If a system were closed so tightly, it would openly invite revolution.

PART FOUR: Reason and Objectivity in Law

A. The Recognition Feature in Law

A detailed analysis of rationality and objectivity in law would be extremely complex. However, the essential function of such considerations can be simply indicated by considering their role in simpler proceedings. The game of baseball is structured so as to allow the operations of the game to be documented and are thus reviewable. One can not imagine any game or practice enduring if the central decisions of its officials were not reviewable. The correctness of a decision must be determinable by the participants. Although the umpire makes the official determination as to whether or not a player is "out", it still remains true that the correctness of his "calls" is determinable (excepting borderline situations). Calculations as to whether the ball or the player made it to first base before the other, is a public event. The major objection to discretion³ in law is that, unless it is narrowly restricted, it threatens the objectivity of the practice. The writing and the application of laws are public and datable events. From the perspective of the Causal Theory, it is clear that such considerations are reflected in the (a)-goals of the biconditional policy basic to any rule-governed enterprise. From such a causal perspective, one can see that unless those who are to come under some practice have some assurance that they will be able to make reasonable determinations regarding the correctness of official "calls", then the agreement necessary to inaugurate and to maintain that practice will not exist.

Examples of central "calls" in law would be: "Guilty", "X has a right to Y", "X has an obligation to Y to do Z". How reviewable are such determinations? If one remembers that Dworkin believes that even at the highest judicial level there can be legitimate disagreement, then one must wonder how such a system manages to maintain its "objectivity". In such controversial contexts, how can the rights thesis--that there is one

right answer (obligatory answer) to a question of law--be true?

Dworkin asks: "Why do we call what 'the law' says a matter of legal 'obligation'? Is 'obligation' here just a term of art, meaning only what the law says? Or does legal obligation have something to do with moral obligation?"¹⁰⁴ Dworkin is concerned with central legal decisions (calls). One might ask Dworkin: Is 'out' just "a term of art", meaning only what the rules of baseball say? Dworkin is challenging a conception central to Hart's legal theory. On Hart's view, "it is important to see that one who says that 'A has a right' does not state the relevant rule of law; and that though, given certain facts, it is correct to say 'A has a right', one who says this does not state or describe those facts. He has done something different from either of these two things: he has drawn a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the case. 'A has a right', like 'He is out' is therefore the tail-end of a simple legal calculation: it records a result and may well be called a conclusion of law."¹⁰⁵ To ask what a right or an obligation is, is to ask for the truth-conditions under which it arises. It would be a category mistake to confuse a "right", with a "fact", or a (legal) "standard".

The central legal standard of a legal system is, for Hart, its rule of recognition. Ultimately, to say that one has a legal obligation, is to say that, given a particular fact-situation, one can conclude from the rule of recognition that certain conduct is obligatory in that particular situation. That is, according to the practice, such a call would be correct. The rule of recognition, according to Hart's philosophy, is accepted as a standard of obligation and right. Dworkin wants to challenge this conception.

He challenges the illumination this 'deductive schema' brings to the concept of legal obligation. Hart, one should remember, admits that the rule of recognition must be supplemented by discretion-3. Dworkin asserts that if the introduc-

tion of the rule of recognition is to be illuminating as to the nature of central legal "calls" then it must cover most of the decisions made by the courts. But Dworkin shows that the role of "discretion" in law is much greater than Hart had thought. The recognition of principles and policies as part of the law (even under the aegis of judicial discretion) would, Dworkin argues, "very sharply reduce the area of the law over which (Hart's) master rule held any dominion."¹⁰⁶ Dworkin's point is that, one way or the other--either by bolting principles to the master rule or by increasing the role played by discretion--Hart's rule of recognition does not illuminate, as fully as he had thought, the truth-conditions under which legal 'calls' can be made. The Causal Theory also recognizes limitations of the rule of recognition's function in the legal system: "Even more powerful and relevant than a rule of recognition for second-order rules, however, is what we might call their generative rule."¹⁰⁷ The recognition of this generative structure again allows one to see that central legal calls are conclusions drawn from legal standards and fact situations. Dworkin's point is, nevertheless, good: The rule of recognition has a narrower utility than Hart had thought. Dworkin's attempt to replace discretion-3 by a set of principles is an attempt to make the truth-conditions behind legal decisions more perspicuous. He could "accept" a rule of recognition as part of his theory of law once its limited function were clarified. He does as much, when he discusses the function played by the doctrines of parliamentary supremacy and precedent in law. The important question to ask is : What could Dworkin not accept without radically altering his central rights thesis? One thing that Dworkin can not accept is a conception of a rule of recognition similar to the "rule of invocation" developed in the Causal Theory. Unlike Hart's and Dworkin's understanding of such a standard, the Causal Theory develops its invoking rule as basic to most any efficacious social practice. Such a rule emerges from a causal analysis

reflecting (a)-type considerations basic to law. In fact, the considerations will be more complex; they will be "~~a~~→b(ceteris paribus)". Once one sees what the invocation rule of the Causal Theory presupposes, then one must realize that Dworkin could not accept such a rule without giving up his legal theory. In the next section, I will try to show this in detail.

B. Legal Obligations

Remember, the rights thesis is Dworkin's theory of how judges should and do decide all questions of law. In other words, it is his explication of the truth-conditions necessary to make claims as to 'right' or 'obligation'. The rights thesis can equally be considered an "obligations thesis", once one remembers that rights and obligations are jurally related. Compare the passage in section A, quoted from Hart, with the following passage. Dworkin argues that in any practice the participants are entitled to the official's "best judgement about what their rights are. The proposition that there is some 'right' answer to the question does not mean that the rules (of the practice) are exhaustive and unambiguous; rather it is a complex statement about the responsibilities (duties and obligations) of its officials and participants."¹⁰⁸

Is Dworkin asking what an "out" is? "Responsible", "due", "obligation", "right", "out", and "guilty" have the function explicated in the passage quoted from Hart. Yet, Dworkin believes that he is, in his rights thesis, adding something to Hart's analysis. He believes that Hart has not fully captured the meaning of "X has a right" or "X has an obligation". In order to show this, he draws a distinction between normative rules and social rules. Dworkin summarizes Hart's position as follows:

"Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met."¹⁰⁹ Dworkin uses as an example the no-hat-in-church rule. A sociologist may describe the behavior

of a community as following such a rule but in doing so he does not assert that they have a duty to obey such a rule. However, when a churchgoer appeals to the rule, he does not mean "simply that others believe that they have a duty, but that they do have that duty. ...The sociologist...is asserting a social rule, but the churchgoer is asserting a normative rule. ...The judge trying a law suit is in the position of the churchgoer, not the sociologist."¹¹⁰

Dworkin therefore argues that judicial decisions are not judgements of social fact but of the normative situation. In Hart's theory, the legitimacy of the ultimate rule -- the rule of recognition -- is based on its acceptance by the (officials of the) community. Dworkin seems to be putting forth the view that the correctness of the analysis of the concept of (legal) obligation must be in terms of acceptability and not acceptance. If one looks closely at this claim, it can be seen as another form of the general argument that principles must be accounted a central part of judicial decisions. When one remembers that "principles", for Dworkin, are "propositions that describe rights"¹¹¹ (and duties) then one can see that his distinction between social and normative rules parallels his distinction between policy and principle, and furthermore, both distinctions can be seen as a particularization of the rights thesis. Thus, it becomes crucial to determine what Dworkin means by a normative judgement. He asserts that Hart "believes that the social practice constitutes a rule which the normative judgement accepts; in fact the social practice helps to justify a rule which the normative judgement states. The fact that a practice of removing hats in church exists justifies asserting a normative rule to that effect -- not because the practice constitutes a rule which the normative judgement describes and endorses, but because the practice creates ways of giving offense and gives rise to expectations of the sort that are good grounds for asserting a duty to take off one's hat in church or for asserting a normative rule that

one must."¹¹²

For Dworkin, the inauguration of social practices have a normative import because they create new forms of action whereby others may be insulted or degraded. All social practices must conform to this basic demand for equal respect and concern of those who come under it. It is this "morality of duty"¹¹³ that Dworkin believes is missing in Hart's account of obligation in general and judicial duty in particular. This argument is central to the rights thesis. The rights thesis is a refinement of Dworkin's earlier claim that the law is a system of entitlements. It is here that an alteration in the thesis would constitute a theoretical change.

Dworkin is really only talking about various fragments of the Causal Theory. His argument amounts to saying that social practices must be designed so as not to offend two (b)-goals -- the goal of equal respect and concern for those who come under social practices. Although very important goals in the matrix, these goals do not represent the whole structure. The Causal Theory gives a much richer and more illuminating picture of how claims regarding the promotion and derogation of (b)-goals proceed, and it gives the systematic and rule-governed nature of such proceedings and also the basic causal rational animating the system. One can see what Dworkin is talking about in terms of the Causal Theory: one can see that his 'rights thesis' really does not come to grips with the requirements of legal theory. Dworkin's theory is radically surpassed at this point and is beyond repair. The Causal Theory demands a change in the conception of the problem with which Hart and Dworkin were contending. "Morality" in the Causal Theory refers to considerations about (b)-goals, with lower-order goals playing a more prudential role. The scale is one of importance. Dworkin confuses a fragment of this structure for the whole.

The charge that Dworkin's rights thesis collapses at this point can be made even more vivid by considering his

theory of adjudication, which is an application of the rights thesis. This theory involves confusion and ambiguity. First, he believes that judicial duty is subsumed under the fragment of equal respect and concern, his 'morality of duty'. Second, another fragment of the matrix, namely, broad presuppositional standards, which Dworkin interprets as inferable from 'the general character of the enterprise', plays a nebulous role in his theory of adjudication. Third, the concepts "principle" and "obligation" tend to be confused. Fourth, there are infelicities in the conception of the relation between generic and particular obligations.

For Dworkin, the argument for a legal duty or right will be a theory of "institutional support". Even a single lawyer's theory of law, on Dworkin's account, "will usually include the full set of moral and political principles to which he subscribes; indeed it is hard to think of a single principle of social and political morality that has currency in his community and that he personally accepts...that would not find some place and have some weight in the elaborate scheme of justification required to justify the body of laws."¹¹⁴

This argument is somewhat of a reductio ad absurdum: Such arguments for institutional support are impractical. He therefore writes: "Jurisprudence poses the question: what is law? Most legal philosophers have tried to answer this question by distinguishing the standards that properly figure in arguments on behalf of legal rights and duties. But if no such list of standards can be made, then some other way of distinguishing legal rights and duties from other rights and duties must be found."¹¹⁵

Once the generic structure of law is exhibited most of the force of Dworkin's theory of adjudication is lost. Deductive inferences from standards through the facts of the case to a judgement become more perspicuous. However, Dworkin would press the argument: Why, even in a clear case is there an obligation to follow the standard, even if it clearly applies?

The answer, he believes, must be one of "principle". But this is circular. The term "principle", as used here, is ambiguous and can at most mean "obligation" or "right". The question thus reverts back to his claim about the morality of duty which he claims to be embedded in the law. This collapses, remember, once this morality is seen as merely a fragment of the (b)-goals of the system's matrix.

The general collapse of Dworkin's rights thesis is made even clearer when one remembers that institutional support (his justificatory theory) is construed by him as a contested concept. The 'character' of a game is an analogous contested concept. One wants to ask: What is Dworkin talking about at this point in terms of the language of the Causal Theory? He may be talking about very general and superior (b)-goals of the matrix. Once this is realized, much of his talk about contested concepts and differences in judicial opinions take on a new form. From the perspective of the Causal Theory, nothing is essentially contested -- though there may be radical confusion. The existence of a legal system assumes basic agreements. If the basic premisses of the legal system are contested by more than a few misfits then it is unlikely that a system like law would exist. The existence of a legal system presupposes a non-revolutionary situation. Dworkin has a very hard time seeing this. One might expect him to ask: At what point is sufficient agreement achieved? At 49%, 50%, 75%, or 100%? Practices such as law and morality arise supposedly because unanimity can not be achieved. This, however, is not the place to erect Dworkin's normative thesis. There are two general considerations regarding the shape of the required agreement. First, the specific goals, and second, their ordering. The main source of disagreement will not be about what goals are to count but for how much they are to count. The Causal Theory makes a very clear distinction between stable higher-order goals and dynamic lower-order goals. A practice can maintain itself if its central and most superior goals are the most important

goals of those who come under the practice. One needs no nebulous theory to see that a social practice could hardly be created, nevertheless maintained, whose sole purpose is to degrade and insult its members. "I find this rule, order, or regulation personally insulting or degrading," will therefore be a legitimate charge against any social practice. Such goals as equal respect and concern are implicit in any social practice. There will be complete agreement about certain goals, both as to their inclusion and priority in a practice. In fact, disagreement may even constitute grounds for questioning a dissenter's rationality. One can therefore expect that mass disagreement and demonstration will represent a reaction against abuse of a practice rather than simply a reaction against a practice itself. Various forms of colonization, slavery, and segregation constitute practices of insult and disconcert. An official of such institutions can not use the concept of obligation in the same sense as it is used in a free and open society of adults. But the Causal Theory makes this story familiar. It is a tale which Dworkin can not tell.

C. One Right Answer

Besides interpreting Dworkin's references to the "character" of a practice as considerations regarding (b)-goals, it is also possible to interpret such references as generic considerations under which obligations arise. One can distinguish between talk about particular obligations and obligations in general. Nevertheless, one must be careful not to think that just because one can talk about obligations at a generic level independently of particular social practices, that this constitutes a theoretically different category of investigation. One might think that questions of law and morality intersect, or that the practice of creating promises and the practice of creating rights/obligations intersect, perhaps overlapping as two circles in a Venn diagram. This would give the impression that there are two independent centers of gravity or areas of

concern which have common interests in certain contexts. When in fact certain questions of morality, valuation, and obligation refer to a way of talking about social practices at a very general level. One can consider how rights are determined in a game like baseball. But talk about how rights are determined in general, very often takes place in the context of inaugurating or criticizing a particular practice. At this level one is concerned with very general social policy and the strategy of very general ways of proceeding. At such levels, "policy" very often becomes platitudinous: "What should I do?" "Take the most worthwhile alternative." But in cases of gross abuse, such considerations become relevant. Questions of obligation at this level of generality become questions of general institutional design: How ought social practices to be designed? How should one proceed? Should unanimity be required? Can a person be expected to accept obligations which he finds insulting or degrading? Obligations seem to involve the experience of doing what one does not want. The truer picture, in fact, is that a person's (b)-goals can not, in this world, all be equally satisfied, and therefore some order of preference must be assigned to them. One can expect that social practices will respect (accept) and protect a person's most important interests. This is a central assumption of the Causal Theory. The existence of a legal system implies such agreement. This seems to be a part of the kernel of truth behind social contract theories of state and society. But once one sees that such talk is really a generic consideration of particular social practices, then confusion as to reference does not arise--the center of gravity of analysis is no longer split.

There is a definite problem of reference in Dworkin's philosophy of law. He recognizes that questions of legal obligation must remain integral to legal decisions. But, he fails to recognize the role of the rule-governed generative structure in such determinations. He does not see that talk

about obligation in general is a generic way of talking about conclusions as resulting from particular legal rules. Questions regarding rights and obligations are not peculiar to law, and thus the experiences of managing and designing other practices becomes relevant to law, and vice versa. But this does not amount to a collapse of practices into one mega-practice or theory. To develop such a practice is the Herculean task Dworkin's theory assigns to judges. The question of obligation, for Dworkin, becomes the problem of providing a justification for forcing others to act in ways they feel to be not in their interest. For the Causal Theory, the issue behind questions of obligation is one of institutional design: How should practices be designed, when one wants essentially voluntary involvement? This leads directly to the causal basis of the theory. Knowing a rule (moral legal, or otherwise) is knowing how to proceed. Rules proscribe and prescribe behavior. Moral rules tell one how to get along with one's fellows. To be admonished for misbehaving is to be informed as to the rule and warned as to the consequences of being one who does not know how to get along with others. To know the rule is to be able to put it into practice. This requires training and discipline, the rationale of which is causal. For Dworkin, however, the central consideration is an obscure conception of moral rectitude. Perhaps the idea is that if those who come under the rules of law believe that they have a moral obligation to follow them, then legal obligation will be that much more efficacious. This, however, is only a fragment of the required analysis of law.

The central argument of Dworkin's legal theory is that the law is a set of entitlements (his rights thesis). He argues that there is always one right answer to a question of law. Though such answers are often controversial, judges can make such determinations by referring to the general character of the practice. The character of a practice is a conceptual device "that internalizes the general justification of the

institution so as to make it available for discriminations within the institution."¹¹⁶ In terms of the Causal Theory, this appeal to a game's character is an appeal to very general and superior goals of the matrix, many of which can be expected to be there, by implication. To say that there is always one right answer, is to say that unless a certain level of agreement can be assumed, it is unlikely that a practice like law will be inaugurated or maintained. A practice whose conclusions were grossly indeterminate could hardly expect to find support. The rights thesis can thus be reduced to a claim about the maturity of a society's legal institutions, the level of agreement needed to maintain it (Dworkin's descriptive thesis), and a claim about institutional design (his normative thesis). The Causal Theory argues that the central rationale of social practices like law is causal in nature. Thus, such proceedings are much more empirically grounded than philosophers like Dworkin and Hart have thought; and therefore, much more determinate and datable. Those who come under a practice expect to be able to make reliable determinations as to what the consequences of their participation under the practice will be. Such security of expectations is central to the generic concern for objectivity in law.

The objectivity of law was threatened by Hart's introduction of discretion. Dworkin's introduction of principles (normative considerations) made the law more determinate but involved obscurities of its own. The Causal Theory's introduction of a generative structure and a causal rationale enabled legal proceedings to achieve a precision in its operations comparable to that of science. The rationality and objectivity of the legal enterprise lies in its openness to review and reform, and the public nature of its decisions. These desiderata find their expression in the electoral, and the legislative processes of government. Dworkin's "institution of rights" represents an essentially vague and grossly indeterminate practice which threatens to retard and obscure the

causal dynamic of social and political development. This is not to say that 'rights' are not integral to the legal enterprise but it is doubtful that they are to be found in the essentially anarchistic form Dworkin's argues for. "X has a right to Y", is still best construed as a "call" in law. "What is a right/obligation?", is still best construed as a request for an explication of the truth-conditions under which such "calls" can be made. The Causal Theory provides a clearer and much richer picture of these truth-conditions than is to be found in either Hart's or Dworkin's analysis.

Philosophers such as Dworkin who consider such issues as civil disobedience, often fail to distinguish between reactions against the system, simpliciter, and reactions against abuses of the system. Consider the practice of conversing. It is implied by the practice that those who proceed to talk with others accept the maxim: "Do not be inconsistent when speaking." Would the following retort be legitimate? "I did not agree to talk in a consistent fashion." If not, why not? Is it not that the practice is contingent upon the practice of some such maxim? To speak is to agree to follow it. Thus, everything Dworkin has to say is captured by the Causal Theory. Of course, it has more to say in many other directions to which Dworkin's theory is mute.

Conclusion:

In a recent defense of his theory, "Can Rights be Controversial",¹¹⁷ one can find Dworkin responding to the theory's earliest critiques. Gerald C. MacCallum asks: "(1) To what might we reasonably be entitled in the way of judicial decisions, given the conditions under which judges do their work? and (2) what is the connection between this and what we are entitled to as of right?"¹¹⁸ He writes further that "a system which fails to provide adequate arrangements for achieving x does not, despite general beliefs about the matter, provide for entitlement to x."¹¹⁹ Dworkin realizes that positivist philosophy can be understood, in part, as "a profound attack on the very rationality of the enterprise" that denies the need in adjudication for judicial discretion.¹²⁰

At the center of Dworkin's legal theory and its defence is his justificatory theory and its role in adjudication. This theory refines his earlier claim that some conception of 'community morality' functions in judicial dispute-settling. This theory is further refined by his notion of a "contested concept", which is the spearhead of his attack on positivism. A contested concept distinguishes between a "concept" and its various "conceptions". At this point, there is a very strong analogy to be drawn between the rights thesis and the Causal Theory. Both the contested concept device and the " $a \leftrightarrow b$, ceteris paribus" policy have similar functions and involve similar assumptions. Each attempts to protect valued features of law (stability, flexibility, democratic control, (a)-goals), while maximizing its aims (achieving justice, equality, fairness, security, (b)-goals). Both theories assume that before any legal system could get off the ground, some natural propensity toward some group of aims would have to be at work. (Formal practices presuppose informal beginnings.) The Causal Theory's position is that the formal structure of law presupposes a causal basis. In Dworkin's theory it is found in his argument for natural rights. These rights are "natural" in the

sense that they must be presupposed by the formal mechanisms of law (in particular, the mechanism of the rule of recognition; or as Dworkin refers to it, the standard of legislative supremacy). As such, these informal elements of law can not originate with the formal elements of law. The "origin" of these elements has been central to the dispute between Dworkin and the positivists. For Dworkin, it makes better sense to say that these informal elements are "discovered" rather than "invented"; they are not human artifacts. But how are they to be "isolated", "ordered", and exactly what sort of "relation(s)" hold between these (b)-goals (natural rights) and institutional structure and history of law (statutes, decided cases, judicial opinions, all of which are valued because they promote the (a)-goals)?

Dworkin's answer is that the judge projects a justificatory/explanatory "conception" of a "concept" that he believes to be animating the law. This conception is used to resolve the case at bar. The following story is used by Dworkin to sharpen one's understanding of the distinction between "concept" and "conception". He writes:

"Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that latter; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind. ... When I appeal to the concept of fairness I appeal to what fairness means,

and I give my views on this issue no special standing. When I lay down a conception of fairness I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it."¹²¹

On Dworkin's view a concept is not identical with its various conceptions. In fact, the set of examples that are generally referred to by agents when using a concept is often incomplete, inconsistent, and contingent. The use of a concept must be mediated by a theory that allows one to generate coherent rules or principles (inference warrants) from a set of controversial conceptions. The story is familiar; it is just a more abstract presentation of Dworkin's theory of adjudication. However, it begins to yield a theory of practical reason. The analogy with the Causal Theory is clear: Interpretations of a rule or regulation (R) must appeal to concepts (b-goals) which control its meaning. The meaning of a rule is controlled by (b)-goals most directly connected with the rule, and controlled more indirectly by the system in the form of the Matrix (theory). Ultimately, the general canons of reason (sense) and fairness (justice) of the system would be involved in determining the meaning of any rule. Given the nature and the complexity of the enterprise, particular conceptions (the content) of the rule or concept will be controversial and will have to be left "open". In the language of the Causal Theory, reference is supplied by the world (the relationship is empirical). Hard cases are produced when the world presents cases that produce anomalies that were not contemplated by the settled meanings of law. These "settled meanings" are theoretical or hypothetical constructs regarding the content and the ordering of the Matrix. Ambiguities and conflicts of reference inevitably arise. In such cases hierarchical considerations come into play. Dworkin's procedure is correct in form; however, the details are obscure. He rightly recognizes that some hypotheses or theory, both general and specific, will be

called into play. These elements are clearly described in the Causal Theory as the Matrix of ordered goals. Various decisions can be construed as hypotheses regarding the correct content and ordering of this Matrix. Resolution of anomalies will call for more detailed resolving rules than the general canons of sense and fairness. Dworkin identifies these rules as "principles". The Causal Theory, however, presents a much richer picture: producing second-order rules and anomaly resolving rules. The greater terminological precision of the Causal Theory provides legal philosophy with a clearer understanding of law, and provides legal science with a more sophisticated mechanism for effecting social policy. The Causal Theory makes explicit that which is only implicit in the rights thesis. Dworkin's picture is overly condensed: He writes that judges in dispute as to what the law is, "are contesting different conceptions of a concept they suppose they hold in common; they are debating which of different theories of the concept best explains the settled cases that fix the concept. ... (The) community's morality ... is not some sum or combination or function of the competing claims of its members; it is rather what each of the competing claims claims to be."

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The concept of rights recognized in law, places judges in a very demanding role. The very luxuriousness of the practice causes one to wonder about its practicality. Underlying the practice of justifying decisions in controversial cases by appealing to contested concepts, Dworkin finds such underlying purposes as an effort towards "the development and testing of law through experiment by citizens and through the adversary process".¹²³ Such a luxuriant practice could hardly deny the rationality of disagreement, or the virtue of tolerance. Fairness necessarily demands these as fundamental elements of an enterprise that takes rights seriously. This raises the crucial question for Dworkin's rights thesis: If reasonable lawyers (men competent in the law) can disagree in such cases,

then in what sense is there always "one right answer" to a question of law?

Human beings can suffer, and can make plans based on their own conception of the good and can act upon them. Dworkin believes that a fundamental right to equal concern and respect, respectively recognizes these fundamental characteristics of human personality. Dworkin wants particular rights (or liberties) to be granted to individuals when necessary to reinforce their right to equality. This would be necessary when it seemed, antecedently, likely that social preferences determined by utilitarian calculations would likely be contaminated by bias or prejudice as revealed by experience with an open and democratic society.¹²⁴ The right to equality (b-goal) is likely to be settled naturally long before any formal institution arises to give it effect; thus, it would be both fair and sensible to say that all participants in the practice are appealing to some common concept of equality, even though they hold different conceptions of it. (This conclusion is crucial to Dworkin's argument). It is worth noting in passing, that Dworkin does not seem to be fully aware of the informal mechanisms (a-goals) which also arise naturally to give informal effect to such natural aims and propensities (b-goals). The key discriminating concept for Dworkin's theory of adjudication is not "rationality", but "fairness". And the centerpiece of this concept is the right to equality. He, however, defends both the reasonableness and the fairness, the sense and the justice, of his theory against the positivists. This emphasis is important, for Dworkin seeks to criticize positivism in its own terms. This restriction produces a terminological (perhaps, also a conceptual) cramp when he tries to elaborate his alternate thesis that there is always one right answer to every question of legal rights.

Dworkin insists that adjudication, "even in hard cases, can sensibly be said to be aimed at discovery, rather than inventing, the rights of the parties concerned."¹²⁵ The posit-

ivist, most certainly, would want to ask: How are such rights "there", in the sense that they could be "discoverable" --after all, they do not clearly arise from the positive law, which in some plain sense is clearly "there"? Is a right "there", in the sense that a certain gustatory experience is "there" in a mass of raw ingredients (perhaps only awaiting the chef's art to bring it forth)? "Discovery" or "invention" may simply be an inadequate dichotomy for dealing with the issues being raised in this debate. Dworkin gives the impression that the schema of principles to be "discovered" is in some sense fully worked out previous to a (series of) judicial decision(s). How else is one to understand Dworkin's claim that, if someone is entitled to something, then a judge deciding the case must presuppose "that there is a single right answer to the question he must decide"?¹²⁶

Dworkin seems to insist on discussing these issues in the overly simplified terms set out by positivists, of "discovery" or "invention". Dworkin, though, has always been more subtle in his views than is allowed by this simple dichotomy.¹²⁷ He has argued that even "if" he is only allowed the vocabulary of positivism (discovery or invention), even "then" he finds what judges do and should do, more reasonably and justly described as discovery rather than as invention, as applying law rather than creating law, and as finding decisions "there" in the law rather than as finding decisions left to judicial discretion. Dworkin is trying to elaborate something which can be displayed in a much better way in the language of the Causal Theory: The application of any regulation must be mediated in particular by a specific (b)-goal and in general by the system in the form of hypotheses regarding the order and the content of the Matrix. The exact content of any ruling, however, will be contingent upon causal relation empirically established. The exact transactions are displayed in the logical and causal relations elaborated by the biconditional policy: " $a \leftrightarrow b$, ceteris paribus". The meaning of any rule is

logically closed by this policy, while its reference is empirically open. Both the need for stability and the need for flexibility are systematically accommodated. It is Dworkin's self-imposed constraint of using positivist terminology that obscures the issues at stake. He tries to refute positivism in its own terms. When he tries to provide a better theory of adjudication and law, he barely escapes from the inadequacies of the positivist vocabulary. This leads Dworkin to such conclusions as:

"But of course the two (judges) who debate cannot look upon their argument (as implying that there is no "right" answer in hard cases), because that analysis leaves each with a theory about nothing. ... But each nevertheless thinks his answer is a superior answer to the question that divides them: if he does not think this, then what does he think?"¹²⁸

Such conclusions illustrate how Dworkin's terminology impoverishes his argument. One can not claim (unless, as a positivist, one holds that "positive law" is to be equated with "law") that since a judge's theory in a hard case is not a claim about "positive law", then it must be a claim about "nothing" in law. It is the standard of sense in law that is at stake. If natural law theory can be faulted for the equation of law and good law, then positivists can be faulted for the equation of law and clear law. This emerges in their "tests" for law: Positivists argue for a clear rule of recognition. Dworkin rests his case upon what the "reasonable and competent" lawyer (person learned in the law) would agree to accept as law.¹²⁹ There are several possible confusions implicit in these two approaches. Since the inauguration of law(s) is a form of standardization, two major problems arise. First, how is the standard to be adjusted in controversial cases so as to preserve its usefulness as a standard? Second, what is to count as the standard, after it is agreed that some standard is needed (or is in force)? After all, there is a fundamental or natural agreement as to the need for law (for

some form of standardization or stability), and also agreement as to the need for accommodation (for some form of adjustment or flexibility). In order to provide for flexibility in law, positivists introduce "discretion". This, of course, jeopardizes the law's stability. Dworkin's introduction of "contested concepts" into law responds in a manner superior to the positivist mechanism of rule of recognition-plus-discretion; it responds to the demand for a standard and the need for its eventual adjustment. Dworkin's concept-conception mechanism is superior, because it recognizes that the transactions between what is in fact the standard and the adjustments that are in fact made, will be determinate in a sense not captured by adjustments made through a discretionary device.

However, there is a different claim that positivists may be making: They may be saying, that in making adjustments, the clarity of the standard must be protected if it is to remain useful as a standard. This assertion may simply follow as a truism from a formal understanding of a need for some such "standard/adjuster" mechanism. But substantively, a practice would not inaugurate a standard unless there were already wide agreement (empirically established) as to what were to count as clear central cases of the standard. (Sense must be controlled by reference.) This sort of thinking leads Dworkin to argue that in some significant sense, certain standards are natural, or pre-institutional. The dispute between positivists and Dworkin has not mainly been concerned with the need for standards (laws) nor with the need for their adjustment in use, but rather with how they are to be adjusted. Dworkin has consistently insisted that such questions are substantive and not formal, and that they are best provided for not by a general grant of discretion to judges, but by charging them with the responsibility to consistently elaborate the positive law in accordance with the community's general principles of right and sense. Dworkin also realizes that even these broad principles are standards, and as such will require adjustment. The

demands that standards be reasonable and moral can thus be seen as systematic ways of raising questions of sense and right, to which the law must always remain "open". In law, as in other practices, standards can be assessed ultimately only in regard to the general ends to which their users put them. The Causal Theory identifies a set of biconditional transactions between particular and general ends: particular ends to which individual users put standards to use; and general ends to which community institutions develop general standards. Positivists ignore such complexities.

The positivist claims, regarding the "clarity" of standards, must be erroneous, because they disregard the rationale for establishing standards. If it were to be accepted that a standard would be mechanically applied (and in the event that this were not possible, discretion invoked), then users would be less inclined to establish such a standard. "Clarity" counts, but not in the way that positivists have argued. "Clarity" counts as part of a biconditional complex (judging in accordance with law). This must be kept in mind when assessing positivist claims. There is a distinction made between a practice (language, morality, law) and its use; and unless the transactions between the two are clearly spelled out, standards are in danger of becoming tyrannical, while usage is in danger of becoming anarchical. Standards should be instructive repositories of collective experience willingly employed by their users.

Dworkin's question is always: Is it fair and sensible to insist that the judge proceed as if there is always 'one right answer', or as if there is always, 'no right answer' to hard cases in law? It is theoretically possible, Dworkin concedes, that "the right answer" may be to leave the judge an option or choice in "tie cases".¹³⁰ However, in a mature legal system, Dworkin believes this would practically never happen, making it reasonable (theoretically sensible) to deny that it never happens, thus making the rights thesis always

the correct way for judges to proceed. The positivist attack on the rights thesis can therefore be seen as an attack on the reasonableness of the Rule of Law (or judging only in accordance with law). Dworkin assumes that the conception of law must be changed (positivists interpret this as a move towards a natural law theory). What is in fact required, is a revised conception of what "judging according to law" actually entails, and especially what its reasonable limits are. Can judges be permitted to 'develop' the standards of sense and right that they are 'bound' to apply? A simple yes or no, does not come to grips with the issue latent in this question. The biconditional policy of the Causal Theory contends with the complications which arise in this context. This would seem to be the only way to escape, first, the positivist conclusion that the rule of law (minus discretion) is irrational: second, the natural law conclusion that an ideal body of law does exist.

Dworkin realizes that one might understand the positivist position as a "profound attack on the very rationality of a enterprise"¹³¹ that does not allow judges discretion. The positivist's introduction of discretion can be seen as a measure (i) to protect the standard, and (ii) to provide adjustment (not necessarily of the standard, but of the practice in general). These two sides of the positivist coin are accountable for "the astonishing volte face among the critics."¹³² Hart believes that "the new critique of positivism...reverses the accusations...and holds positivists' cardinal sin no longer to be 'formalism' or belief in a 'mechanical' theory of judicial decision, but to consist in a mistaken assimilation of the judge's task in deciding hard cases to a legislative or law-making [discretionary] choice."¹³³ Dworkin's critique is less of a "reverse" than Hart realizes. Hart's reaction suggests he does not realize the complexity of the positivist position -- i.e., its implicit claim about an institution which is essentially a practice for standardizing conduct. This oversimplification is also to be found expressed in Dworkin's question

"Is there any way to take the [positivist] philosopher's claim other than as a claim within the judge's enterprise?"

'Within' or 'without', in what sense can the law be 'open' or 'closed' to modification? Are positivist arguments, asks Dworkin, to be understood as claims about the 'real world'? Or are they reports about, "not another enterprise, but objective fact that any enterprise must face if it is to be realistic"?¹³⁵

Dworkin's response betrays the terminological and conceptual poverty of his analysis: This objective reality, he argues, "must contain rights and duties, as objective facts independent of the structure and content of conventional systems."¹³⁶ The most illuminating criticism of positivism is to regard it as an inadequate response to the central institutional problems of (i) whether there is a need for a standard, (ii) what is to count as the standard, (iii) how the formal properties of any standard/adjuster mechanism figure in such substantive considerations. The introduction to save the rule model of law (dominated by a rule of recognition) is inadequate on each point. Dworkin's response betrays an underestimation of the complexity of the mechanism implicit in any standardization.

The law will have devices internal to it, allowing for and controlling the elaboration and development of law. To say that there is always one right answer in law can not simply mean, as positivists assert, that antecedent data existed in a clear and precise way that would satisfy any claimant. The system must be worked out over time. Adjudication, the determination of right, or the provision for a legal resolution of a dispute, is distorted and overly simplified by positivist claims regarding "sense" and "right". If they use, as their sole criteria, decisions strictly derived from clearly pre-existing statute, precedent, or custom, then adjudication becomes woefully debilitating as a tool of social management. The positivist "move" of distinguishing "ought" from "is", was made in order to expose covert judgements of value expressed in descriptive terms. The descriptive and normative uses of a term, in certain contexts, can be confused. Positivists

found it offensive to have judges making any value judgements, covert or overt. For Dworkin, judging necessarily involves judgements of values, but it is the order of judgement which is really at stake in adjudication: Value judgement is necessarily involved in determining what judges must and what judges must not take into account in making decisions. The institution of adjudication presupposes a theory of political morality.

"Controversial propositions of law either assert or deny the existence of a legal right or some other legal relation."¹³⁷ Either they are invented or discovered. The "existence" of law, in Dworkin's philosophy, remains inadequately analysed. In law, as in other practices, there are experts as well as laymen. On occasion, the onus must be on the layman to seek expert guidance. Law is a cooperative venture. Even though he may have the first word, the man on the Clapham omnibus does not necessarily have the last word.

Footnotes:

¹ Lord Shaw, Legislature and Judiciary, (1914).. Quoted in Louis L. Jaffe, English and American Judges as Lawmakers (Oxford: Clarendon Press, 1969), p. 21. Hereinafter, cited as Jaffe.

² Jaffe, p. 92.

³ Ronald Dworkin, "Judicial Discretion", The Journal of Philosophy, 60 (1963), 624-38. Ronald Dworkin, Taking Rights Seriously (Cambridge, Massachusetts: Harvard University Press, 1977). Hereinafter, cited, respectively, as Discretion and Rights.

⁴ In this thesis "The Causal Theory" refers to the theory of law developed in the following papers: S.C. Coval and J.C. Smith, "Some Structural Properties of Legal Decisions", The Cambridge Law Journal, 32 (1973), 81-103. Coval and Smith, "The Causal Theory of Law", C.L.J., 36 (1977), 110-51. Coval and Smith, "The Completeness of Rules", C.L.J., 36 (1977), 364-8. Hereinafter, cited respectively as Structural, Causal, and Rules.

⁵ Structural, p. 102.

⁶ Causal, p. 124.

⁷ Causal, p. 113.

⁸ Carlos E. Alchourron and Eugenio Bulygin, Normative Systems (New York: Springer-Verlag, 1971), p. 176. Hereinafter, cited as Normative.

⁹ Normative, p. 176.

¹⁰ Normative, p. 176.

¹¹ Normative, p. 177.

¹² Normative. p. 177.

¹³ Normative, p. 177.

¹⁴ Normative, p. 177.

15 Normative, pp. 177-8.

16 Normative, p. 179.

17 Normative, p. 180.

18 Rights, p. vii.

19 Discretion, p. 624.

20 Discretion, p. 624.

21 G.C. MacCallum, "Dworkin on Judicial Discretion", The Journal of Philosophy, 60 (1963), 638-41; p. 641. Hereinafter, cited as Judicial.

22 Rights, p. 40.

23 Rights, p. 290.

24 Rights, pp. 14-45.

25 Rights, pp. 31-2, and p. 69.

26 Rights, p. 70.

27 Rights, p. 31.

28 Rights, p. 32.

29 Rights, p. 22, and pp. 38-9; Discretion, p. 634.

30 Rights, p. 24.

31 Rights, p. 58.

32 Rights, pp. 44-5.

33 Rights, pp. 81-130.

34 Rights, p. 84.

35 Rights, p. 87.

- 36 Structural, p. 102.
- 37 Rights, p. 88.
- 38 Rights, pp. 90-1.
- 39 Rights, p. 91.
- 40 Rights, p. 83.
- 41 Rights, p. 205.
- 42 Rights, p. 200.
- 43 Rights, p. 200.
- 44 Rights, p. 91.
- 45 Rights, p. 92.
- 46 Rights, p. 92.
- 47 Rights, p. 113.
- 48 Rights, p, 110.
- 49 Rights, p. 113.
- 50 Rights, p. 82.
- 51 Rights, pp. 86-7.
- 52 Rights, p. 123.
- 53 Rights, p. 123.
- 54 Rights, p. 121.
- 55 Rights, p. 67.
- 56 Rights, p. 68.

57 Rights, p. 63.

58 Rights, p. 126.

59 Rights, p. 185.

60 Rights, p. 124.

61 Rights, p. 126.

62 Rights, p. 255.

63 Rights, p. 162.

64 Rights, pp. 176-7.

65 Rights, p. 101.

66 Rights, p. 93.

67 Noel B. Reynolds, "The Concept of Objectivity in Judicial Reasoning", Western Ontario Law Review, 14 (1975), 1-30; p. 4.

68 H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), p. 127. Hereinafter, cited as Concept.

69 Concept, p. 125.

70 Concept, p. 125.

71 H.L.A. Hart, "Philosophy of Law, Problems of", in The Encyclopedia of Philosophy, ed., Paul Edwards (New York: Collier Macmillan Pub., 1967). VI, 264-76, p. 271.

72 Rights, p. 89, and pp. 93-4.

73 Rights, p. 87.

74 W.B. Gallie, "Essentially Contested Concepts", Proceedings of the Aristotelian Society, New Series, LVI (1955-6), 167-98; p. 169. Hereinafter, cited as Contested.

75 Rights, pp. 104-5.

76 Contested, p. 195.

77 Contested, pp. 196-8.

78 Rights, p. 82.

79 Rolf E. Sartorius, Individual Conduct and Social Norms (Encino, California: Dickenson Publishing Company, 1975), pp. 203-4. Hereinafter, cited as Individual.

80 Rights, p. 124.

81 Rights, p. 109.

82 H.L.A. Hart, "Law in the Perspective of Philosophy: 1776-1976", New York University Law Review, 51 (1976), 538-51; pp. 549-50. Hereinafter, cited as Law.

83 Rights, p. 121.

84 Individual, pp. 196-7.

85 Individual, p. 192.

86 Rights, p. 107.

87 Rights, p. 103.

88 Individual, p. 202.

89 Individual, p. 203.

90 Rights, pp. 86-7.

91 Law, p. 551.

92 Law, p. 550.

93 Rights, p. 116.

94 Individual, p. 115.

95 Individual, p. 57.

- 96 Individual, p. 203.
- 97 Cf. Structural, p. 103.
- 98 Structural, p. 103.
- 99 Rules, p. 368.
- 100 Rights, pp. xiv-xv.
- 101 Rights, p. xv.
- 102 Rights, pp. 286-7.
- 103 Martin P. Golding, Philosophy of Law (Englewood Cliffs: Prentice-Hall, Inc., 1975), p. 108.
- 104 Rights, p. 14.
- 105 H.L.A. Hart, Definition and Theory in Jurisprudence (Oxford: The Clarendon Press, 1953), p. 10.
- 106 Rights, p. 43.
- 107 Structural, p. 100.
- 108 Rights, p. 104.
- 109 Rights, p. 49.
- 110 Rights, pp. 50-1.
- 111 Rights, p. 90.
- 112 Rights, p. 57.
- 113 Rights, p. 80.
- 114 Rights, p. 68.
- 115 Rights, p. 68.
- 116 Rights, p. 105.

- 117 Rights, p. 279ff.
- 118 Judicial, p. 640.
- 119 Judicial, p. 641.
- 120 Rights, p. 287.
- 121 Rights, pp. 134-5.
- 122 Rights, pp. 128-9.
- 123 Rights, pp. 216-7.
- 124 Rights, p. 277.
- 125 Rights, p. 278.
- 126 Rights, p. 278.
- 127 See particularly, Rights, p. 282.
- 128 Rights, p. 282.
- 129 Rights, p. 280.
- 130 Rights, p. 285.
- 131 Rights, p. 287.
- 132 Law, p. 545.
- 133 Law, p. 546.
- 134 Rights, p. 287.
- 135 Rights, p. 288.
- 136 Rights, pp. 288-9.
- 137 Rights, p. 290.

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