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Doctor of Philosophy
Trinity, 1980

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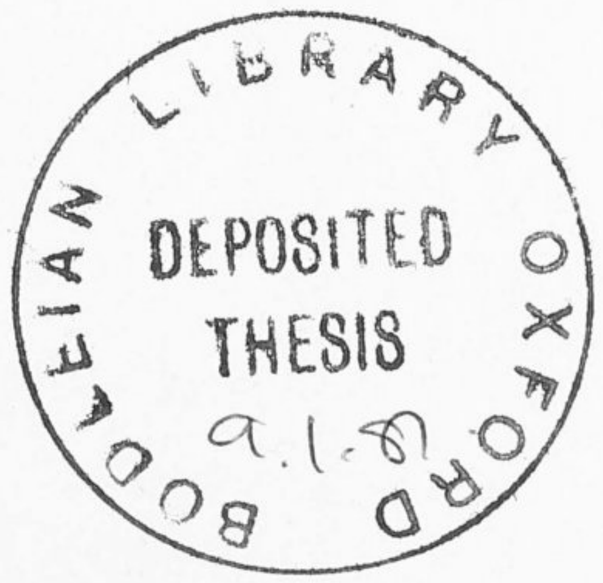
This thesis is mainly a critical examination of Professor R.M. Dworkin's recent attack upon the theory of judicial discretion. Dworkin is concerned to attack the theory in all of its forms, but he uses Professor H.L.A. Hart's version as his principal target. The examination therefore concentrates on Dworkin's attack upon Hart.

Following a short Introduction, Hart's theory of adjudication and its constituent theory of judicial discretion are investigated in chapter two. In the remaining four chapters Dworkin's response to Hart's views is considered. Chapter three isolates four main themes around which Dworkin centres his attack: that Hart's theory (a)fails to distinguish weak and strong discretion, (b)is morally and politically unattractive, (c)is not true to the facts of the Anglo-American adjudicative process, and (d)is the consequence of an inadequate conception of law -- the model of rules. An attempt is made in chapter three to refute (b) and (c), and to determine the exact meaning of 'strong discretion'. An important distinction between _having_ discretion and _exercising_ discretion or discretionary judgment is also noted. Chapter four contains an analysis of Dworkin's theories about rules, principles and policies, and chapter five attempts to refute Dworkin's claim that Hart's theories of law and adjudication must restrict binding law to valid rules. In chapter six Dworkin's alternative theories are considered. It is argued that judges would inevitably have (strong) discretion and would inevitably be led to exercise (strong) discretionary judgment, even if the law included all that Dworkin says it does, and even if judges decided cases in the way in which Dworkin says they do. From this it is concluded that Dworkin has failed in his bid to refute the theory of judicial discretion.

ADJUDICATION AND DISCRETION

Wilfrid J. Waluchow

MT 1980



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INTRODUCTION

The question of 'judicial discretion' has dominated a good deal of the recent literature in legal philosophy, owing in large part to the stimulating work of Professor R.M. Dworkin. The question is sometimes expressed as asking whether, and in what sense, judges are ever free or entitled to employ non-legal standards and reasons when they decide what Professor Dworkin has called "hard cases". At other times the question is expressed as asking whether legal standards dictate uniquely correct answers for all legal cases; or alternatively whether the law sometimes 'runs out', at which point a judge must rely on non-legal standards, e.g. his own or the community's moral standards, to decide among the alternatives left open by the law.

Many legal philosophers and scholars follow Professor H.L.A. Hart in arguing that judicial discretion is a necessary or inevitable feature of law. Professor Hart goes so far as to argue that judicial discretion is not merely necessary, but highly desirable as well. Hart suggests that viable legal systems must

> compromise between two social needs: the need for certain rules which can, over great areas of conduct,

> safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed official choice, issues which can only be properly appreciated and settled when they arise in concrete cases.[1]

The judge and certain other administrative rule-making authorities fulfil this second need according to Hart. The judge does so by exercising his discretion and the administrative authority does so by fashioning concrete rules the observance of which furthers very general aims set out in advance by the legislature.

Professor Dworkin argues, on the other hand, that judicial discretion (as it is normally conceived) is neither necessary nor desirable.[2] He also argues that discretion is not as a matter of fact employed in the Anglo-American legal systems, except in very special areas of the law where its exercise is sometimes explicitly required. Dworkin gives as an example the area of sentencing where a minimum and a maximum penalty is sometimes prescribed and the judges are left to their discretion to choose the actual penalties. Dworkin insists, however, that in all but these very special areas, Anglo-American judges do not and need not have discretion.

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[1]H.L.A. Hart, The Concept of Law, P.127 -- hereafter referred to as CL. (Note: Complete bibliographic information for all source notes can be found in the Bibliography at the end of this thesis.)

[2]As will be seen in chapter three, Dworkin distinguishes three senses of the term 'discretion'.

Although Dworkin's ultimate aim is to discredit all theories of law and adjudication which rely upon judicial discretion to explain judicial reasoning in hard cases, he uses Hart's theory as his principal target. This strategy is a good one. Hart's views on law are both sophisticated and influential and Dworkin will have done much to discredit the theory of judicial discretion in general if he can somehow undermine the position of its foremost proponent.

Dworkin's critique of Hart's views is the most powerful and sustained that has yet been offered. It covers a wide range of issues, such as the nature of legal adjudication, the relationship between law and morality, the fairness of the legal enterprise, and the differences between the various sorts of legal standards which figure in legal argument. Owing to its immense scope, and to its importance as the first truly sustained and incisive challenge to the influential theory of judicial discretion, Dworkin's attack upon Hart's views is worthy of close examination and evaluation. The principal aim of this thesis is to carry out such an examination and evaluation.

The argument will proceed as follows. I shall begin by outlining and discussing in chapter two Hart's views on adjudication and discretion. Anyone who attempts to discuss Hart's views on these matters faces three obstacles. First, Hart's comments seem aimed more at combating the extremes of legal realism and legal formalism than at a positive

account of adjudication. Second, Hart's position as it is presented in CL and his earlier essay "Positivism and the Separation of Law and Morals" seems somewhat different from the position advanced in the later "Problems of the Philosophy of Law".[3] At the very least there is a shift in the importance ascribed to purpose in the interpretation and application of legal rules. Third, Hart's views are expressed (at least in his earlier writings) in terms which differ significantly from those employed by Dworkin. Hart seems to refer to all legal standards as 'rules', whereas Dworkin is anxious to distinguish between rules, principles and policies. Many of Dworkin's arguments against Hart turn on the claim that the latter's conception of law excludes what Dworkin calls principles and policies and is restricted to what Dworkin calls rules. In chapter five it will be argued that Hart's conception of law is not restricted to Dworkinian rules. In chapter two, however, Hart's theory and its supporting arguments will be sketched largely in the terms employed in CL and "Positivism", since it is the theory described there that Dworkin is primarily concerned to attack.

In chapter three I shall begin to consider Dworkin's critique of the views discussed in chapter two. Dworkin finds Hart's views unsatisfactory on a number of counts: four will be discussed. Dworkin argues (A)that Hart's arguments fail

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[3]Hereafter these works will be referred to as "Positivism" and "Problems".

to distinguish adequately between "weak" and "strong" discretion, and wrongly assumes that conditions under which the former is necessary are in fact conditions under which the latter is necessary; (B)that Hart's theory of discretion is inconsistent with the facts of adjudication as it is practised in the Anglo-American legal systems; (C)that the theory of discretion is morally and politically unattractive; and (D)that the view that judicial discretion is a necessary feature of law is the result of an unsatisfactory conception of law -- the model of rules. Dworkin's defence of propositions (A) - (D) is the main topic of chapter three. I shall attempt to refute (B) and (C), and an attempt will be made to determine what exactly Dworkin means by 'strong discretion'. It will also be argued that both Dworkin and Hart fail to distinguish adequately between the following two very different claims: 'S <u>has</u> discretion' and 'S <u>exercises</u> discretion'. Proposition (D) will be considered briefly but it constitutes the main topic of chapters five and six.

Dworkin's defence of propositions (B) and (D) centres, to a large extent, around the claim that Hart's conception of law does not and cannot accommodate, as binding law, what Dworkin calls principles and policies. Dworkin argues that philosophers and lawyers are led to the theory of discretion because they follow Professor Hart in accepting a theory of law which restricts binding law to valid rules. He argues further that once the role of binding principles and policies

is fully appreciated, it will be seen that judicial discretion neither exists (within the Anglo-American legal systems) nor needs to exist. Dworkin's arguments for the claim that Hart's conception of law is restricted to rules is the topic of chapter five. But before those arguments are considered, it will be necessary to determine exactly what Dworkin means by 'rules', 'principles' and 'policies', and how, in his view, standards of these various sorts interact with one another. This will be done in chapter four. Dworkin's views on rules, principles and policies will be investigated in greater detail than is perhaps necessary for the purposes of the main argument of this thesis. The reason for this is that Dworkin's account of how these standards interact and differ from one another is both interesting and important in its own right.

In chapter five I shall outline and examine several arguments advanced by Dworkin in support of his claim that Hart's conception of law is restricted to valid rules. I shall argue that each of these arguments is fallacious, and that Hart's conception of law is consistent with principles and policies.

Finally, in chapter six Dworkin's alternative theories of law and adjudication will be considered. I shall suggest several reasons for supposing that judicial discretion would exist even if the law included all that Dworkin says it does, and even if judges decided hard cases in the way

in which Dworkin says they do. From this it will be concluded that Dworkin has failed in his bid to refute the theory of judicial discretion.

Owing to the breadth of Dworkin's critique of Hart's theory of discretion, the discussion in this thesis must be somewhat selective. It is hoped, however, that most of Dworkin's most important points and arguments will have been touched upon.

PROFESSOR HART'S THEORY OF ADJUDICATION

In CL Hart argues that law is best viewed as a union of primary and secondary rules. All legal systems consist of:

(1)a master rule of recognition (or set of such rules)

and

(2)all those rules, primary and secondary, (e.g. precedent based, customary and statutory) which meet the requirements for validity set out in the master rule of recognition.

According to Hart the rule of recognition is a secondary social rule. It is a rule which exists as a complex general practice among officials of the legal system and the general population: the former identify the valid rules of the system according to accepted criteria, while the latter acquiesce in, and conform with, the results of the rule's use by the officials.[1] Hart suggests that the criteria of validity in terms of which the valid rules are identified may

> take any one of a number of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases (CL, p.97).

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[1]See CL, pp. 59 & 60.

Hart adds that

> For the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers (CL, p.98).

The rule of recognition, then, is part of the legal system solely in virtue of its acceptance within the community of legal officials and within the community at large. All the other rules gain their membership, and are therefore valid law, not solely because they are accepted, but ultimately because they satisfy one or more of the various criteria outlined or displayed in the accepted master rule of recognition.

It is perhaps worth noting that this account is quite compatible with the existence of customary law within legal systems. Both the rule of recognition and customary rules recognized by that rule of recognition are law only if they are widely accepted. What distinguishes the two, however, is that the latter, i.e. customs, become law only because the rule of recognition provides (and it might not have done so) that certain long-standing community customs count as valid laws of the system. In short, a customary rule is law not solely in virtue of its acceptance within the section of the community of which it is a custom. The rule of recognition, however, is law solely in virtue of its acceptance within both the legal community and the community at large. So for Hart law

consists of an accepted rule of recognition and all those rules which satisfy the various criteria of validity that happen to be recognized in that rule.

Given this simple yet highly illuminating and influential picture of law, one might be drawn to a theory of adjudication such as the following, which could be called Theory F -- the formalist theory of adjudication:

> Theory F: If (and only if) the instant case is covered by a rule which satisfies the criteria outlined in the accepted rule of recognition, then the judge must apply that rule and decide in accordance with it.

In some ways the formalist theory is very appealing. It seems to accord with the commonly held (but naive) view that judges simply apply rules which have been set by some other representative body such as Parliament or Congress, whose proper function it is to set the rules to be applied impartially in courts of law. It accords, in other words, with common views concerning the separation of legislative and judicial functions. Nevertheless the formalist theory must be rejected, and according to Hart its major defect lies in its failure to account for the necessity and desirability of judicial discretion. As noted earlier, Hart claims that viable legal systems must compromise between two competing social needs. The first is the need for clear, indisputably valid rules which can, over wide areas of conduct, safely be applied by private persons and officials without either fresh official guidance or the weighing up of social issues. The formalist lays

great stress on this need.[2] His ideal is a legal system in which the rule of recognition settles beyond dispute the question of which rules are legally valid, and thus which rules must be obeyed and applied in courts of law. It is also a system in which these valid rules are so perspicuous and so well formulated that their concrete requirements are never in doubt. Both elements are required if the ideal of absolutely clear guidance is to be secured. It would be of little use to know that a particular rule is indisputably valid if it were unclear what that rule required and vice versa. According to Hart, however, these two elements are often lacking in fulfilment. The rule of recognition is sometimes unequipped to deal with certain questions of validity, especially in times of revolution.[3] More often, though, it is the other element of the formalist's ideal that fails to be satisfied. Even when we are certain that a particular rule is valid law, it will sometimes be unclear what, if anything, that rule requires in certain cases to which it might reasonably be thought to apply.

> It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without

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[2]Cf. Joseph Raz, The Authority of Law, pp. 221 & 222 where Raz presents several arguments to show why legal systems should be concerned to fulfil this important need, in so far as this is possible.

[3]See CL, pp. 118-120 and 144-150.

> further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim (CL, p.125).

Hart does not explicitly refer to it as such, but it is clear that a third handicap under which he feels we must labour is that feature of natural languages which, following Waismann, he calls 'open texture'.[4] It is in terms of these three handicaps (though given the first two the third is, in Hart's view, something of a blessing) that Hart attempts to demonstrate the necessity and the desirability of judicial discretion, and hence the falsity of the formalist theory of adjudication.

I shall begin with the argument advanced in CL to support what will be called the 'necessity thesis', the proposition that it is necessary that judicial discretion exist.[5] The first and foremost step in the argument, which will be called the 'necessity argument', is the appeal to open texture. Hart begins by contrasting two methods of communicating general standards of behaviour. The first is the method of example (precedent) and he quickly shows how communication by this method "may leave open ranges of possibilities, and hence of doubt, as to what is intended, even as to matters which the person seeking to communicate

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[4]F. Waismann, "Verifiability", pp.117-144.

[5]Two versions of the necessity thesis will be distinguished below in chapter three. For the purposes of this chapter, however, I shall be content with the thesis in the above form.

has himself clearly envisaged" (CL, p.122). The inadequacies of this method are all too apparent to legal theorists who attempt to outline a theory of precedent which construes it as reasoning by example. The familiar and vexing questions are: 'What are the relevant features of the earlier case?' and 'How do they bear on the instant case?'.

With this seemingly inferior method of example, Hart contrasts the communication of general standards by "explicit forms of language" (CL, p.122). He suggests that this method might be thought "clear, dependable, and certain" (CL, p.122). But of course it is not always so, and Hart attempts to support this claim by appealing to the open texture of general classificatory terms. There will

> indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable...but there will also be cases where it is not clear whether they apply or not (CL, p.123).

> Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they have what has been termed an open texture...uncertainty at the borderline is the price to be paid for the use of general classifying terms (CL, pp. 124 & 125).

Given this feature of language, there is always the logical possibility that borderline or anomalous cases will arise in which it is "indeterminate" or uncertain whether some particular fact-situation is covered by the

general terms of a legal rule -- and this will be so regardless of how precisely and unambiguously that rule has been framed. "If in such cases doubts are to be resolved, something in the nature of a choice between open alternatives must be made by whoever is to resolve them" (CL, p.124). This task, Hart suggests, is performed by the presiding judge in the case in which doubt arises; and the "discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice" (CL, p.124).

So far, then, Hart has argued that general classificatory terms have open texture and that borderline or anomalous cases must therefore arise in which the question whether the rule, by its terms, applies is uncertain or indeterminate. Relative to the language of the rule, then, a free undetermined choice is necessary. But on what grounds is this choice to be made? According to Hart the judge must strike some sort of balance between any reasonable social aims and purposes which seem to him to be relevant to the case and decide in the light of these whether or not to apply the rule. He must, that is, exercise his discretion and provide his own standards. The law's guidance has run out. Hart goes on to suggest that

> In these cases it is clear that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely

> correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests (CL, p.128, emphasis added).

As will be seen later, the position in "Problems" is not quite so skeptical, but in CL Hart wishes to hold (a)that it will always be possible for an anomalous or borderline case to arise in which the answer to the question whether the pertinent rule applies is not dictated (solely) by the language of that rule. He also wishes to hold (b)that there will never be a uniquely correct resolution of the competing aims and purposes which might seem relevant to the case and in terms of which the question whether the rule is to be applied can be conclusively answered. All that is possible is a "reasonable compromise" and if there is more than one reasonable compromise there may be more than one reasonable and acceptable answer to the question of application.

Propositions (a) and (b) are two very different claims and it is important that they be clearly distinguished. One might agree with Hart that the language of a general rule is often in itself insufficient to answer questions of application and yet go on to submit that in light of the various other considerations which must be taken into account, there will either always, or at least sometimes, be right answers to those questions. The question whether a rule applies to a case or fact-situation is not necessarily identical to the question whether its constituent terms

apply in virtue of their agreed meanings; and it does not follow from the fact that one sometimes lacks an answer to the latter question that one also lacks an answer to the former. As will be seen in chapter six, Dworkin seems to fully appreciate the important difference between these two questions and attempts to provide a theory in terms of which the former question can always be answered (in principle) even when the latter cannot. It will also be seen later in this chapter that Hart's views appear to have shifted in such a way as to allow that at least sometimes the former question can be answered even when the latter cannot. In "Problems" Hart suggests that the explicitly stated or generally agreed purpose of a rule might sometimes settle conclusively the question of its application, and he describes as "oversimplified" the view that whether or not a case is covered clearly by a legal rule is determined exclusively by the meaning of that rule's terms. What concerns us at this point, however, is the view which is advanced in CL and "Positivism", and that view is open to the above objection.

So in CL Hart insists that there is no uniquely correct resolution of the various factors which might reasonably be held to bear on the application of legal rules when their meaning proves indeterminate. Nevertheless, the resolution must be reasonable and to that end judges must observe certain ground rules.

> At this point judges...make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues...these virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interests of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice (CL, p.200).

To sum up the necessity argument, open texture entails that cases will arise in which the question whether a legally valid rule applies in virtue of its terms is uncertain or indeterminate. Thus the judge must step beyond the law -- i.e. beyond the rule -- and consider various social aims and purposes which seem to him to be relevant. He must decide, in the light of these various factors, whether or not it would be better to construe the rule so as to apply, and his decision must be such as to effect a reasonable compromise among these factors. There will be no uniquely correct resolution or answer to the case because (on the CL account) there will never be a uniquely right way to make this reasonable compromise. The judge must make an intelligent, impartial, neutral and principled choice among more than one reasonable and acceptable solution.[6]

I should now like to consider a few objections which might be raised against the necessity argument. The first

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[6]For an account of how these 'principled' choices might be made, see D.N. MacCormick, Legal Reasoning and Legal Theory, passim.

objection has already been mentioned briefly. The argument seems to suffer from a failure to distinguish adequately between the following two very different questions: (a) whether a rule applies to a fact-situation, and (b)whether its constituent terms apply in virtue of their agreed meanings. The open texture of general terms entails indeterminacy and the need for a choice only if one assumes that an affirmative (or negative) answer to (b) entails an affirmative (or negative) answer to (a), and as was suggested earlier, it need not. To find support for this last claim one need not go so far as to agree with Professor Fuller that the applicability of a rule can never be determined without a prior understanding of the purpose(s) for which the rule was framed.[7] It is quite possible that in some cases an affirmative answer to (b) might well entail an affirmative answer to (a). All one needs to claim is that the rule's applicability can sometimes (though granted not always) be determined, say, by the apparent and obvious purpose of the rule, even when the meaning of the rule fails us. A negative answer to (b) need not result in a negative answer to (a). Whether the applicability of the rule can be determined in the proposed way, or whether a negative (or affirmative) answer to (b) does indeed result in a corresponding answer to (a) will depend, presumably, upon the secondary rules (of adjudication)

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[7]Lon L. Fuller, "Positivism and the Separation of Law and Morals -- A Reply to Professor Hart", pp. 661-669.

accepted within the legal system in question -- and these may vary. It will depend, that is, upon whether those secondary rules include only the 'literal rule' of interpretation, or alternatively whether they include some other rule(s) according to which applicability may be determined by other considerations. So the necessity argument fails to appreciate sufficiently the distinction between (a) and (b), and that the connection, if any, between (a) and (b) will depend upon secondary rules of adjudication which may vary from system to system and from time to time within the same system.

The second objection which might be raised concerns the assumption that all general classificatory terms are open-textured. Some philosophers might wish to argue that there is implicit in the use of every truly meaningful general term a rule or agreed set of criteria which spells out necessary and sufficient conditions of that term's application. Others may wish to restrict the thesis to purely descriptive terms. Both groups will concede that these criteria are often extremely difficult to unearth, as philosophers who attempt to do so (e.g. Plato in the early dialogues) soon discover, yet they will argue that the discovery is nonetheless theoretically possible. To support their position these objectors might have us consider general terms such as 'brother', 'horse' and 'triangle' which, they will urge, can be

easily defined in terms of necessary and sufficient conditions of correct application. If these terms can be so easily defined, what reason can there be for supposing that the same cannot be done, at least in principle, for all other meaningful general terms? Indeed if such definitions or criteria are not possible, how could one ever know whether one had used a general term properly? But if it is always theoretically possible to discover the correct criteria of application for a general term, then a judge's duty might well be always to try to establish what these are and to employ them in reaching his decision. This may be his duty, they will argue, even though he might well be unable to demonstrate conclusively that he has unearthed the correct criteria and that his decision is therefore the right one.

This second objection is not nearly as worrying as the first, and there is little doubt as to how Hart would respond. In CL it is suggested that

> The uncritical belief that if a general term... is correctly used, then the range of instances to which it is applied must all share 'common qualities' has been the source of much confusion. Much time and ingenuity has been wasted in jurisprudence in the vain attempt to discover, for the purposes of definition, the common qualities which are, on this view, held to be the only respectable reason for using the same word of many different things...(CL, p.234).

He goes on to suggest

> Wittgenstein's advice...is peculiarly relevant to the analysis of legal and political terms. Considering the definition of 'game' he said, 'Don't say there

> must be something common or they would not be called 'games', but look and see whether there is anything common to all. For if you look at them you will not see anything common to all but similarities, relationships, and a whole series at that' (CL, p.234, citing Philosophical Investigations, i, 66).

So Hart would certainly classify as naive and gravely misleading the view that all general terms can be defined in terms of necessary and sufficient conditions of application. In support of this view he would presumably invoke the powerful and influential arguments in the Philosophical Investigations that the use of many general terms is governed by family resemblance. If the range of cases to which a general term may possibly be applied are related by nothing stronger than family resemblance, then the possibility of our gathering together necessary and sufficient conditions of application must be very remote indeed, and the possibility of it sometimes being indeterminate whether a case is covered by that term very strong indeed.

A second response at Hart's disposal is the following. Even if one can, for certain terms such as 'brother', 'horse' and 'triangle', list a set of necessary and sufficient conditions, one might still be faced with problems of indeterminacy. To provide criteria of application for a term one must of course employ other terms, and these may be open-textured or governed by family resemblances. Thus it might be clear that a brother is a male sibling. What might not be so clear, though, is what counts as a male or

a sibling. When does a person who undergoes the long process involved in a sex-change become (if ever, some might say) a member of the opposite sex? There will undoubtedly be clear cases, but there will undoubtedly also be those which are not so clear.

Yet another response Hart might make is to point to the arguments advanced by Waismann in support of the open-texture hypothesis and suggest that even if, by some chance, one could overcome the above problems and discover a set of features shared by all the present plain cases of a general term, this could never serve as an authoritative definition or criterion. "We can never", it would be urged, "exclude altogether the possibility of some unforeseen situation arising in which we shall have to [or want to] modify our definition."[8] The fact that persons can now undergo sex-changes with incredible success may, for example, require that we reconsider our 'definition' of the term 'brother' -- a term which might figure in countless legal rules. Definitions are not immutable and authoritative, except perhaps in highly formalized languages such as Euclidean geometry which deal with abstract or ideal objects and notions. At best they are rough but often helpful guides to what are presently plain cases and are often discarded or altered to accommodate new and unforeseen

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[8]Waismann, "Verifiability", p.120.

cases. Since there is no authoritative criterion to which a judge might appeal, it follows that he must sometimes make an undetermined choice in his decision whether to apply the term and thus the rule of which it is a part. The case before him might well be one which signals the need for a change in the hitherto acceptable definition of the general term.

So the objection that necessary and sufficient conditions for the application of general terms are, contra the open-texture thesis, discoverable in principle is at best highly dubious. The next objection to be considered argues that Hart's defence of the necessity thesis fails, as it stands, to demonstrate the necessity of judicial discretion. It is quite conceivable that there be a system of law in which anomalous cases are always referred back to the legislative source for settlement, and judges decide plain or easy cases only.[9] Alternatively, the system might be such that only clear cases are held to be 'justifiable'. In the first system, S(1), there would be no judicial discretion -- its exercise would be reserved

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[9]Cf. the French Law of 16-24 August, 1790, title 2, article 12, which (in rough translation) reads: "Courts will address themselves to the legislature every time they believe it necessary to interpret a law." See also the French Constitution of 1790, article 256, which (again in rough translation) reads: "When, after the Supreme Court of Appeal has quashed the decision of a lower court, a second decision on the merits is appealed on the same grounds, the issue cannot be discussed in the Supreme Court of Appeal until it has been submitted to the legislature, which enacts a law binding on the Supreme Court of Appeal."

for the legislature; in the second, S(2), there would be no discretion of any kind.

There are at least two lines of response Hart might make in reply to this objection. First, he might submit that the necessity argument is intended to apply only to legal systems like those found within Great Britain and North America, where the secondary rules of recognition and adjudication are such that (a)judges <u>are</u> left to apply general standards set by the legislature even when those standards provide insufficient guidance, and (b)where at least some anomalous cases <u>are</u> held to be justiciable. Given (a) and (b), he might argue, <u>judicial</u> discretion is indeed necessary.

This reply is of course possible, but it would be made only at the cost of seriously weakening the original argument and thus, in the end, the necessity thesis itself. The argument purported to show that judicial discretion is a necessary or unavoidable feature of law. But with these qualifications it could only be thought to show this with respect to systems in which both (a) and (b) are true. So unless Hart wishes to accept a weaker, and far less interesting, version of the necessity thesis, he would do well to avoid this first line of response.

Fortunately there is a second more forceful line which does not require that the necessity thesis be weakened in any way. Hart might meet the objection directly and argue

that there would be a need for judicial discretion even within S(1) and S(2). Consider the following argument. The open texture of general terms entails that situations will arise in which it is indeterminate or uncertain whether a rule covers a particular fact-situation. These are cases which fall within the open-textured penumbra of meaning. In much the same way, it will sometimes be uncertain or indeterminate whether a case falls within the penumbra, or alternatively whether it falls within the core of settled meaning. In short, it will sometimes be indeterminate whether a case is indeterminate. This will be so unless one wishes to claim that whenever there is even the tiniest and remotest doubt as to the applicability of the rule, the case falls within the penumbra. But if that were true, it would follow that very few, if any, cases could be tried within S(1) and S(2). In almost any case one might imagine there will be some grounds for a certain amount of skeptical doubt. One could also be sure that litigants would point to these grounds whenever it was to their advantage to do so. If one is to assume, then, that S(1) and S(2) are even remotely viable legal systems, one must also assume that a clear case could be one in which there is some remotely possible doubt about whether the fact-situation is covered by the pertinent rule. But if this assumption is made, one must accept that there will be borderline cases, wherever one wishes to draw the line.

Just as "particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule", cases do not await us already marked off from each other as either clear or indeterminate. One individual might think that the toy motor-car in Hart's example (CL, pp. 125 & 126) is a clear case of a vehicle; another might think not, although he might very well think it could be a vehicle. He simply contends that it is not obviously or indisputably so. Thus the judge in such a case would be forced, if he entertained both possibilities, to employ judicial discretion and choose. He would be forced to decide either that the case is a clear one, and thus that the child is guilty; or that it is anomalous or indeterminate, and thus that it is either non-justiciable or must be sent back to the legislative source for settlement.

Before turning to consider Hart's argument for what will be called the 'desirability thesis', the proposition that judicial discretion is desirable, I should like to deal with one further objection which someone might be inclined to raise against the necessity argument. The objection is as follows. Even if one accepts that S(1) and S(2) do not serve as counter-examples to the necessity thesis, there is another type of system, S(3), which does fulfil this role. The necessity argument applies only to systems in which the roles of legislator and judge are filled by

different individuals. The latter attempts to apply standards set by the former, and it is sometimes uncertain exactly what has been prescribed. However, in a system such as S(3) in which these roles are combined in one individual (e.g. a king) there would be no need for judicial discretion -- indeed no need for discretion of any sort. The king would always know exactly what he had prescribed. Thus, it might be argued, Hart has failed to show that judicial discretion is a necessary feature of law.

This objection is clearly misguided. If one grants that the situation represented by S(3) is one in which law is observed, i.e. it is one in which an attempt is made to govern according to general standards, not mere fiat, then it follows from Hart's argument that whoever is to apply those prescribed general standards to concrete cases, whether he be king or judge, will be forced to make free choices. If one were to separate the function of legislating general standards from the function of applying those standards to concrete cases, then one might go so far as to say that judicial discretion is a necessary feature of S(3). The important point is not who applies the general standards, but the insufficient guidance they sometimes provide once they have been set.

So given (a)that general terms are open-textured, and (b)that there are no other considerations over and above the language of rules (and the discretion of judges who apply them) in terms of which questions of application may

be conclusively answered, it follows from Hart's argument that judicial discretion is a necessary feature of law. Yet as was seen, there is good reason to question proposition (b), as Hart seems to acknowledge in his later writings. As will also be seen in chapter six, Dworkin is very anxious to provide a theory of law and a theory of adjudication which allows him to refute proposition (b) and thus the necessity argument.

I should now like to turn and consider Hart's argument for the desirability thesis. The argument will be called the 'desirability argument'. According to Hart

> 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 actual application, a fresh choice between open alternatives (CL, p.125).

Hart's argument for this proposition makes reference to the other two handicaps (in addition to open texture) under which he feels we must labour in attempting to govern by way of general standards: relative ignorance of fact and relative indeterminacy of aim. It is perhaps worth noting that the desirability argument does not depend on the truth of the necessity thesis. Hart believes that even if it were true that rules could somehow be framed without open-textured terms, and thus the need for discretion, this should be avoided.

> We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified. We

shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined. The rigidity of our classifications will thus war with our aims in having or maintaining the rule (CL, pp.126 & 127).[10]

The desirability argument begins, then, with the familiar premise that legislators do not, and for all practical purposes could not, anticipate all the possible fact-situations to which their general rules will, or might reasonably, be thought to apply. Nevertheless, argues Hart, they can and probably do anticipate certain clear cases, e.g. the operators of motor-cars and motor-cycles taking Sunday drives through the public park. They know that these sorts of fact-situations either will or are very likely to arise, and their aim or intention is to secure peace and quiet in the park by excluding these vehicles. But what of the unanticipated cases? In Hart's view, the aims or intentions of the legislators in these cases are indeterminate. The legislators "have not settled, because [they] have not anticipated, the questions which will be raised by the unenvisaged case when it arises..." (CL, p.126). Yet if their rule is so clear and determinate in meaning that it dictates results in all (or nearly all) conceivable cases, the legislators will have blindly committed themselves and the judge to a particular result in the unanticipated case. It is better, however,

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[10]Cf. "Problems", p.270.

that this not be blindly pre-determined and that the question of what is to be done be left to the discretion of judges who can better appreciate and settle the question when it arises in a concrete case. According to Hart the open texture of general terms allows for this possibility.

I shall now consider a few objections which might be raised against this argument. First, it fails, as it stands, to demonstrate the desirability of judicial discretion. Even if one were to accept, as proven, the claim that some form of discretion is desirable when rules are applied to concrete cases, it has yet to be shown that the desirable form is judicial discretion. Ideally, it might be argued, the delicate balancing of social aims and purposes which Hart's theory requires would be better left, as in S(1), to a more representative and responsible body such as a legislature. If, as members of democratic societies, we would be hesitant to allow non-representative individuals such as judges (or monarchs) to set laws and to decide, thereby, how citizens will be dealt with by the legal system, we should be equally hesitant to allow them the power to decide what shall be done in hard cases where those laws prove indeterminate.

Perhaps the most obvious reply to this first objection is to concede that judicial discretion does seem to compromise democratic ideals. The best situation would perhaps be one in which all judicial decisions follow (in

conjunction with the facts of the case) from decisions made by democratic bodies. Yet it is often the case that ideals and ideal procedures cannot successfully be realized in practice, and that we meet with misfortune and failure if we strive to attain the unattainable. To take a familiar example, Plato may well have been right in claiming that government by enlightened, wholly impartial and benevolent philosopher-kings would be the ideal. Yet even if we assume this, it remains true that the results, in terms of tyranny and dictatorship, of striving to implement, within our highly imperfect society, a form of government suitable only to ideal worlds, would be far less desirable than the results of implementing, say, representative democracy, a form of government far more suitable to our less than perfect world. Similar considerations apply to the choice between judicial and legislative discretion. We might grant that within an ideal world in which legislators have sufficient time and energy to deal properly with hard cases, it would be better if they, and not judges, performed the delicate balancing of social aims and purposes such cases typically require. But of course in our less than perfect world, legislators do not have sufficient time and energy to acquaint themselves adequately with all the facts and all the implications of all hard cases. Even if they were somehow able to make the necessary time, the wheels of government and of justice would be forced

to turn far slower than we should find acceptable. So given these practical considerations, it seems to follow that judges and not legislators are our best hope in dealing with hard cases. Thus it follows, if Hart's arguments are sound, that judicial discretion is desirable.

The second objection to be considered is perhaps much more serious than the first, as it penetrates to the very core of Hart's views on adjudication and discretion. It would seem that the desirability argument might easily be extended to cover certain cases (these will be called 'plain-meaning cases') which do not fall within the open-textured penumbra of legal rules. Hart has argued, quite convincingly, that the possibility of our blindly committing ourselves to unreasonable results in unanticipated cases is a sufficient reason for framing legal rules in loose, open-textured terms, thereby allowing judges room to manoeuvre when these rules are applied to concrete cases. If we do frame rules in this way, we must of course pay a high price in terms of certainty, reliability and uniformity in the application of the rules, but in Hart's view this price is, contra the formalist, well worth paying. Now if the possibility of unwanted results serves as a sufficient reason purposely to frame rules which provide uncertain or indeterminate guidance, and to promote uncertainty when there might well be a good deal more certainty, then it should also be a good, if not sufficient,

reason for allowing judges not to apply a rule when its plain meaning calls for an unwanted result -- a result which might well "war with our aims in having or maintaining the rule" (CL, p.127).

It is clear, though, that the author of "Positivism" would be extremely reluctant to allow the extension. (I say 'the author of "Positivism"' since the author of "Problems" might wish to allow the extension to cover certain cases which are clear or easy cases on the earlier account.) To allow that judges should, or may legitimately, decline to apply rules in plain-meaning cases is to

> assert mysteriously that there is some fused identity between law as it is and as it ought to be...that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of settled meaning which rules have...("Positivism", p.29).

How then might the author of "Positivism" block the proposed extension of the desirability argument?

Perhaps he might attempt to advance the following familiar argument. There will admittedly be plain-meaning cases which we or a judge might wish to exclude from the scope of a rule in order to give effect to reasonable social aims. Nevertheless, it is the proper function of a judiciary in a constitutional democracy to render decisions in accordance with the aims or intentions of the elected legislators whenever it is clear what these are, and even when doing so might seem clearly unreasonable or undesirable.

Since the cases in question are all, ex hypothesi, plainly covered by the terms of valid legal rules, the aims or intentions of the legislators must have been those which will be secured if the rules are applied. Thus judges must apply rules in all plain-meaning cases.[11]

Leaving aside the fact that it applies only to statutory law and completely ignores the vast body of law instituted and developed by the courts, the first point to be made against the above argument is that it fails to appreciate an important distinction set out by Gerald MacCallum, who distinguishes between "particular" and "general" legislative intentions.[12] The former refers to the meaning in which the legislators intended particular words to be understood, while the latter refers to the purpose or aim they intended to achieve in framing the rule they did. Given this very useful distinction, the obvious question is: 'Which of these two very different sorts of intention is a judge to respect?'. If he is to respect the particular intentions of the legislators, then once again, the question arises as to why, given Hart's arguments, we should not allow

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[11]An argument of this form seems to be advanced by Tindal C.J. in Sussex Peerage Case (1844) 11 CL. & F. 85; 8 E.R. 1034, where he states: "If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

[12]G. MacCallum, "Legislative Intent", pp. 237-273.

judges to depart from the particular intentions of the legislators when doing so is a necessary condition of fulfilling, say, the legislator's general intentions. If, on the other hand, the role of the judiciary includes or consists of the task of abiding by the general intentions of the legislature, then a judge's task will sometimes require him to depart from the plain meaning of a rule's terms in order that he might abide by these general intentions.[13] The purpose or aim of the legislators might be fulfilled only if the terms of the rule are taken in other than their plain or literal meaning.

The second difficulty with the argument is that it seems to assume that the plain meaning of the terms used in a legal rule is necessarily identical with, or at least an infallible indicator of, the particular intentions of the legislators. In other words, it assumes that what those words mean is always identical with, or an infallible indicator of, what the legislators meant by those words. This assumption is presupposed in the claim that judges will abide by the intentions of the legislators if and only if they observe the plain meaning of the latter's words. But this assumption is clearly false. It is surely possible for an individual, S, to prescribe that all X's shall $\emptyset$, and for there to be a case which S neither

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[13] In Engineering I.T.B. v. Samuel Talbot Ltd. (1969) 2 Q.B. 270, Lord Denning said: "We no longer construe acts according to their literal meaning. We construe them according to their object and intent."

intended nor meant to be included within the scope of 'X' (and thus the prescription) which is nevertheless such that given what 'X' means, not what S meant by 'X', it clearly or plainly involves an instance of an X. There may be certain words, e.g. certain demonstratives, which are such that what they mean is what the speaker meant on some particular occasion of use, but for most words the proposed distinction obviously holds. Thus S might prescribe that all transport vehicles must pay a road tax of one hundred pounds. Given the meaning of 'vehicle', it might be argued, cargo airplanes are subject to the tax, even though we may safely assume that S did not intend or mean that they be subject to a road tax. Of course it is true that if, in issuing a prescription, S commits himself, and possibly others, to all results which accord with the plain meaning of the terms used, then S may be said to have committed himself to the claim that cargo airplanes must pay the one hundred pound road tax. But it is not true that he could be said to have thereby intended or meant that this be the case when he issued his prescription. This shows the fallacy in assuming that the plain meaning of a rule is necessarily identical with, or an infallible guide to, the intentions or aims of the legislators. It also shows the fallacy in supposing that if judges are to abide by the intentions or aims (particular or general) of the legislators, then they must always decide in accordance

with the plain meaning of the legislature's rules.

Yet perhaps the familiar argument can be given a more plausible reading. Even if we grant that the plain meaning of a rule is neither identical with, nor an infallible guide to, the particular or general intentions of the legislators, it may nevertheless constitute very good evidence as to what those intentions are or were. Consider the following argument. The cases under consideration are all, ex hypothesi, plain-meaning cases. It follows from this that, for any particular case one happens to choose, the hypothesis that it was anticipated and that it was intended or meant by the legislators to be included within the scope of the rule, is far more likely than the hypothesis that it was not. Legislators must be assumed to be reasonably intelligent and capable employers of the language in which they frame their rules. It is reasonable to assume, therefore, that they were well aware of the plain cases and intended or meant that they be included. Thus it is far more likely, though admittedly not certain, that judges will decide in accordance with the particular or general intentions of the legislators if they always apply legal rules when their plain meaning makes them applicable.[14]

Though the familiar argument is rendered more plausible

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[14] An argument of this form is advanced by Professor MacCormick in Legal Reasoning and Legal Theory, p.204. Perhaps Tindal C.J. in Sussex Peerage Case can be read in this way as well. See above, note 11.

by these alterations, it remains unconvincing. Granted one must remember that the cases under consideration are all, ex hypothesi, plain-meaning cases; but one must also remember that they are all such that "we would wish to exclude [them] in order to give effect to reasonable social aims" (CL, p.270). Indeed the aims which prompt this wish are frequently those for the sake of which the rule was itself fashioned -- the 'mischief' it was intended to remedy. Given the nature of these cases, and given that legislators realize that judges too are reasonably intelligent and competent employers of the language who, like other competent members of the 'language community' are reasonably well aware of the plain cases of most terms, it seems to follow that the legislators failed to anticipate these particular cases and that they did not, therefore, intend or mean them to be included within the scope of their rule. Otherwise they would have framed their rule differently; they would have framed it in such a way that its plain meaning did not lead to these unwanted results. Perhaps this follows only if one is able to attribute rationality, benevolence and a modest degree of responsibility and care to the legislators. Yet if one cannot, then justice would seem to require that judges be allowed to override their irrational, malevolent or irresponsible aims and intentions. So even this more plausible version of the argument seems destined to failure.

It appears, then, that the extension of the desirability argument to plain-meaning cases could not successfully be blocked by an appeal to the principle that judicial decisions must respect or accord with the intentions or aims of the legislators. Indeed, since the plain meaning of a rule may well diverge from the particular or general intentions of the legislators, the principle, in conjunction with the above considerations, would seem to require non-application in certain plain-meaning cases. We would do well then to consider an alternative strategy.

Perhaps Hart could argue in the following manner. To grant judges the liberty not to apply rules in plain-meaning cases would be to undermine totally the pursuit of an important ideal: the rule of law. If it were within a judge's power not to apply legally valid rules whenever, in his opinion, non-application would further any sort of "reasonable social aims", then he could not, in any sense, be said to be bound by those rules. One is reminded in this context of an analogous problem which emerges from the Practice Statement of 1966.[15] Prior to 26 June, 1966, The British House of Lords had considered itself bound by its earlier decisions. On that day, however, Lord Gardiner revealed the Lords' intention to modify their practice of considering themselves bound by their earlier decisions,

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[15]Cited in Rupert Cross, Precedent in English Law, p.109.

and "while treating former decisions of [the] House as normally binding to depart from a previous decision when it appears right to do so." One of the more interesting philosophical questions raised by Lord Gardiner's statement concerns, of course, the meaning of the phrase "when it appears right to do so". It seems clear that a rule from which one is free to depart whenever it appears right to do so cannot, with any sense, be said to be binding. Indeed a rule which one is bound to follow only when it appears right to do so may well be no rule at all. The point is a common one in moral philosophy, and is frequently used to attack certain forms of rule utilitarianism. If, on each occasion in which a 'rule' is applied, one were logically able to depart from the rule if it appeared right to do so, i.e. if, in one's opinion, departure would result in more positive net utility than application, then rule utilitarianism reduces in effect to act utilitarianism. One is left judging each case on its own merits.[16] Similarly, if a judge were able to depart from legal rules whenever doing so would, in his opinion, further reasonable social aims, then his task would not be to apply rules of law, but in effect to render decisions which further (or at the very least do not hinder) reasonable social aims. He would not be bound by rules. It follows from these considerations that if the rule of law is to be at all realizable, then,

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[16]For a discussion of this point see R.M. Hare, Freedom and Reason, pp. 130-136 and David Lyons, Forms and Limits of Utilitarianism, passim.

logically, there must be certain cases in which rule-application is not at the option of him who applies the rule; these are the plain-meaning cases.

The defect in the above argument lies, of course, in its final step. Even if we grant, as we surely must, that meaningful rule-following requires that there be at least some cases in which the application of a rule is not open to question, it does not follow that these cases are necessarily identical with the class of cases in which the plain meaning of the rule's terms would make it applicable. Leaving aside till later the question whether being a case of the former sort (applicability beyond question) entails being a case of the latter sort (plain meaning makes it applicable), it is clear that the converse relationship fails to hold. Meaningful rule-following does not require that we treat the application of all plain-meaning cases as beyond question. If the range of considerations which could be used to justify non-application in plain-meaning cases were suitably narrowed in some way to include, for instance, only those reasonable social aims or purposes in terms of which the rule itself could be justified, then meaningful rule-following would indeed be possible. Judges would still be bound to apply the rules in all plain-meaning cases in which non-application could not be justified in these terms, but could be justified by other reasonable social aims. Alternatively, one might allow the range of relevant considerations to include any reasonable

social aims, not just those which could be seen to justify the rule itself, but stipulate that the cost, in terms of these aims, of applying the rule to the case in question must obviously be very great. Thus one might adopt some version of the 'golden rule' according to which rule-application is required in all plain-meaning cases unless, for instance, this "leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."[17] Finally one might combine the above two strategies and require that the cost in terms of the apparent purpose of the rule itself be very high. Given that one can restrict the range of plain-meaning cases in which non-application is allowed or required in at least these three ways, it follows that a judge could sensibly be bound or required to apply a valid rule of law without thereby being bound or required to apply that rule whenever the plain meaning of its terms renders it applicable. It follows, in other words, that judges could, logically, be given a limited power to depart in plain-meaning cases.

In the light of these considerations it is clear that Hart could not successfully block an extension of the desirability argument to plain-meaning cases by arguing that meaningful rule-following, and thus the very possibility

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[17]Parke B. in Becke v. Smith (1836) 2M. & W. 191; 150 E.R. 724.

of instituting the rule of law, requires that the rules be applied in all plain-meaning cases. Yet perhaps there is a more convincing reply. Perhaps the point is not that judges must, logically, apply rules in all plain-meaning cases; the point is that it is desirable, all things considered, that they do so. If rules are sometimes not applied when their language makes them clearly applicable, then great uncertainty and instability will be the result. There will admittedly be plain-meaning cases in which certain social aims, including perhaps the purpose for which the rule obviously was enacted, argue in favour of non-application. But there are other more general social aims, e.g. the need for certainty, predictability and reliability in the legal system, which argue in favour of application in all plain-meaning cases, and the number of times and the extent to which the latter more general aims of the system outweigh the former is such that it is better in the long run if judges always apply rules in plain-meaning cases. Support for this line of argument is gained when one considers that the ordinary private citizen cannot be presumed always to know the various social aims and purposes for the sake of which legal rules are fashioned and in terms of which a judge might attempt to justify non-application in a plain-meaning case. We are perhaps on far safer ground, however, if we presume that the ordinary citizen is, as a member of

the language community, reasonably well aware of the plain meaning of words used within that community. Thus if rules are always interpreted and applied in virtue of plain meaning, we have a reasonable chance of fulfilling the need for "certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues..." (CL, p.127). If, on the other hand, interpretation and application of the rules may at any time depend on various controversial, and to the private citizen possibly unknown, questions concerning reasonable social aims and purposes, then our chances of fulfilling this crucial need are substantially reduced.

Though this is perhaps the most convincing argument one could advance to block the extension of the desirability argument to plain-meaning cases, there are at least two important considerations weighing against it. First, the argument may well exaggerate the extent to which there is widespread agreement on 'plain meanings', and thus it may well exaggerate the extent to which clear guidance would be forthcoming if the question whether a rule is to be applied is always taken to depend entirely on its plain meaning. As stated in paragraph 30 of the 21st Report of the Law Commission,

> To place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship...Such an approach

> ignores the limitations of language, which is not infrequently demonstrated even at the level of the House of Lords when Law Lords differ as to the so-called "plain meaning" of words.[18]

It would be a mistake to exaggerate the range of the penumbra, but it would also be a mistake to go the other way and to exaggerate the range of the core of settled meaning.

Secondly, and more importantly, the argument seems to exaggerate the degree to which uncertainty and indeterminacy is introduced if the application of legal rules in plain-meaning cases is sometimes taken to depend on questions of aim or purpose. It assumes that great uncertainty and indeterminacy would result if, for instance, it were recognized and accepted both within the official legal and the private communities that rules would not be applied in plain-meaning cases whenever application would be clearly unreasonable or "manifestly absurd or repugnant". This assumption is doubtful. One can grant that there is obviously a limit to the knowledge of (legally recognized) social aims and purposes that we may, with reason, ascribe to the ordinary private citizen; but there must also be a limit to his ignorance. One is surely on safe ground if one assumes that the private citizen's ability to detect plain-meaning cases in which applying a rule would be manifestly absurd or repugnant is as great

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[18] 21st Report of the Law Commission: The Interpretation of Statutes, H.C. 256, 1969 (Law Com. No. 21). See, for example, London North-Eastern Ry. v. Berriman [1946] A.C. 278.

as his ability to detect plain meaning cases _simpliciter_. It is patently obvious that a cargo airplane is a transport vehicle; it is equally obvious that it would be absurd to impose a _road_ tax on such a transport vehicle. Yet if this is so, then one encounters no great loss of certainty, reliability, predictability and so on, if one allows judges, under certain conditions, not to apply rules when their plain meaning makes them applicable. Indeed given that one loses very little, if anything, if one makes this allowance, and given the distinct possibility that manifestly absurd results will be encountered if one does not, it seems desirable, all things considered, that one _not_ require application in all plain-meaning cases. Thus it follows that the need for certainty, predictability and so on cannot be relied upon successfully to block the extension of the desirability argument to (certain) plain-meaning cases.

Despite all this, it appears that the author of "Positivism" and _CL_ would be reluctant to allow the proposed extension. The view advanced in these works seems to tie clear cases to the core of settled meaning which rules and their terms are presumed to have, and hard penumbral cases, in which discretion is necessary, to the open texture of those rules and terms. The position appears to be that judicial duty requires the application of legally valid rules in all cases in which the core of plain or settled meaning calls for application. To this

extent, then, Hart (in "Positivism" and CL) is in agreement with the formalist's theory of adjudication. Yet Hart also holds, as we have seen, that uncertain borderline cases will inevitably arise in which the judge must, of necessity, step beyond the law, i.e. beyond the set of rules satisfying the master rule of recognition, and freely choose a solution which gives effect in some way to reasonable social aims. Theory F must be modified so as to yield something more like the following:

> Theory H: (1)If the instant case is plainly covered by a rule which satisfies the rule of recognition, then the judge must apply that rule and render his decision in accordance with it.
>
> (2)If the instant case is not plainly covered by a rule which satisfies the rule of recognition, then the judge must exercise discretion and decide whether, in his view, and in terms of reasonable social aims,it would be better to construe the rule in such a way as to make it apply, or alternatively whether it would be better to construe it so as not to apply. He must then decide the case in accordance with this decision.

Two brief points of clarification are in order. On what I claim is the earlier account in CL and "Positivism", the antecedent of condition (1) above holds when either (a) the case is, in virtue of the language in which the rule is expressed, a plain-meaning case, or (b)a judge in an earlier precedent-setting case decided to include within the rule's scope a non-plain-meaning case obviously like the instant case in the relevant respects. If it is not clear or plain

that the two cases are alike in the relevant respects, then the judge will be forced, presumably, to proceed to step (2) and to exercise discretion. With respect to (b), Hart submits that when a borderline case is decided, the judge will "have settled a question as to the meaning, for the purposes of [a] rule, of a general word" (CL, p.126). As with the suggestion that judges must apply rules in all plain-meaning cases, this need not be true; it will depend on whether the rules of adjudication and recognition which are accepted in the particular system in question are such as to provide that the interpretation of a legal rule or term by a judge sets a precedent to which at least certain other judges must adhere. In addition, this precedent rule might well apply only to rules of a certain type, e.g. to common law rules but not statutes.

The second point is that the above explanation of Theory H is only tentative. Once we have taken into account what appear to be Hart's amended views in "Problems", my explanation of Theory H will have to be altered.

So how has the view which has just been sketched and evaluated been altered? The first thing to notice is that the notion of open texture seems to have been replaced with the notion of "relative indeterminacy". In distinguishing between clear and indeterminate cases, Hart now writes:

> The clear cases are those in which there is general agreement that they fall within the scope of a rule, and it is tempting to ascribe such agreement simply to the fact that there are

necessarily such agreements in the shared conventions of language. But this would be an oversimplification because it does not allow for the special conventions of the legal use of words, which may diverge from their common use, or for the way in which the meaning of words may be clearly controlled by reference to the purpose of a statutory enactment which itself may be either explicitly stated or generally agreed ("Problems", p.271).

So Hart now wishes to allow that the explicitly stated or generally agreed purpose of a rule can be used to determine whether a case clearly falls within its scope, and thus within the central element of settled law. On this account, even if the open texture of a rule's terms causes uncertainty or indeterminacy, this can sometimes be overcome by an appeal to the explicitly stated or generally agreed purpose of the rule. If it is clear that that purpose would be satisfied only if the rule were interpreted in one particular way, then that interpretation is the proper one and the rule and its agreed purpose provide fully determinate guidance. They eliminate the need to proceed to step (2) of Theory H and to the exercise of discretion. On this later view, not all clear cases are plain-meaning cases.

This appeal to purpose has some other significant effectsupon the earlier discussion. The most important effect is the following: earlier we considered the distinct possibility that applying a rule in a plain-meaning case would sometimes lead to manifestly absurd or repugnant results, or to results which conflict with our very aim in having or maintaining the rule. This possibility seemed to create serious problems for Hart's earlier view, which

recognizes the need for flexibility in the face of such results, and yet ties clear cases in which application is required to the core of settled or plain meaning. It was argued that these unfortunate results could largely be avoided, at minimal cost, if it were accepted that application is not required in each and every plain-meaning case. In that Hart now wishes to hold that "the meaning of words may be clearly controlled by reference to the purpose of a statutory enactment", it is not unreasonable to suppose that he might accept this suggestion and thereby avoid the above-mentioned problems. If applying the rule to a plain-meaning case would conflict, say, with the agreed or explicitly stated purpose of the rule, then that case might not, given the appropriate secondary rules of adjudication and recognition, be considered a clear case in which application is expected and required. Granted it might be considered a clear case, but once again, this will depend on the secondary rules accepted within the particular system in question.

If Hart were to accept this latter suggestion, then it would follow that, in his view, not all clear cases are necessarily plain-meaning cases (purpose may settle any indeterminacy arising from open texture, vagueness or so on) and not all plain-meaning cases are necessarily clear cases (plain meaning may conflict with agreed purpose). This is substantially different from the earlier account which seems to suggest that all clear cases are

necessarily plain-meaning cases and all plain-meaning cases are necessarily clear ones.

One further point is worth noting. As was seen earlier, Hart sometimes seems to suggest in CL that whenever a judge encounters a case in which the decision is not clearly covered by the plain meaning of a valid rule (now the plain meaning, the special legal meaning, or the agreed or explicitly stated purpose of the rule) his decision must be guided by various reasonable social aims and purposes of which, Hart suggests, there will always be more than one reasonable and acceptable compromise. "[T]here is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests" (CL, p.128, emphasis added). The position in "Problems", however, is not quite so skeptical. Though Hart continues to stress that these other considerations will not always settle questions of application (discretion is still necessary), he explicitly allows that sometimes they will. He writes:

> In some cases only one such consideration may be relevant, and it may determine a decision as unambiguously as a determinate legal rule ("Problems, p.271).

In the light of these important changes, it is clear that the explanation of Theory H given above must be modified. In determining whether a case is a clear one, and thus whether step (1) of Theory H is in play, one must,

or may be required to, consider not only (a)the plain meaning of the rule's terms, and (b)prior decisions in which questions of meaning have, for the purposes of the rule, been institutionally settled. One must, or may be required to, consider (c)the special conventions governing the legal use of words, (d)the explicitly stated or generally agreed purpose of the rule (if there is such a purpose), and possibly (e)other considerations which might, on some occasion, determine the decision which must be reached as clearly and precisely as a fully determinate legal rule. If one steps beyond what is suggested in (d) and considers instead what purpose 'would justify' or 'would have justified' the rule, regardless of whether it is agreed that it does or whether that purpose is explicitly stated, then one has presumably gone beyond step (1) of Theory H to step (2). One has begun the exercise of discretion.[19]

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[19]As will be seen in chapter six, Dworkin's theory of adjudication requires that a judge ask which purpose justifies or would have justified the rule, and not which purpose is as a matter of fact accepted or stated as justifying the rule.

DWORKIN'S RESPONSE -- A START

In this chapter I shall make a start at outlining and discussing Dworkin's various responses to the views considered in chapter two. As was seen in that chapter, Hart appears to advance a theory of adjudication, Theory H, according to which the existence of judicial discretion within legal systems is both necessary (the necessity thesis) and desirable (the desirability thesis). Hart of course also wishes to endorse what might be called the 'existence thesis', the proposition that judicial discretion exists, as a matter of fact, within the legal systems of Great Britain and North America. Though Hart does not explicitly argue in favour of the existence thesis, this raises little problem. It is clear that the existence thesis follows logically from the necessity thesis. If one holds that judicial discretion exists, necessarily, within all legal systems, then one is committed logically to the claim that it in fact exists within all those systems. Thus Hart's arguments for the necessity thesis also serve as arguments for the existence thesis.

Dworkin finds Theory H and its supporting arguments

unsatisfactory on at least the following four counts:

A. The necessity argument fails to distinguish adequately between 'weak' and 'strong' discretion, and wrongly assumes that the conditions under which the former is necessary are in fact conditions under which the latter is necessary.

B. Theory H is not, in Dworkin's view, true to the facts -- the existence thesis is false.

C. Theory H is morally and politically unattractive -- the desirability thesis is false.

D. The necessity thesis is false and is the consequence of an unsatisfactory and radically incomplete conception of law -- the 'model of rules'.

Propositions A - D represent some of the main themes around which Dworkin's response is centred, though he of course has much more to say. For instance, in chapter three of Taking Rights Seriously,[1] Dworkin argues that the social rule theory upon which Hart's explanation of the master rule of recognition is based is unsatisfactory.[2] I shall, however, limit the discussion to propositions A - D. Proposition D is also the principal topic of chapters five and six.

II

According to Dworkin, Hart, like so many other lawyers and philosophers, fails to distinguish adequately, if at all, between three very different senses of the term 'discretion'. Dworkin suggests that we sometimes use

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[1] Hereafter referred to as TRS.

[2] See TRS, pp. 46 - 80.

'discretion' to say that for some reason (e.g. open texture, vagueness or ambiguity) "the standards an official must apply cannot be applied mechanically but demand the use of judgment"(TRS, p.31). A sergeant who has been told to pick his five most experienced men for patrol has discretion in the first weak sense if it is "hard to determine which [are] the most experienced" or if "reasonable men can interpret [the order] in different ways" (TRS, pp. 32 & 69). In such a case we might say that "the sergeant's orders left him a great deal of discretion" (TRS, p.32).

When, on the other hand, we claim that the decision whether the ball or the runner reached second base first is at the discretion of the second base umpire, we mean 'discretion' in a second weak sense: "we mean that on this issue the head umpire has no power to substitute his own judgment if he disagrees" (TRS, p.32). To say that an individual has discretion in this second weak sense is to say that "his decision is final" (TRS, p.69).[3]

Dworkin suggests that these two weak senses of the term 'discretion' must be disentangled from what he terms 'strong discretion'. Sometimes, he claims, we use 'discretion' to say that on some issue an official is "simply not bound by the standards set by the authority in question" or that "his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise

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[3]Cf. CL, pp. 138-144.

the question of discretion" (TRS, pp. 32 & 33). Thus, he suggests, a sergeant has discretion in this strong sense when he is told to "[p]ick any five men for patrol he chooses" and "[w]e use this sense not to comment on the vagueness or difficulty of the standards, or on who has final word in applying them, but on their range and the decisions they purport to control" (TRS, p. 32). Dworkin adds that "[i]f the sergeant is told to take the five most experienced men, he does not have discretion in this strong sense because that order purports to govern his decision" (TRS, p. 32).

The important distinction, for the purposes of this thesis, is the one between discretion in Dworkin's first weak sense (judgment) and discretion in the strong sense.[4] Dworkin would have us consider whether Hart's arguments are sufficient to demonstrate the necessity (and thus the existence) of strong discretion, which appears to be what Hart wishes to show, or whether they are sufficient merely to show the necessity (and thus the existence) of discretion in its weaker form. As was seen in chapter two, Hart divides cases into two fundamental categories: core and penumbral. Core cases are clear cases and clear cases are "those in which there is general agreement that they fall within the scope of the rule" ("Problems", p.271). On the earlier account sketched in CL and "Positivism", Hart appears to ascribe such agreements simply to the fact that there are

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[4]Hereinafter 'weak discretion' should be taken to refer to the first weak sense of the term 'discretion'.

"necessarily such agreements in the shared conventions of language", but of course he later explicitly repudiates this view in "Problems" and allows other factors, such as the rule's obvious or stated purpose, to affect the question of its application. What would have been a penumbral case on the CL account may well turn out to be a core case on the "Problems" account. On both accounts, however, core cases are equated with clear cases, and clear cases with those in which there is general agreement on whether the rule applies to them. Penumbral cases, on the other hand, are "cases where it is not clear whether [the rules] apply or not" (CL, p.123); and if clear cases are identified with those in which there is general agreement whether they apply, then unclear cases will be ones in which there is lack of agreement.

Dworkin would presumably find Hart's division quite acceptable in itself. There is little harm in saying that some cases are hard controversial cases while others are easy and not controversial. This is equivalent to saying that judgment, i.e. weak discretion, is required in some cases but not others. But, Dworkin would add, a fallacy is committed when one switches from saying that penumbral cases, so defined, are ones in which weak discretion is necessary to saying that these cases are ones in which strong discretion is necessary.[5] Lack of agreement and

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[5]Dworkin suggests that the "inclination to convert discretion in the first into discretion in the third sense, is extraordinarily common among legal philosophers" (TRS, p.70).

certainty entails only that the decision to be made cannot be arrived at mechanically or easily, but demands the use of judgment. It does not, however, entail that the judge has (or must have) strong discretion -- that he is free or entitled to make a choice from amongst open alternatives. The rule, however vague and ambiguous it might be, and however many reasonable interpretations and constructions it can be given, may nevertheless 'control' (or is it 'purport to control'?) the judge's decision.

At this point several crucial questions emerge for which answers must be found if one is even to begin to understand the above argument and its bearing on Theory H. For instance, at one point Dworkin says that "[a]n official's [strong] discretion means...that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion" (TRS, p.33). This claim raises a fundamental question: 'What exactly does it mean to say that a decision or a case is controlled by a standard?'. There appear to be two possibilities.

First, a standard may be said to control a decision or a case if and only if (1)the decision-maker is bound by, or required to follow, the standard, and (2)the standard determines or entails one and only one decision in that case. Thus if there is a binding military rule which requires a sergeant to select his tallest man for a certain military

exercise, and it is undeniable that Private Smith is the tallest man under the sergeant's command, then the rule determines or entails one and only one result or decision: Private Smith must be chosen. In this case one might say that the decision is fully or totally controlled.

But there would appear to be another possible meaning of the phrase 'controls a decision'.'Controls' need not be taken as equivalent in meaning to 'fully or totally controls'. A standard might be taken to control a decision if and only if (1)the decision maker is bound by, or required to follow, the standard, and (2)the standard, though it fails to determine or entail a unique answer, narrows the range of acceptable answers in some way or other. Suppose that a sergeant is required to pick not <u>the</u> tallest man, or <u>the five most</u> experienced men, but simply <u>five</u> experienced men. If, among the group of seven men from which the sergeant is required to choose, Private Smith is the only one lacking in experience, then the rule, though it fails to determine or entail one unique answer, does nonetheless restrict the range of acceptable choices. It rules out all those combinations of five in which Smith figures, despite the fact that it allows a 'free choice' from among the six possible combinations in which Smith does not figure. The rule may therefore be said to exert a controlling influence on the decision. It controls, in the sense of 'partially controls', the decision to be reached.

Now if, in denying that judges have discretion, Dworkin means to assert merely that judicial decisions are always partially controlled by binding standards, and that judges are never totally free to choose in any way they see fit, then he is not really in disagreement with Hart at all. As was seen in chapter two, Hart's view is that binding legal standards are subject to varying degrees of indeterminacy, and that this fact entails that cases will inevitably arise in which a choice will have to be made from among alternatives which the law leaves open. But nowhere does Hart claim that these cases are such that the judge is totally free to decide in any way he sees fit. A standard (or set of such) may fail to single out a uniquely correct answer, but it (or they) might nonetheless restrict (i.e. partially control) the range of acceptable answers to a considerable degree. Hart provides good examples of this in the form of standards which require that an industry charge only a 'fair rate' or provide 'safe systems of work'. He writes:

> Of course even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them. Some extreme cases of what is, or is not, a 'fair rate' or a 'safe system' will always be identifiable ab initio. Thus at one end of the infinitely varied range of cases there will be a rate so high that it would hold the public up to ransom for a vital service, while yielding the entrepreneurs vast profits; at the other end there will be a rate so low that it fails to provide an incentive for running the enterprise. Both these in different ways would defeat any possible aim we could have in regulating rates (CL, p.128).

Of course Hart also suggests that whenever a judge decides a penumbral case,

> He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule. To characterize these would be to characterize whatever is specific or peculiar in legal reasoning (CL, p.124).

So Hart would undoubtedly agree that however indeterminate a standard (or set of such) might be, it (or they) will nevertheless partially control the decision to be reached. The judge is never, Hart would want to say, totally free to choose in any way he sees fit. It follows from this that if, in denying that there is strong discretion, Dworkin wishes to disagree with Hart over whether binding legal standards ever allow more than one open alternative from which the judge may choose, he must mean 'controls' in the sense of 'totally controls'. He must mean that a binding standard controls a decision or a case if and only if (1) it must be followed in that case, and (2) it determines or entails a uniquely correct result -- a 'right answer'.

But now a second question arises which is perhaps more important than the first. In order that one may truthfully deny that a judge has strong discretion on some matter, or in some case, is it necessary, in Dworkin's view, (a)that the standards the judge is bound or required to follow control the decision, or (b)that those standards

merely purport to control the decision? Dworkin appears to suggest both, despite the fact that these two claims are obviously not equivalent. He claims, for example, that the sergeant who is told to pick the five most experienced men does not have strong discretion "because that order purports to govern his decision" (TRS, p.32, emphasis added).[6] This clearly suggests that (a) is unnecessary and that the presence of standards or instructions which purport to govern or control his decision is sufficient to deny the sergeant strong discretion. Later, however, Dworkin states that an official's strong discretion "means...that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion" (TRS, p.33, emphasis added). If the proposition 'S has strong discretion' means that there is no binding standard which in fact fully controls the decision, then this suggests that (b) is insufficient and that it is necessary that there be no standards which succeed in controlling the decision, regardless of what they might purport to do. The passage indicates that (b) is insufficient because (a) is necessary.

It is not clear which explanation of 'strong discretion' Dworkin intends. In other words, it is unclear which of the following two propositions he means to affirm:

P(1): An individual, S, lacks strong discretion on some matter if S is bound by standards which

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[6]He uses 'purports to govern' and 'purports to control' interchangeably.

purport to control his decision fully.

or

P(2): An individual, S, lacks strong discretion on some matter if S is bound by standards which (a)purport to control his decision fully, and (b)succeed in doing so.

I shall argue in a moment, however, that serious problems arise if P(1) is accepted, and that it is therefore more likely, perhaps, that Dworkin intends P(2). I shall also consider an objection to P(2) which, though it is fallacious, reveals the important need to distinguish clearly between the claim that S has strong discretion on some matter and the claim that S exercises strong discretionary judgment on that matter. But before all this can be argued, it is necessary to investigate what it means exactly to say of a standard either that it does or that it does not 'purport to control a decision'. I can only imagine that Dworkin means to suggest the following.

An order requiring sergeants to pick the tallest man purports to control a sergeant's decision because (1)it presupposes that there is a tallest man,[7] and (2)it charges the sergeant with the task or responsibility of choosing that particular individual. It purports to control the decision because it purports to determine a unique result or decision in all cases to which it applies and requires that that decision be accepted. An order requiring sergeants

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[7]--in much the same way as the proposition 'The tallest man in England lives in Liverpool' presupposes that there is an individual who is in fact the tallest man in England.

to pick a tall man, not the tallest man, does not even purport to control a sergeant's decision (fully) because (1)it does not presuppose that there is but one tall man, and (2)it does not, at least in itself, charge the sergeant with the task of choosing any one individual in particular. It does not purport to control the decision because it does not purport to determine a unique result in all cases to which it applies. It leaves the sergeant discretion to choose from among whatever tall men might be under his command.[8]

Similarly, an order requiring sergeants to pick, for dangerous patrol exercises, their 'five most experienced men' purports to govern the decision of a sergeant because (1)it presupposes that there are in fact five men who are most experienced, and (2)it charges the sergeant with the responsibility or task of choosing those particular individuals. This would be so even if it were hard "to determine which were the most experienced" (TRS, p.32, emphasis added).

If this is what is meant by the claim that the sergeant's orders purport to govern or control his decision, then the following important question arises: 'What if, despite the presupposition upon which it is based, i.e. what if despite (1) above, the rule or order fails in what it purports to do? What if, that is, there is in fact no unique set of

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[8]If, as a matter of fact, there happens to be one tall man under the sergeant's command, then the order effectively controls the decision in those circumstances. It does not, however, purport to do so.

individuals to which one could apply the description 'the five most experienced men'? For instance, the sergeant's men may all be of equal experience. Alternatively, there might be one set of five who are most experienced at, say, patrol exercises; while there might be another set who are most experienced in operations under fire, and who would, therefore, be more prepared for whatever dangerous contingencies might happen to arise. In one sense, or according to one possible standard of experience, the first group is the most experienced; in another sense, or according to another possible, and highly relevant, standard of experience, the second group is most experienced. The order, and any purpose which may underlie the order, and in terms of which it might be interpreted, rules out neither possibility. In such cases is it not true that the order fails in what it sets out or purports to do, namely, to control the decision fully? It would appear so. But now consider the following argument.

If one accepts (1) that an individual, S, lacks strong discretion whenever standards S is bound or required to follow purport to govern or control his decision fully, P(1); and

(2) that a case could arise in which standards which purport to govern or control a decision fail to do so;

then one is committed to the conclusion

(3) that there might be cases in which an individual, S, lacks strong discretion even though his decision is not fully controlled by binding standards.

In other words, if 'strong discretion' is understood in the way suggested in proposition P(1), it follows that an individual may lack strong discretion even if standards he is bound or required to follow fail to determine a unique result which must be accepted -- a 'right answer'. It also follows, incidentally, that philosophers such as Hart have committed a serious fallacy in so far as their arguments seem to assume that a judge will have (strong) discretion if the law sometimes fails, for reasons such as open texture and vagueness, to determine or entail a uniquely correct result. But on this understanding of 'strong discretion', a right answer is not necessary to deny that a judge has strong discretion. All that is necessary is that the law purport to provide one. If Dworkin accepts P(1), then what divides him and Hart is not so much a difference of opinion over whether the law always provides a right answer, but a difference of opinion over the conditions under which judges have or do not have strong discretion. For Dworkin a sufficient condition for judges not to have strong discretion is that the law purport to control their decisions fully, P(1); for Hart it is necessary that the law in fact succeed in doing so, P(2).

It might be thought absurd to suppose that Dworkin could have possibly meant to affirm P(1). Yet perhaps P(1) is not quite as absurd as it might appear at first glance. The point might be this: even if one must accept the possibility that

binding standards (or orders or instructions) will sometimes fail in what they purport to do, namely, to control decisions fully, it remains true that an individual who is bound by those standards is nonetheless required to proceed _as if_ they do succeed in what they purport to do.[9] The sergeant's orders still require him to pick _the_ five most experienced men, and he must therefore proceed, because he is bound by those orders, to select his men on the assumption that there is in fact a unique group satisfying that description. Similarly, judges may be required, by the rules of adjudication existing within their legal systems, always to search for _the answer_ determined by standards under which they are legally bound -- unless, of course, they are explicitly granted discretion on some question, such as in sentencing. The proposition that judges lack strong discretion does not mean that all cases _are_ fully controlled by binding legal standards; only that judges are required by the legal system always to proceed on the assumption that they are. By purporting to control decisions fully, the law denies judges the liberty ever to assume, and decide as if, they have options. Those cases in which an individual lacks strong discretion, i.e. in which binding standards purport to control his decision, are to be contrasted with cases in which there are no such standards

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[9]Cf. _TRS_, p.116 where Dworkin writes: "The law may not be a seamless web; but the plaintiff is entitled to ask the judge to treat it as if it were."

and in which the individual therefore has strong discretion. In these latter cases, S is not charged with the responsibility of coming to any one particular decision or result; he is at liberty, within reason, to supply his own standards and his own answers.[10]

On this understanding of 'strong discretion', then, the question whether judges have strong discretion is, as noted earlier, logically independent of the question whether binding legal standards do in fact succeed in always providing right answers. Judges might well lack strong discretion even though the law sometimes fails to control their decisions fully. This is an important point: a good deal of the debate over judicial discretion is normally thought to hinge on whether the law succeeds in providing uniquely right answers for all cases. Received opinion is that it fails in this regard and that judges therefore have, and must have, strong discretion. Dworkin, on the other hand, is normally thought to argue that the law always does provide right answers, and that judges therefore neither have, nor need to have, strong discretion. But if 'strong discretion' is understood in the way suggested in P(1), then the question whether there are always right answers is far less important than one might have gathered.

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[10]See TRS, p.33 where Dworkin notes that "[t]he strong sense of discretion is not tantamount to license, and does not exclude criticism." The answer provided by someone who has strong discretion can still be criticized on grounds of rationality, fairness and effectiveness. Cf. CL, p.200.

It is tempting to infer from this result alone (logical independence of the two questions) that Dworkin could not possibly have meant 'strong discretion' in the sense suggested in P(1); for if he did, then it is hard to understand why he would have attempted, with so much vigour, to defeat the necessity thesis by arguing that "[f]or all practical purposes, there will always be a right answer in the seamless web of our law."[11] If the question whether judges have strong discretion is logically independent of whether the law always provides a right answer, then why should Dworkin have bothered with the latter question?

A possible answer to this puzzle can perhaps be found in chapter thirteen of TRS. There Dworkin concedes that on his theory of adjudication it is theoretically possible that the law should sometimes fail to control judicial decisions fully -- even if they purport always to do so.[12] As will be seen later, Dworkin's theory includes the claim that the right answer in a hard case is that answer which is provided by the scheme of principles and policies which offers the best conceivable explanation and justification -- the best theory -- of the established settled law. Yet as Dworkin realizes, this account of hard cases fails to exclude the possibility that there might be 'ties' among legal theories. There might, that is, be a

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[11]"No Right Answer?", p.84 -- hereafter referred to as "NRA?".

[12]Dworkin's theory of adjudication will be investigated below in chapters four, five and six.

set of theories such that each of them is no better and no worse than any other theory within that set, but each _is_ better than all other theories not included within that set. If these equally good 'best theories' sometimes provide incompatible answers to the issue posed in a hard case, then the law will sometimes fail to exert full control over a judge's decision.

Having admitted this possibility, Dworkin goes on to suggest that we can nevertheless speak about the probability that a legal system "will produce many or few cases that are in fact ties" (_TRS_, p.286). He says that if the system is a "primitive one" in which the materials to be explained and justified are very few,

> it is probable...both that the judges will judge that several cases are ties, and that in fact several cases will be ties. Since there is very little settled law, more than one theory of law, critically different for the result in a hard case, will often offer equally good justifications for the settled law, and will seem to offer equally good justifications to many judges (_TRS_, p.286).

Later Dworkin seems to admit that under such conditions it would be "silly", "unreasonable" and indeed "irrational" for the "enterprise" (i.e. the legal system) to "instruct judges to ignore [the] possibility [of a tie]" (_TRS_, p.287). In other words, if it is very probable that the law will (or does) _frequently_ fail to control judicial decisions fully, and if it is also probable that judges will (or a fact that they do) frequently judge that the law fails to control their decisions fully, then it would be silly,

unreasonable and irrational for the ground rules of the enterprise (i.e. the rules of adjudication of the system) to require judges always to proceed as if the law always does fully control judicial decisions -- to deny them strong discretion (understood as in P(1)). But suppose, Dworkin adds,

> that the legal system...is very advanced, and is thick with constitutional rules and practices, and dense with precedents and statutes. The antecedent probability of a tie is very much lower; indeed it might well be so low as to justify a further ground rule of the enterprise which instructs judges to eliminate ties from the range of answers they might give. That instruction does not deny the theoretical possibility of a tie, but it does suppose that, given the complexity of the legal materials at hand, judges will, if they think long and hard enough, come to think that one side has, all things considered and marginally the better of the 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 tie cases at law. Of course, the instruction will be not rational but silly if the legal system is not sufficiently complex to justify that calculation of antecedent probabilities (TRS, pp. 286-287).[13]

In Dworkin's view, then, it would be perfectly rational and reasonable, in conditions such as described above, to require that judges never, under any circumstances, render tie judgments -- that they always decide as if the law always fully controlled their decisions. This would be rational and reasonable, Dworkin argues, even though it must be admitted that the law may in fact sometimes fail

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[13] "NRA?", pp. 83-84.

to exert total control over some decisions. The rationality and reasonableness of requiring judges always to proceed as if the law always fully controls judicial decisions turns not upon whether the law _always_ provides a right answer, but upon, among other things, whether in all probability it fails to do so very often, and whether it is likely that one could determine those cases in which it does fail. Thus Dworkin's concern with the question whether there "_can_ be no right answer, but only a range of acceptable answers, in [any] hard case" in which, by definition there is considerable disagreement and uncertainty, is perhaps consistent with his accepting P(1) and the concept of strong discretion it suggests (_TRS_, p. 290, emphasis added). He might want to show not that there always will, in theory, be a right answer in a hard case, but that there _can_ be, and for all practical purposes _will_ be, such an answer. He might, that is, wish to refute the theory that disagreement and uncertainty in penumbral cases entails that there is no right answer.

So it is not altogether unreasonable to suppose that Dworkin might have intended to affirm P(1) and a concept of discretion according to which it is sufficient to deny that S has strong discretion that standards under which he is bound purport to control his decision. On this view, to say that judges lack strong discretion is not to say that their decisions are in fact fully controlled in all cases; rather it is to say that judges are not at liberty ever to

assume that, and decide as if, they are not. It is to say, in other words, that judges are required, by rules of adjudication, "to eliminate [the not-fully-controlled hypothesis] from the range of answers they might give" (TRS, p.286). I shall now argue, however, that this notion of strong discretion leads to serious difficulties of such a nature that, on balance, it is perhaps more likely, though by no means certain, that Dworkin means to conceive of strong discretion in the way suggested in P(2) and not P(1).

Assume, for the purposes of argument, that the proposition 'Judges lack strong discretion' means simply that the law requires judges always to proceed as if its binding standards control all judicial decisions fully. Assume further, for the moment at least, that this view is not incoherent and that judges may sensibly be said to lack strong discretion even in cases where binding standards fail to exert full control over the decision to be reached. Problems still remain; for it seems quite conceivable that a case should arise in which it is not only true that the decision is not fully controlled, but true that the judge knows that it is not. Prima facie there is no reason to exclude this possibility, just as there seems no reason to exclude the possibility of a case arising in which the sergeant in Dworkin's example knows that the rule or order requiring him to pick his 'five most experienced men' fails

to control his decision fully. Yet if the possibility of such cases must be accepted, the following argument (which will be called 'argument A') must be faced.

> If one accepts (1)that an individual lacks strong discretion whenever the standards he is bound or required to follow purport to govern or control his decision fully, P(1);
>
> (2)that legal cases may arise in which binding legal standards fail in what they purport to do, namely, to control the decision fully; and
>
> (3)that in some of these cases the judge will know full well that the decision is not fully controlled;

then it would appear to follow

> (4)that in certain cases a judge will <u>know</u> that, if he is to decide the case, he must choose from among alternatives which are left open by those binding standards.

But if one accepts (4), then it follows

> (5)that there may be cases in which the judge does not have strong discretion, even though he knows he must choose from among alternatives left open by binding law.

Conclusion (5) is, to say the least, somewhat problematic. If a judge knows full well that the law is consistent with more than one answer, and that he <u>must</u> therefore choose from among these answers if he is to decide the case rationally, then one wants to say that he has discretion -- strong discretion. But this is exactly what one cannot say if P(1) is accepted. One must continue to deny that the judge is really free or entitled to choose, since he is required,

despite his knowledge, to decide as if, or on the assumption that, the law does fully control his decision; to decide on the assumption that what he knows not to be the case is in fact the case. To say that he lacks strong discretion is to say that he must eliminate the not-fully-controlled hypothesis from the range of conclusions he might consider. Yet as argument A clearly shows, this would, under certain circumstances, be rather absurd, and would give the claim that judges lack strong discretion a hollow ring. If the judge knows in a certain case that binding standards fail to control his decision, then he knows that those standards leave him alternatives -- regardless of any separate rules of adjudication, any ground rules of the enterprise, which might instruct him to do what is in this case the impossible, namely, to decide as if those standards do succeed in controlling the decision. He cannot, logically, comply with that rule or instruction of adjudication. If he knows that the applicable binding standards leave alternatives open, he cannot help but choose from among them if he is to decide the case rationally. He cannot accept a uniquely correct answer when he knows that none exists. Under these conditions, one wants to say that the judge has strong discretion; but of course one cannot if one accepts P(1).

If Dworkin is both to avoid conclusion (5) and accept P(1), then the soundness of argument A must somehow be challenged. The argument is clearly valid, so the truth of

at least one of its premises must be denied. Premise (1) is of course P(1), so it cannot be challenged. Premise (2) is unassailable: it is part of the meaning of 'purports' that X's purporting to ϕ does not entail X's success in ϕ-ing. This leaves premise (3). Perhaps Dworkin would wish to offer an argument such as the following. The standards binding within modern legal systems, such as they are found within Great Britain and North America, are so numerous and complex that it is virtually impossible that a judge should ever know that in some particular case those standards fail to control his decision fully. It would be presumptuous of the judge to suppose that he could ever know this, especially if he must admit that the "probability of error in a judicial decision seems to be greater than the...probability that some case will indeed be, in fact, [not fully or totally controlled]" (TRS, p.286). This is not to say, of course, that the judge might not know full well (a)that, in general, it is theoretically possible that some of the cases he will have to decide during his career are not in fact fully or totally controlled, and (b)that it is theoretically possible that the instant case is one of these; he simply cannot know that it is. Yet if a judge could never identify a particular case as one which definitely is not fully controlled, then it is neither unreasonable, silly, nor irrational if the law requires him to proceed on the assumption that it is in fact fully controlled. Since premise (3) is false, there

will never in fact be a case in which the judge lacks strong discretion even though he knows he must choose from among alternatives. Thus P(1) can be accepted without fear of conclusion (5).

There are serious problems with this response. First, it is not at all clear why we should accept the proposition that judges in modern legal systems are incapable of knowing, in certain cases, that their decisions are not fully controlled. This seems at the very least theoretically possible. Yet if it is theoretically possible that a judge should possess this knowledge, then it is theoretically possible that (5) should be true, and this is enough to cast considerable doubt on P(1) and the concept of strong discretion it suggests.

Yet even if one grants that the standard materials found within modern legal systems are so complex that one must eliminate the theoretical possibility that a judge should ever know that his case is not fully controlled, the response is open to another more serious objection. P(1) is not, presumably, intended to apply only to judges who function within modern, complex legal systems. Rather it is intended to apply to sergeants, to chess referees, to baseball umpires, and to judges in primitive legal systems where the incidence of not-fully-controlled cases is very high. In short, it is intended to apply to <u>any</u> situation in which one finds an individual who "is in general charged with making decisions subject to standards set by a particular

authority" (TRS, p.31). Thus it might well apply to cases in which the individual concerned can, and indeed does, know that the standards under which he is bound fail to control his decision fully. The sergeant, for example, might be well aware that an order to pick his five most experienced men fails to control his decision fully if all his men are of equal experience. But if P(1) is a general claim which is intended to be analytic of the concept of strong discretion, it would be fallacious to defend P(1) by an appeal to contingent features of special cases -- cases in which the complexity of the materials or standards (supposedly) entails that premise (3) is false. There are quite clearly other cases, such as the sergeant example and the example of the primitive legal system, where the individual concerned does know that his decision is not fully controlled and in which, therefore, the acceptance of P(1) would force one to deny that he had strong discretion even though he knew that a choice had to be made.

The obvious way out of these difficulties, of course, is to abandon P(1) in favour of P(2), the claim that an individual lacks strong discretion only if he is bound by standards which in fact succeed in controlling his decision fully. Given that Dworkin suggests both P(1) and P(2), and given that the former leads to clearly absurd results in many cases, and robs the proposition 'S does not have strong discretion' of any practical significance in cases where S

knows he must choose, one is perhaps better off assuming that Dworkin really meant all long to suggest P(2). If P(2) is accepted then it follows, of course, that S has strong discretion on some matter if and only if (1)he is bound by standards which do not even purport to control his decision fully, or (2)he is bound by standards which purport but fail to control his decision fully. The order to pick a tall man gives the sergeant strong discretion in virtue of (1); the order to pick his five most experienced men for patrol gives the sergeant strong discretion in virtue of (2) when, e.g., the sergeant's men are all of equal experience. It also follows that if S knows that his decision is not fully controlled by binding standards, then he has, and he knows he has, strong discretion. In accepting P(2) one avoids the absurd result that S might, in some case, know that he lacks strong discretion even though he also knows he must choose. Finally, it follows that S lacks strong discretion on some matter only if both (1) and (2) are false. According to P(1) the falsity of (1) is sufficient.

If one assumes, then, that Dworkin meant to suggest P(2), his argument against the necessity argument would appear to be this. Lack of agreement and certainty in hard penumbral cases does not entail that the law fails to control these cases fully. To the contrary, it entails only that decisions in those cases cannot be arrived at mechanically

or easily but require the use of judgment. Irrespective of any disagreement and uncertainty there might be in a hard case, the law nevertheless purports to provide an answer and may in fact succeed in doing so. If it does succeed, then the judge does not have strong discretion, regardless of any uncertainty and disagreements there might be over what that answer is.

These points are well taken. There is no logical relationship between, on the one hand, mere uncertainty and controversy, and on the other, the lack of a right answer. As Dworkin points out, there are other phenomena such as literary criticism[14] and the explanation of history[15] in which controversial questions upon which certainty and agreement cannot be reached can be, and often are, thought nevertheless to have uniquely correct answers. Historians, for example, are not simply free to choose answers when there is doubt or controversy. In the same way, the question whether a legal rule applies might well have, and be thought to have, an answer, even though there is considerable disagreement and uncertainty over whether it does apply. Disagreement and uncertainty on some question entails only that the answer cannot be arrived at simply or mechanically. It does not, however, entail that there is no right answer and that a "free creative choice" amongst "open alternatives"

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[14]See "NRA?", pp.76-84.

[15]See TRS, pp.281-282.

is either allowed or required.

I should now like to consider an objection which might be raised against P(2) and against Dworkin's argument if it is understood in the above way. I wish to do so not because the objection is a good one -- indeed it is fallacious -- but because it helps bring to light an important distinction which, if clearly drawn, helps to clarify these issues somewhat and reveals the need to distinguish carefully between two very different versions of the necessity thesis. The objection I have in mind runs as follows.

Earlier an argument (argument A) was considered which revealed the absurdity of supposing that P(1) is true. If the latter is accepted, then one is led to the ridiculous conclusion that an individual might lack strong discretion on some matter even though he knows he must choose from among alternatives which are left open by binding standards. In these cases the proposition 'S does not have strong discretion' is of no practical significance whatsoever, if it is understood in the way suggested in P(1) -- if, that is, it is understood as claiming merely that standards under which S is bound purport to control his decision, and therefore deny him the right to choose. Given his knowledge, S must choose if he is to decide the case. Now it might be thought that the way out of this problem is to reject P(1) in favour of P(2). If the latter is accepted, then S lacks strong discretion only if standards he is

bound to follow succeed in controlling his decision fully and the absurd conclusion described above is avoided. If binding standards succeed in controlling the decision, then it is not true that S must choose; but if it is not true that S must choose, it follows that he does not know that he must. Nevertheless, the objection continues, the problems encountered with P(1) are merely replaced with equally troublesome problems if 'strong discretion' is understood in the way suggested in P(2). As Hart has pointed out, hard penumbral cases inevitably arise in which there appear to be at least two different answers to the legal question posed, and each of these has as good a claim as any other to being the unique answer, if there is one, determined or required by binding legal standards. Now regardless of whether there is, in theory, a right answer to the question posed in a hard case, it will nevertheless be true that "something in the nature of a choice between open alternatives must be made..." (CL, p.124, emphasis added). If there is a range of answers each of which has, so far as the judge can determine, as good a chance as any of being the 'right answer', if indeed there is one, then the judge will be forced to choose. But if, because of open texture and other sources of indeterminacy, hard cases such as this must arise, then there is no practical significance in denying that judges have strong

discretion in some cases. If, in practice, judges are forced to choose, then it is much more honest to accept that they have strong discretion. It would be absurd to deny this, and to deny that legal systems inevitably include strong discretion, simply on the ground that, in theory, the law always controls decisions fully -- always provides 'right answers'. This would be as absurd as saying that there is not strong discretion because the law purports to control all judicial decisions fully.

Though there is something to this objection, it is fallacious as it stands, for reasons pointed out by Dworkin.[16] A judge in a hard case might well be uncertain and in disagreement with others about how a hard case is to be decided, and yet believe, and have reasons for believing, (1)that there is a right answer, i.e. that the law does in fact fully control his decision, and (2)that he has that right answer, i.e. that it is fully controlled in the way in which he thinks it is. He might, that is, believe that his decision is fully controlled and that there are reasons, however weak and unconvincing they might seem, for supposing that it is controlled in one particular way. In such a case, he will not exercise a choice, in the sense contemplated in the above objection and in Hart's arguments. He will not conceive of himself as exercising a "choice between open alternatives". Given his beliefs, he will conceive

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[16] See TRS, chapter thirteen and "NRA?".

of himself as accepting what he has reason to believe is the right answer he must accept because it is determined by standards he is bound to follow, in much the same way as an historian will conceive of himself as accepting what he has reason to believe is the right answer to a controversial historical question. So the mere fact that there is considerable controversy and uncertainty in any hard case does not entail that a judge will be forced to choose, in the way in which he would be entitled to choose if he had strong discretion.

Once again these points are well taken. Yet the reply reveals a more plausible way in which the original objection might be stated. Granted it does not follow from the mere fact that a case is a hard case that a judge will be forced to make a free choice. The judge may believe, and have reasons for believing, (1)that there is a right answer, and (2)that he has got it. But what are we to say of a case in which the judge does <u>not</u> believe (1) and (2)? What if, for instance, he believes that there is no right answer to the case before him; or if he believes that there <u>is</u> a right answer, in theory, but that he has no good reason for believing, of any of the answers which seem to him to be possible, that it is that right answer? Will he not, in these circumstances, be forced to choose in the way in which he would be entitled to choose were there in fact no right answer? I should now like to argue that he will indeed be forced to choose. I shall begin by distinguishing four

different ideal cases:

Case A: The judge believes that the decision is not fully controlled.

Case B: The judge neither believes that the decision is fully controlled, nor believes that it is not fully controlled.

Case C: The judge believes that the decision is fully controlled, but does not believe, of any particular answer which seems to him to be possible, that it is the right answer.

Case D: The judge believes that the decision is fully controlled and that it is controlled in a particular way -- i.e. that one of his possibly-right answers is in fact the actually-right answer.

Now it must be granted, for reasons outlined above and stressed by Dworkin, that in Case D the judge will not be forced to make a choice such as he would be free to make if he had strong discretion. But cases A - C are an entirely different matter. Take Case A first. If the judge believes that binding standards fail to control the decision fully, then he believes he has options-- he believes he has strong discretion.[17] But if he sincerely believes that he has options, and if he is to come to a decision, then it follows that he cannot help but choose from among those options in the way in which he would be free to choose if it were true that he had strong discretion on the matter. He can no more accept an answer that he believes does not exist than he can accept an answer that he knows does not exist. So regardless of whether the law does fully control his

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[17] He may, of course, be wrong; but more on that later.

decision, the judge will, given his beliefs, be forced to choose in Case A.

The same would appear to be true in Case B. If the judge believes neither that the case is fully controlled, nor that it is not fully controlled, then he will see no reason for supposing that any of the answers he views as possibly the right answer, is in fact the right answer, if indeed such an answer exists. He will therefore see no reason to exclude any of those possibly-right answers. But if he sees no reason to believe that the law excludes any of these possibly-right answers, then, logically, he cannot honestly and rationally judge one to be 'the right answer', an answer which he admits might, but then might not, exist. Any such judgment would be groundless and gratuitous; he cannot judge on grounds he does not have. It would appear, then, that the judge must, in Case B, choose on grounds other than those which argue that one of the possibly-right answers is in fact the right one determined by binding standards. This is precisely the sort of choice he is entitled to make if he has strong discretion.

There is a parallel between the judge in Case B and the religious agnostic. The agnostic neither believes that God exists, nor believes that God does not exist. The agnostic, like the judge in ideal Case B, sees no good reason for believing either proposition, and thus cannot help but withhold judgment on the matter. I should

perhaps stress that I am not claiming here that there may be cases in which the judge believes the case neither is nor is not fully controlled. In such a case the judge does have a belief -- an inconsistent one. The sort of case I have in mind is one in which belief is withheld or suspended. I should perhaps also stress that Case B is not one in which the judge believes that no support can be found for any of the possibly-right answers. Indeed in a truly hard case, he will most probably think it possible to find good support for each answer.[18] The problem is that there will, so far as he can tell, be no good reason for supposing, of any one of these well-supported, possibly-right answers, that it is not the right answer -- if indeed such an answer exists.

Case C also appears to be one in which the judge will be forced to choose. The judge might, for instance, be convinced by arguments such are advanced by Professor Dworkin in TRS that, in theory at least, the law always fully controls judicial decisions. He might, therefore, believe of a particular hard case that it does have a right answer and that one of the possibly-right answers that he, and others before him, have entertained is very likely that answer, though he will probably admit that it is somewhat possible that the right answer is one which has not even been considered. Nevertheless, the judge can (a)believe that,

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[18] Cf. Professor MacCormick's discussion of the many ways in which Donoghue v. Stevenson ([1932] A.C. 562) might have been justified, in Legal Reasoning and Legal Theory, pp.108-128.

in theory, there definitely is a right answer to the hard case, (b)believe that that answer is very likely one of the possibly-right answers which have been considered, and yet (c)find the question posed by the hard case so complex and baffling, and so easy to justify and answer in more than one way, that he cannot in all honesty say that he believes, of any one possibly-right answer, that it is the right answer. In such a case it seems that "something in the nature of a choice between open alternatives must be made..." (CL, p.124).

So it seems that in cases like A, B and C the judge will, given his beliefs, or lack thereof, have to make a choice from amongst what are, for the purposes of his decision, open alternatives. He will have to choose on grounds other than those which argue, with respect to one of the possibly-right answers, that it is the right answer determined by binding standards. But now the following question arises: If, as has yet to be shown, cases like A, B, and C do (and must) sometimes arise within, e.g. the Anglo-American legal systems, does it not follow that strong discretion exists (and must exist) within these systems, even if, as Dworkin argues, "[f]or all practical purposes, there will always be a right answer in the seamless web of our law" ("NRA?", p.84)? I shall now argue that the proposition 'Strong discretion exists (or must exist)' can be given at least two very different

meanings, and that on one of its meanings the truth of the proposition does follow if there are cases like A, B or C, but does not follow if it is given its other meaning. I do not wish to argue or suggest that either Hart or Dworkin makes this distinction; indeed I believe that they do not and that a certain amount of confusion is engendered by the failure to distinguish these two senses of the proposition. I hope, by drawing attention to the distinction, to shed some light on these very difficult issues.

The distinction I have in mind is between the following two propositions:

D(1): S has (or had) strong discretion in case X.

and

D(2): S exercises (or exercised) strong discretionary judgment in case X.

Propositions D(1) and D(2) mean very different things. In claiming that S <u>has</u> strong discretion in case X, one means to say that S's decision is not fully controlled by binding standards in X, either because those standards do not even purport to control his decision, or because they purport but fail to do so. (This follows from P(2).) The term 'strong discretion' is used here to describe the judge's relationship to binding law. It is used to say that the law fails to bind the judge to one particular decision in case X. Discretion in this sense is a property of the judge in his relationship to binding law.

In claiming that S exercises strong discretionary

judgment in X, one does not, however, mean to say or imply anything at all about whether S's decision is in fact fully controlled by binding standards. The term 'strong discretion' is used here not to describe the judge's relationship to law, but to describe an actual decision or judgment he in fact made in X -- to say that that judgment was, as a matter of fact, of a certain kind. Discretion in this sense is not a property of a judge's relationship to binding legal standards; it is a property of actual decisions and judgments. 'Discretion' is used not to say that the law fails to bind the judge to one decision, but to say that, as a matter of historical fact, the judge made a certain sort of judgment or decision. It is to say that he made the sort of judgment he is entitled to make when he <u>has</u> strong discretion.[19]

It is crucial to notice that propositions D(1) and D(2) are logically independent of one another. In saying that S has strong discretion in X, one implies nothing at all about the sort of decision S will make or about S's beliefs about X. What one does imply is <u>one's own</u> belief that X is fully controlled. But of course S may perceive the situation in a very different light. He might believe, as in Case D, that X is fully controlled by binding standards and that he therefore does not have strong discretion (only weak discretion); and if he views the matter in this way, then

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[19]An analogous distiction can be drawn between the proposition 'S has <u>weak</u> discretion in X' and the proposition 'S exercises <u>weak</u> discretionary judgment in X'.

barring neglect of his duty to apply the law when (he believes) it provides an answer, he will not exercise strong discretionary judgment. He will decide as in Case D.

Though proposition D(1) does not, for these reasons, entail proposition D(2), it does, of course, entail the following proposition:

D(3): Case X is not (or was not) fully controlled.

In other words, in saying that a judge has strong discretion in X one implies that X is not fully controlled by binding standards.

So proposition D(1) entails D(3) but not D(2). Proposition D(2), on the other hand, entails neither D(1) nor D(3). The exercise of strong discretionary judgment by S in X entails neither that S has strong discretion in X nor that the law fails to control X fully. If S's state of belief is as described in Cases A, B and C, then he will exercise strong discretionary judgment -- he will choose from among what are, so far as he can tell, open alternatives.

It might be thought that D(2) must entail D(1) and therefore D(3). Is it not true that S can exercise a strong discretionary judgment only if he has the discretion to exercise? I see no reason, however, why one must answer this question affirmatively. Take, for example, Case A in which S believes that his decision is not fully controlled.

Assume that this belief is wrong and that the law does in fact succeed in controlling S's decision fully -- that it succeeds in supplying a right answer. If, in this case, S sincerely believes he has options from which he can and must choose on grounds not supplied by binding standards, then, as was argued earlier, he will choose on those grounds. He will not conceive of himself as choosing what he has reason to believe is a right answer determined by standards he is bound to follow. He will conceive of himself as making the sort of choice he is entitled to make if he has strong discretion. Is it not better to say, in this sort of case, that a strong discretionary judgment was exercised unnecessarily, or perhaps even improperly, than to say that such a judgment was not made? One might say the judgment was improper if one believes that S's conclusion that his decision was not fully controlled was arrived at far too hastily or was the result of carelessness. Yet whatever one's opinion about the way in which the case was decided, or about S's perception of his situation vis-a-vis his relationship to binding law, one cannot deny that he chose on grounds other than those provided by standards he was bound to follow, i.e. that he exercised strong discretionary judgment. So long as one is clear about what is being claimed, there is no problem or paradox here. One can assert proposition D(2), that S exercised a strong discretionary judgment in X, and go on, quite consistently, to deny propositions D(1) and D(3),

that S had strong discretion in X and that X was not fully controlled. One can say that S's strong discretionary judgment was unnecessary because X was, contrary to S's belief, fully controlled and S did not, therefore, have strong discretion.

Before turning to consider how all this affects the necessity argument and Dworkin's arguments against it, attention will now be drawn to one further proposition, D(4), which must not be confused with either D(1) or D(2):

D(4): S exercises (or exercised) his strong discretion in X.

D(4), unlike D(2), seems to imply D(1) and D(3). In saying that S exercised <u>his</u> strong discretion one implies that it was his to exercise. One of course also implies D(2), that a strong discretionary judgment was in fact exercised. So in saying that S exercised his strong discretion in X, one seems to imply (a)that he had strong discretion in X, (b)that his judgment was in fact a strong discretionary one, and (c)that the law failed to control the decision in X fully. In saying that judges sometimes exercise (or must exercise) <u>their</u> strong discretion, one seems to imply (a)*that sometimes they have (or must have) strong discretion, (b)*that sometimes their judgments are (or must be) strong discretionary ones, and (c)*that sometimes the law fails to control their decisions fully. One of the aims of this thesis is, of course, to defend (a)*, (b)* and (c)* against Dworkin's arguments.

So how does all this bear upon the original question whether Hart's arguments for the necessity thesis are sufficient to demonstrate the necessity, and thus the existence, of strong, not merely weak, discretion? The first thing to note is that the 'necessity thesis' is radically ambiguous (as is the existence thesis). The important differences between D(1) and D(2) require that the following two propositions be distinguished:

NT(1): It is necessary that judges have strong discretion.

NT(2): It is necessary that judges exercise strong discretionary judgment.[20]

Dworkin's objections to the necessity argument would appear to show that mere uncertainty and disagreement over whether, e.g. a case falls within the scope of a valid legal rule, does not entail that the judge has strong discretion on that matter. The rule may both purport to control the decision and succeed in doing so, regardless of any disagreement and uncertainty there might be over how, and whether, the rule, in conjunction with whatever other considerations are relevant to the question of its precise scope, fully control that decision. Of course it is also quite conceivable that there be a case in which

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[20]An analogous distinction must be drawn between two versions of the existence thesis, ET(1) and ET(2). There is little point in distinguishing between two versions of the desirability thesis. If it is desirable (or undesirable) that judges have strong discretion, then it is desirable (or undesirable) that they exercise strong discretionary judgment, and vice versa. I shall therefore continue to refer simply to the desirability thesis.

(a)everyone is quite certain and in full agreement that the decision is not fully controlled, and (b)everyone is wrong about that. There may, for example, be a long-forgotten precedent which, when added to the examined materials, results, and would be seen to result, in a fully controlled decision. So there is no logical relationship of any sort between, on the one hand, mere uncertainty and disagreement, and on the other, the presence or absence of a right answer. So even if, as Hart argues, penumbral cases must arise in which there is considerable uncertainty and disagreement, it does not follow that there is no right answer in those cases, and that judges therefore have strong discretion.

So Hart's arguments do not appear to support NT(1); but neither do they support NT(2). Lack of agreement and certainty does not entail, in itself, that a judge will exercise strong discretionary judgment. The reason, of course, is that he might well view his situation as in Case D. He might be very uncertain, and in disagreement with others, about the answer to be given in a hard penumbral case, and yet believe, and have reasons for believing, that there is a right answer and that he has got it.[21] He might, that is, believe that his decision is fully controlled and that there are reasons, however weak and unconvincing they might seem, for supposing that it is controlled in

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[21]His reasons need not be good ones of course.

the way in which he believes it is. In such a case he will not exercise strong discretionary judgment, even if, as a matter of fact, his case is not fully controlled and he therefore has strong discretion. To the contrary, he will accept, and conceive of himself as accepting, what he has reason to believe is 'the right answer' determined by standards he is bound to follow. In this case he will not exercise strong discretionary judgment.

So the mere fact that hard penumbral cases are inevitable in no way serves, in itself, to support the necessity thesis in either of its forms. Despite this, the above discussion does reveal some interesting consequences for the discretion debate. If there are any cases in which the judge's state of belief is as described above in Cases A, B and C, then it follows, necessarily, that there are cases in which judges exercise strong discretionary judgment. Whether there 'is' strong discretion, understood in this way, will not depend upon the mere fact that there are hard cases in which judges are uncertain and in disagreement; but neither will it depend on whether in fact the law always succeeds in controlling judicial decisions fully. To the contrary, it will depend on whether judges always <u>believe</u> that the hard cases they decide are like Case D; whether they believe in all cases that their decisions are fully controlled and believe that the answers they select are the right ones determined by binding standards. If they do not always believe this, then it follows,

necessarily, that they sometimes exercise strong discretionary judgment. Thus if it could somehow be shown that not all cases within the Anglo-American legal systems are like Case D, then ET(2), the proposition that Anglo-American judges sometimes exercise strong discretionary judgment, will have been proven.[22] In addition, if it could somehow be shown that judges will inevitably, though perhaps not necessarily, perceive some of their cases to be like Cases A, B and C, then NT(2), the proposition that judges necessarily exercise strong discretionary judgment, will be shown.[23]

These same 'facts' about judges' states of belief would not, however, serve in any way to prove either ET(1), that judges sometimes have strong discretion in the Anglo-American legal systems, or NT(1), that judges necessarily have strong discretion.[24] Whether judges have, or have to

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[22] I shall attempt to show this in the following section.

[23] It cannot be logically necessary that someone should come to hold a certain belief. It can, however, be 'inevitable' in some weaker sense according to which 'It was inevitable that S should come to believe that p' means, roughly, that any reasonable person in S's position would believe that p. Henceforth I shall assume that 'necessary' in NT(2) is to be understood as meaning inevitable in this sense. In chapter six it will be argued both that it is inevitable that judges in the Anglo-American legal systems should sometimes exercise strong discretionary judgment, and inevitable that judges should come to exercise strong discretionary judgment if they attempted to follow Dworkin's theory of adjudication.

[24] Since Hart seems to argue, for instance, that open texture entails that there will be penumbral cases and that judges will therefore have (strong) discretion, and since open texture is a logical property of general terms, I shall assume that NT(1), unlike NT(2), employs 'necessary' in the strictly logical sense.

have, strong discretion depends entirely on whether the law fully controls, or is capable of fully controlling, all judicial decisions. It does not, however, depend on whether judges believe these things.

I should stress once again that I do not wish to argue or suggest that the arguments of Hart and Dworkin fully appreciate the distinctions I have attempted to draw. To the contrary, it would appear that they do not, and that a certain amount of confusion is introduced as a result. For instance, the question whether there 'is' strong discretion is usually thought to turn on whether the law always succeeds in providing right answers. Yet as will be seen below, Dworkin attempts to support the proposition that there is no strong discretion by claiming that judges neither believe nor argue as if they are ever free to choose between open alternatives. It may seem somewhat puzzling, however, that Dworkin should think that this fact (if it is a fact) provides much in the way of support for the denial of the necessity and existence theses, if these are understood, as they usually are, as being equivalent to NT(1) and ET(1). The mere fact that judges believe that the law fully controls all their decisions would provide little in the way of support for the denial of ET(1) and NT(1). Judges might, for example, simply be wrong in believing that the law always fully controls judicial decisions. But if we were to understand Dworkin as arguing against ET(2) and NT(2), then if judges <u>do</u> believe that the law fully

controls all their decisions, then it would indeed follow that strong discretion does not, and need not, exist -- in the sense in which to say that strong discretion does not, and need not, exist is to deny ET(2) and NT(2). The falsity of ET(2) and NT(2) would follow irrespective of whether, in theory, judges' decisions are not always fully controlled.

So it is crucial that the differences between NT(1) and ET(1) on the one hand, and NT(2) and ET(2) on the other, be kept clearly in mind when arguments about judicial discretion are being made or evaluated. This I shall attempt to do in the remainder of this thesis.

III

A second major claim Dworkin wishes to make against Theory H is that both it and the theory of law with which it is associated are not true to the facts -- ET(1) and ET(2) are false. He argues that any theory of adjudication which relies on strong discretion to explain judgments in hard cases presents a "plainly inadequate phenomenological account of the judicial decision" (TRS, p.86). Dworkin writes:

> Judges do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own. The institutional constraints they sense are pervasive and endure to the decision itself (TRS, p p.86-87).

Judges do not, that is, ever conceive of themselves as proceeding to step (2) of Theory H and resorting to strong discretion. In a similar vein, Dworkin argues that whenever litigants come to court in hard cases, they always suppose, and argue as if, they are entitled to decisions in their favour, just as they do in easy or "core" cases. They never view themselves as attempting to persuade a judge to adopt one 'open alternative' instead of another. To the contrary, they believe that the law is already settled in their favour on the question before the court, and they consider the judge duty-bound to decide in accordance with that settled law. The point is put particularly well by Professor Sartorius who, like Dworkin, rejects the existence thesis in both of its forms. Sartorius submits that a

> litigant before a court is not in the position of one begging for a favour from a potential benefactor, but rather in that of one demanding a particular decision as a matter of right, as something to which the law entitles him.[25]

In the light of the important distinction between ET(1) and ET(2), the question arises as to which of these two theses the above arguments could be thought to support. If they are thought to support ET(1), then they are open to the following objections. First, it clearly does not follow from the fact that litigants always claim and argue that the law is settled in their favour in hard cases that the

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[25]"Social Policy and Judicial Legislation", p.153.

law always is settled, or even that litigants sincerely believe that it is. It is clearly to one's advantage in a hard case always to argue as if the law were settled in one's favour, even if one believes it is not. Second, even if judges and litigants do in fact always believe that the law fully controls all judicial decisions, it does not follow that the law actually succeeds in doing so. It obviously does not follow from the mere fact that everyone believes that p that 'p' is true. Everyone might have thought at one time that the Earth is flat; it does not follow, however, that the Earth is or was flat. Similarly, the mere fact, if it is a fact, that litigants and judges always believe that judicial decisions are fully controlled, and that they believe, therefore, that judges do not have strong discretion, in no way entails that those decisions are fully controlled and that judges do not have strong discretion. Third, it is far from clear that Anglo-American judges always do believe that judicial decisions are fully controlled: witness the testimony of judges such as Holmes, Cardozo, Macmillan and Radcliffe. Holmes, for instance, claimed that sometimes judges must exercise "the sovereign prerogative of choice."[26] Judge Cardozo said:

> We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined

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[26] O.W. Holmes, Collected Legal Papers, p.239.

> the form and the tendency of a rule which at that moment took its origin in one creative act.[27]

Lord Macmillan suggested that in almost every appeal case it is possible to decide the question either way with reasonable legal justification.[28] With respect to those judges who speak as if their decisions are always fully controlled, and do not betray the fact that they have exercised a strong discretionary choice, it is quite possible that a good many of them might be advancing what they believe to be a version of the "noble lie". Lord Radcliffe writes:

> I do not believe that it was ever an important discovery that judges are in some sense lawmakers. It is much more important to analyse the relative truth of an idea so far-reaching; because unless the analysis is strict and its limitations observed, there is a real danger in its elaboration. We cannot run the risk of finding the archetypal image of the judge confused with the very different image of the legislator.[29]

> [J]udges will serve the public interest better if they keep quiet about their legislative function. No doubt they will discreetly contribute to change in the law, because, as I have said, they cannot do otherwise, even if they would. But the judge who shows his hand, who advertises what he is about, may indeed show that his is a strong spirit unfettered by the past, though I doubt very much whether he is not doing more harm to general confidence in the law as a constant, safe in the hands of judges, then he is doing good to the law's credit as a set of rules nicely attuned to the sentiment of the day.[30]

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[27] Cardozo, The Nature of the Judicial Process, pp. 103-104.

[28] Macmillan, "Law and Ethics", p.49.

[29] Radcliffe, The Law and Its Compass, p.14.

[30] Ibid., p.11.

If this point of view is at all common among judges, then it is not at all surprising that some choose not to speak as if they have strong discretion in certain cases. But if cases must arise in which judges have strong discretion, then whatever judges say, it will

> be part, even if an implied part, of the rules on which courts act that courts have jurisdiction to settle them by choosing between the alternatives which the statute leaves open, even if they prefer to disguise this choice as a discovery (CL, p.149, emphasis added).

So Dworkin's two arguments would appear to provide little in the way of support for the denial of ET(1), the proposition that Anglo-American judges sometimes have strong discretion. Litigants and judges could well be wrong in their opinions; some judges clearly do believe that they sometimes have strong discretion; and those who speak as if they do not may, like Lord Radcliffe, consider it better to keep quiet about it.

Dworkin's first argument would, if it were sound, provide more support for the denial of ET(2), the proposition that judges in the Anglo-American legal systems sometimes exercise strong discretionary judgment. Yet as was just seen judges often describe themselves as having had strong discretion -- the "sovereign prerogative of choice" -- in some hard cases. So it is clear that at least some judges believe that they have strong discretion, and from this follows the truth of ET(2).

A third reason why, according to Dworkin, Theory H must be rejected as a description of the adjudicative process as it is practised within the Anglo-American legal systems is that it fails to accommodate all the elements of binding law which figure in that process. In the opening chapters of TRS Dworkin argues that these systems include many more sorts of standards than (he supposes) Theory H and the conception of law with which it is associated, the "model of rules", would have one believe. It includes what Dworkin refers to as 'principles' and 'policies'. He claims that Theory H fails to assign these standards their proper roles within adjudication, since the theory of law upon which it is based, the model of rules, must restrict binding law to a set of legal rules which pass validity tests outlined or displayed in a master rule of recognition. On theory H, Dworkin claims, principles and policies must find their way into adjudication as standards to be considered in the exercise of strong judicial discretion, i.e. at step (2) of Theory H, not step (1). But this grossly distorts their role, he suggests; they are viewed by the legal community as binding law which must be followed whenever they are applicable to a case.

Dworkin's arguments for the claim that Hart's theories of law and of adjudication do not, and cannot, accommodate principles and policies as binding law will be investigated in chapter five. There it will be argued that those arguments are all fallacious, and that Hart neither does, nor needs to,

restrict the elements of binding law which satisfy his rule of recognition, and which are therefore employable at step (1) of Theory H, to what Dworkin calls 'rules'. It will be argued that Hart is therefore quite able to account for the presence of binding principles and policies within legal adjudication. But as this is the major topic of chapter five, these issues will be left till then.

IV

A third leg of Dworkin's response to Theory H centres around the claim that Theory H is morally and politically unattractive, i.e., the desirability thesis is false. Dworkin advances two main arguments in support of this view. The first, which will be called the 'unfairness argument', runs as follows. If a judge decides a case by the exercise of his strong discretion, then in effect he makes new law and applies it retroactively to the case before him. On Theory H, a judge sometimes makes new law when he chooses whether or not to apply a valid rule in a penumbral case. But if in this way a judge "makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event" (TRS, p.84). It is patently unfair, however, that an individual should be held responsible for violating a duty which is created only after the event, or as lawyers sometimes say,

ex post facto; and since it is morally and politically undesirable that a legal system should cater to such patent unfairness, it is highly undesirable that judges should ever decide cases by exercising their strong discretion.

Dworkin's second argument is labelled the "argument from democracy", and it is similar to an argument considered in chapter two above. There it was considered whether the author of "Positivism" and CL could possibly block the extension of the desirability argument to plain-meaning cases by an appeal to the democratic principle that judicial decisions must always be subordinate to the intentions or aims of the legislature, and thus ultimately to the wishes of the electorate. The present argument also appeals to this principle. It is as follows.

> [A] community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law (TRS, p.84).

As was seen earlier, Theory H argues that judges must sometimes decide cases by exercising their (strong) discretion. When they do so, their choice is to be guided by the consideration of various social aims and purposes which seem to be relevant and worthy of promotion or protection. Yet according to the argument from democracy, this is most unsatisfactory. Since judges are, for the most part, responsible to neither the electorate nor their representatives, there is nothing to prevent them from deciding in a manner

which is quite at odds with what the community would want or even find acceptable. And even if judges possess the most honourable intentions, it is far more likely that a collective decision of a body of elected and responsible representatives will result in a more

> accurate expression of the different issues that should be taken into account. The political system of representative democracy may work only indifferently in this respect, but it works better than a system which allows non elected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers (TRS, p.85).

The unfairness argument and the argument from democracy represent the main reasons Dworkin provides for rejecting the desirability thesis, and thus, ultimately, for rejecting, as morally and politically unattractive, Hart's theory of adjudication, Theory H. The requirement that judges sometimes exercise their strong discretion, which is suggested in step (2) of Theory H, requires that one view judges as sometimes fulfilling the role of deputy legislator, a job for which they are most unsuited and which should be left, if at all, to elected officials. The theory also entails that judges must sometimes make new law and apply it retroactively to the cases before them, a result which Dworkin finds most unfair. For these reasons, argues Dworkin, one should be strongly inclined to reject both the desirability thesis and Theory H.

I would now like to consider a few objections to these arguments. There are several points which might be

made against the argument from democracy. First, if, as Hart claims, judges must sometimes exercise their strong discretion in hard cases, then it follows that this must be tolerated if one wants law. The democratic ideal cannot be fully realized in practice.[31] Second, the democratic ideal need not be accepted as an absolute ideal which outweighs all other benefits one gets from systems of law which recognize the need to leave open, for later settlement by an informed, official choice, issues which can be properly appreciated and settled only when they arise in concrete cases.[32] Third, the argument from democracy loses a good deal of its appeal when it is remembered that the function of legislating is not always confined to elected officials. Parliaments, for example, sometimes authorize non-elected members of executive departments and administrative bodies to legislate on matters within certain limited speres.[33] Fourth, the argument loses more of its appeal in light of the fact that 'judicial legislation' is often subject to review and reversal by the elected legislature. It would be unrealistic to assume that bad legislation will always be remedied in this way, but if this occurs sometimes, and if the possibility is always there and

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[31] See the discussion of S(1) - S(3) in chapter two above, p. 23 ff.

[32] On this see chapter two above, p.28 ff. and CL, p.125 ff.

[33] Cf. CL, p.127 ff.

judges are aware that it is, then this takes much of the sting out of the argument from democracy.

Several points can also be made against the unfairness argument. One might argue, in a fashion similar to above, (a)that a certain amount of unfairness must be tolerated, because the exercise of judges' strong discretion must be tolerated, and (b)that fairness is not, in any event, an absolute ideal which would outweigh any benefits one gets from a legal system which recognizes that certain issues can be reasonably and properly settled only when they arise in concrete cases and are considered. A third point to be made is related to the second, and concerns how high a price, in terms of fairness, one has to pay if judges decide cases as Theory H requires. Stephen Munzer takes up this point in his essay "Right Answers, Preexisting Rights and Fairness".[34] Munzer argues that the price is not as high as might appear at first glance; genuinely unfair retroactive legislation occurs when

> the legal status of some act done before the law was passed has been changed, i.e., an act once legally permitted has been made a breach of duty for the purpose of tort liability. This is at least prima facie objectionable because we suppose that a person has a right to found expectations on the law as it stands at the time he acts.[35]

Yet as Munzer points out, these sorts of situation must be carefully distinguished from those in which Theory H

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[34]For a similar argument, see R. Cross, Precedent in English Law, p.31.

[35]Munzer, "Right Answers, Preexisting Rights and Fairness", p.1064.

requires the exercise of strong judicial discretion. These latter cases are all 'penumbral cases' in which, for example, there seem to be good reasons both for and against the proposition that the defendant's action was legally permitted. Owing to the controversial and uncertain nature of these cases, neither the plaintiff nor the defendant could claim that his justified expectations were unfairly frustrated. Each has some reason to expect a decision in his favour, but each also has some reason to expect a decision in his opponent's favour, although each will, of course, claim and argue that he has the better of the two cases. These penumbral cases must be kept clearly distinguished from those cases in which what is plainly the law is in some way altered by an act of judicial legislation.

Dworkin objects to this way of viewing the matter. In his reply to Munzer's argument, he suggests that, irrespective of a right-holder's expectations, he is unfairly treated if he is denied a decision to which he has a legal right; and of course his possession of that right is in no way dependent on his knowing for certain that he has it and that he may therefore found legitimate expectations on it. If he has a right to a decision in a hard penumbral case, then he is unfairly treated if he is denied that right even if he has no knowledge of it.

A major problem with Dworkin's response is that it assumes that there always are right answers, and thus

legal rights, in all hard penumbral cases. If this assumption were true, then it might well be unfair if judges were to decide some cases by exercising their strong discretion. But of course one of the major claims of Theory H is that that assumption is false, that in some cases there is no uniquely correct answer, but only a set of answers each of which enjoys some support in the binding standards of law. That it would be unfair if judges were to exercise strong discretion when the law always succeeds in controlling decisions fully, serves in no way to show that the same would be true if they were to do so when the law fails in this respect.

So there are several replies to be made against the argument from democracy and the unfairness argument. The most general objection which can be made against both is this. If, as Hart seems to argue, both NT(1) and NT(2) are true, then Dworkin's arguments have very little force. At best they show it to be somewhat unfortunate that the exercise of judges' strong discretion must be tolerated, even if, ideally, it would be better if a legal system were somehow able to do without it. They could not, however, be viewed as providing a sufficient reason for rejecting theory H in favour of an alternative theory according to which both NT(1) and NT(2) are false; if these two theses are true, i.e. if it is both necessary that judges have strong discretion and necessary (inevitable) that they exercise strong discretionary judgment, then there could be

no such alternative. So Dworkin must meet NT(1) and NT(2) directly, though as I mentioned above, neither Dworkin nor Hart seems to distinguish clearly between NT(1) and NT(2). One of Dworkin's arguments against the two theses has, of course, already been encountered in section II of the present chapter. There I considered Dworkin's charge that lack of certainty and agreement does not, as Hart's arguments seem to suppose it does, entail (what I have called) NT(1) and NT(2). But this is by no means all that Dworkin has to say; his arguments against the two theses are both numerous and complex. It is to an examination of some of these arguments that I should now like to turn.

V

Dworkin's attack on the two necessity theses is perhaps best understood as beginning with a concession. Dworkin may be viewed as conceding, arguendo, that one "will come naturally to the theory of judicial discretion in the strong sense" if one accepts the proposition that Hart's model of rules sufficiently captures all the elements of binding law (TRS, p.39). In other words, Dworkin is willing to concede that if the law is identified with a set of rules each of which satisfies validity tests outlined or displayed in a master rule of recognition, then it follows that judges will sometimes be forced to exercise their strong discretion, i.e. it follows that NT(1) and NT(2) are both true. Given this model or conception of law, the law will often fail to

provide full control and guidance for judicial decisions. But this is of little consequence, Dworkin would add, since the model of rules fails adequately to capture all elements of binding law. It must be rejected in favour of a much richer conception of law which is capable of accommodating much more than just valid rules; and once the model of rules is rejected in favour of this richer conception, it no longer follows from the fact that valid rules often fail in, for instance, the various ways pointed out by Hart, to control decisions fully, that judges are inevitably led to exercise strong discretion.

So Dworkin sets himself the task of undermining the model of rules and replacing it with a richer conception of law. He takes up this task in the opening chapters of TRS where he develops a conception of law which includes what Dworkin refers to as 'principles' and 'policies', standards which differ from rules in various crucial respects. One very important respect in which, according to Dworkin, they differ from rules is that they are not captured, and cannot be captured, by Hart's master rule of recognition. Thus, in Dworkin's view, the model of rules could not possibly accommodate them as binding law, and must instead relegate them to the domain of extra-legal considerations to which judges appeal in the exercise of their strong discretion. But as was seen above, Dworkin is of the opinion that this account of principles and policies presents a grossly distorted picture of their roles within adjudication.

Judges and litigants treat them as binding law and as often providing determinate guidance when the rules run out, and one is better off abandoning the model of rules than to deny these important facts about principles and policies and their roles within the adjudicative process (as it is practised within Great Britain and North America). Yet once the model of rules is safely set aside and replaced with this richer conception of binding law, it no longer follows from the conceded fact that the valid rules of a legal system sometimes fail, in themselves, and in ways that are rather obvious, to control decisions fully, that judges must sometimes exercise strong discretion.

The first step in Dworkin's attack, then, is to concede that the model of rules entails NT(1) and NT(2). The second step is to argue that the model of rules must be abandoned because, among other things, it does not, and cannot possibly, account for the presence of binding principles and policies within adjudication. But the attack does not end here. Dworkin wishes not only to say that the presence of binding principles and policies within adjudication serves to undermine the model of rules and any support it happens to provide for NT(1) and NT(2), he also wishes to argue that the presence of these standards is sufficient to eliminate the need for judges ever to exercise strong discretion. Once principles and policies are taken fully into account, it will be seen that "[f]or all practical purposes, there will always be a right answer

in the seamless web of our law" ("NRA?", p.84).

How, in Dworkin's view, principles and policies help secure these right answers is an important question which will be addressed in chapter six below. But before that question can be addressed, it is necessary to investigate what Dworkin means by 'rules', 'principles' and 'policies' and how, in his view, standards of these various sorts interact with one another. As will be seen, the accounts he offers are not without their difficulties.

Before commencing the investigation, I should perhaps stress once again a point made in the Introduction. The following analysis of Dworkin's theories about rules, principles and policies is more detailed than is perhaps necessary for the purposes of the main argument of this thesis, which deals with the question of judicial discretion. My justification for engaging in such a detailed analysis is that so many of Dworkin's observations and arguments are both interesting and important in their own right.

RULES, PRINCIPLES AND POLICIES

According to Dworkin there is a distinction to be made between rules and principles and the distinction is a logical one.[1] It is not, as some have supposed, a distinction based entirely on degrees of specificity.[2] Principles are not, he would argue, simply rules containing very general or abstract terms, and alternatively rules are not simply principles containing highly specific or concrete terms. Dworkin suggests that rules and principles are similar in so far as they both support conclusions about rights and obligations, but they differ in the sort of support they provide.

> Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision (TRS, p.24).

Thus if there is a valid legal rule stating that the maximum allowable speed limit on a highway is sixty miles per hour, and a judge is faced with a case in which that speed limit

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[1] It will be argued below that Dworkin in fact distinguishes rules and principles on two very different grounds.

[2] See J. Raz, "Legal Principles and the Limits of the Law", p.838 ff. and G. Hughes, "Rules, Policy and Decision Making", p.419.

has been surpassed, the decision that an illegal act has been committed must, according to Dworkin, be accepted. The rule provides an answer which cannot be rejected. If the rule is invalid, however, it contributes nothing at all to the decision. It provides no reason whatsoever why anyone should not exceed sixty miles per hour.

Dworkin contrasts rules with principles. A principle

> does not even purport to set out conditions that make its application necessary. Rather it states a reason that argues in one direction, but does not necessitate a particular decision (TRS, p.26).

Thus if there is a principle stating that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime"[3] then if, as in Riggs, an individual, S, has attempted to acquire property by his own crime, it does not follow that the conclusion 'S is not permitted to inherit' must, in that case, be accepted. Principles, unlike valid rules, do not necessitate decisions. To the contrary, principles state reasons which vary in a dimension Dworkin calls 'weight' or 'importance'. They often compete for control of decisions, the weightiest competitor being the winner, and the choice of one principle over another in a particular context does not require the outright rejection or modification of the other, as it would if the two standards were

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[3]Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 190 (1889) -- cited in TRS, p.23.

valid rules. Given that the standards are principles which have weight and do not necessitate decisions, the losing principle can simply be judged to have, in that particular context, less weight or strength than its competitor. But in a different context or case, one in which the principle faces a different and less weighty competitor, or in which the same two principles compete but the facts, and thus the weights, are different, the losing principle might well win the day -- its reason might be weightiest.

So the first thing Dworkin wishes to say about rules versus priciples is that the latter, unlike the former, compete for control of decisions, and a principle's loss in one context does not, as it would if it were a rule, entail that it can never again compete, and possibly win, in some other context. But this is not the only distinction Dworkin seems to draw. In his view principles differ from rules not only in so far as they compete with one another for control of decisions, but in so far as they, unlike rules, are capable of compromise.[4] If a rule contributes anything at all to a decision it contributes a decisive answer. Either the rule itself determines a decision which must be reached or it has no effect whatsoever. In this sense, rules contribute in an

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[4]This second aspect of Dworkin's attempt to distinguish rules and principles is often overlooked. See, for instance, David Lyons' "Principles, Positivism, and Legal Theory", p.418 ff.

"all-or-nothing" fashion. Principles, according to Dworkin, are different in this respect. A principle can often contribute something other than a decisive or conclusive answer. It can contribute in the sense that the decision reached, even though it may fail to satisfy the principle, would have been different had it not been for the principle. As an example Dworkin gives the rules governing adverse possession. In Dworkin's view, these rules (or the decision to adopt them) represent a compromise amongst competing principles. The principle that no man may profit from his own wrong, P(1), weighs against allowing someone to acquire property by adverse possession. But there are other principles, not specified by Dworkin, which weigh more heavily in favour of allowing property to be acquired in this way. As a result adverse possession is allowed. But this is not to say that the 'defeated principle', P(1), contributes nothing to the decision at all. To the contrary, argues Dworkin,

> these rules have a different shape than they would have had if the principle had not been given any weight in the decision at all. The long length of time generally required for acquiring title by adverse possession might have been much shorter, for example, had this not been thought to conflict with the principle. Indeed, one of my reasons for drawing the distinction between rules and principles was just to show how rules often represent a kind of compromise amongst competing principles in this way (TRS, p.77).

So even if a principle, P(1), is defeated by another principle P(2), the former may still have some effect upon the decision. Its defeat does not require its 'unconditional

surrender', as it would, Dworkin suggests, were it a rule.

There are presumably various ways in which a defeated principle could affect a decision. For instance, if there are two or more answers which fully satisfy P(2), then the answer or decision, d(n), which does the least amount of violence to P(1) might be required. There is no compromise here, but P(1) nonetheless does, despite its defeat, influence the decision. Alternatively, there might be a case in which there are, say, three possible answers which satisfy P(2), but in varying degrees, and one which fails to satisfy P(2) at all. Answer d(1) satisfies P(2) more fully than answer d(2) which in turn satisfies P(2) more fully than d(3). Decision or answer d(4), however, fails to satisfy P(2) at all, i.e., it violates P(2). We might imagine that a plaintiff, P, argues that he is entitled, under principle P(1) to answer d(4): that the defendant, D, shut down his factory entirely in order that he, P, not suffer from the pollution it causes.[5] D, on the other hand, argues that he is entitled under P(2) to decision d(1): that he, D, be allowed to continue as before. Now if d(1) and d(4) exhaust the possible answers to the case, then P(2)'s greater weight would require d(1). But d(1) and d(4) do not, we have supposed, exhaust the possibilities. A judge might decide that D must cut the

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[5] I am here borrowing an example originally discussed by K. Greenawalt in "Policy, Rights and Judicial Decision", p.1013, and by Dworkin in TRS, p.306 ff. Dworkin's comments on the case will be investigated below.

amount of pollution caused by, e.g., one quarter, d(2), or by one third, d(3).[6] If d(3) is chosen, then P(1) is judged to have more weight than if d(2) had been chosen. In either case, P(1), the defeated principle, influences the decision and requires a compromise. If, however, instead of P(1) and P(2) we had rules R(m) and R(n), then to say that R(n) is 'defeated' is to say, on Dworkin's account, that it is invalid and as such contributes nothing. The answer supplied by the victorious rule, d(m), is required and no compromise is allowed.

So there would appear to be two different ways in which Dworkin attempts to distinguish rules and principles. First, he suggests that they may be distinguished in so far as the answer provided by an applicable valid rule must always be accepted -- I shall call this the 'non-competition thesis'-- whereas the answer(s) called for by an applicable principle must be accepted only if the principle is not outweighed by a competitor -- I shall call this the 'competition thesis'. Answers provided by valid rules must always be accepted; answers suggested

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[6]Two points are worth noting. First, I have chosen percentages under one half. If D were required to cut his production by, say, two thirds, then one might be inclined to say that P(1) was judged to outweigh P(2), even though the latter defeated principle called for a compromise. Second, in a case such as described above, there are presumably far more possible answers than I have supposed. D could be required to cut his pollution-causing production by any percentage. If he were required to cut it by one half, then one might want to say that the principles were judged to be of equal weight or strength.

by principles only sometimes. The competition and the non-competition theses are to be distinguished from the very different claim that principles, unlike rules, are subject to compromises. Defeated principles can at least sometimes influence decisions by determining which of two or more answers which happen to satisfy a victorious principle is to be accepted. They can force compromises -- I shall call this the 'compromise thesis'. Rules, on the other hand, specify particular answers and they leave no room for compromises. If a rule does not itself determine an answer which must, in the circumstances, be accepted, then it has no effect whatsoever -- I shall call this the 'non-compromise thesis'.

It is important to notice not only that Dworkin does draw this second distinction, but that it is logically independent of the first. One can reject the claim that a valid rule's answer or contribution must always be accepted (the non-competition thesis) and at the same time accept the claim that a rule's contribution is decisive whenever it does in fact contribute (the non-compromise thesis). I should like to do both; my reasons for rejecting the non-competition thesis will be given below.

In Dworkin's view 'policies' must be distinguished from both rules and principles. The latter are "propositions that describe rights." Policies, on the other hand, are "propositions that describe goals"(TRS, p.90). Having defined principles and policies in this way, Dworkin must

of course explain the difference between rights and goals.

He begins his explanation with the idea of a political aim.

> A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it (TRS, p.91).

From here Dworkin goes on to subdivide political aims into two categories: rights and goals.

> A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some other political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served. A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals (TRS, p.91).

A right, then, is an individuated aim. It provides a *prima facie* reason why someone in particular, i.e. the right-holder, should receive an opportunity, resource or liberty. He has a right to that benefit. The right attaches to all individuals within a certain class specified in the principle which describes that right, and everyone within that class is entitled, *ceteris paribus*, to the benefit the right describes. Thus if it is a principle that all citizens are entitled to a fair trial, then each and every individual who falls within the class of citizens is entitled, *ceteris paribus*, to a fair trial. All else being equal, it would be

wrong to deny him that benefit.

Goals, on the other hand, are not thought by Dworkin to attach in this way to individuals within classes, and the pursuance or protection of a collective goal entitles no one in particular to a benefit. Goals do not require what Dworkin calls " distributional consistency" (TRS, p.88). It "need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike" (TRS, p.88). If, for the sake of furthering some collective goal, e.g. increased productivity, the legislature awards a subsidy to one manufacturer, it does not follow that, for the same reason, i.e. to reach the goal of increased productivity, it must award another subsidy, let alone an equal one, to a similarly situated manufacturer. The goal might have been, for the time being, sufficiently served by the first subsidy and thus the reason no longer calls for the second. This is so, Dworkin argues, even if it would have been better, in terms of satisfying the goal, if the subsidy had been awarded to the second but not the first.[7] Alternatively, the goal might be better served if the second manufacturer received less, or even none, so that more could be given to yet another manufacturer whose reception of the subsidy would further the collective goal to a greater extent. The main point is that the goal itself requires

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[7]See TRS, p.321.

a subsidy for no one in particular -- no one is entitled to anything. If, however, the manufacturers have a right to their subsidies, then each is, in virtue of that fact alone, entitled, all else being equal, to that benefit.[8]

So principles (and rules, presumably,) describe rights, and policies describe goals. But now the following questions must be asked. What is to be done when

(a)two principle-based rights conflict (or interact in some other way)?

(b)a principle-based right conflicts (or interacts) with a rule-based right?

(c)two rule-based rights conflict (or interact)?

(d)a principle-based right conflicts (or interacts) with a goal?

(e)a rule-based right conflicts (or interacts) with a goal? and

(f)two goals conflict (or interact)?

If Dworkin's views about rules, principles and policies, and their roles within adjudication, are to be understood, these questions must all be answered. But before proceeding to investigate the answers Dworkin provides, four brief but important remarks are in order.

The first remark is this. A crucial component of Dworkin's explanation of legal and political argument is the notion of a legal or political theory. Dworkin is of the

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[8]For a powerful critique of the alleged distinction between rights, as individuated aims, and collective goals, see J. Raz's review of TRS, "Professor Dworkin's Theory of Rights". I shall leave uninvestigated the question whether Dworkin's characterizations stand up to Dr. Raz's critique.

view that most individuals, including judges, who think at all seriously and systematically about their legal system, or about controversial issues arising within it, embrace, at least implicitly, a theory or conception which shows how that system, or parts of it, can be best explained and justified. Their theory will also show the obligations, rights, powers, etc., individuals have under that system. As will be seen below, it is Dworkin's view that one's actual legal rights and obligations are those which one has under the best legal (or political) theory that could conceivably be devised to explain and justify one's legal system.[9] Arguments in hard cases are arguments about what that best theory is, and about what rights and obligations it establishes. A judge's duty is always to attempt to enforce these rights in his decisions. Dworkin is also of the view that with respect to almost any truly controversial legal issue there will be several competing theories or conceptions, each of which will normally have some degree of plausibility -- some claim to being the best, i.e. the right, theory or conception. This is why the issue is controversial and why reasonable people disagree. Nevertheless, he suggests, each party in a hard case believes, and attempts to argue (1)that his theory is better than all other competing theories that have been

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[9]Sometimes he seems to use the term 'conception of law' to mean much the same as 'legal theory', and sometimes he uses the latter to mean much the same as 'political theory'. I shall assume that these expressions are equivalent in meaning.

advanced and considered either by himself or by other parties, and (2)that it is better than any other theory which could, conceivably, have been, but was not, advanced and considered. Each party will believe and argue both (1) and (2) even though it will seldom, if ever, be the case that he could demonstrate, to the satisfaction of all others, that (1) and (2) are true, and even though he will, in most cases, admit that the claim of each of the other parties, that his theory is as described in (1) and (2), has some plausibility.[10]

The structure of legal and political theorizing is, in Dworkin's view, similar in this respect to arguments in hard cases. Philosophers and jurists, when they debate controversial issues of legal and political philosophy, such as the nature or essence of law, and the so-called 'binding force of precedent', can frequently be viewed as arguing over which conception or theory best explains and justifies either law in general or some particular form or part of it. As in hard cases, there will invariably be more than one plausible theory or conception, and the debate is over which of these is best.

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[10]It will be argued in chapter six that if judges are (or were) required to construct, and consider the relative merits of, competing theories of law when they decide hard cases, then, contrary to what Dworkin says, there will (or would be)cases in which the judge does not believe (1) and (2). From this I shall attempt to derive, via the arguments of chapter three, the following conclusion: even if Dworkin is right about the way in which hard cases are decided, it still follows that judges will inevitably be led to the exercise of strong discretionary judgment.

In so far as Dworkin views hard cases and legal theorizing in this way, one must be careful, when investigating his views, to distinguish between (1)those theories or conceptionswhich, according to Dworkin, constitute the various plausible competing theories or conceptions of the phenomenon or concept under investigation, and (2)that theory or conception which he, Dworkin, submits as the right one, i.e. as that which offers the best conceivable explanation and justification of the phenomenon or concept in question. Since an important feature of any legal system (and thus any legal theory) is the manner in which the system (and thus the theory) deals with cases of conflicting standards of law, we must be careful to distinguish carefully between (1)*those theories which Dworkin thinks constitute the various competing theories concerning the manner in which conflict-situations must be handled, and (2)*that theory which he, Dworkin, submits as the right one. It is sometimes not abundantly clear from the discussion which Dworkin intends; whether in describing how a judge might dispose of a problematic case he is (a)showing how, on one plausible but not necessarily correct theory, the decision <u>might</u> go, or (b)showing how, on what Dworkin takes to be the correct theory, the decision <u>should</u> go. It obviously will be of great importance to be clear which is intended.

A second important preliminary remark is the following.

As noted above, Dworkin's view is that a judge must always attempt to enforce, in his decision, whatever political or legal rights individuals have under the best theory of law that can conceivably be devised to explain and justify his legal system. In response, then, to the question 'How must judges decide cases?', Dworkin might simply reply that they must attempt to decide in accordance with the best theory of law, whatever that is judged to be. The details of that theory will of course vary from system to system and from time to time within one and the same system, the reason being that the materials to be explained and justified will vary in these respects. Of course opinions on what the best theory is at any given time with respect to any given system will often vary from one individual to the next. But at the most abstract and general level, Dworkin can avoid these differences in detail and respond to the proposed question in the way described. Fortunately Dworkin does not leave the issue there. He goes on and attempts not only to provide some details of a theory of law which he believes to be the best, but to describe partially some of the competing theories. In examining Dworkin's views on law and adjudication, it will therefore be crucial to distinguish, on the one hand, any arguments relating to the general claim that judges must decide cases in accordance with the best legal theory, and on the other, any arguments or suggestions regarding what that theory, or its competitors,

might look like. Objections to the latter are not necessarily applicable to the former.

A third remark is this. It may not be clear at first glance whether Dworkin's suggestion (a)that principles describe rights which compete for control of decisions and may be compromised, (b)that rules, unlike principles, apply in an all-or-nothing fashion, and (c)that goals, unlike rights, are nonindividuated political aims, are thought by Dworkin to be (1)contestable claims which find their way into Dworkin's own theory of the Anglo-American legal systems, but not necessarily all other plausible competitors, or (2)claims which are non-contestable or non-controversial and which, therefore, will be found within any plausible competing theory. Since Dworkin describes the distinctions between rules, principles and policies as logical in character, it will be assumed that (a) - (c) are intended to be analytic and therefore part of any plausible legal theory, in much the same way as the definition of 'force' as mass multiplied by acceleration would have been part of any plausible theory of classical physics.

A fourth and final remark is the following. It was seen that Dworkin's attempt to distinguish rules and principles centres around four very different claims. First, that the answer provided by an applicable valid rule must always be accepted (the non-competition thesis), whereas an answer suggested by an applicable principle may be

rejected if the principle is outweighed by a competitor (the competition thesis). Principles compete; rules do not. It was argued that these two claims must be clearly distinguished from two further claims: that principles, unlike rules, may exert an influence on a decision and possibly force a compromise even when they are defeated (i.e. outweighed) by a competitor (the compromise and non-compromise theses). This form of compromise occurs when there are more than two possible answers consistent with the victorious principle and at least one of these violates the defeated principle to a lesser or greater degree than some other(s). The question of a principle's weight can come in, then, at two points. First, in determining which of two conflicting principles has greater weight, and second, in determining which of the possibly many decisions which respect the victorious principle should be reached. In the following discussion of Dworkin's views regarding conflicts among principles, it will be assumed, as it almost always is in Dworkin's discussions,[11] that the choice is between two mutually incompatible decisions each of which respects one of two conflicting standards. The question to be answered, then, is which standard, and therefore which answer, must be accepted. When we come to investigate Dworkin's views regarding

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[11] It is this, perhaps, which explains why the compromise and non-compromise theses are so frequently overlooked.

conflicts between rules and between rules and principles, however, the assumption will have to be dropped; otherwise the significance of the compromise and non-compromise theses will be missed entirely.

Returning now to questions (a) - (f), it can now be seen that Dworkin's reply to each of them might simply be the following. Any conflict-situation must be dealt with in whatever manner is required by the best legal theory which could conceivably be devised to explain and justify the system in which the conflict arises. At the most abstract or general level this is all Dworkin need say. But of course Dworkin has much more to say on the subject than this. In TRS he describes various conflict-resolving methods which might find their way into plausible theories of the Anglo-American legal systems. It is to his descriptions of these methods that I shall now turn.

II

Dworkin claims that principles describe rights and that these principles, and the rights they describe, sometimes compete for control of legal decisions. If this is so, then a judge will of course require a method of determining which of two or more competing principles wins the competition, and thus whose rights should prevail.[12]

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[12]One can either describe the conflict here as one between rights or as one between the principles which describe those rights. I shall use both ways of describing such situations on the understanding that they are equivalent.

In chapter four of TRS, Dworkin claims that rights (or the principles that describe them) "may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts" (TRS, p.92).[13] He goes on to say that "We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition" (TRS, p.92). It might be thought that we have here the answer to our question: principle P(1) has more weight than principle P(2) if and only if P(1) must yield to less principles and policies than P(2). But of course this will not work; the problem is merely pushed back one step. How does one determine the principles and policies to which P(1) and P(2) must yield? Presumably they must yield only to principles of less weight, and weight is the notion in need of explanation. So we must look elsewhere.

In his discussion of how recent economic analyses of law bear on his rights thesis,[14] and in "A Reply to Critics"[15] Dworkin provides a few more thoughts on how

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[13] An absolute principle is one which cannot be outweighed by a competitor. This suggests that the so-called principle is really a rule, since its answer must be accepted whenever it applies. Perhaps Dworkin would distinguish absolute principles and rules on the ground that the former can, while the latter cannot, be compromised. Although an absolute principle cannot be defeated by a competitor, the latter might be of sufficient weight to require an answer which satisfies the former less than is possible.

[14] See TRS, p.96 ff.

[15] See TRS, p.291 ff.

the relative weights of principles might be determined. He discusses in both places some typical negligence and nuisance cases in which, he claims, the principle that "each member of a community has a right that each other member treat him with the minimal respect due a fellow human being" competes with the principle that each individual has a "liberty to pursue his own affairs free from an exaggerated concern for the consequences for others" (TRS, p.308). In chapter four Dworkin considers the well-known example of the drowning man whose life can be saved at a slight cost, in terms of inconvenience, to a passer-by. According to one popular theory,[16] the victim's claim-right to concern and respect on the part of the passer-by is of greater weight than the latter's liberty-right to go about his business since "the collective utility of the pair is very sharply improved by a rescue" (TRS, p.99). On this conception or theory, the victim's claim-right (or the principle which describes it) outweighs the liberty-right of the passer-by (and the principle which describes it). Rescue is therefore required.

It is worth noting that on Hand's test the weight of a right or principle varies from case to case and depends on the particular facts of the case in which it competes.

It is not as if one could determine the weight of a principle

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[16]This is a theory which parallels Learned Hand's test for negligence, which deals only with what precautions a man who acts is required to take to avoid harm, so that his positive act shall not be regarded as negligent. For the sake of convenience, I shall refer to this parallel theory as 'Hand's theory' or 'Hand's test'.

independently of the effects of its application in some particular context. One could not, that is, first determine the weight of competing principles (by way of one's legal theory) and then go on to consider the particular facts of the case to see how the case must be decided. To the contrary, one must examine those facts in order to establish the weights of the principles as they compete in that particular context. If the drowning man could have been saved only at the cost of putting the passer-by at great risk (e.g. the latter cannot swim and suffers from acute hydrophobia) then the probable consequences, and thus the weights, would have been very different. So the fact that one principle outweighs another in some particular context does not entail that it does so always. Weight is not, on this theory, a property of principles or rights per se, but only of principles and rights as they compete within particular contexts, or as Dworkin sometimes says, "on particular facts" (TRS, p.92). Thus if a judge were to accept Hand's theory, or perhaps a generalized version of it according to which any competing principles must be weighed as prescribed by the test in its more modest or restricted form, then he could not, in constructing his general theory of law, assign weights to the various principles found within that theory. The question of weight would arise only when the theory is applied to a particular case, at which point the theory will, of course, provide a method for determining the weights of whatever principles

compete in that particular context.[17]

Of course Hand's test represents but one theory of how competing principles should be weighed. In "A Reply to Critics", Dworkin considers various competing theories ranging from a strict deontological theory which provides no room at all for a consideration of consequences, to an extreme consequentialist theory of rights which holds that "everyone has a duty to act, on every occasion, so as to produce the best results, as a utilitarian would define these, and that those who benefit from such acts from time to time have a 'right' to them" (TRS, p.313). The latter theory is not really about how principles and rights are to be weighed in cases of conflict, since on this theory there is but one principle, a version of the principle of utility, and it always prevails. Though strict deontological theories characteristically do provide room for more than one principle, they are notorious for failing to provide methods of resolving conflicts. Frequently an appeal is made to intuition: one simply apprehends or intuits, either in general or in particular cases, which principle is of greater weight. Dworkin says little about strict deontological theories other than to say that "it is doubtful how far [a] judge will succeed in finding his deontological principles

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[17] But see, e.g., TRS, p.171 where Dworkin suggests that "In a well-formed theory some consistent set of [goals, rights and duties -- or principles and policies] internally ranked or weighted, will be taken as fundamental or ultimate within the theory." This suggests that there is more than one notion of weight at work in Dworkin's remarks -- a possibility which will be investigated below.

in the best justification of the existing law..." (TRS, p.313). These theories are not, according to Dworkin, plausible competing theories of how legal principles are weighed in the Anglo-American legal systems.

Dworkin wishes to say, then, that any plausible competing theory will allow some room for a consideration of consequences. Hand's test, in both its restricted and expanded forms, gives a prominent place to considerations of consequence; but there are many others which do so as well. Dworkin claims that a theory might "specify special circumstances in which the crucial question is not whether the collective utility of the pair will be sharply advanced, but only whether it will be marginally advanced" (TRS, p.99). This might be the relevant question when, for instance, "one man's positive act, as distinct from a failure to act, creates a risk of direct and foreseeable physical injury to the person or property of another" (TRS, p.99). In "A Reply to Critics", he adds that a theory

> may provide a higher standard of care or sacrifice when the risk is of damage to persons rather than to property...and it may make certain competing rights, like the right to express one's opinion in politics or to choose one's associates, so important that these fail, in concrete cases, only when the consequences of their exercise would be immediate and grave, while it may make other rights, like the right to conduct the business one wishes on a particular piece of land one owns, so much less important that much less grave consequences might be sufficient to deny the right in particular circumstances (TRS, p.314).

This important passage raises some interesting questions about the meaning of Dworkin's claim that principles

have weight. As was seen, on Hand's test, in both its restricted and expanded forms, weight seems to vary from case to case and is not a property of principles per se, or in abstraction from particular contexts. Rather it is a property of principles and rights as they compete on particular facts. To say that P(1) outweighs P(2) is to say that it does so in a given context. On (what I have been calling) Hand's test, it is to say (a)that in that particular context the answer suggested by P(1) must be accepted over the answer suggested by P(2). But it is also to say (or at least imply) (b)that the consequences of accepting P(1)'s answer in that context are much better than the consequences of accepting P(2)'s answer. Given Hand's theory, proposition (a) is true if and only if proposition (b) is true.

Now if, as Dworkin suggests it might, a theory were to "make certain competing rights, like the right to express one's opinion in politics or to choose one's associates, so important that these fail, in concrete cases, only when the consequences of their exercise would be immediate and grave", then anyone who accepted that theory would not, in saying, for example, that the principle of free political speech, P(1), outweighs the principle of equal concern and respect, P(2), imply proposition (b), though he would of course imply proposition (a). The reason (b) would not be implied is that the consequences of following P(1) instead of P(2) must be immediate and

grave before P(2) outweighs P(1). It is not sufficient merely that those consequences be worse, or even much worse, than the consequences of following P(2). Thus the consequences of following P(1) might be far worse than the consequences of following P(2), even though P(1) outweighs P(2).

According to Dworkin, then, the threshold of bad consequences necessary to outweigh principles in cases of conflict can be set at a variety of levels. With respect to one principle, P(2), it might be the case that for any competitor, P(n), P(n) outweighs P(2) in circumstances C if and only if the consequences in C of following P(n) are simply better than the consequences of following P(2). In this case we might say that P(2)'s 'weight threshold' is very low. With respect to another 'more important' principle, P(1), it might be the case, for example, that for any competitor, P(n), P(n) outweighs P(1) if and only if the consequences of applying P(1) instead of P(n) are "immediate and grave". In this case we might say that P(1)'s weight threshold is very high.

The possibility of there being these different thresholds raises the following important question. If the weight thresholds of P(1) and P(2) are as described, is it not natural to say that P(1) is a 'stronger' or 'more important' or 'weightier' principle than P(2)? Dworkin suggests as much when he says that the right, and thus the principle, of free speech may be viewed as "so important"

that its threshold is set very high. Since Dworkin employs the terms 'weight' and 'importance' interchangeably,[18] one may assume that in his view P(1) may be said to have more weight than P(2) if its threshold is set higher.

This notion of weight as involving thresholds is of course very different from the one discussed earlier. On the earlier account weight is a property ascribable to principles and rights only within particular contexts, and as contexts vary so too will the weights of principles. But if, in saying that P(1) has more weight than P(2), one means to say that its weight threshold is higher, then weight is not a context-relative notion. The weight of a principle is set by one's legal theory and does not vary from one case to the next -- though of course the threshold might vary from one theory to the next, depending on the importance ascribed to the principle within a particular theory. The difference between these two different notions might be marked by calling the one 'threshold weight' and the other 'context weight'. A principle P(1) might, in a given situation, contextually outweigh another principle P(2) even though P(2) has a higher threshold weight than P(1). The consequences of following the principle of free political speech, P(2), might, for example, be in some case grave and immediate.

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[18] See TRS, p.26 where in his first discussion of principles Dworkin says "Principles have a dimension that rules do not -- the dimension of weight or importance " (emphasis added).

Two important points arise if, as I have argued, there are at least two very different notionsof weight implicit in Dworkin's discussions. First, it will be of crucial importance to be clear which notion is being employed in a given context of discussion. For instance, Dworkin's claim that a well-formed theory of law will assign weights to the various rights, obligations and goals it sets out requires the impossible if 'weight' is taken to mean context weight. One cannot assign context weight in abstraction from particular contexts, and the various contexts in which principles can compete with one another are infinite in number. If, however, 'weight' is taken to mean threshold weight, a property which is not context-relative, then the task is not quite so onerous and can perhaps be completed. Second, the meaning of the term'weight' may well vary from one legal theory to the next. If, for instance, one holds a (deontological) theory about rights and principles, a theory according to which the weight of a principle or right does not vary from one context to another and is totally independent of consequences, then one's understanding of 'weight' (we might call this notion of weight 'intrinsic weight') will be very different than it would be if one held, say, (the parallel to) Hand's test of negligence. On the former (deontological) theory, one would find no room for threshold weight -- which sets the threshold of bad consequences necessary to outweigh a right or principle -- because consequences are irrelevant

to whether one principle outweighs another. One would also have little reason to employ the notion of context weight, since the weight of a principle would not vary from one context to another. On the former theory (the parallel to Hand's test) one must, of course, find room for context weight, and there is room for threshold weight as well. So Dworkin's suggestion that "[p]rinciples have a dimension that rules do not -- the dimension of weight or importance" is, given his own account, both incorrect and misleading. At the very best it is misleading in so far as it masks the fact that, in Dworkin's view, there are different sorts of weight and these may vary from one theory to the next and within one and the same theory.

So far it has been seen that Dworkin allows, as possible, theories according to which the context weights of competing legal principles or rights can sometimes be determined by examining the consequences for litigants of following these principles in particular cases. In reply to criticisms by Kent Greenawalt, however, Dworkin goes much further than this.[19] He allows, as conceivable, and indeed plausible, theories which make the consequences for third parties relevant to the question of which litigant's right, and the principle under which he has that right, is of greater weight.

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[19]See Kent Greenawalt, "Policy, Rights and Judicial Decision".

Greenawalt has us consider two cases. In the first case, C(1), the defendant, D, starts up a business in a remote area that necessarily involves offensive odours and air pollution. An affected local resident, P, the plaintiff, demands that D stop polluting the area. The same is true of the second case, C(2). All that distinguishes C(1) and C(2) is that in the former case the surrounding population is very small, whereas in the latter case, C(2), it is very large. With respect to P and D themselves, however, C(1) and C(2) are identical. D creates the same amount of pollution and the effects upon P of D's actions are identical. Greenawalt submits that in C(1) the factory owner, D, has a right to continue his polluting practices and a right to a court's decision in his favour but in C(2) he does not. The question is: 'How does one distinguish C(1) and C(2)?'.

Dworkin agrees with Greenawalt that there is a significant difference between C(1) and C(2) and that different decisions are required in each. He construes the two cases as typical nuisance cases in which the familiar principle that each member of a community has a right that each other member treat him with the minimal respect due a fellow human being, P(1), competes with the principle that each has a liberty to pursue his own affairs free from an exaggerated concern for the consequences for others, P(2). Now if, as on Hand's test, the weights of these two competing principles are to be determined exclusively in terms of the

effects upon P and D, then of course C(1) and C(2) are indistinguishable. P is harmed no more and no less in C(2) than in C(1). But if the consequences for individuals other than P and D can influence the relative weights of P(1) and P(2), then it does not follow from the fact that P is harmed to the same extent in C(1) and C(2) that these two cases are indistinguishable. Dworkin's view appears to be that the nature of D's action, and the principles under which D and P have rights in C(1) and C(2), are such as to make these consequences relevant. Dworkin writes:

> Sometimes the considerations that increase or decrease the force of the claim-right are automatically considerations that decrease or increase the force of the abstract liberty...In such a case, considerations of consequence will be limited to considerations affecting the interests of the parties directly concerned. But sometimes considerations of consequence arising from the interests of other parties will affect either the force of the claim-right or the force of the liberty independently, because arguments of fairness that support these rights make such considerations relevant. The second nuisance case just discussed [C(2)] is one example: the greater number of the people with competing abstract claim-rights who would be adversely affected made it no longer morally plausible for the defendant to claim a concrete liberty-right to pollute (TRS, p.308).

The argument appears to be this. The fact that D's action is of such a nature as to harm the interests of a great number of third parties who, like P, have claim-rights against D, is a crucial factor which weighs against D's liberty-right in its competition with P's claim-right.

It weighs against D's liberty-right to such an extent that

> even if each plaintiff in the second case [C(2)] had only the same interest to assert that the plaintiff had in the first [C(1)], the defendant's moral freedom, given a general obligation to treat his neighbours with respect, is much less. It might well seem plausible, under these changed circumstances, to insist that each plaintiff's right to that level of respect yields a concrete right to have the nuisance abated in this case. If we think that the decision in the second case is correct, it is because we feel that it does (TRS, p.307).

According to Dworkin, then, the context weight of P's claim-right remains constant in C(1) and C(2). The context weight of D's liberty-right, however, varies inversely as the number of third-party claim-rights to concern and respect with which that liberty-right competes. There will come a point at which the number of third-party claim-rights in competition with D's liberty-right decreases the latter's context weight to such an extent that any one claim-right will be of sufficient weight, in itself, to contextually outweigh that liberty-right. That point is crossed in C(2). P's claim-right, though it has the same context weight as it had in C(1), is now of sufficient weight to defeat D's weakened liberty-right.

If this is a proper characterization of a difficult argument, then the obvious question which comes to mind is this. Why should one suppose that the mere number of third-party claim-rights with which D's liberty-right competes is a factor which decreases the latter's context weight in its competition with P's claim right? Put in

another way, why should the mere fact that there are others who are harmed by D's actions influence whether D shows P the concern and respect to which he, P, is entitled? Dworkin's answer to these questions is puzzling. He writes:

> It is...an important part of conventional morality that someone who shows 'decent respect for others' must take into account the number of people who will be damaged by what he does as well as the amount of damage that each will suffer. If the same action, for the same benefit to himself, injures a larger number of people, even in the same degree, then he shows less respect for each in persisting than if the number injured had been smaller (TRS, p.307).

Prima facie this explanation is very problematic. It seems false that D shows less concern and respect for P in C(2) than he does in C(1). It may be true that he shows less concern and respect for others in C(2) than in C(1); yet this seems due not to the fact that he shows each individual less respect in C(2) than in C(1), but to the fact that there are more individuals to whom he fails to show concern and respect. Dworkin is certainly correct that it is an important part of conventional morality that the number of people who will be harmed by what one does and not merely the amount of damage each will suffer is (normally) a crucial factor in the assessment of one's actions.[20] Thus if one harms two hundred

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[20] I add 'normally' because it may be true that harming or killing ninety nine is no better than harming or killing one hundred. Amount of harm done may not be totally commensurate with numbers harmed.

individuals, this is normally worse, all else being equal, than if one harms only two. It is not correct, however, that those very same numbers necessarily influence the level of harm done each individual in particular.[21] The same seems to be true of the amount or degree of respect one shows to others in one's actions. You treat me with no greater respect or concern if you torture me alone than if you do the same to one hundred others as well, though what you do in the second case, i.e. torture not only me but one hundred others as well, is undoubtedly far worse.

This last observation is crucial in so far as the very point of a right-based theory is normally thought to be the way in which it centres upon the individual and makes the question whether he gets certain benefits and protections largely, perhaps even totally, independent of the general consequences for others. It is this which is thought by right-based theorists to be a prime reason for choosing their approach over a utilitarian one. To make the individual's right to concern and respect depend on the number of others who are similarly harmed seems to rob that right of its very point.

This last point leads to another of some significance.

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[21] If it did, then the amount of harm done would increase exponentially in proportion to the numbers harmed. If one harmed two people, then one would create more than twice as much harm than if one harmed only one -- in what one is inclined to call the same degree.

In "A Reply to Critics", Dworkin makes the following claim:

> [T]he transactions and events that give rise to common law problems are drawn from relatively familiar sorts of situations, and these are situations exhibiting the familiar conflict between the abstract right of members of a community to a measure of concern from those whose acts affect them, and the abstract liberty of others who wish to pursue their own interests and ambitions (TRS, p.323).

In light of this and earlier claims made by Dworkin it is tempting to argue as follows:

If (1)all common law problems (and cases) exhibit this familiar conflict between the claim-right of P (plaintiff) to concern and respect, R(p), and the liberty-right of the defendant, D, to be free from an exaggerated concern for others, R(d); and

(2)the context weight of R(d) in its competition with R(p) is a function, not only of the effects on D of denying him that right in that context, but of the number and context weights of any third-party claim-rights, R(t), with which it competes in other contexts; and

(3)a third party has a claim-right, R(t) to concern and respect on the part of D which competes with R(d) if and only if that third party is, like P, affected adversely by D's actions;

then it would appear to follow

(4)that Dworkin is committed to the view that all common law cases are to be decidedas an act utilitarian would decide them.

Whether P's claim-right to concern and respect from D, R(p), is of sufficient weight to outweigh D's liberty-right to do what he wishes, R(d), will always be a function of the extent to which others are harmed by D's actions. In other words, whether D has a 'concrete right' to perform actions which adversely affect others will depend on how much harm

he produces. But if this is true, then it seems to follow that under common law an individual has a "right to nothing but his expectations under general utility" (TRS, pp.99-100). Yet this is a proposition which, if accepted by Dworkin, robs his 'rights thesis' (that judicial decisions enforce existing rights) of any real significance. The proposition that judges must and always do enforce existing rights in their decisions reduces, in the end, to the proposition that they must always decide as an act utilitarian would decide.

There are at least two reasons, however, why it would be a mistake to draw conclusion (4). First, the argument ignores the fact that the threshold weights of R(p) and R(d) need not be such that R(d) is outweighed by R(p) whenever the bad consequences for those affected by D's actions are greater (on some utilitarian scale) than the good consequences for D. A legal theory might place far greater emphasis on individual liberty than would be allowed under such a strict act-utilitarian theory of 'rights'. It might, for example, stipulate that the bad consequences for affected third parties must be <u>far greater</u> than the good consequences for D before the latter's liberty-right is outweighed. In this case, D might have a right to pollute even in those situations in which an act utilitarian would require that he stop. So even if Dworkin holds that the context weights of R(d) and R(p) depend entirely on

consequences for all those affected by D's actions, he is not thereby compelled to accept conclusion (4).

Secondly, it would be a mistake to suppose that Dworkin would accept premise (2). Although he does rely totally upon consequences for affected parties in his attempt to defeat Greenawalt's putative counter-example, and although he does admit that the theory of law presupposed in premise (2) is conceivable, it is clear that he neither accepts the theory himself, nor considers it a plausible competing account of how legal rights in common law cases are to be weighed against one another.[22] Dworkin's view is that plausible theories will find some room for consequences "not only for the two [litigants] but for society generally", and that C(1) and C(2) can be distinguished (a)regardless of which plausible theory one happens to accept, and (b) regardless of what other elements one might have in one's theory of law, and in terms of which weight is to be established. But he denies that these consequentialist considerations need be the only relevant considerations. With respect to the sorts of cases of which C(1) and C(2) are examples, Dworkin writes that

> consequentialist aspects of what it is reasonable for a landowner to expect are mixed with other, non-consequentialist aspects, like the question

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[22] It is noticeable that in "A Reply to Critics" Dworkin seems to accept the conceivability of such a theory, whereas in chapter four of TRS the view seems to be that the theory would be incoherent. Compare theory (1) p.313 with Dworkin's suggestion at p.99 that an argument based on that theory could not be construed as an argument of principle, i.e. as an argument purporting to establish a right.

> of which of two conflicting uses was prior, or, as in cases of the present controversy about landing rights for Concorde, which is more 'natural' or to be preferred on grounds of political morality that are not consequentialist. Popular theory draws on all these, and other, considerations in judging what fairness requires in such cases, and ordinary men and women disagree about their right mix from case to case, though rarely do they deny any role at all to considerations of consequence (TRS, pp. 300-301).

So although the consequences for third parties will, on any plausible theory, be relevant in a common law case, they will not be the only relevant factors. Premise (2), then, must be replaced with the following:

> (2)*on any plausible theory, the weight of R(d) in its competition with R(p) is, in part, a function not only of the effects upon D of denying him that right in that context, but of the number and context weights of any third-party claim-rights, R(t), with which it competes in other contexts;

The meaning of 'in part' will of course vary from one theory to the next and will depend on which other factors a particular theory happens to find relevant and how, on that theory, these are to be "mixed" with consequentialist considerations. In any event, once premise (2) is replaced with premise (2)*, a commitment to the view that every common law case must be decided as an act utilitarian would decide it no longer follows. All that follows is a commitment to the view that act-utilitarian considerations are always relevant to, though not dispositive of, the question how such a case must be decided.

To sum up, Dworkin's view is that the weights of competing principles and rights are determined by tests

which vary from one legal theory to the next. It also appears to be his view, at least implicitly, that there is no single notion of 'weight'. To the contrary, the meaning of the term 'weight' sometimes varies from one theory to the next, and even within one and the same theory. As for which tests are called for by the correct theory of the Anglo-American legal systems, Dworkin says little other than that they will assign some role to (1) the effects upon litigants of accepting an answer suggested by each of the competing principles under which they claim rights, (2)the effects of doing so on affected third parties, or "society in general", (3)various other non-consequentialist factors. As was seen, Dworkin's account of how (2) may be relevant (in relation to C(1) and C(2)) raises serious questions. In particular it raises the question whether, in making the rights of litigants vis-à-vis one another depend on the harm done to third parties, one is not stepping beyond a sole concern for the rights of those litigants. Dworkin's curious attempt to explain how and why this over-stepping can be avoided in the cases proposed by Greenawalt (one shows each less concern and respect if the numbers are greater) seems ultimately to fail.

III

I should now like to turn and consider Dworkin's position regarding the interaction between principles (or

principle-based rights) and rules (or rule-based rights). It was seen that in Dworkin's view principles 'compete' for control of decisions, while rules apply in what Dworkin terms an "all-or-nothing" fashion. "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision" (TRS, p.24). This claim about rules was called the 'non-competition thesis'. Now given the non-competition thesis, one is led quite naturally to the following conclusion. It is Dworkin's view that if a valid rule and a legal principle both apply to a case and lend support (albeit in logically different ways) to mutually incompatible decisions, then one of the following two alternatives must be accepted:

(a) the rule and the principle both survive intact and the rule is followed; or

(b) the principle is followed and the rule is therefore invalid (or invalidated).

Nevertheless, Dworkin seems to entertain a third possibility. In his dicussion of Riggs v. Palmer, Dworkin writes:

> The court began its reasoning with this admission: 'It is quite true that the statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way...be controlled or modified, give this property to the murderer.'* (115 N.Y. 506, 22 N.E. 188 (1889)) But the court continued to note that 'all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his

> own iniquity, or to acquire property by his own crime.'* (*Ibid., at 190) The murderer did not receive his inheritance (TRS, p.23).

Dworkin proposes Riggs as a telling counter-example to Hart's model of rules; as a case in which principles, and not merely rules, properly figured in the court's decision. One is therefore safe in assuming that Dworkin considers the reasoning in Riggs to be cogent; otherwise the case could hardly be thought by him to serve as a counter-example to the model of rules. Yet if the court's reasoning is cogent, then it seems to follow that the following is a distinct possibility:

> (c)the rule is valid, but its force or effect is controlled or modified by its interaction with the principle(s).

The question which must now be asked is whether (c) is logically compatible with the non-competition thesis, the proposition that valid legal rules, unlike principles, "set out consequences that follow automatically when the conditions provided are met" (TRS, p.25).

Prima facie (c) does not appear to be compatible with the non-competition thesis. According to that thesis, whenever a valid rule applies to a case its answer must be accepted. It would appear that the statutory rules regulating wills and the devolution of property were both valid and applicable to Riggs -- though as will be seen below, this appearance may be deceptive. Thus, given the non-competition thesis, their answer, decision for the defendant, should have been accepted.

But Dworkin wants to deny this. He agrees that it was proper for the court to decide for the plaintiff. There were certain fundamental maxims or principles of the common law which somehow 'controlled' or 'modified' the 'force' or 'effect' of the statutes. The crucial question, of course, is 'How can this be done, if the non-competition thesis is true?'. There appear to be two possible answers:

(i) the interaction of the principle(s) with the rule(s) renders or shows the latter to be invalid; or

(ii) the interaction somehow renders or shows the rule(s) to be non-applicable.

If a rule is both valid and applicable, then its answer must be accepted. Thus if its answer is not to be accepted, then it is either invalid or it fails to apply.

If what is meant in suggesting that the effect or force of the relevant statutory rules in Riggs were controlled or modified is that (i) is true, then one's meaning cannot, of course, be captured by (c). On option (c), the rule is valid while its force or effect is somehow modified. According to (i), however, the rule is invalid (or invalidated). Perhaps Dworkin does wish to explain Riggs in the way suggested in (i). Perhaps he wishes to say that the court, in coming to the decision it did, rendered or declared the statutory rules governing wills and the devolution of property invalid, and replaced them with new rules containing exception clauses which deprive a murderer of his

inheritance. When one alters a 'valid' rule R, one in effect renders or shows it to be invalid and replaces it with another rule, R', which is the valid rule.

I shall leave aside the question whether it would be at all plausible to suppose that any sort of alteration in a rule necessarily results in its destruction and replacement. For if this is the line Dworkin wishes to take, then one wonders what is left of his claim that valid rules necessitate decisions. If what has been accepted as a valid rule can be replaced in this way when it conflicts with principles of the common law, then one of two things must be accepted. First, one accepts that until the decision to replace a rule has been taken, the rule is in fact valid. The decision to alter R invalidates it. The difficulty with this, of course, is that the validity of an applicable rule would no longer entail that its answer must be accepted. Dworkin accepts this alternative only at the cost of contradicting the non-competition thesis which says that a valid rule's answer must always be accepted. Thus one is left with the second option: one accepts that a 'conflict' between a rule and principles (of the common law) shows that the rule never really was valid at all. This approach avoids the inconsistency of the first, though it is perhaps not without its difficulties. First, there seems to have been no suggestion in Riggs that the relevant statutory rules (or the pertinent parts

of them, i.e. those parts under which Palmer seemed entitled to his inheritance) were 'invalid'. Second, the approach leads to the conclusion that there never really was a genuine conflict among legal standards in Riggs. The relevant rules established by the statutes did not serve as "counter-instances" to the principle that no man may profit from his own wrong, because they were not legally valid rules (TRS, p.25). The principle could not have been responsible for a "change [in] an existing rule of law" (TRS, p.37). There was no "existing rule of law" to be changed.

Perhaps, then, Dworkin would do well to avoid explaining Riggs in the manner suggested in answer (i). This leaves answer (ii): the interaction of the statutory rules and the common law principles or maxims in some way renders the former non-applicable (but not invalid). Once again there seem to be two possibilities: (a)the rules are altered in some way so that they do not apply to Riggs, or (b)the rules are given an interpretation according to which they do not apply. (a) is of course similar to (i), the first answer just considered. The difference is that one no longer assumes, as one does with (i), that altering the rules necessarily results in their invalidity and in their being replaced with different rules which are now, or always were, the valid rules. To the contrary, one assumes that a valid rule, R, could actually

be altered in some way, not merely accepted as it is, or replaced with a different rule. Thus on this account one might say that the same rules survive Riggs, though in a slightly altered form.

A major problem with this way of describing things is that there will surely come a point at which one no longer can say that the same rules remain. To the contrary, one will have to say that new rules have been substituted, and the difficulty, of course, is in discovering a principle or criterion which tells one when this point has been reached.[23] But this problem need not detain us; it is clear that if Dworkin wishes to describe Riggs in this way he will have seriously undermined his conception of rules. Any standard which one is able to modify so that it does not apply cannot, with any degree of plausibility be said to "set out legal consequences that follow automatically when the conditions provided are met" (TRS, p.25). That a rule is both valid and applicable would not, as Dworkin seems to suppose it does, entail that its answer, its "consequences", must be accepted. To the contrary, one could accept both the rule's validity and its applicability, and at the same time go on to alter it in such a way that it does not apply.[24]

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[23]This is a problem of the 'identity' of rules.

[24]But see TRS, p.38 where Dworkin says that a lawyer must recognize that "judges change old rules and introduce new ones." See also, TRS, p.37 where Dworkin writes: "...in Henningsen the previously recognized rules about manufacturers' liability were altered on the basis of principles..." (emphasis added).

So one is left with (ii)-(b), the second alternative under answer (ii) -- that the relevant statutory rules governing wills and the devolution of property were given an interpretation according to which they did not apply to Riggs. This may well be the proper way in which to view Riggs, though it seems at least as plausible to suppose that the court followed option (ii)-(a).[25] The reason is this. After noting that the statutes, if literally construed, and if their force and effect can in no way be controlled or modified, give Palmer his property, the court went on to say:

> The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it could never have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and if it had been supposed necessary to make such provision of law to meet it, it cannot be doubted that they would have provided it.[26]

Here the court seems to suppose that the rules do in fact give the defendant his inheritance. The suggestion seems to be that if the law-makers had been aware of this

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[25] Dworkin, however, views Riggs as a case in which the statute of will was given a 'new interpretation'. See TRS, p.29.

[26] Riggs v. Palmer, 115 N.Y. 506 at 509, 22 N.E. 188 (1889) at 189.

unfortunate fact, and had been aware that someone, such as Palmer, might attempt to exploit it, they would have framed their rules differently -- they would have provided an exception for donees who murder testators to make the will operative. But the important point is that, in the court's view, the law-makers did not in fact provide such an exception; and because of this the court seems to take upon itself the task of providing the exception on the assumption that the 'general intentions' of the law-makers could not have been that their rules should in this way lead to the violation of fundamental principles of the common law.[27] If this is a proper reading of Riggs, i.e. if the court followed (ii)-(a) and not (ii)-(b), then, as argued above, the very case Dworkin proposes as a counter-example to the model of rules in fact serves to undermine his conception of rules.

Let us suppose, however, that Riggs can indeed be viewed as a case in which the statutes governing wills and the devolution of property were subject to interpretation, not alteration -- that the court followed (ii)-(b) and not (ii)-(a). There are some grounds for supposing this. For instance, immediately following the passage quoted above, one discovers the following claim:

> It is a familiar canon of construction that a thing which is within the intentions of the makers of a statute is as much within the statute

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[27] I am here using 'general legislative intention' in the way suggested by MacCallum. See chapter one above.

> as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.[28]

The court might be taken as claiming here, in a somewhat confused way, that properly understood, and as they stand, the statutes do not apply to Riggs; the case is not "within" the scope of the statutes. If this is so, then the court has implicitly accepted one of the main propositions defended in chapter two: that the question whether a rule applies to a case is not necessarily identical with the question whether its plain meaning makes it applicable. In this instance, the rules are thought not to apply to Riggs since following them in that case would conflict with any conceivable general legislative intention or aim for the sake of which the rule might have been enacted. The legislators could not have intended that their statutes lead to results which violate fundamental principles of the common law.[29]

Whether Riggs is properly understood in this way is not, for the purposes of this investigation, the important question. The crucial question is whether this view of rule-application, as involving more than plain meaning, is consistent with the non-competition thesis, that rules, unlike principles, necessitate decisions. There seems no

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[28] Riggs v. Palmer, 115 N.Y. 506 at 509, 22 N.E. 188 (1889) at 189.

[29] Cf. Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180 and Ridge v. Baldwin [1964] A.C. 40.

reason to suppose that it is not. The situation is unlike the one in which an applicable valid rule is altered so as not to apply. Here the decision is that properly understood, and as they stand, the rules do not in fact apply. Thus one avoids having to say that the answer provided by an applicable valid rule need not be accepted. Conflicting principles determine not that a valid rule should be modified, but that it does not, despite its plain meaning, in fact apply. It may of course be much more difficult to determine in this way whether a rule applies, and whether it therefore necessitates a decision, than if the question were taken to depend exclusively on plain meaning. But the difficulty of determining whether a valid rule applies has nothing to do with whether it necessitates a decision. To say that such a rule necessitates a decision is not to say that it is easy to determine whether or not it applies; it is to say that if it does apply, then its answer must be accepted.

The above view of rule-application as involving more than just plain meaning seems, then, to be quite consistent with Dworkin's conception of rules. A problem with the approach, however, is that it leads one, as with option (i) above, to deny that a case such as Riggs involves a genuine conflict among legal standards. There never really was a conflict because the statutory rules, properly understood, did not in fact violate the principle

that no man may profit from his own wrong. Riggs is not, on this interpretation, a case in which the court "change[d] an existing rule of law" (TRS, p.37). This particular result is perhaps not too troublesome. What seems problematic, however, is the general conclusion the above discussion of Riggs seems to reveal. Any case which might appear to involve a genuine conflict between an existing rule of law and a principle, and in which it might appear that the principle has forced an alteration in the rule, or required its replacement with a new rule, will have to be described, given the non-competition thesis, in such a way as to deny that there ever was a genuine conflict. Either the rule was invalid all along, or its proper interpretation shows that it does not, and never really did, conflict with the principle. In short, Dworkin is led to deny that a valid rule could ever be altered or replaced for the sake of an important fundamental principle. Yet he does describe Riggs as a case in which "an existing rule of law" has been changed, and he does describe Henningsen v. Bloomfield Motors, Inc.[30] as a case in which "the previously recognized rules about automobile manufacturers' liability were altered on the basis of the principle [that the court cited in its opinion]" (TRS, p.37, emphasis added). Given the non-competition thesis, however, this could not, logically, have been the case. I conclude, then, that the

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[30]32 N.J. 358, 161 A.2d 69 (1960).

fact that the "force or effect" of a rule can be, and undoubtedly is, sometimes "modified or controlled" by principles, a fact seemingly acknowledged by Dworkin, raises serious difficulties for his conception of rules. The non-competition thesis must, it would appear, be rejected.[31]

IV

Turning now to cases in which two rules (or rule-based rights) conflict, Dworkin's view is that one of the conflicting rules cannot, logically, be a valid rule at all. It cannot, therefore, give rise to a competing or conflicting right. If both rules were valid, then both of their answers would have to be accepted, since the answer provided by a valid rule must, in virtue of the non-competition thesis, be accepted in all cases to which that rule applies. But to say that two rules conflict with one another is to say that they supply mutually incompatible answers which cannot, without inconsistency, both be accepted. Thus it follows that (barring inconsistency) at least one rule cannot, logically, be valid. Dworkin notes that a

> legal system might regulate such conflicts by other rules, which prefer the rule enacted by

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[31]For further discussion of Dworkin's views regarding the interaction between rules and principles see Tapper, "A Note on Principles", especially p.630; Christie, "The Model of Principles", p.660 ff.; and Note, "Understanding the Model of Rules", p.921 ff.

the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques.) (TRS, p.27).

Dworkin of course wishes to exclude, as logically incoherent, any method of regulation which leaves two conflicting rules both valid.[32] Any system which prescribed such a method, or any judge who included such a method within his theory of law, would be guilty of violating the non-competition thesis, according to which it is logically impossible for two valid rules to conflict.

Now there seems no good reason for accepting this view of rule-conflicts, and thus no good reason for accepting the non-competition thesis. As Stephen Munzer notes,

> there is nothing in the bare notion of satisfying criteria that excludes the possibility that the set of criteria of validity possessed by a legal system should prove mutually incompatible with respect of the set of possible rules that might satisfy them.[33]

The manner in which conflicts are handled will of course depend, as Dworkin suggests, upon the sorts of conflict-resolving procedures accepted and practised within the particular system in question. Yet there seems no reason to suppose that those procedures could not be such as to allow a 'defeated' rule to survive both valid and intact.

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[32] But note: if one of the rules cannot be valid, then once again there is no genuine conflict among legal standards.

[33] "Validity and Legal Conflicts", p.1151.

To say that a rule is a valid rule of a legal system is not necessarily to say that its answer must be accepted in all cases to which it applies. It might be to say, simply, (a)that the rule satisfies the criteria of validity of the system, and (b)that the answer it provides must be accepted unless it conflicts, in a certain case, with another valid rule which, given the accepted conflict-resolving procedures, is the preferred rule. Thus in a case of conflict, C(1), rule R(1) might be 'preferable' to R(2). The second-order conflict-resolving procedures or rules of the system state, for instance, that any rule laid down by a superior court, e.g. R(1), overrides, in cases of conflict, any rule laid down by an inferior court, e.g. R(2); R(1) must therefore be followed in C(1). But there might well be another case, C(2), in which only R(2) applies. In C(2) the answer required by R(2) must be accepted. Yet again, there might be a case, C(3), in which R(2) and R(3) apply. If the court which laid down R(2) is superior to the court which laid down R(3), then the answer provided by R(2) must be accepted. In this case, R(2) is the preferred rule.

It is clear that one can imagine legal systems in which situations such as described can occur. It follows that the notion of two conflicting yet nonetheless valid rules is not, as Dworkin seems to suppose, logically incoherent. This brings us to another point of some significance. If there is nothing logically incoherent in

the notion of a valid rule whose answer is not accepted in a particular context because it is overridden by another valid rule, then what reason could there be for supposing that a valid rule could not, logically, be overridden in a particular context by a principle? Can one not imagine a conflict-resolving rule according to which, say, a valid rule is overridden in any case in which accepting its answer would lead to the gross violation of certain important or fundamental principles of the common law?[34] If a legal system were to adopt such a second-order rule, then a case such as Riggs might well be explained as a case in which a statutory rule is overridden by (not invalidated, altered or reinterpreted in the light of) certain fundamental principles of the common law. The statutes would, of course, continue to determine results in cases where they did not, as they did in Riggs, conflict with these principles.

It should perhaps be stressed that I am not suggesting here that Riggs may in fact be explained in this way; nor am I suggesting that the Anglo-American legal systems in fact contain second-order rules according to which principles (or rules) can override (other) valid rules in certain cases. The extent of my intention is to suggest that there could,

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[34]The second-order rule might, of course, say that the valid rule must nevertheless be followed, or even that the rule is invalidated in virtue of the conflict. The point I wish to make is that it need not say either of these two things.

logically, be a system in which such rules were to be found and in which, therefore, cases like Riggs could be explained in their terms. It may well be that as a matter of empirical fact, the conflict-resolving rules accepted within the Anglo-American legal systems do not allow valid rules to be overridden in this way. But if in fact they do not, it is not because the concept of a valid rule requires this. That a standard is a valid legal rule does not, in itself, entail that its answer must always be accepted. To the contrary, the system in which the rule is found might be such that the rule's answer must be accepted unless it is overridden by (a)a preferred rule, or (b)a preferred principle.

So once again there is reason to reject the non-competition thesis. It is quite conceivable that a valid legal rule should, like a principle, survive a conflict-situation in which the answer it provides is not accepted. But if this is so, then the sharp contrast Dworkin attempts to draw between rules and principles begins to weaken. Yet it may not disappear entirely; the above considerations do not serve to refute the compromise and non-compromise theses, which, as was argued earlier, are important, yet frequently overlooked, components of Dworkin's attempt to distinguish rules and principles. It is here, perhaps, that a plausible contrast between rules and principles is to be found.

Dworkin might argue as follows. Leave aside the question of when rules contribute to decisions; whether, that is, the non-competition thesis is true and rules contribute whenever they are both valid and applicable. However one answers that question it will remain true that whenever a rule does contribute to a decision it contributes a decisive answer. The rule either specifies an answer which, in the circumstances, must be accepted, or it has no effect whatsoever. If a rule is overridden, then, unlike a defeated principle, it can have no effect on the decision. Principles are different in this respect. A principle can contribute something without contributing a decisive answer. It can provide a reason for choosing among answers, even if it itself does not specify an answer, and it can force a compromise between itself and a competitor, even if it is contextually outweighed and therefore defeated by that competitor. A defeated principle can force a compromise in the sense that it may require that an answer be chosen which satisfies the victorious principle to a lesser extent than is possible.[35] Principles can do this because, unlike rules, they do not specify particular answers which must be accepted if they are followed. To the contrary a principle provides grounds for choosing among answers which are not actually specified

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[35] On this see above p.117 ff.

in that principle. For instance, the principle requiring concern and respect for one's neighbour, P(1), provides a reason for choosing d(4), that the defendant shut down his factory entirely, over d(3), that he reduce production by one third, and for choosing d(3) over d(2), that he reduce by one quarter. But the principle does not specify any one of these answers as the one which must be chosen. Rather it provides a reason (that concern and respect will be shown the plaintiff) which, to use Dworkin's words, "argues in one direction", i.e. towards answer d(4) (TRS, p126). But this does not entail that d(4) must be accepted. The liberty principle, P(2), provides a reason which argues in the other direction, i.e. towards answer d(1); and which answer is required will depend on the relative context weights and threshold weights of these two competing principles.

Rules, Dworkin would argue, are different in this respect. They specify or determine particular answers, not merely reasons for choosing certain answers over others. Unlike principles, rules "set out...consequences [i.e. answers] that follow automatically when the conditions provided are met" (TRS, p.25).[36] In other words, their logical form is that of the conditional. A rule can always be expressed in the form: if p is the case, then q must be the result. It may, of course, be very difficult

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[36] ...and when they are neither invalidated, altered, reinterpreted or overridden.

sometimes to determine whether condition p is in fact satisfied, or what the exact consequences, q, are, but a rule nevertheless does set out conditions and consequences, and it is this which separates it from a principle. The latter does not even purport to do this. So even if the non-competition thesis must be rejected, a logical distinction may still be drawn in terms of the compromise and non-compromise theses.

It might be thought that the non-compromise thesis is falsified by the following considerations. As Dworkin himself admits, rules often contain words such as 'unreasonable', 'unjust', 'negligent', 'significant' and so on.[37] Yet if this is so, then it is doubtful whether rules can be thought always to set out particular consequences or answers which follow automatically whenever the conditions provided are met -- whether, that is, they are incapable of compromise. Notions such as reasonableness admit of degrees; some actions and some contracts, for example, are more unreasonable than others. Now this in itself does not of course entail that some rules are subject to compromise. Dworkin can simply say that if, for instance, there is a rule stating that any contract which results in an 'unreasonable restraint of trade' is void, then one has here all the elements of a conditional. The rule can be expressed as follows: if a

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[37] See TRS, pp.27-28.

contract results in an unreasonable restraint of trade, then it is void -- regardless of how unreasonable the restraint of trade happens to be. It may be difficult to determine whether the antecedent is satisfied, but if one establishes or judges that it is, then the rule provides an answer -- the contract is void. That a contract would result in an unreasonable restraint of trade is not simply a reason for holding the contract to be void, as it would be if the rule were replaced with a principle. It is not simply a reason which argues in that direction.

Nevertheless, it might be argued, the rule leaves room for compromise. Rules such as the above invite the question 'How unreasonable must the restraint be if the contract is to be void?'. Is it sufficient that it be marginally unreasonable, or must it be clearly unreasonable, very unreasonable, or even grossly unreasonable? Now if the rule is taken in isolation, then one would be inclined to say, for the reasons cited above, that marginally unreasonable is sufficient to meet the conditions set out in the rule, which, after all, states simply that the restraint must be 'unreasonable'. But suppose that a judge is in a position to argue as follows. There are certain fundamental principles of the common law which require, for example, the freedom of individuals to enter into binding contracts. To hold contracts void if they result in marginally unreasonable restraints of trade would be to violate those principles. Thus, for the sake

of these important principles, contracts will be held to be void only if they result in restraints of trade which are more than only marginally unreasonable. Has there not been a compromise here between the rule and those principles?

It must be admitted that there may have been a compromise here; but if there has it is not the sort of compromise which casts doubt on the non-compromise thesis. The above case is one in which the judge has either grappled with a question of interpretation or altered the rule in light of conflicting principles.[38] In the first instance, he has merely attempted to interpret the conditions of the rule. There is no compromise here. In the second, he has altered those conditions so that the rule no longer applies to the case in which the restraint is only marginal. In doing so he does, of course, effect a compromise of sorts between the rule and the freedom-of-contract principles; he changes the rule so that it no longer applies and therefore no longer provides an answer which conflicts with the principles in the problematic cases. In so far as the rule is altered for sake of the principles, it is reasonable to say that a compromise has been reached between the rule and those principles. Yet this is very unlike the sort of compromise that a principle seems subject to. A principle can be compromised without being altered (or overridden) so

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[38]As was seen earlier, however, it is not clear whether, in Dworkin's view, a valid rule could be altered in the light of conflicting principles.

that it no longer applies to the problematic case. One can simply choose an answer which satisfies the applicable principle less than is possible. So it would appear that a plausible distinction between rules and principles can be drawn in terms of the compromise and non-compromise theses.

V

I now wish to turn and consider how, in Dworkin's view, goals (and the policies which describe them) interact with principle-based rights (and the principles which describe them). The picture is blurred, however, by a failure on Dworkin's part to distinguish clearly between what was earlier called 'threshold' and 'context' weight.I shall attempt to sharpen the picture as best I can.

In chapter four of TRS Dworkin makes it a matter of definition that a right "cannot be outweighed by all social goals" (TRS, p.92). He goes on to suggest:

> We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration; but only by a goal of special urgency (TRS, p.92).

It was seen earlier in section II that there are at least two very different notions of weight at work in Dworkin's discussion of rights and how they compete with one another: threshold weight and context weight. To say that P(1) has a greater context weight than P(2) in

circumstances C is to say that an answer satisfying P(1) must be chosen in C over an answer satisfying P(2). To say that P(1) has higher threshold weight than P(2) is to say that it takes more, in the way of bad consequences (broadly defined) to defeat P(1) than it does to defeat P(2). It was suggested earlier that it is very important that these two notions be clearly distinguished; it is clear, however, that an analogous distinction can and should be made regarding the 'weight' of a goal, and it is equally important that this distinction be kept clearly in mind. As Dworkin says, some goals, such as the goals of political administration, are rather routine, while others are much more important. Of the former it can be said that they have very low threshold weights; while of the latter it can be said that their threshold weights are very much higher. Nevertheless, it is conceivable, one should think, that there might be a case in which a low-threshold goal contextually outweighs a higher-threshold competitor, just as there might be a case in which a low-threshold right defeats a higher-threshold right. In such a case one would say that the less important goal outweighs the more important goal. Consider the following example.

It might be an extremely important goal of a legal system that the community view its courts as primarily concerned with the prevention of injustice. It might also be a less important goal of the legal system that the

'wheels of justice' succeed in turning smoothly, efficiently and quickly. To say that the former has a higher threshold weight than the latter is to say that the amount of inefficiency and inconvenience caused by a decision which could be justified in terms of the former would have to be very great before the latter outweighed the former, and before the latter would justify a different decision which went against the former. It is perhaps possible to view a case such as Rondel v. Worseley[39] as involving, at least in part, a competition between these two goals. The first goal (that the prevention of injustice be seen to be the primary concern of the courts) could be said to argue in favour of allowing dissatisfied litigants to sue their barristers. After all, there is little reason to doubt that the community realizes full well that litigants are sometimes dealt injustices as a result of the irresponsible and careless work of their barristers. The added inconvenience in terms of the time and effort which courts might have to dedicate in order that issues which give rise to litigation should finally be settled is not nearly as important a consideration as the fact that the community will view the legal system as sacrificing the interests of justice for the sake of mere administrative efficiency and convenience if the decision goes against the plaintiff. But of course

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[39] [1969] 1 A.C. 191 where it was determined that a barrister is not liable for any defect in the presentation of his case. One of the court's reasons for not finding in favour of the plaintiff was that it would flood the courts with dissatisfied litigants.

there may come a point where the amount of inconvenience and inefficiency caused would outweigh these more 'important' or 'weighty' considerations. If the courts would literally be flooded with claims by disgruntled litigants, then the disservice done to the goal of efficiency might (it could be argued) then be of a sufficient degree that that goal, i.e. efficiency, outweighs the more important goal, that the courts be seen to be interested primarily in the prevention of injustices.

It seems reasonable, then, that a distinction be drawn between the context and threshold weight of a goal, and important that these two notions be clearly distinguished in discussions about goals. But these two notions are not clearly distinguished in the passage quoted above. It is therefore not entirely clear what Dworkin's position is regarding the interaction between goals and principle-based rights. Dworkin says that a political aim is not a right "unless it has a certain threshold weight against collective goals in general." This suggests that for any right and for any goal, it must be the case that the right has a higher threshold weight than the goal. In other words, the consequences of sacrificing the goal for the sake of enforcing the right must be more than simply worse than the consequences of denying the right for the sake of the goal. In short, it takes more, in the way of undesirable consequences, to defeat the right than to defeat the goal. How much more is needed to defeat the right will

depend, presumably, on one's legal or political theory, as it does with competing rights; and of course the thresholds may vary from one theory to the next and from one aim to the next within one and the same theory. But wherever the threshold is set, it must, logically, be higher than any of the goals recognized within the theory. Rights must count for something more than goals. It is a consequence of this view, however, that for any right and for any goal, it is logically possible for that right to be contextually outweighed by that goal, even though, of course, that right must have a higher threshold weight than the goal.

When one turns to what Dworkin says next, however, a certain amount of confusion is introduced. In explaining what it means to say that rights must have a certain threshold against goals in general, Dworkin says that an aim is not a right unless it cannot be defeated by appeal to any of the routine goals of political administration, but only a goal of special urgency. This suggests something entirely different. It suggests that an aim is not a right unless there are at least some goals which could not conceivably outweigh that aim, regardless of context weight.[40] It says nothing, however, about the relative threshold weights of the right and all those goals which

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[40]Cf. Dworkin's claim that "It follows from the definition of a right that it cannot be outweighed by all social goals" (TRS, p.92, emphasis added).

<u>can</u> contextually outweigh the right. Must the threshold weight of the right be higher, or much higher, than the threshold weights of all those goals? If not, then to say that S has a right to X may be to say very little of any real significance. It might be to say, simply, that whenever routine goals of political administration argue against his receiving X, S is nonetheless entitled to X. It would not, however, be to say anything at all about his entitlements in situations in which other goals figure. It would be to take rights not at all seriously.

It is not clear which of these two views Dworkin intends to advance. Perhaps he wishes to support a combination of the two. Perhaps, that is, he intends to say that an aim is not a right (a)unless it is such that there are certain routine goals which, logically, cannot outweigh it, <u>and</u> (b)unless it has a higher threshold weight than all goals. On this view a right always counts for more than a goal and may serve as an individual trump over that goal -- if that goal is a 'routine' one.

In any case, Dworkin's position regarding the interactions between principle-based rights and goals will be similar to his position regarding the interactions between two or more principle-based rights. It will be similar in so far as the question of how these interactions are to be dealt with will depend, to a very large extent, on one's political or legal theory. It will depend on

where one sets the threshold weights of the various principles and policies which find their way into the theory. It will also depend on the sorts of non-consequentialist considerations one allows as relevant and how, on one's theory, these are to be "mixed" with the consequentialist aspects. Finally, goals (or the policies which describe them) will, like rights (or the principles which describe them), be subject to compromise. A goal can be satisfied less for the sake of a right which "argues in the other direction." This last point raises one further question which is difficult to answer. If Dworkin wishes to say that for any right there will be some goals which cannot outweigh that right, does he also wish to say that these 'trumped' goals are incapable, logically, of influencing the decision in any way whatsoever? In other words, must a trumped goal be incapable of forcing any sort of compromise between itself and the victorious right? There seems no reason to suppose that it must lack this capacity, but there is nothing in Dworkin's discussions to suggest either that he would or that he would not agree.

VI

Regarding the interaction of rules (or rule-based rights) and policies (or goals), Dworkin's position will presumably be similar to his position regarding rules <u>versus</u> principles, and objections to the latter position will

apply equally well to the former position. If the non-competition thesis is false, and the force and effect of a rule can be controlled or modified by a principle, then there is no reason to suppose that the same effect could not be brought about by a competing policy. In other words, there is no reason to suppose it logically impossible that a policy should cause a rule to be invalidated, altered, reinterpreted or overridden, assuming, of course, that it does not describe a 'routine' goal which is incapable of competing with rights.

VII

As for the interaction of policies (or goals) with one another, Dworkin's view should now be rather apparent. Goals often compete with one another and may have different threshold and context weights. They may also, like principles, be compromised. "Collective goals encourage trade-offs of benefits and burdens" (TRS, p.91). A community may "pursue different goals at the same time, and it may compromise one goal for the sake of another" (TRS, p.92).

VIII

In conclusion, I would like to summarize a few of the main points which have emerged from this discussion of Dworkin's views regarding rules, principles and policies. Only those which have a direct bearing on the remaining arguments of this thesis will be mentioned.

The first point is that the contrast Dworkin attempts to draw between rules and principles is not quite as sharp as he appears to suggest. It is quite conceivable, for instance, that a valid rule should, like a principle, survive a conflict-situation in which the answer it provides is not accepted; the non-competition thesis is false. The significance of this point will become apparent in chapter five where I shall consider, and attempt to refute, an argument offered by Dworkin which claims that principles, because they have weight, are incapable of constituting valid law. Though the falsity of the non-competition thesis weakens the contrast Dworkin attempts to draw between rules and principles, it does not serve to destroy it entirely. A plausible contrast can still be drawn in terms of the compromise and non-compromise theses which, I argued, are frequently overlooked.

As for the various ways in which principles (or principle-based rights) and policies (or goals) interact, Dworkin's view is that the 'weights' of competing standards must be determined by tests which may vary from one theory to the next. It also seems to be a consequence of his views that there is no single notion of 'weight'. To the contrary, it seems quite possible that the meaning of the term 'weight' should vary from one theory to the next and should sometimes vary within one and the same theory.

'Weight' can mean context weight, threshold weight, and if one happens to hold a deontological theory of rights, intrinsic weight. As for which tests of weight are called for by the best legal theory that could conceivably be devised to explain and justify the Anglo-American legal systems -- the correct theory of those systems -- Dworkin's view appears to be that it will assign some role to the effects upon litigants, third parties, and even "society in general". It will also find room for the consideration of a whole host of non-consequentialist factors. The determination of weight, then, is no simple matter. How a judge within the Anglo-American legal systems determines the 'weight' of competing principles and policies will depend, to a very large extent, on the particular legal theory he happens to feel compelled to adopt; and whatever tests he chooses, he will seldom, if ever, have an easy time in applying them to concrete cases. The significance of these last two points will become apparent in chapter six where it will be argued that judges would inevitably be led to the exercise of strong discretionary judgment were they to attempt to follow the decision-procedures recommended by Dworkin.

THE 'MODEL OF RULES'

Having investigated what Dworkin means by 'rules', 'principles' and 'policies' and how, in his view, standards of these three sorts interact with one another, I now wish to return to the necessity theses and Dworkin's arguments against them. As noted in chapter three, Dworkin's main argument against the two theses, and the support Hart attempts to provide for them, may be viewed as beginning with a concession. Dworkin seems to concede, arguendo, that one "will come naturally to the theory of judicial discretion in the strong sense" if one accepts the model of rules. But this is of little consequence, Dworkin would add, since the model of rules can and must be rejected in favour of a richer conception of law which, unlike the model of rules, is capable of accommodating, as binding law, a wide range of principles and policies. Yet once the model of rules is safely rejected and replaced with this wider conception of law, it will be seen that it is by no means necessary or inevitable that judges have strong discretion (NT(1)) or that they

exercise strong discretionary judgment (NT(2)).[1]

Dworkin's attack, then, is two-pronged. First, he sets out to undermine the model of rules and any support it provides for the necessity theses. His main argument against the model is that it is incapable of accommodating principles and policies as binding law. This first part of the attack is of course a very crucial one. If, as Dworkin supposes, one is led quite naturally to the theory of strong discretion if one accepts the model of rules, and if, as Dworkin also supposes, the model has a tight grip on the minds of most lawyers and legal philosophers and is therefore very much the "ruling theory of law", then Dworkin will have done much to discredit the necessity (and existence) theses if he can somehow undermine their main base of support -- the model of rules (TRS, p.vii). Yet as noted earlier, Dworkin's attack does not end here. He goes on to argue that once the model of rules is abandoned and replaced with his richer conception, the need for strong discretion will be seen to be completely eliminated. "For all practical purposes, there will always be a right answer in the seamless web of our law" -- i.e. judicial decisions are, for all practical purposes, always fully controlled by binding legal standards ("NRA?", p.84).

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[1]As noted earlier, Dworkin does not, of course, distinguish clearly between the two versions of the necessity and existence theses.

A number of questions arise if Dworkin's argument is best understood in this way. First, is Dworkin correct in claiming that the 'model of rules' either does not, or could not possibly, accommodate principles and policies as binding law? It will be argued in this chapter that Dworkin is not correct; that the 'model of rules' can easily accommodate at least some of Dworkin's principles and policies. But this reply begs the question whether the model is capable of accommodating all the principles and policies Dworkin claims it must. It will be argued that Hart's model of rules is logically consistent with there being systems of law in which the sorts of principles and policies Dworkin claims are binding are in fact binding, but that Dworkin has provided insufficient evidence for the claim that Great Britain and North America contain legal systems of this nature. This leads to a third important question which will be the main topic of chapter six. If Hart must admit the possibility of a system which contains, as binding law, the sorts of principles and policies Dworkin claims are binding in Britain and North America, then is he thereby led to a denial of the two necessity theses? Dworkin claims that the presence of these principles and policies results in a 'right answer' for all judicial decisions (at least for those decisions which the law purports to control fully) and eliminates the need for judges ever to

resort to the exercise of strong discretionary judgment. But if this is true, then even if the Anglo-American legal systems are not as Dworkin describes them, Hart must admit that it is not necessary that judges have strong discretion and that they exercise strong discretionary judgment. He must, in short, admit the falsity of NT(1) and NT(2). In chapter six I shall attempt to defend the two necessity theses against Dworkin's arguments by providing reasons for supposing, _contra_ Dworkin, that judges would have strong discretion, and would inevitably be led to the exercise of strong discretionary judgment, even if their legal system contained all of Dworkin's principles and policies. Thus even if Dworkin is correct in claiming that the Anglo-American legal systems include, as binding law, all that Dworkin says they do, that fact would not serve to defeat either the necessity or the existence theses.

What reason could there be, then, for supposing that principles and policies either are not, or could not be, accommodated by the so-called model of rules? I shall begin with a few arguments which purport to show that they _are not_ accommodated, and then go on to consider a number of arguments purporting to show that they _could not_ be accommodated. All are fallacious.

The first argument runs as follows. Hart's view, as expressed in, for example, _CL_ and "Positivism" is that legal systems are systems of _rules_. They are composed

of a master rule of recognition and all those rules, primary and secondary, precedent-based, customary and statutory, which satisfy the criteria of validity outlined or displayed in this master rule of recognition. Indeed, Hart claims to have discovered the "key to the science of jurisprudence" in the notion of law as the union of primary and secondary rules (CL, p.79). Since Hart restricts binding law to rules satisfying the rule of recognition, he finds no room for principles and policies.

The fallacy in this first argument is all too apparent. It is true that Hart refers to law as a system of primary and secondary rules. It is also true that he attempts to support the necessity theses by arguing that the guidance provided by rules invariably runs out at some point. Nevertheless it is important to appreciate that Hart normally does not distinguish between rules, principles and policies, although he does mention, at various places, all three types of standard.[2] In CL Hart seems more interested in contrasting rules, as normative standards, with such things as habits, commands and predictions, things with which the normative standards of law have sometimes erroneously been identified. It would therefore be fallacious and unfair to suppose that Hart meant to conceive of law as a system of rules in Dworkin's

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[2]But see, e.g., "Problems" which was written after Dworkin's work brought to light the importance of distinguishing clearly between these different types of standards.

sense of that term, and to conclude from this that the model of rules can safely be abandoned. One must provide grounds other than the mere fact that Hart chooses to refer to law as a system of rules, if one is to justify the claim that the model of rules fails to accommodate what Dworkin calls principles and policies.

It might be thought that these grounds are to be found in "Positivism" where Hart considers and explicitly rejects the

> invitation to revise our conception of what a legal rule is. We are invited [he says] to include in the 'rule' the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled ("Positivism", p.28).

Here, it might be argued, Hart has clearly refused the invitation to suppose that aims other than rules could possibly be part of binding law. But of course this is not necessarily what has been rejected in the above passage. Strictly speaking, the view being rejected is one which makes any aim (i.e. any principle or policy) in terms of which a legal rule is interpreted or altered part of that rule. This rejection is quite consistent with the acceptance of the view that these aims, or at least some of them, could nevertheless be part of the law -- if one interprets 'the law' as possibly including, for Hart, more than (Dworkinian) rules, which is the hypothesis we are considering and which has yet to be refuted. These aims

are simply not law in virtue of their being in some way part of rules which are law.

Despite this, it might be argued, Hart does consider and reject the view that "the social policies and purposes in terms of which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of 'law'..." ("Positivism", p.27, emphasis added). This, it might be urged, must be read as an outright rejection of the view that considerations other than valid rules can constitute binding law.

Yet once again there is an alternative reading. Hart might simply be read as rejecting the proposition that any 'aim' in terms of which a judge either does or could come to a rational decision in a penumbral case is, in virtue of its employment or possible employment in that context, part of 'the law'. There are some aims or standards used by judges, in the exercise of their strong discretion, which they are not legally bound to use. The law does have limits. And of course all this is quite compatible with the view that some aims are, for other reasons, part of binding law. For example, an aim might constitute binding law if it is explicitly stated or generally agreed that it serves to justify a binding legal rule. It will be a binding aim in the sense that it is the duty of the judge "to take the measure of [the aim]...and that if he does not he will on that account have made a mistake" (TRS, p.35);

in the sense that it is an aim "which officials must take into account if it is relevant..." (TRS, p.26). So this passage also fails to provide any reason for supposing that Hart would wish to restrict binding law to valid (Dworkinian) rules.

In the absence of any evidence to the contrary, let it be assumed, then, that Hart means something like 'normative standard' when he uses the term 'rule', and that he might be willing to include within the scope of his conception of law some of those standards Dworkin refers to as legal principles and policies. This seems no less likely than the hypothesis that Hart wishes to restrict binding law entirely to (Dworkinian) rules.[3] If there is no reason for supposing that Hart neither intends nor would wish that principles and policies be excluded from the scope of his model of 'rules', one is still left with the question whether the model can successfully accommodate them. It is possible to extract from TRS at least three arguments advanced by Dworkin in support of the proposition that the model of rules cannot find room for binding legal principles and policies -- at least all of them -- regardless of what Hart might have intended or would now wish. It is

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[3]Several philosophers and lawyers share the view that by 'rule' Hart means what Dworkin would call 'standards'. See, e.g., J. Raz, "Legal Principles and the Limits of Law"; G. Marshall, "Positivism, Adjudication and Democracy", pp. 142-143; and E.P. Soper, "Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute", pp. 479-480.

to these arguments that I should now like to turn.

The first argument to be considered will be called the 'validity argument', and it runs as follows. According to the model of rules, the master rule of recognition outlines criteria of validity which any standard must meet if it is to count as valid binding law. Rules fit the bill perfectly: they are capable of satisfying validity-criteria because "validity is an all-or-nothing concept, appropriate for rules" (TRS, p.41). Principles, on the other hand, are incapable, logically, of satisfying validity-criteria because the notion of validity, in so far as it is an all-or-nothing concept, is "inconsistent with a principle's dimension of weight" (TRS, p.41). Since principles (and policies) are incapable of satisfying validity-criteria, it follows that they are incapable of satisfying the rule of recognition, and from this it follows that they are incapable of acquiring the status of binding law.[4]

The validity argument is fallacious. Its fallacy lies in an assumption against which I argued in chapter four: that a standard's validity entails that it must be followed or complied with in any case to which it applies. If this assumption is accepted, and if principles need be followed only when they are not outweighed by stronger

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[4]Dworkin uses the term 'principle' to refer to both principles and policies, unless he indicates to the contrary, or unless the context makes plain that he means only the former. For the sake of convenience the same will be done in the remainder of this chapter.

competitors, then it follows logically that principles could not possibly be valid (or invalid). But if this assumption is rejected, and one accepts in its place the view that a standard's validity entails (a)that it satisfies the criteria of validity (membership) of the system , and (b)that it must therefore be followed in any case to which it applies, unless it conflicts in a certain case with another valid standard which, given the accepted conflict-resolving procedures, is the 'preferred' or superior standard, then the mere fact that principles have weight and that this weight is a factor in determining whether, and the extent to which, they must be followed, does not entail that they are logically incapable of validity. It follows from this that principles, because they have weight, are not thereby rendered incapable of satisfying a rule of recognition, the master test for valid law. So the validity argument provides no reason for supposing it to be logically impossible for the model of rules to accommodate principles. A standard can be both valid (an all-or-nothing matter) and have weight (a matter of degree). Weight and validity are not, as the validity argument assumes, mutually incompatible properties.

At this point the following objection might be raised. Even if one grants that there is nothing in the bare notion of validity which logically excludes principles from satisfying validity tests, it is nevertheless true

that principles could not possibly satisfy the sorts of validity tests which must, according to a legal positivist such as Hart, be contained within the rule of recognition. This brings us to Dworkin's second, and perhaps most important, argument: the 'pedigree argument'. It begins with the following undeniable premise:

> If principles of the Riggs and Henningsen sort are to count as law, and we are nevertheless to preserve the notion of a master test for law, then we must be able to deploy some test that all (and only) the principles that do count as law meet (TRS, pp. 39-40).

In other words, the rule of recognition must contain validity-criteria in terms of which legal principles can be distinguished from other non-legal standards -- standards which may perhaps be used in the exercise of strong discretion, but which do not constitute valid binding law. The second step in the argument is the claim that the type of criteria which Hart, as a legal positivist, is restricted to cannot possibly capture those binding principles which figure in, for example, Riggs and Henningsen. In support of this crucial second step, Dworkin provides the following argument. In so far as he claims to espouse legal positivism, Hart must accept three fundamental tenets of that view. The first of these is as follows:

> The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific

criteria, by tests not having to do not with their content but with their pedigree or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules (rules which lawyers and litigants wrongly argue are rules of law) and also from other sorts of social rules (generally lumped together as 'moral rules') that the community follows but does not enforce through public power (TRS, p.17).

"But", the argument continues, "this test of pedigree will not work for the Riggs and Henningsen principles" (TRS, p.40). Of course the obvious and crucial question is 'Why not?', and Dworkin gives what appear to be two quite different answers. The first answer is suggested in chapter two of TRS where Dworkin suggests that

> The origin of these as legal principles lies not in a particular decision of some legislator or court, but in a sense of appropriateness developed in the profession and public over time (TRS, p.40).

Dworkin's second answer is suggested in chapter three, and is further elaborated and developed in chapter four.

> A principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question (TRS, p.66).
>
> According to what will be called criterion A (the

first answer), a principle is a binding principle of law if a "sense of its appropriateness " has developed in the profession and public over time. An important question, of course, is whether the Anglo-American legal systems contain criterion A as a test for binding legal principles. But for the purposes of this discussion, the question can

safely be set aside; for even if criterion A were such a test, and even if the Riggs and Henningsen principles were binding because they satisfied that test, it would not follow that there are binding principles which cannot be captured except by way of tests which deal with their content. This would follow if criterion A required that a principle be appropriate, in the sense in which to say that it is appropriate is not to say that it is felt or believed to be good or worthwhile, but that it is good or worthwhile. It is clear, however, that this is not what criterion A demands. It demands that most of the profession and public believe or sense that the principle is appropriate or good, and that they believe or sense this over a period of time. To determine whether this is so, one need not be concerned with the content of the principle, in so far as this bears on the question whether the principle is a good one, morally or otherwise. Criterion A is really an evaluatively-neutral pedigree test the satisfaction of which can be empirically determined. It therefore seems to pose no problem for Hart and his master rule of recognition. If all legal principles were law in virtue of having satisfied criterion A, then Hart could readily embrace them.

It is crucial to pause at this point to note a limitation which must be placed on the pedigree argument if it is to be at all plausible. As the discussion has so far revealed, Dworkin seems at times to argue that the

model of rules could not possibly accommodate, as binding law, principles of any sort.[5] According to the pedigree argument, the impossibility is a result of the supposed fact that there are no pedigree tests which might conceivably serve to capture principles. Now prima facie there seems no good reason for supposing this. As Dr. Raz has noted,

> Legal principles, like other laws, can be enacted or repealed by legislators and administrative authorities. They can also become binding through establishment by the courts.[6]

There seems nothing inherent in the notion of a principle which precludes the possibility of its enactment; unless, of course, one assumes (a)that the proper enactment of a standard entails its validity, and (b)that principles, because they have weight, cannot conceivably be valid. Yet if (b) is rejected, then there seems no good reason for supposing that a principle is logically incapable of enactment; and if this is so, then a rule of recognition could very well stipulate that duly enacted principles, like duly enacted rules, are binding law -- and this will be purely a matter of the standard's pedigree. To say that the principle is binding law will be to say that it satisfies the criteria of validity specified in the rule

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[5]This seems to be the thrust of the validity argument. If all principles have weight, and weight is logically incompatible with validity, then it is logically impossible that a principle, any principle, should count as valid law.

[6]"Legal Principles and the Limits of Law", p.848.

of recognition and that it therefore is a standard "which officials must take into account, if it is relevant, as a consideration inclining in one direction or another" (TRS, p.26).

The same would appear to be true of principles which enjoy a long line of support in judicial decisions. In explaining how these become binding law, Raz calls upon Hart's conception and analysis of social or customary rules. (The argument assumes, of course, that by 'rule' here one means what Dworkin refers to as principles, policies and rules.) Raz suggests that some legal principles are established and become binding law in virtue of their acceptance as such by judges, in much the same way as rules of recognition and primary rules of obligation in pre-legal societies become binding in virtue of their acceptance by the appropriate groups of individuals. Raz goes on to argue that the presence of these judicial customs shows that Hart's model of rules must be modified. "Since it is itself a judicial custom [the rule of recognition] cannot confer any special status on other judicial customs..."[7] Thus, "[a] legal system consists not only of one customary rule of law-enforcing agencies and all the laws recognized by it, but of all the customary rules and principles of the law-enforcing agencies and all the laws recognized by them."[8]

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[7]Ibid., p.852.

[8]Ibid., p.853.

Perhaps I have missed the point of Raz's argument, but I see no reason why the model of rules cannot be employed, without alteration, to explain why it is that, in some legal systems, judicially adopted principles and rules are "binding only if they have considerable authoritative support in a long line of judgments."[9] This can simply be explained by saying that if this is so, then this requirement is contained within the rule of recognition which is very different from these judicial customs in at least the following three respects. First, the rule of recognition is a special sort of custom. It is a secondary rule which contains criteria of validity for other sources of law -- including judicial customs. Secondly, the existence of the rule of recognition requires more than just acceptance by judges. It requires, on the part of the general population, general acquiescence in, or conformity with, the results of its use by judges and other officials.[10] This need not be the case with respect to a strictly judicial custom. Thirdly, principles can be outweighed by, and compromised for the sake of, other binding standards. The rule of recognition, in so far as it is the ultimate rule of the legal system, could not be outweighed or compromised in this way.

So there seems no reason why enactment and authoritative

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[9] Ibid., p.848.

[10] See CL, pp. 59-60.

support in a long line of judgments could not function as pure pedigree criteria for binding legal principles. Another candidate, of course, is one which validates certain non-judicial social customs. With respect to such a criterion Dr. Raz says:

> Those legal systems which do regard [social] customs as legally binding do so only if they pass certain tests. These tests, if they are not set out in a statute or some other law, are laid down by the rule of recognition, which determines under what conditions social customs are binding in law.[11]

If the pedigree argument is to be at all plausible, then, it would seem that Dworkin must be read as arguing that the model of rules is incapable of finding room for principles _of a particular sort_, i.e. of the _Riggs_ and _Henningsen_ sort. He must, that is, be understood as advancing the following argument. Irrespective of whether it is possible for there to be a legal system in which _some_ principles are captured by pedigree tests, and irrespective of whether the legal systems of Great Britain and North America are, as a matter of fact, of this nature, it nevertheless remains true that these two legal systems do contain at least some principles (e.g. the _Riggs_ and _Henningsen_ principles) which are legally binding despite their failure to satisfy any tests of pedigree. Thus the model of rules cannot account for _all_ the binding principles and policies that might figure in legal adjudication. It

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[11] "Legal Principles and the Limits of Law", p.852.

is therefore an incomplete, and thus unsatisfactory, theory of law. Henceforth it will be assumed that this is how the pedigree argument is to be understood.[12]

This brings us to the second answer Dworkin provides in reply to the question why pedigree tests "will not work for the Riggs and Henningsen principles." According to what will be called criterion B, those principles which figure in the soundest theory of the law that could conceivably be devised to explain and justify the substantive and institutional rules of the legal system in question all count as binding law.[13] In chapter four of TRS Dworkin provides an elaborate sketch of what such a theory will look like. He indicates that the scheme of principles will provide the best explanation and justification of (a)the provisions of the constitution, (b)the settled practices of the system (e.g. the practice of precedent), (c)duly enacted statutes, and (d)judge-made rules and precedents. Dworkin also indicates that this theory of law will contain what he calls a "theory of institutional mistakes" (TRS, p.121). He has us imagine an

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[12]-- even though the validity argument seems quite clearly to be intended as an argument for the claim that the model of rules could not find room for any binding legal principles.

[13]In chapter three of TRS Dworkin says that the theory must justify the rules and no mention is made of explanation. Later, however, when his ideas are further developed, Dworkin speaks in terms of both justification and explanation; he says there is both a dimension of fit (explanation) and a dimension of political morality (justification). The nature of these two dimensions will be discussed in chapter six.

ideal judge, Hercules, a lawyer of super-human skill, patience and acumen, who sets out to construct the best possible explanatory and justificatory theory of his legal system. Dworkin submits that if

> the history of his court is at all complex, [Hercules] will find, in practice, that [a] requirement of total consistency...will prove too strong, unless...he may, in applying this requirement, disregard some part of institutional history as a mistake. For he will be unable, even with his superb imagination, to find any set of principles that reconciles all standing statutes and precedents. This is hardly surprising: the legislators and judges of the past did not have Hercules' ability or insight, nor were they men and women who were all of the same mind and opinion (TRS, p.119).

So the best possible theory of any actual legal system could not, in practice, explain and justify, in a consistent manner, all the explicit substantive and institutional rules, practices and precedents. It will be able to explain only those which are 'not mistaken'. How Hercules will be able to determine which items are mistaken is a crucial question which will be investigated in the following chapter. For the time being, suffice it to say that the answer he gives will depend very much on his legal theory, which raises a serious problem, since he will want a theory of mistakes to help him determine the theory of law he must accept.

In any case, Dworkin suggests that Hercules will discover that there is a range of plausible candidates for the best possible theory. It is this best possible theory, of course, which determines which principles are legally

binding. In choosing his theory Hercules will evaluate all the alternatives along two dimensions: "institutional fit" and "political morality". Dworkin writes:

> No theory can count as an adequate justification of institutional history unless it provides a good fit with that history; it must not expose more than a low threshold number of decisions,particularly recent decisions, as mistakes; but if two or more theories each provide an adequate fit, on that test, then the theory among these that is morally the strongest provides the best justification, even though it exposes more decisions as mistakes than another (TRS, p.340).

So theories of law cannot render too many decisions or rules mistaken, and if two or more theories surpass the minimum threshold required by the test of institutional fit, then the theory which is "morally the strongest" is to be chosen, even if it renders more institutional history mistaken than its rival(s). If two or more theories have each surpassed the minimum threshold required by the test of institutional fit, that dimension is no longer relevant.

There are a host of crucial questions which arise from this account. For instance, where is the minimum threshold to be set? Is it possible for the threshold to vary from one theory to the next, depending on the principles and policies found within those theories? If so, then a theory which, for example, places very great weight on the principle of judicial subordination to the legislature might tolerate far fewer mistaken statutes than some other theory which ascribes far less weight to that

principle. If, on the other hand, the threshold is set not by particular legal theories, but rather by general principles of theory construction, which might, presumably, apply to theories of other sorts, such as literary, historical or scientific theories, then why does Dworkin insist that a legal theory must be particularly concerned not to expose recent decisions? These and other important questions which arise from Dworkin's theory of adjudication will be discussed in greater detail in the following chapter. Here I am merely concerned with the general character of criterion B and how it bears on the pedigree argument and its claim that the model of rules is incapable of accommodating all binding legal principles.

It will be remembered that we were considering how, in Dworkin's view, principles of the Riggs and Henningsen variety are distinguishable as legally binding standards. According to criterion B, those principles which figure in the soundest theory of the law that can be devised to explain and justify the substantive and institutional rules, decisions and practices of the system in question are legally binding within that system. It can now be seen that if the Riggs and Henningsen principles are legally binding because they satisfy criterion B, then they are not necessarily identifiable and distinguishable as binding law by any test which has to do solely with their pedigrees. To tell whether they are legally binding one must determine whether they figure in the soundest theory of law; but to

determine what that theory is one may (if two or more theories pass the test of fit) be forced to address questions of political morality -- to ask which of two or more theories which happen to pass the minimum threshold of institutional fit is morally the strongest. As Dworkin suggests,

> 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... is superior (TRS, p.67).

But if Hart, as a legal positivist, is restricted to morally-neutral criteria of validity which deal solely with a standard's pedigree, it follows that he cannot accommodate, within his model of rules, principles of the Riggs and Henningsen variety. Thus the model of rules can safely be abandoned on the ground that it provides, at best, an incomplete conception of law.

The pedigree argument invites several replies. Perhaps the most obvious response is one which calls into question Dworkin's claim that as a matter of fact the Anglo-American legal systems contain criterion B as a test for binding law. As a non-lawyer I would only reveal my ignorance on the subject if I attempted seriously to challenge this claim on empirical grounds. Yet several academic lawyers have done just that. Professor MacCormick, for instance, argues in Legal Reasoning and Legal Theory that the attempt by judges and lawyers to 'extract'

principles which justify or explain the explicit standards of their legal system -- or some particular part of it -- is not the attempt to discover principles which must be applied because they are binding law. Rather it is the attempt to discover principles which may be applied because they are (at the very least) consistent with the existing settled law.

> The point is...to show that the decision contended for is thoroughly consistent with the body of existing legal rules, and is a rational extrapolation from them, in the sense that immediate policies and purposes which existing similar rules are conceived as being aimed at would be pro tanto controverted and subjected to irrational exceptions if the instant case were not decided analogously with them.
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> Thus the need to find, in default of some directly applicable rule, some supporting analogy or principle of law, is a requirement which guides the lawyer in framing his case.[14]

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[14] Legal Reasoning and Legal Theory, p.120, emphasis added. See also J. Raz, The Authority of Law, p.201 ff., especially p.204, and H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream", p.982 where Hart writes: "[W]hen the judges choose, as they may have to, at a higher level of principles or received values, the alternatives presented to them at this level will all have the backing of great areas of the legal system comprehended under them, and whichever alternative is chosen, it will have its feet firmly planted in the existing system and may be ranked as a decision warranted because controlled by law." It is perhaps worth mentioning a point which may divide Professors Hart and MacCormick. MacCormick seems prepared to say that the Anglo-American legal systems are such that principles which fulfil an "actual or potential explanatory and justificatory function in relation to law as already established" count as legal principles (Legal Reasoning and Legal Theory, p.238). Professor Hart might not be prepared to go quite this far. He might wish to distinguish between legal principles which are, for example, either enactments or judicial customs, and principles which serve, in these systems, as good reasons for developing new law in certain ways, by reasons of analogy and so forth.

> A judge, by formulating a general principle expressing the underlying common purpose of a set of specific rules at once rationalizes the existing law so as to reveal it in the light of a new understanding, and provides a sufficient ground for justifying a new development in the relevant field. He does not thereby show that the decision must be as he proposes to give it in the instant case; only that it may legitimately be so given.[15]

MacCormick argues further that when two or more principles or policies can plausibly be extrapolated from existing law, the judge must rely on "consequentialist arguments" to support the choice he must make.

> The justification of the decision must depend upon the reasoned assessment of the relative, or comparative, desirability and undesirability of the consequences which the decision as a decision of principle will entail.[16]

Once the principle has been extracted and used in this way it provides, in MacCormick's view, a permissive ground for further development of the law. A later court may, but need not, accord the principle weight in a later decision. Yet once it is employed in a long line of judgments, "It passes from being simply permissive to being mandatory subject to defeasance..."[17] In other words, it reaches the stage where it becomes a judicial custom binding upon the courts in the sense that the judge must follow it if

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[15] Legal Reasoning and Legal Theory, p.126, emphasis added. For MacCormick's justification of the requirement that a judge find an acceptable principle to legitimate his decision see Ibid., pp.187-188.

[16] Ibid., p.173.

[17] Ibid., pp.160-161. Cf. CL, pp.246-247.

it applies and if it is not outweighed -- i.e. defeated. MacCormick points to cases such as Home Office v. Royal Dorset Yacht Co. Ltd.[18] as cases in point. There Lord Reid said:

> I think the time has come when we can and should say that the neighbour principle ought to apply unless there is some justification or valid explanation for its exclusion.[19]

According to MacCormick, this statement, and an earlier statement by Lord Pearson,

> show a shift from acceptance of the neighbour principle as a general statement which may be applied in recognizing new areas of negligence liability, if supported by strong reasons of policy and closeness of analogy, to one which ought to be applied unless countervailing reasons be shown.[20]

If MacCormick is correct in his account of how principles figure within the adjudicative process as it is practised in Great Britain and North America, then Hart need not be concerned if, as Dworkin supposes, some of the principles judges cite in the justification of their decisions are not, and could not be, captured by pedigree tests. Unless a principle has considerable support in a long line of decisions, a matter of pedigree, it fails to constitute binding law, and as such it need not be captured by the rule of recognition.

Professor Dworkin would, of course, object strenuously

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[18] [1970] A.C. 1004.

[19] Ibid., at 1026-1027.

[20] Legal Reasoning and Legal Theory, p.159, emphasis added.

to the account MacCormick offers. In his view there are principles which are treated by courts as legally binding (not merely permissive) even though they have not figured in any previous judicial decisions (and are neither social customs nor enactments). His view would therefore be that MacCormick's account, like the model of rules, presents at best only a partial account of the truth. To support his claim, Dworkin would, of course, point to cases such as Henningsen in which, he argues, the court relied on principles "that had not been formulated before, in anything like the same fashion, like the principle that automobile manufacturers have a special responsibility to the public" (TRS, p.65). To mount a proper challenge to Dworkin's general claim that there are some legal principles which are binding despite their lack of pedigree would require a large-scale empirical study of a sort which is well beyond the scope of this thesis. What is within its scope, however, is a brief examination of Henningsen and Riggs to see if they serve, as Dworkin seems to think they do, to verify that general claim. It is to this task that I should now like to turn.

If Riggs and Henningsen are to fulfil this verificatory role, then the principles cited therein must satisfy two conditions: (i)they must, at the time, have been legally binding upon the courts, and (ii)they must have nevertheless failed to fulfil any of the pedigree tests which principles are able to satisfy. It will be argued below that in both

cases (i) may be satisfied but (ii) is not.

Take Henningsen first. Dworkin cites six principles which figured in the court's decision:

> (a) '[W]e must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.[21]
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> (b) 'In applying that principle, the basic tenet of freedom of competent parties to contract is a factor of importance.'[22]
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> (c) 'Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned.'[23]
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> (d) 'In a society such as ours where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly.'[24]
>
> (e) '"[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?"'[25]
>
> (f)'"More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other..."'[26]

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[21] Henningsen v. Bloomfield Motors. Inc. 32 N.J. 358, at 386; 161 A.2d 69 (1960), at 84.

[22] Ibid.

[23] Ibid., at 388; 161 A.2d at 86.

[24] Ibid., at 387; 161 A.2d at 85.

[25] Ibid., at 389; 161 A.2d at 86, quoting Frankfurter, J. in United States v. Bethlehem Steel, 315 U.S. 289, 326 [1942].

[26] Ibid.

It seems reasonable to suppose that the court felt legally bound by these principles. For instance, it said that principle (a) must be kept in mind. It also said that because of principle (d) it must examine purchase agreements closely to see if consumer and public interests are treated fairly. So it is plausible to assume that condition (i) was in fact fulfilled and that principles (a) - (f) were legally binding on the court, in the sense that it was the duty of the court to take them into account in their decision, and to accord them whatever 'weights' they have in that particular context, and that the court would have been guilty of a mistake if it had not done so. But is it plausible to suppose that any one of these principles satisfied condition (ii)? Prima facie it seems that each had considerable authoritative support, and that it was therefore not fulfilled. There is no question that principle (e) enjoys the necessary support. In Justice Frankfurter's view no other principle enjoyed more support. Principle (f) follows logically from (e). If courts will not allow themselves to be instruments of inequity and injustice, it follows that they will not "enforce transactions in which the relative positions of the parties are such that one has unconscionably [i.e., unjustly] taken advantage of the necessities of the other..."[27]; and from this it follows that they will not enforce bargains in which one party

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[27] Ibid., at 389; 161 A.2d at 86.

has unjustly taken advantage of the economic necessities of the other -- principle (f). Principle (c) was taken by the court as equivalent to (e) and it therefore would seem to enjoy the necessary support as well. It is of course beyond question that (a) and (b) were principles of very long standing.[28] This leaves (d), the principle Dworkin explicitly says did not have the necessary institutional support. According to Dworkin, (d) was a principle "that had not in fact been formulated before, in anything like the same fashion" (TRS, p.65). Once again, however, it is unclear why Dworkin believes that this principle lacks support -- that it has no pedigree. It may well be true that no court had, before Henningsen, explicitly said, in so many words, that automobile manufacturers have a "special responsibility to the public."[29] Yet this principle seems to follow from another more general principle which does have the necessary support and pedigree, namely, the principle that the manufacturer of 'imminently dangerous' items is under a special duty of care.[30] It is clear that both the court in Henningsen

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[28]Fivey v. Pennsylvania R.R. Co. 67 N.J.L. 627, 52A. 472, (E. & A. 1902) was cited by the court in Henningsen as precedent for principle (a). Manchester, Sheffield and Lincolnshire Ry. v. Brown (1883) 8 A.C. 703, 716-729, per Lord Bramwell and Salt v. Marquis of Northampton [1892] A.C. 1, 18-19 per Lord Bramwell appear to serve as precedent for (b).

[29]But see Cardozo's comments in MacPherson v. Buick Motor Co. 217 N.Y. 382, 111 N.E. 1050.

[30]On the history of this and related principles see E.H. Levi, An Introduction to Legal Reasoning, chapter two.

and Cardozo in MacPherson were of the opinion that automobiles are imminently dangerous items.[31] Since principle (d) seems merely to be a more concrete instance of a principle of very respectable pedigree, it seems to pose no problem for Hart and his rule of recognition.

Riggs would seem to pose little problem either. The principles cited and used in the court's decision were described as "fundamental maxims of the common law." As such they obviously satisfy the necessary test of pedigree. I conclude, then, that Henningsen and Riggs, Dworkin's two main 'counter-examples' to the model of rules, provide no support for the proposition that there are legal systems (viz., the Anglo-American legal systems) in which some principles are binding even though they satisfy no tests of pedigree. I also conclude that these two cases provide no reason for supposing that principles do not function within the adjudicative processes of Great Britain and North America in a manner such as described by Professor MacCormick.

Yet as was noted earlier, the failure of Riggs and Henningsen to provide Dworkin with examples of principles which are legally binding despite their lack of pedigree does not entail that there are no such principles. My

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[31] See, e.g., MacPherson at 1053 where Cardozo states: "Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." They include automobiles.

brief discussion of those two cases does not in any way serve to disprove Dworkin's general thesis that such principles are to be found. To the contrary, it merely shows that they are not to be found in Riggs and Henningsen--that neither of these cases serves to verify or prove Dworkin's claim. So my arguments necessarily leave open the possibility that the Anglo-American systems of law do, as Dworkin supposes they do, contain at least some principles which are legally binding because they provide the best justification and explanation of existing settled law. Let it be assumed, for the purposes of argument, then, that this possibility is in fact actualized, and that the process of 'extracting' principles from past judicial history is actually the attempt to discover, not merely permissible standards, but binding standards. Let it be assumed, that is, that Dworkin is right and MacCormick is wrong. Even if this much is granted to Dworkin, there is yet another, perhaps more serious, objection to which the pedigree argument is vulnerable. It will now be argued that even if it were true that Great Britain and North America contain criterion B as a test for binding law, this would not serve to undermine a theory such as Hart's, which claims that legal standards are identifiable by a master rule of recognition, and any support such a theory (the so-called 'model of rules') might provide for the necessity theses. The reason is this: Hart neither wishes nor needs to restrict his rule of recognition to tests which deal solely

with a standard's pedigree. In short, criterion B, which includes moral criteria for law, is perfectly consistent with the model of rules.

Consider once again the pedigree argument. It begins with the premise that Hart's legal positivism commits him to three fundamental tenets of that view, the first of which is as follows. All laws "can be identified and distinguished ...by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed" (TRS, p.17). The pedigree argument is sound, then, only if the following two propositions are true:

(i)Hart is a legal positivist.

and

(ii)All legal positivists are committed to Dworkin's first tenet of positivism.

It is clear, however, that propositions (i) and (ii) are mutually incompatible. Whichever one accepts one will be hard-pressed to reconcile the other with the following important claim from CL:

> In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values (CL, p.199).

Now if Hart is of the view that some rules of recognition explicitly include moral values and principles as tests for binding law, then it is by no means true that, in his view, all binding legal standards, within all legal systems, "can be identified and distinguished by...tests having to do not with their content but their pedigree or the manner

in which they were adopted or developed." What counts as binding law within some legal systems may sometimes depend (at least in part) on questions of morality and justice. Thus the pedigree argument provides no reason for supposing that Hart would reject, as inconsistent with the model of rules, any test for binding law which contained non-pedigree, moral criteria. Thus even if the Anglo-American legal systems contain criterion B as a test for law, this provides no reason for rejecting the model of rules as an inadequate conception of law.

There are several objections which some might be tempted to raise at this point. For instance, it might be objected that Hart cannot accept moral criteria into the rule of recognition, regardless of what he might have suggested in his less careful moments. He admits such criteria, it might be argued, only at the expense of embracing a form of natural law, a doctrine he explicitly rejects on numerous occasions and which is logically inconsistent with his legal positivism and the view that law and morality are conceptually distinct. To admit that moral criteria could be included within a rule of recognition is to admit that what is legally binding may depend on what is morally binding -- to admit that on some issues there is a "fused identity between law as it is and as it ought to be" ("Positivism", p.29). But if, as a legal positivist, Hart must reject moral or evaluative criteria, then the pedigree argument stands as a valid and telling

criticism of his model of rules.

It is important to understand why this first objection is misguided; why, that is, Hart can admit moral criteria into the rule of recognition without abandoning legal positivism and embracing a form of natural law. The reason is this. It is a fundamental tenet of natural law, as that theory has been traditionally conceived, that a standard is legally valid and binding, and gives rise to genuine legal rights, obligations and so on, only if it is not morally invalid or unjustified.[32] In other words, all valid legal standards are either morally justified, or at the very least morally neutral. The rule forbidding murder is a rule of the former sort; a rule requiring contracts to be signed and witnessed by three persons is perhaps an example of the latter sort. A natural lawyer might, of course, hold that only standards of the former sort, i.e. those that are positively morally justified, are legally valid. If so, then his theory will presumably find some way of explaining why the three-witness rule, and the countless other rules like it, are not merely morally neutral, but positively justified. It might, for instance, say that it is morally indifferent whether the system adopts a rule requiring three witnesses as opposed to one requiring four, but that the particular rule chosen is morally

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[32]There are those who claim that classical natural lawyers never held the view that standards which are immoral cannot constitute valid law. See, e.g. John Finnis, Natural Law and Natural Rights, passim. Dworkin appears to treat classical natural law as including the first tenet. See, e.g., TRS, p.341 ff.

justified once it has been legally adopted and accepted. Before its adoption the rule is morally indifferent; after its acceptance it is morally justified. In any case, the point is that the natural lawyer need not go this far. All he needs to claim, if he is to count as a proponent of natural law, is that morally invalid or unjustified standards are not legally valid. This minimum claim would seem to constitute the 'core' of natural law, and one might call it the 'first tenet of natural law'. According to this tenet, any putative law that violates a requirement of morality is not really a valid law at all. Unless a theory accepts the first tenet it is not a natural law theory.

It is clear, however, that Hart has not, in allowing moral criteria into the rule of recognition, embraced the first tenet of natural law. According to that tenet a standard that violates a requirement of morality fails to be valid law; but it fails to be so <u>irrespective of whether that moral requirement is, as a matter of contingent social fact, contained within the system's accepted rule of recognition</u>. Any standard, in any system, and regardless of any <u>accepted</u> tests of legal validity, fails to constitute valid law if it is immoral. On Hart's account, however, this is far from the case. The moral requirements (if indeed there are any) in terms of which the legal validity of standards can be established or challenged are those, and only those, the satisfaction of which has been accepted

within some particular system as a necessary condition for legal validity. They are those moral values which have been incorporated into the rule of recognition, either by explicit enactment (as in the United States) or by way of judicial practice. It follows, then, that there might well be other moral values not incorporated in a particular rule of recognition whichare violated by a nonetheless legally valid and binding standard. In other words, it follows that in some particular legal system a standard might be legally valid and morally unjustified -- in terms of moral values which have not been incorporated into the rule of recognition. But this consequence clearly violates the first tenet of natural law. It is, however, quite consistent with legal positivism, the view which stresses the possibility of this consequence. Hart writes:

> It seems that all writers classed as positivists have subscribed to the view that unless the law provides to the contrary, the fact that a legal rule is morally iniquitous or unjust does not entail that it is invalid or not law. This view may also be expressed as the claim that no reference to justice or other moral values enters into the definition of law. "The existence of law is one thing: its merit or demerit another" (Austin). "Legal norms may have any kind of content" (Kelsen). Such a denial of a necessary or definitional connection between law or legal validity and morality is perhaps the principal point of conflict between legal positivism and theories of natural law. For nearly all variants of the latter refuse to recognize as law or legally valid, rules that violate certain fundamental principles. It is, however, important to remember that this denial of a necessary connection between law and morals is compatible with the recognition of many other important connections between them.[33]

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[33]"Legal Positivism", p.419, emphasis added.

It is true that if Hart had, for some reason, claimed it to be necessary that a system of law contain a rule of recognition according to which a standard is legally valid only if it is not morally unjustified, then he would have accepted the first tenet of natural law, and thereby repudiated his legal positivism. But all Hart claims is that it is possible that there be a system in which, as a matter of contingent fact, the accepted tests for valid law require that a standard not violate either the requirements of morality in general, or certain moral values and principles actually specified in the rule of recognition. This is perfectly consistent with the rejection of natural law and the acceptance of legal positivism, the view which insists that if legal validity is in some way, and in some particular system, a function of 'moral validity', it is only because the rule of recognition makes it so. One might summarize this last important point in the following way. According to the model of rules, what counts as a valid law is not necessarily (though possibly) determined by tests which deal solely with a standard's pedigree; what counts as a test for valid laws is, however, necessarily determined by pedigree -- i.e. by what is in fact accepted as the ultimate rule of recognition. The pedigree argument is fallacious in so far as it assumes that by accepting the second claim, Hart has thereby committed himself to denying the first.

If, as is now clear, Hart neither wishes nor needs to restrict the tests for binding law contained within his rule of recognition to non-moral criteria which deal only with a standard's pedigree, the question arises as to why Dworkin might have supposed that he does. There are several possible explanations. First, in describing criteria of validity, Hart does usually restrict his examples to content-neutral pedigree criteria. For instance, in his chapter on the "Foundations of a Legal System, Hart writes:

> Whenever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases (CL, p.97, emphasis added).

All of these possible criteria deal with pedigree, as do the examples Hart normally uses for purposes of illustration: "Whatever Rex I enacts is law" (CL, p.93) and "What the Queen in Parliament enacts is law" (CL, p.108). Nevertheless it is clear that Hart does not intend his list of suggestions to be exhaustive.

A second possible reason hinges on the term 'validity', which is more often than not used to denote a purely formal or content-independent notion. For example, in propositional calculus a distinction is often made between an argument's validity, which is a matter of its logical form, and its soundness, which can be determined only by examining the content of the argument, to determine whether its

premises are true. If one assumes that validity is always a purely formal matter, then one is led quite naturally to the conclusion that a positivist, in so far as he accepts the proposition 'All laws must be valid', is logically committed to the proposition 'All laws must satisfy purely formal criteria of validity'; and from this one is led to conclude that the positivist must exclude content-dependent tests such as whether a rule violates a principle of morality.

Yet it would be a mistake to think that 'validity' is always used to denote a purely formal notion. For example, the phrase 'moral validity' is sometimes employed to denote a content-dependent notion. A morally valid principle is often held to be one which not only passes certain formal requirements, such as that it be entirely universal in form, but which is also true or justified, depending on one's semantics. The notion of a valid contract appears similar in this respect. For example, courts sometimes deny legal validity to 'bargains' in which one party has "unconscionably taken advantage of the necessities of the other", and whether a 'bargain' is of this nature is certainly a question which cannot be answered without examining its content.[34]

A third possible reason has to do with the fact that many writers who have traditionally been classified as

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[34] Henningsen at 389; 161 A.2d at 86, quoting Frankfurter, J. in U.S. v. Bethlehem Steel, 315 U.S. 289, 326 [1942].

positivists do accept Dworkin's first tenet of positivism. The prime example, perhaps, is John Austin who identified law with the commands of a sovereign. Whether a command has issued from an individual who is habitually obeyed, but is not in the habit of obeying anyone else, is entirely a question of that command's pedigree.[35]

A fourth and final possibiliity stems from Dworkin's views regarding the positivist's "picture of law's function" (TRS, p.347). In defending his assumption that the positivist is committed to pedigree tests for law, Dworkin provides the following argument. The positivist conceives of law as providing a "settled, public and dependable set of standards for private and official conduct..." (TRS, p.347). According to Hart, this function is largely fulfilled by the introduction of the secondary rule of recognition which stipulates

> public features whose presence or absence will be decisive in identifying other rules as legal rules. [Hart] says that the acceptance of this sort of secondary rule marks the transition from a pre-legal society to a society with law, because the public features made decisive by the secondary rule will cure the defect of uncertainty latent in pre-legal practice (TRS, p.347).

In order that this prime function of law should be fulfilled, these public tests must be such that the question whether

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[35] A contemporary example is Joseph Raz who restricts tests for binding law to non-moral criteria. See The Authority of Law, p.45 ff. Raz distinguishes what he calls the "strong social thesis", that the identification of law never turns, in any legal system, on moral argument, from the "weak social thesis", that sometimes, in some systems, the identification of some laws turns on moral arguments. Raz accepts the strong social thesis; Hart clearly accepts the weaker one.

a rule satisfies them, and is therefore valid law, must not be subject to any substantial degree of controversy or uncertainty. To this end, the positivist will dismiss the possibility of moral tests for law on the ground that they introduce far too much indeterminacy and uncertainty. If the status of a standard as binding law depends on inherently controversial questions of morality, then the whole point of law is lost. The secondary rule of recognition would "introduce no further determinacy and could not mark a transition to anything" (TRS, p.347).

A major fallacy in this argument lies in its failure to appreciate that a positivist need not conceive of certainty as the only value to be pursued by law, or as a value of overriding concern. Granted, positivists such as Hart make a great deal of the need for certainty. Yet as was seen in chapter two, Hart recognizes other competing values and concerns, such as the need for flexibility in the application of legal standards. Hart argues that the possibility of our blindly committing ourselves to unreasonable results in unanticipated cases is a sufficient reason for framing legal rules in loose open-textured terms, thereby allowing ourselves considerable room to manoeuvre when these rules are applied in actual cases. Hart of course recognizes that when rules are framed in this way a high price is paid in terms of certainty and dependability. It is his view, however, that this price is well worth paying. Yet if the possibility of unwanted results serves, in Hart's mind, as a sufficient

reason purposely to frame rules which promote uncertainty when there might well be certainty, then it is clear that there is at least one legal positivist for whom the value of certainty is not of overriding or total concern. But if certainty need not be the total or overriding concern of the positivist, there is no reason why he cannot allow moral criteria into the rule of recognition. That the set of public standards for private and public conduct should not violate certain fundamental tenets of justice is a value a legal positivist might well endorse as an end (together with certainty) towards which law might (and often does) strive. If he endorses such a value, then he will find it consistent with his views regarding the functions of law that some rules of recognition incorporate principles of justice as grounds for the validity of laws.

This leads to a third and final argument Dworkin offers to support his view that the model of rules cannot successfully accommodate all the binding legal principles which might figure in the adjudicative process. (This argument is, incidentally, also open to the above objection.) In "A Reply to Critics", Dworkin replies to the argument that the model of rules can easily accommodate, as a test for binding law, what I earlier called 'criterion B'. On that criterion a principle is legally binding if it figures in the soundest explanatory and justificatory theory of the existing settled law. E.P. Soper and David Lyons both argue

that criterion B is consistent with Hart's legal positivism since, as was argued above, Hart insists merely that pedigree, in this case social practice, necessarily determines what counts as a criterion of legal validity; but he neither insists, nor needs to insist, that these criteria must themselves necessarily be morally-neutral pedigree tests.[36] Thus Hart can accommodate within his model of rules, a test for valid law, such as criterion B, which makes morality relevant to questions of legal validity. He can do this, and remain faithful to legal positivism, because he will add that if morality is indeed relevant to questions of legal validity, in the way suggested by criterion B, it is only because social practice, i.e. the accepted rule of recognition, makes it so. Hart can, that is, "simply incorporate all of [Dworkin's] claims about legal practice, if they are sound, as refinements " of his own model of rules and its constituent theory of adjudication, Theory H (TRS, p.346).

Dworkin is understandably unhappy with this defence of the model of rules. He raises two objections. First, he argues that the defence undermines (what Dworkin takes to be) the positivist's thesis regarding the conceptual distinction between law and morality.[37] If criterion B is

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[36] E.P. Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", p.509 ff. and David Lyons, "Principles, Positivism, and Legal Theory", pp.424-426.

[37] See TRS, pp.348-349.

admitted as a possible test for binding law, then it will have to admitted that the question whether a standard is legally binding could turn on moral questions -- on which theory is morally the strongest. This, of course, is the pedigree argument once again, and my objections to it have been noted above.

Dworkin's second objection is not so easily disposed of. The objection is as follows. Let us assume that the pedigree argument is fallacious and that Hart could allow certain moral values and principles into his rule of recognition as tests for valid law. Let us assume further that it is consistent with the positivist's theory about the functions of law that a certain degree of uncertainty be tolerated vis-à-vis the satisfaction of whatever validity tests happen to be incorporated in the rule of recognition. Even if this much is granted, it remains the case that, as a positivist, Hart could not possibly go so far as to accept criterion B as a possible test for binding law. That criterion makes 'legal validity' systematically dependent on controversial questions of political morality. This, Dworkin seems to argue, would introduce into the rule of recognition, and into the guidance the law provides for both judge and citizen, an amount of uncertainty which is far greater than a positivist, with his theory about law as providing a settled, dependable and relatively certain set of public standards, could conceivably find acceptable. It would also introduce far too much uncertainty vis-à-vis

the resolution of particular legal issues. Principles do not stipulate answers which must be accepted whenever they apply; they provide reasons which argue in one direction. They must be weighed before their effects upon a legal decision can be determined, and the 'weight' of a principle is often a matter of considerable uncertainty and controversy. The legal positivist can perhaps allow some uncertainty over what counts as valid law, and about the ways in which binding legal standards settle concrete issues; but he cannot, without inconsistency, tolerate the degree of uncertainty that would result if criterion B were accepted as a test for binding law. A secondary rule of recognition containing such an indeterminate criterion, and which allowed standards whose effects upon concrete decisions is more often than not a matter of considerable controversy and uncertainty, could "introduce no further determinacy, and could not mark a transition to anything." This will be called the 'certainty argument'.[38]

The certainty argument invites at least two replies. First, the argument fails to appreciate the important differences between two different sorts of critical claims that can be made about an entity. One must distinguish between (a)criticism which argues that X, because it fails to fulfil the function(s) of an A (a type of entity), or

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[38]Dworkin does not explicitly advance the argument in the form I have given it, but it is, I believe, implicit in what he says at TRS, pp.346-50.

fails to fulfil these functions adequately, is either a bad or unsatisfactory A or a less satisfactory A than it might be; and (b)criticism which argues that X, because it fails to fulfil the function(s) of an A, or fails to do so adequately, is not really an A at all, let alone a good or satisfactory one. Criticism of the second sort can be made when the satisfaction of certain functions enters into the definition of 'A'. For instance, if 'knife' is defined as, say, a bladed implement capable of cutting, then an X which cannot cut even the softest of materials fails to count as a knife, regardless of whether it has all the other properties normally associated with knives. If, on the other hand, 'knife' is defined in a way which makes no reference to functions, then an entity which satisfies that definition, and yet fails, for some reason, to cut anything (e.g. its blade is completely flaccid) might be criticized along the lines suggested in (a). In other words, it might be described as a bad or unsatisfactory knife -- but a knife nonetheless.

In any case, once this (admittedly crude) distinction is drawn, the question immediately arises as to how we are to understand the positivist's position if, as Dworkin supposes, he views the primary function of law as the establishment of a relatively stable, settled and dependable set of public standards for private and official conduct. Is it his view that the fulfillment of this function (to a certain degree) is a <u>defining</u> feature of law, or merely

a criterion in terms of which one might evaluate systems of law? Put in another way, would a system of social regulation possessing all the hallmarks of a legal system (e.g. it has judges, administrators, secondary rules of recognition, change and adjudication, and so on) but whose rule of recognition introduced far less dependability and certainty than is possible, be described by a positivist such as Hart (i)as a non-legal system of social regulation, or (ii)as a legal system which is far less satisfactory than it might be -- but a legal system nonetheless? I am inclined to think Hart would choose option (ii). My reasons are as follows. First, one searches in vain for any attempt by Hart to define or analyze the concept of law in functional terms. Second, Hart seems prepared to claim that 'international law' is really law, despite its obvious failure always to provide a settled, dependable and relatively certain set of public standards for the conduct of nations. Yet if Hart would accept option (ii), then he can, with complete consistency, accept the possibility of a legal system in which a criterion such as criterion B is an accepted test for binding legal principles. He might, of course, wish to add that such systems would be less than satisfactory.

A second objection to which the certainty argument is open is that it seems to exaggerate the degree of uncertainty that is introduced if criterion B is accepted as a test for

binding law.[39] If legal validity were <u>always</u> to depend on controversial questions of morality, then great uncertainty would very probably be the result. Thus if a society's rule of recognition were to stipulate simply that "All disputes are to be settled as justice requires",[40] (criterion C), then the set of standards for public and private use within that society would be no more settled, dependable, stable and certain than they would be were there no rule of recognition at all. One might well agree with Dworkin that the adoption of criterion C "would introduce no further determinacy and could not mark a transition to anything."

It is clear, however, that a rule of recognition containing criterion B need not be anywhere near as indeterminate and uncertain as one containing criterion C. For one thing, criterion B, unlike criterion C, is logically dependent upon, and therefore requires the existence of, <u>other</u> criteria of validity. According to criterion B, it will be remembered, those principles which are necessary to provide the best explanation and justification of the settled law count as binding law. Criterion B requires, then, that there be a body of <u>settled legal standards</u> to be

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[39]It may also rest on an exaggerated contrast between the 'certainty' one gets from rules and the 'uncertainty' one gets from principles. Rules are, after all, frequently altered or replaced, and they are subject to considerable controversy over their 'proper interpretations'.

[40]Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", p.512.

explained and justified; and the existence of such a body of standards requires that there be other criteria of validity in terms of which this settled law can be identified and distinguished. Yet if there are these other criteria, and if they identify and distinguish a wide range of settled, dependable, and relatively certain standards that are sufficient to guide private and official conduct in the great majority of cases, then a rule of recognition containing criterion B as a test for law which must be employed "when the standard materials provide uncertain guidance", (i.e. in hard cases), might very well introduce a great deal of further determinacy and mark a transition to something of great social significance (TRS, p.326). Of course the degree of further determinacy introduced will depend largely on what these other criteria are. Dworkin seems to acknowledge this in reply to the charge that his theory of law "designates more cases as hard cases -- allows more room to challenge what is taken to be settled law -- than positivism does" (TRS, p.361). Dworkin writes: "It is in fact a difficult question whether my theory allows more 'settled' law to be challenged. Much depends upon details of doctrine and practice in particular jurisdictions -- for example whether these allow overruling of undesirable precedents" (TRS, p.362).

I conclude, then, that the certainty argument, like the pedigree and validity arguments, provides no ground for

supposing that the so-called 'model of rules' is logically incapable of accommodating criterion B as a possible test for binding legal principles. Thus even if it were true that, in some legal systems,(e.g. the Anglo-American legal systems) at least some principles are legally binding because they satisfy criterion B, this poses no problem for Hart and his 'model of rules', a theory of law which claims that all binding legal standards, regardless of whether they are rules or principles, are identifiable by tests which are contained or outlined in a master (social) rule of recognition.

THE NECESSITY THESES

In the previous chapter it was argued (a)that the so-called model of rules[1] is logically consistent with there being legal systems in which criterion B is an accepted test for binding legal principles (and policies), but (b)that Dworkin has provided insufficient evidence for the proposition that Great Britain and North America contain legal systems of this nature. It was also argued (c)that Hart might very well consider systems containing criterion B somewhat unsatisfactory -- but legal systems nonetheless. Yet if (a) - (c) are true, one is left with the following crucial question. If Hart must admit the conceivability of systems of law containing criterion B, then is he thereby led to a denial of the necessity theses? On criterion B the law includes a whole host of binding principles and policies, and according to Dworkin, the presence of these standards eliminates the need for judges ever to exercise their strong discretion. Yet if this is true, then Hart must admit that

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[1]--to be understood not as a theory which restricts binding law to Dworkinian rules, but as a theory which argues that binding legal standards, whether they are rules, principles, or some other sort of standard, are identifiable by criteria outlined or displayed in a master (social) rule of recognition.

the exercise by judges of strong discretion is not a necessary or inevitable feature of all conceivable legal systems. In short, Hart must admit that NT(1) and NT(2) are false. My principal aim in this final chapter is to defend the two necessity theses by providing reasons for supposing that the exercise by judges of strong discretion would, contra Dworkin, still be necessary or inevitable in systems which include criterion B as a test for law, and in which principles and policies play the roles Dworkin ascribes to them. I shall not attempt to demonstrate the truth of the necessity theses; only to cast serious doubt on the success of Dworkin's valiant attempt to refute them.

The argument will proceed as follows. In section II, I shall provide a sketch of criterion B which is a bit more detailed than the one offered in previous chapters. I shall be particularly concerned with the theory of "institutional mistakes" which is a crucial component of that criterion. I shall also consider briefly Dworkin's account of how judges are to employ criterion B to answer certain types of legal questions which are characteristically posed in hard cases. Following this I shall consider in section III whether NT(1), the proposition that it is necessary that judges should sometimes have strong discretion, is falsified by the fact that criterion B is a possible test for binding law and that the standards it designates as binding law could be used by judges in the way Dworkin suggests. It will be argued that there is good reason to

be skeptical about whether there would always be one uniquely correct theory of law which determines uniquely correct answers in all cases; and since NT(1) is falsified by Dworkin's arguments only if there always would be such answers, there is reason to be skeptical about whether Dworkin has successfully challenged NT(1). In section IV reasons will be provided for supposing it very likely that judges should sometimes come to exercise strong discretionary judgment if the procedures sketched in section II are followed. If this is so, then Dworkin's arguments fail to provide adequate support for the rejection of NT(2), the proposition that it is necessary (inevitable) that judges should sometimes <u>exercise</u> strong discretionary judgment, even if the skeptical arguments of section III are unsound and judges would not <u>have</u> strong discretion were criterion B accepted as a test for binding law.

II

Criterion B designates, as binding law, all those principles and policies which figure in the soundest theory of law that could conceivably be provided to explain and (morally) justify the settled rules and practices of the legal system in question.[2] As noted in chapter five, Dworkin suggests that this scheme of principles and policies explains and (morally) justifies (a)the provisions of the

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[2]As will be seen below, this 'moral justification' is of a very special sort.

constitution, if there is one, (b)the settled practices of the system (e.g. the practice of following precedents under certain conditions, (c)duly enacted statutes, and (d) judge-made rules and precedents. For the purposes of illustrating what this scheme of principles and policies will be like and how, in theory at least, judges should set out to discover it, Dworkin has us imagine an ideal judge, Hercules, a lawyer of super-human skill, patience and acumen, who constructs a theory of the Anglo-American legal systems. It seems that Hercules is not only capable of constructing a grand theory of his legal system; he is capable of contructing the objectively best one -- i.e. that theory or scheme which includes all (and only) those standards (properly weighted) that are legally binding within Hercules' jurisdiction and which therefore define the actual legal rights of both judge and litigant within that jurisdiction. It is not absolutely certain that Dworkin intends Hercules to be an ideal judge who necessarily gets things right and therefore discovers the objectively best theory of law. He may simply intend him to be a very gifted but fallible judge who might on occasion make an error. It will be assumed, for the purposes of this discussion, however, that Dworkin intends him to be the former. Hercules' theory provides, then, the right answers which ordinary judges within Hercules' jurisdiction must attempt to discover and enforce in their decisions. The ordinary, fallible judge will, in constructing his own theory of law -- or bits of

it -- attempt, so far as he can, to approximate the legal theory Hercules would construct. He will do so even though he will undoubtedly know full well that he could not demonstrate to the satisfaction of all others (i)that his theory of law is identical with Hercules' theory and that it therefore is the objectively best theory of law, or (ii)that his theory is better than any of the other competing theories which have actually been entertained either by himself or by other fallible judges and lawyers. Nevertheless, Dworkin seems to suggest, the fallible judge will believe, and have reasons for believing, both (i) and (ii).

So Dworkin has us imagine that Hercules sets out to formulate that scheme of principles and policies which provides the best explanation and (moral) justification of (a) - (d) above. But as noted in chapter five, Dworkin does not, for a moment, believe that even Hercules will be able to explain and justify in a thoroughly consistent and plausible manner, all of (a) - (d) above. To the contrary, he believes that Hercules "will be unable, even with his superb imagination, to find any set of principles [and policies] that reconciles all standing statutes and precedents" (TRS, p.119, emphasis added). This is not at all surprising, adds Dworkin, since the legislators and judges of the past did not have Hercules' ability or insight, nor were they all of the same mind and opinion. So Dworkin submits that Hercules will inevitably be forced to designate, as mistaken, some of his legal system's institutional history. But he must not

"make impudent use of this device, because if he were free to take any incompatible piece of institutional history as a mistake...then the requirement of consistency would be no genuine requirement at all" (TRS, p.121). Dworkin indicates that Hercules' theory of institutional mistakes must have two parts. First, it will show the consequences for further arguments of taking some institutional event to be mistaken; and second, it will limit the number and character of the events that can be disposed of in that way. Dworkin indicates that in the first part of his theory Hercules will distinguish between the "specific authority of any institutional event", which is its "power as an institutional act to effect just the specific institutional conseqences it describes" and its "gravitational force", which is its power to influence other decisions (TRS, p.121). He indicates further that Hercules will distinguish between "embedded and corrigible mistakes; embedded mistakes are those whose specific authority is fixed so that it survives their loss of gravitational force; corrigible mistakes are those whose specific authority depends on gravitational force in such a way that it cannot survive this loss" (TRS, p.121). Thus, if Hercules accepts the principle of legislative supremacy, then if he decides that a statute prohibiting motor-vehicles from public parks is mistaken, he must consider it an embedded mistake. He must respect and enforce the limitations it imposes on, e.g. motorcycle and automobile owners who might wish to drive their vehicles through a

public park; but he cannot argue, by reasons of analogy, i.e. on the basis of principles which are held to 'justify' the statute's enactment, that a new rule prohibiting motor-vehicles from public beaches should or must be adopted. He cannot appeal to the statute as grounds for adopting the new rule because the statute, in that it is an embedded mistake, has no gravitational force to influence other decisions. If, however, the institutional act or event in question is a past judicial decision, and Hercules does not adopt a "strict doctrine of precedent", then he can designate the mistake a corrigible one and thereby deny its enactment as well as its gravitational force (TRS, p.121). This is what happens, presumably, when precedents are overturned or overruled.

In any event, whether a mistake is embedded or corrigible it must be excluded from the set of materials Hercules must justify and explain.[3] But now the important questions are: (a)How many of the vast array of decisions and standards

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[3]It may, of course, be necessary that Hercules continue to respect the "specific authority" of the mistake. It is crucial to be clear on this point. Dworkin does not suggest that all mistakes are "corrigible". The fact that Hercules will be forced to consider a certain portion of institutional history as mistaken does not entail in itself that "in the end [his legal theory] unsettles part of what is originally accepted as settled law" (C.L. Ten, "The Soundest Theory of Law", p.535). As Dworkin indicates in his reply to a similar charge by Mr. Mackie (in "The Third Theory of Law", pp. 15-16) "Much depends upon details of doctrine and practice in particular jurisdictions -- for example whether these allow overruling of undesirable precedents" (TRS, p.362).

found within his jurisdiction can Hercules legitimately designate as mistakes? and (b)On what grounds can he distinguish those which are mistaken? In answer to question (b), Dworkin provides four guidelines which he suggests Hercules will accept. Dworkin argues that the first two follow from the principle of fairness which Hercules will be compelled to accept if he is to provide an "adequate account of the full practice of precedent" (TRS, p.113). Dworkin argues that the general gravitational force of precedents can be explained only by an appeal to the fairness of treating like cases alike. "A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future" (TRS, p.113). Dworkin suggests that if "Hercules bears in mind the connection...between precedent and fairness, this connection will suggest two guidelines for his theory of mistakes" (TRS, p.122). The first is this:

> If he can show, by arguments of history or by appeal to some sense of the legal community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force that it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut (TRS, p.122).

This first guideline is puzzling. Dworkin suggests that the argument from fairness is "undercut" if the principle underlying the precedent is unlikely to be followed in future. If this is so, then what is to be made of the claim

that "the very fact of [a] decision...provides some reason for deciding other cases in a similar way in the future"? If it is truly unfair to decide in a manner which is inconsistent with a past decision, then how can this 'unfairness' be alleviated by the mere fact that it is likely to be repeated in the future -- especially if the "sense of the legal community" is wrong and the original decision was indeed a fair or just one?

Dworkin's second guideline is no less puzzling. He indicates that if Hercules

> can show by arguments of political morality that [the] principle, apart from its popularity, is unjust, then the argument from fairness that supports that principle is overridden (TRS, pp. 122-123).[4]

Now if by "overridden" Dworkin means undercut, then once again, if the mere fact of a decision provides some grounds for deciding other cases in a similar fashion, it should follow that there is at least some reason to accept that principle and thus the precedent it is thought to support.

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[4]As will be seen below, Dworkin uses the term 'political morality' to mean the community's political morality; and by 'the community's political morality' he seems to mean that set of fundamental principles which best explains the "standard cases" of the various contested moral concepts employed by the laws and institutions of the political or legal system. In other words, he means that set of fundamental principles which best explains why all the "standard cases" of those contested concepts -- i.e. those cases with respect to which there is agreement within the community that they instantiate the concept in question -- are as they are thought to be. If this is what is meant by 'political morality', then it seems to follow that a principle can be denied 'legal' status simply on the ground that it conflicts with community morality, and even if it serves to explain and justify more settled law than any other competing principle. On this see C.L. Ten, "The Soundest Theory of Law", p.533 ff.

Perhaps, though, Dworkin does not mean to deny that there is any reason to accept the principle and the precedent. Perhaps he merely wishes to deny that the reason is of sufficient weight to override or outweigh other reasons of fairness which argue against continuing to accept the principle and the decision. But this raises problems as well. If the original decision was truly unjust, is it at all plausible to say that fairness requires that it be repeated? Can fairness argue in favour of perpetuating an injustice? It would seem not, and thus the argument from fairness is undercut not simply overridden. Yet if fairness cannot argue in favour of following unjust decisions and principles, then it must argue in favour of just ones. A just decision, however, is one which should have been made, and a principle supporting such a decision is presumably one which should be followed. Yet if this is so, then the same reasons which argued in favour of the original decision, namely, that a good principle will be respected, would seem to argue equally in favour of the later decision, if the situation in the later case is (relevantly) similar to what it was when the original decision was given. So the mere fact of a decision does not seem to provide much in the way of justification for deciding similar cases in the same way. If the original decision was a just one, then the reason(s) which made it a good decision in the first place argue equally in favour

of repeating the decision in a relevantly similar case.[5]

Dworkin suggests two further guidelines Hercules will accept for the second part of his theory of mistakes. He will suppose that "decisions at a lower level are more vulnerable than decisions at a higher" and he will consider recent decisions to be less vulnerable than older ones (TRS, pp. 122 & 340). Dworkin provides no explanation as to why Hercules will accept these further guidelines. Nevertheless, they, together with the first two considered, are open to the following important objection: they are all part of Hercules' general legal theory. The first two, for example, are said to depend on principles of fairness which, Dworkin argues, Hercules will be compelled to accept into his legal theory if he is to explain the full practice of precedent. But if the guidelines are part of Hercules' theory, or follow from principles which are part of that theory, then how can he *use* them to *select* that theory? He must select the theory which best explains and justifies the *unmistaken* settled law; but he needs that theory to tell him which settled law *is* unmistaken, and thus which settled law needs to be explained and justified. The theory of institutional mistakes, in so far as it is theory-relative, cannot, without circularity, be used in determining what that

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[5]On this see J. Raz, "Professor Dworkin's Theory of Rights", p.135. Raz points out certain special cases where fairness may argue in favour of repeating a decision which should not have been made in the first place.

best theory is. What one needs are guidelines which are not, in this way, theory-relative; but Dworkin gives no indications as to what these might be.[6]

Dworkin's answer to question (a)-- How many decisions and standards can be labelled as mistakes? -- seems to be 'Not too many'. As noted in chapter five, Dworkin distinguishes two dimensions along which Hercules will evaluate the legal theories he considers: institutional fit and political morality. Dworkin submits that no theory can count as an adequate justification of institutional history unless it provides a "good fit" with that history. By this Dworkin means that it cannot "expose more than a low threshold number of decisions as mistakes" (TRS, p.340). If, however, two or more theories pass the minimum threshold required by the test of fit, then the theory which is "morally the strongest" is the objectively best theory which defines the legal rights and obligations of both judge and litigant. If two theories have each passed the minimum threshold required by the test of institutional fit, that dimension is no longer relevant.

As noted in chapter five, a host of questions arise from this account. One of the most important questions, for the purposes of this discussion, is 'Where exactly is this minimum threshold of institutional fit to be set?'. Dworkin's answer appears to be: 'It depends on one's legal

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[6]On this and related points, see Nickel, "Dworkin on the Nature and Consequences of Rights", p.1122.

theory.' He suggests that if "a theory containing one principle is better on the dimension of fit, but a theory containing a contrary principle is better on the dimension of morality, then the jurisprudential question is raised as to which is more important in determining institutional rights in cases of that sort" (TRS, p.340). Yet if the question of where the minimum threshold is to be set, together with the question of how important each of the two dimensions is to particular sorts of legal problems, are jurisprudential questions the answers to which will turn on one's legal theory, then the problem of circularity is once again introduced. If it is possible for the minimum threshold and the relative importance of the two dimensions to vary from one theory to the next, depending on the principles and policies found within those theories, then a theory which, for instance, places very great weight on the principle of judicial subordination to the legislature might tolerate far less mistaken statutes than some other theory which ascribes far less weight to that principle -- or does not even include that principle. But if this is so, then the 'data' to be explained and justified may vary considerably depending on where the minimum threshold is set; and what is the best explanation and justification of one set of data will not necessarily be the best explanation and justification of some other set of data -- a set which is different from the first because a different amount of the settled material has been excluded

as mistaken. Once again, Hercules is required to select the theory which best explains and justifies the "unmistaken" settled law, but he needs that theory to tell him which settled law is unmistaken, and thus which settled law is in need of explanation and justification.

There are further problems which Hercules will encounter -- problems which may lead one to wonder whether he will be compelled to accept one and only one theory as providing the objectively best explanation and justification of his legal system. But before these problems are investigated, I should like to consider, briefly, how Dworkin supposes that Hercules will use his legal theory to decide particular sorts of issues that are characteristically raised in hard cases. Dworkin argues, of course, that Hercules will never decide any hard case by exercising his strong discretion (except, of course, in those special sorts of situation where strong discretion has explicitly been granted). To the contrary, when the settled rules or precedents fail to guide him fully he will repair to his legal theory and determine, for example, whether the relevant legal rule or precedent must be applied -- whether, that is, application is the right answer which the binding standards of law demand. How he will determine what his theory requires is a very complicated matter, of course, and the procedures he follows will differ, argues Dworkin, depending on whether he is dealing with, e.g. a problem of statutory interpretation or attempting to determine the

scope of a binding (and unmistaken) precedent.

If Hercules is dealing with a question of statutory interpretation, then he must begin by asking "which arguments of principle and policy might properly have persuaded the legislature to enact just that statute" (TRS, p.108).[7] He must ask which of the various principles and policies which might be thought, reasonably, to justify the statute conflict with standards which must find their way into his theory of law if that theory is to provide an adequate explanation and justification of institutional history. These must be excluded straight-off from consideration. Those that are left might properly have persuaded the legislators to enact the statute they did. Hercules must then determine which, among these remaining principles and policies, "offers a better justification of the statute actually drafted" (TRS, p.109). Dworkin holds that, in theory, there will always be a set of principles or policies which provides the statute with its best justification (and explanation). These will, of course, be standards which figure in Hercules' general theory of law. They will not be standards which Hercules might personally find attractive but which have

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[7]Dworkin attempts to distinguish between "arguments of principle" and "arguments of policy" by saying that the former "attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit", while the latter "attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community" (TRS, p.294).

no basis in sound political theory.

It is important to notice that Dworkin does not require that Hercules ask which arguments of principle and policy did in fact persuade the legislators to enact the statute they did. There is no talk of attempting to decide in accordance with the aims or intentions of the legislators. Rather, Dworkin suggests that Hercules will ask which arguments of principle and policy might properly have persuaded them to do so, if they were guided by the constraints imposed upon them by the constitution and their institutional responsibility to pursue the collective welfare of the political community in their legislation.[8] The emphasis is placed on the best theory of law in Dworkin's account of statutory interpretation in hard cases, and not on speculation about what the legislators as a matter of fact might have intended, or on what is explicitly stated or generally agreed to be the justification of the statute. It appears that in Dworkin's view it is quite proper legally for Hercules to decide a case in one way even though the intentions or aims of the legislators clearly were, or would have been, that it be decided in some other way. On Dworkin's theory they might have gotten their institutional duty all wrong.

For Dworkin, then, the 'right answer' determined by a statute in a hard case is that answer which best satisfies

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[8]See TRS, pp. 107-108.

whatever principles or policies provided the statute with its best justification at the time of its enactment. Dworkin does not, incidentally, suggest that Hercules must consider (a)which principles or policies <u>now</u> provide the best justification of the statute. Rather he requires that Hercules consider (b)which <u>would have</u> provided the statute with its best justification at the time it was enacted.[9] Since both institutional history and other facts about Hercules' society might well have been different at the earlier time, the answer Hercules would give to question (a) need not be the same as the answer he will give to (b). In any event, when a legislature enacts a statute it does something more than create a legal right (or obligation or power) the scope of which is entirely a function of the "shared conventions of language" or any "explicitly stated or generally agreed purpose(s)." The right (or obligation or power) created by that institutional event extends, at the moment of enactment, to all those cases in which the statute properly interpreted applies; and whether a particular interpretation is proper will depend, in a hard case, on whether the statute, thus interpreted, would have served those principles or policies which provided the statute with its best justification at the time of its enactment.

So Hercules will consider arguments of principle and

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[9]See, e.g., "NRA?", p.68.

policy when he interprets statutes in hard cases. If, however, the hard case turns on the scope or 'gravitational force' of a precedent (or a judge-made rule), then, Dworkin argues, Hercules will consider only arguments of principle. He will ask "which arguments of principle justify that particular rule or precedent?" and once again, it is important to note that Hercules will not ask which arguments of principle were thought, by the enacting judge, or are now thought, by most lawyers, to justify the rule or precedent (TRS, p.115). The emphasis is placed, once again, on the best legal theory, and thus upon what actually does justify the rule or the precedent.[10]

Dworkin's explanation of why Hercules will consider only arguments of principle when he attempts to determine the scope of "judicial enactments" seems to be this. The full gravitational force of precedents can be explained only in terms of the "fairness of treating like cases alike" (TRS, p.113). It is fairness which explains the following feature of the practice of precedent.

> If it is acknowledged that a particular precedent is justified for a particular reason; if that reason would also recommend a particular result in the case at bar; if the earlier decision has not been recanted or in some other way taken as a matter of institutional regret; then that decision must be reached in the later case (TRS, p.115).

If the earlier decision is acknowledged to be justified for

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[10] It is not clear why, but Dworkin seems to suggest that when a "judicial enactment" is the object of concern, Hercules will ask which arguments of principle justify that enactment --not which arguments would have justified that enactment at the time of its enactment.

reason R and if R argues in favour of a particular answer in the instant case, then 'fairness' requires that that reason be followed once again and that that particular answer be accepted.[11] It would be unfair for the government, having intervened in the first case on the grounds of reason R, to refuse to do so again in the later case in which R also applies. Yet this gravitational pull that fairness exerts via an earlier decision would not exist, Dworkin argues, if that decision were justified on policy grounds. Fairness does not, he suggests, require the consistent application of policies (or the goals they describe) since it "need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike" (TRS, p.88). Only rights and principles require "distributional consistency" (TRS, p.88). Thus if "an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force" (TRS, p.113).

I fail to understand this explanation of why Hercules will restrict himself to arguments of principle when he attempts to determine the scope of a precedent or a "judicial enactment". If (1)the gravitational force of precedent is really to be explained in terms of the fairness of applying any justificatory reasons which (a)are held to have justified an earlier decision, and (b)apply to the

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[11] I criticized this argument earlier in this chapter.

case at bar; and (2)policies <u>can</u> sometimes serve to justify political and judicial decisions;[12] then why should one suppose that a precedent would have no gravitational force if it were justified on grounds of policy? If the satisfaction of policy P truly serves to justify an earlier decision, d(1), and if that reason, i.e. the satisfaction or promotion of P, "would also recommend a particular result [d(1)*] in the case at bar", and the "earlier decision has not been recanted or in some other way taken as a matter of institutional regret", then, unless weightier reasons outweigh P, d(1)* must be reached in the later case -- if, as Dworkin suggests, fairness requires the consistent application of reasons which are acknowledged to have justified past decisions.[13]

It is possible to extract from <u>TRS</u> one further argument for the claim that Hercules will restrict himself to arguments of principle. In discussing the "interpretation of judicial enactments", such as the rule in <u>Rylands v. Fletcher</u>,[14]

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[12]See, e.g., <u>TRS</u>, p.308 where Dworkin writes: "Sometimes the interests of others will be great enough, quite apart from any question of competing rights, to defeat an abstract right." This point will be discussed in greater detail later.

[13]The fact that P could be outweighed poses no problem, of course; rights can be outweighed as well. See chapter four above. The fact that circumstances may have changed in such a way that the satisfaction of P does not require d(1)* poses no problem either. If the circumstances have changed in this way, then the two cases, the instant case and the 'precedent-case', are not relevantly similar.

[14][1866] L.R. Ex. 265, aff'd (1868) L.R. 3H.L. 330.

Dworkin writes:

> [S]ince Hercules will be led to accept the rights thesis...his 'interpretation' of judicial enactments will be different from his interpretation of statutes in one important respect. When he interprets statutes he fixes to some statutory language...arguments of principle or policy that provide the best justification of that language in the light of the legislature's responsibilities. His argument remains an argument of principle; he uses policy to determine what rights the legislature has already created. But when he 'interprets' judicial enactments he will fix to the relevant language only arguments of principle, because the rights thesis argues that only such arguments acquit the responsibility of the 'enacting' court (TRS, p.111, note 1, emphasis added).

The argument is this: (1)when he interprets an enactment, and thus attempts to determine the scope of the right (or obligation, etc.,) it creates, Hercules must consider which arguments provide, or would have provided, the enactment with its best justification; but (2)since he accepts the rights thesis, Hercules believes that only arguments of principle could possibly justify judicial enactments, in contrast to statutory enactments which can be justified on grounds of both principle and policy. From this it follows (3)that Hercules will consider only arguments of principle when he interprets judicial enactments.

There is a problem with this argument. It is not clear that premise (2) is true -- that the rights thesis does include the claim that only arguments of principle could possible serve to justify judicial enactments. If (2) were true, then one would be hard-pressed to reconcile the rights thesis (which both Dworkin and his alter-ego Hercules accept) with Dworkin's acknowledgement that policy can sometimes

outweigh rights. As noted in chapter four above, it is not altogether clear when, in Dworkin's view, this can happen, but it is clear that his view is that it can happen sometimes. In "A Reply to Critics", for instance, Dworkin submits that "[s]ometimes the interests of others will be great enough, quite apart from any question of competing rights, to defeat an abstract right" (TRS, p.308). As a case in point, Dworkin cites D v. National Society for the Prevention of Cruelty to Children,[15] in which the plaintiff demanded pretrial that the name of the anonymous informer who denounced her to the society be disclosed, alleging that she required this information to argue her case properly. The court conceded that "plaintiffs generally have a right to the information they need", but argued that "the effectiveness of the Society would be reduced if it were known that it might be forced to reveal the names of anonymous informers" (TRS, pp.308-309). Dworkin suggests that this position makes no sense if what is meant by 'effectiveness' is mere efficiency. That would make the policy a "routine goal of political administration" which cannot outweigh a genuine right. But, he argues, if by 'effectiveness' is meant effectiveness in reducing damage to children, then this potential damage "is so great that the plaintiff's abstract right to disclosure must yield, because, while a right, it is not so important or powerful

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[15](1977) 1 All E.R. 589.

a right as to trump an especially strong social disadvantage" (TRS, p.309).

Now if these interests can outweigh the right of the plaintiff to disclosure, then it must be the case that at least sometimes an argument of policy is needed to acquit the responsibility of the original court. So if Dworkin (a proponent of the rights thesis) is prepared to allow that courts can, and must, sometimes consider arguments of policy to justify their rules and decisions, then there is no reason why a later court called upon to 'interpret' the earlier court's decision, or to determine its gravitational effect, should not do the same. Indeed, on Dworkin's account there is every reason why it should -- if the original decision was indeed justified on grounds of policy.[16]

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[16]For further cases in which "public policy" seemed quite clearly to be used in the justification of the decision, see, e.g., Rondel v. Worsley ([1969] 1A.C. 191) where, it will be remembered, it was determined that a barrister is not liable for any defect in the presentation of his client's case. One of the court's reasons for not finding in favour of the plaintiff was that it would result in the flooding of the courts with litigation by disgruntled litigants. Cf. Lord Tomlin's comments in Donoghue v. Stevenson ([1932] A.C. 562 at 600; 1932 S.C. (H L.) at 57) and White & Carter (Councils) Ltd. v. McGregor ([1962] A.C. 413; 1962 S.C. (H.L.) 1), especially the argument of counsel that "It is contrary to public policy that the innocent party should swell his own profits by insisting on going on with performance in rendering services or manufacturing goods which no one wants...The appellant company's contentions lead to commercial and economic absurdity with far-reaching and serious consequences" (at 423-424). See also Home Office v. Royal Dorset Yacht Co. Ltd. ([1970] A.C. 1004) and Conway v. Rimmer ([1968] A.C. 910). For further examples and for a very thorough and enlightening discussion of the ways in which public policy and other "consequentialist" factors have played an important role in English and Scots law, see MacCormick, Legal Reasoning and Legal Theory, passim.

It is perhaps worth noting that Dworkin might still wish to claim that the court's decision in D v. NSPCC rested on an argument of principle. He might wish to say that the judge used policy to determine the scope of the plaintiff's right to disclosure; and since the decision was that the scope of that right did not extend to the plaintiff, the argument was one of principle -- i.e. it was about rights. This would mean, presumably, that any argument which gave weight to at least one right counts as an argument of principle. Yet even if one grants this much to Dworkin, it remains true that the judge considered an argument of policy to determine the scope of the defendant's abstract right -- just as he might have considered an argument of policy if he had to determine the scope of a statutory right. Dworkin might wish to refer to the overall argument in both sorts of case as one of 'principle', but it still remains true that a component of each argument is an argument of policy, which, in the case of D v. NSPCC, was sufficient to "defeat" the right of the plaintiff to disclosure.

In any case, Dworkin's view is that Hercules will always be able to discover within his theory of law a set of principles or policies which provides the best justification of whatever rule or precedent he must be concerned with in a hard case. He must use these principles and policies in the ways described above to determine the right answers required by binding law -- to determine the way in

which the law fully controls his decision.

A crucial question arises at this point in the investigation. What if Hercules must decide a case in which a principle or policy provides what is unquestionably the best justification, perhaps the only conceivable justification, of the pertinent piece of institutional history, and yet it is unclear, exactly, how that standard is to be understood or interpreted? For instance, suppose that Roe v. Wade[17] and Doe v. Bolton[18]

> can be justified only by supposing some important right to human dignity, but do not in themselves force a decision one way or the other on the issue of whether dignity requires complete control over the use of one's uterus (TRS, p.127).

On one understanding of the concept human dignity, say one which "connect[s] dignity with independence", a principle of dignity may require decision in favour of a woman's right to an abortion; on some other understanding of that concept, the principle may require the opposite decision (TRS, p.128). Dworkin suggests that if "Hercules sits in the abortion cases he must decide that issue and must employ his own understanding of dignity to do so" (TRS, p.127). But now the question is: 'How does Hercules reach this understanding of the concept dignity?'. In attempting to answer this question Dworkin draws on the notion of a concept, e.g. dignity, fairness or equal protection, "that admits of

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[17] 410 U.S. 113 [1973].

[18] 410 U.S. 179 [1973].

different conceptions; that is...a contested concept" (TRS, p.103). Many of the general justificatory principles within Hercules' theory of law will employ such concepts as will the provisions of a typical constitution, and Dworkin sets out to provide a theory according to which there will always be one best conception of a contested concept, and thus one best way to understand general justificatory principles. Dworkin follows Gallie and Rawls in distinguishing between concepts and conceptions.[19] He suggests that this

> is a crucial distinction which it is worth pausing to explore. Suppose a group believes in common that acts suffer from a special moral defect which they call unfairness, and which consists in a wrongful division of benefits and burdens, or a wrongful attribution of praise or blame. Suppose also that they agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial cases. In that case, the group has a concept of unfairness, and its members may appeal to that concept in moral instruction or argument. But members of that group may nevertheless differ over a large number of these controversial cases, in a way which suggests that each either has or acts on a different theory of why the standard cases are acts of unfairness. They may differ, that is, on which more fundamental principles must be relied upon to show that a particular division or attribution is unfair. In that case, the members have different conceptions of fairness (TRS, pp.134-135).

Although there will be agreement on certain clear cases (e.g. to strip someone naked and flog him in a crowded public street would be to rob him of his dignity on any

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[19] W.B. Gallie, "Essentially Contested Concepts" and John Rawls, A Theory of Justice, pp. 3-10.

plausible understanding or conception of that concept), there will be substantial disagreement on a wide range of hard, controversial (i.e. penumbral) cases (e.g. to deny a woman the right to an abortion on demand, or to require compulsory use of seat belts, may rob a person of her dignity on one conception of dignity but not on some other). It is in these hard cases that the application or the scope of the shared concept is contested. In Dworkin's view, of course, this widespread disagreement does not in any way entail that the question whether, and how, the concept applies in any of these hard cases, lacks a right answer.[20] To the contrary, if individuals are instructed, for example, to act 'fairly', they are charged with

> the responsibility of developing and applying their own conception of fairness as controversial cases arise. This is not the same thing, of course, as granting them a strong discretion to act as they like; it sets a standard which they must try -- and may fail -- to meet, because it assumes that one conception is superior to another (TRS, p.135).[21]

Dworkin is of the view that there will be one uniquely best conception of a concept, and it is this conception which will entail the uniquely correct answer to the question of what that concept, or a principle which makes reference to it, requires in a hard case. As for how Hercules will

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[20] -- for reasons outlined and considered in chapter three.

[21] Once again, one has a hint of the suggestion that if individuals are charged with the responsibility of finding a right answer, then they do not, in virtue of that fact alone, have strong discretion -- though perhaps Dworkin means to say here that under such conditions these individuals have not been granted strong discretion.

determine which conception is best, Dworkin's view appears to be that he will follow the same general procedure he uses to develop his general theory of law. In "A Reply to Critics" Dworkin says that the "contest between theories of law has the same form as contests between theories of the equal protection clause or theories of negligence, though the former is more general" (TRS, p.353). So when individuals contest competing conceptions, they are "contesting different conceptions of a concept they suppose they hold in common; they are debating which of [two or more] theories of that concept best explains the settled or clear cases that fix the concept" (TRS, p.128). The correct conception is that set of fundamental principles which best explains the clear cases that fix the concept, and this makes contested concepts, and the way in which they are elaborated, very much like theories of law, and the way in which they are developed. The rules and precedents Hercules sets out to explain and justify are simply replaced by the clear cases which fix the concept he attempts to elaborate.[22]

To sum up, on criterion B the law includes all those principles and policies which figure in the soundest theory that could conceivably be provided to explain and justify

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[22]There may be differences. For instance, it is not clear whether there is room for an analogue to the theory of institutional mistakes. Any case which one might be tempted to call a mistake would presumably not be a clear case which helps to fix the concept.

the established, unmistaken law. (It will also include, presumably, principles for establishing the 'weights' of principles and policies, as well as principles which tell Hercules how to resolve conflicts among competing standards of the various sorts, and so on.) When it is unclear exactly what is required by a rule or a binding precedent, Hercules will find an answer by determining which principles, and perhaps policies, justify, or would have justified, that rule or decision. In doing so he will judge possible theories or justifications along two dimensions: 'institutional fit' and 'political morality'. If two or more theories pass the test of institutional fit, then that theory which is soundest in the dimension of 'political morality' is the objectively best one, even if it fits less well with the settled law than a rival. Once the minimum threshold of the test of fit has been surpassed, that test is no longer relevant. If a set of principles or policies provides what is unquestionably the best justification and explanation of a piece of institutional history, but it is unclear exactly what some of those principles or policies require, because, for example, they are far too abstract and general to offer much concrete guidance in hard cases, then Hercules will be forced to elaborate the contested concepts referred to in those standards, and thus to elaborate those standards themselves and make their requirements more specific. Given that the law contains this host of standards, and that they are used in

these ways to decide hard cases, it follows, Dworkin argues, that NT(1) (it is necessary that judges have strong discretion) and NT(2) (it is necessary (inevitable) that judges sometimes exercise strong discretionary judgment) are both false. There are legal systems in which judges neither have strong discretion nor exercise strong discretionary judgment.

III

I would now like to turn and argue that there is good reason to be skeptical about (a)whether there will always be one uniquely best general theory of the law; (b)whether there will always be one uniquely best justification of a rule or precedent; and (c)whether there will always be one uniquely best conception of an essentially contested concept of political morality. If there is good reason to be skeptical about (a) - (c), then there will, of course, be good reason to be skeptical about whether legal systems (in Dworkin's view, the Anglo-American legal systems) which required judges to decide cases in the ways described in section II would always succeed in fully controlling judicial decisions. If, for example, there would sometimes be two possible justifications of a statute, neither of which is better than the other, but each of which is better than all others, then a judge who followed Dworkin's prescription, i.e. who followed the Herculean decision-procedure, might be left

with a 'choice' between interpretations neither of which is more justified than the other. If the statute entails different answers on these different interpretations, then the law would have failed fully to control the judge's decision, and he would therefore have strong discretion; and NT(1) would not be falsified. The skeptical considerations which will be considered apply more or less equally to (a), (b) and (c), though there are some differences which will be noted. Unless otherwise indicated, then, the arguments should be taken to apply to all three propositions.

The most important point to note about Dworkin's account of adjudication is that it fails to exclude the logical possibility that there might be 'ties' among theories, justifications or conceptions. Dworkin, of course, concedes this; but he goes on to argue that "[f]or all practical purposes, there will always be a right answer in the seamless web of our law" ("NRA?", p.84). In "mature" legal systems, those which are "thick with constitutional rules and practices, and dense with precedents and statutes" (TRS, p.286) the "intersections and interdependencies of different legal doctrine will be so intense that it will not be possible to maintain the third position [that more than one theory, etc., is best] against the other two [that one is actually better than the other(s)]" ("NRA?", p.84). In other words, if the data to be explained and justified are sufficiently dense and complex, it will never in fact be the case that there is a tie -- even

if its theoretical possibility must be acknowledged.

Dworkin's argument invites several replies. First, as John Mackie has noted,

> there is a weakness in the argument that an exactly equal balance between the considerations on either side is so unlikely that it is almost certain that one party will have an antecedent right to win (TRS, pp.286-287). This argument assumes too simple a metric for the strength of considerations, that such strengths are always commensurable on a linear scale, so that the strength of the case for one side must be either greater than that of the case for the other side, or less, or else they must be equal in the sense of being so finely balanced that even the slightest additional force on either side would make it the stronger. But in fact considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced.[23]

As Mackie points out, the 'tie' judgment need not be equivalent to the 'equally balanced' judgment. To say that there is a tie between two theories of law is to imply that each is neither better nor worse than the other, but this need not mean that the two are finely balanced. To illustrate his point, Mackie considers an analogous case of three brothers in which the relevant question is whether Peter is more like John than he is like James. Mackie suggests that there

> may be an objectively right and determinate answer to this question, but again there may not. It may be that the only correct reply is that Peter is more like James in some ways and more like John in others, and that there is no objective reason for putting more weight on the former points of resemblance than on the latter or vice versa.[24]

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[23] John Mackie, "The Third Theory of Law", p.9.

[24] Ibid., p. 9.

Yet another example can perhaps be found in the selection of motor-cars. There are various criteria, i.e. considerations, in terms of which motor-cars can be evaluated or rated: economy, power, comfort, style, safety, and so on. A motor-car satisfying all these criteria is undoubtedly better than one which satisfies none. If the two cars are, instead, exactly identical, then they are of course equally good. Yet if one car is very economical, stylish and safe, but not very comfortable or powerful, while the other is very comfortable, powerful and safe, but not very economical or stylish, then all one might wish to say is that, as a car, neither is better or worse than the other.[25] But from this one would not wish to conclude that the two are equally good in the sense in which to say that they are equally good is to imply that one's claim would be false were it suddenly discovered that the first car got one more mile per gallon than had originally been thought. Likewise, two or more legal theories, etc., might be such that none is better than the other(s) and yet they are not equally good in the sense that "even the slightest additional force" in favour of one theory, etc., would make it the strongest.

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[25]-- unless, of course, there is reason to prefer one set of criteria over the other. If, for instance, S's purpose in choosing a car is to find safe, reliable transport for his family, then a car which is safe, comfortable, and economical, but not very powerful or stylish is undoubtedly and objectively a better car, <u>for S's purposes</u>, than one which is powerful and stylish, but somewhat dangerous, uncomfortable and expensive. But '<u>qua</u> car', one might say, there is no objective reason to say the first is better.

In "A Reply to Critics" Dworkin considers Mackie's argument and suggests that it harbours two misunderstandings of the way in which, on Dworkin's account, legal theories justify (and explain) institutional history. First, it assumes that Dworkin would say

> that a justification of a body of material becomes better, as a justification, when it justifies a greater percentage -- even a marginally greater percentage -- of that material (TRS, p.360).

To this Dworkin replies,

> I see no reason why that should be so. When two theories compete along...the dimension of fit, the contest is not to see how many distinct bits of institutional history each explains...The contest along that dimension supposes a metric that is less precise and more a matter of characterization. Each of two theories may fit 'reasonably' but not very well the 'great bulk' of precedents, and yet one be preferred to the other because it can more plausibly be seen as explaining the 'trend' of recent decisions. In that case, the justification ...described does not provide that any improvement along the dimension of fit is automatically an improvement in overall justification (TRS, p.360).[26]

But does this first reply overcome the objection posed in Mackie's incommensurability argument? Assume that Mackie's argument does suggest a metric which is perhaps too simple for Dworkin's purposes; that the best legal theory (or justification or conception) must not justify and explain a greater percentage of institutional history, but rather the 'trend' of recent decisions. Even if this much is granted,

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[26]It is not clear how this explanation in terms of the trend of recent decisions would work, if at all, with respect to contested concepts. Perhaps the best conception will offer the best explanation of the most recent developments in the community's beliefs regarding the scope of the concept; it will best explain the trend towards the more contemporary views.

it would seem that Dworkin's account is still vulnerable to the principal point of Mackie's argument. Just as Peter might be more like John in some ways and more like James in others, and just as one car might be better than another in some respects and worse in others, one theory might justify and explain certain aspects of the 'trend' of recent decisions better than another, while the latter might well justify and explain other aspects of that 'trend' better than the former. And of course there might be 'no objective reason for putting more weight on the former [aspects of the trend] than on the latter or vice versa." So Mackie's incommensurability argument would appear to stand in the face of Dworkin's first reply. From the fact that it is extremely unlikely that cases should ever arise in which theories are precisely balanced on the test of fit, it does not follow that it is extremely likely, virtually certain, that there will always be one theory that is better than all the rest.

The second way in which, according to Dworkin, Mackie's argument misrepresents his account is that the concept of justification he, Dworkin, describes

> provides for a threshold of fit that must be met by any theory that is ultimately to qualify, but argues that if two theories each pass that threshold, the choice between the two will be governed by political morality (TRS, p.360).

It is far from clear, however, that this appeal to the dimension of political morality will survive Mackie's objection. The 'morality' to which Hercules will appeal

when he tests theories of law is described by Dworkin as "the community's constitutional morality" (TRS, p.126).[27] Dworkin argues that this form or branch of morality must be distinguished from the community's "popular morality" (TRS, p.126) or the "people's morality" (TRS, p.125) -- the actual moral beliefs or convictions of the community on particular issues, as might be elicited by way of a Gallup Poll or by asking the hypothetical man on the Clapham Omnibus -- and Hercules' own moral and political convictions. Dworkin insists that Hercules' theory of adjudication

> ...identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community (TRS, p.126, emphasis added).

But now the question is: 'How does Hercules go about determining this morality presupposed by the laws and institutions of the community?'. Dworkin's answer appears to be that he will follow the procedure recommended for the elaboration of contested concepts. According to Dworkin, Hercules will get his sense of what moral principles are "presupposed by the laws and institutions of the community" by elaborating the moral concepts these laws and institutions employ -- concepts such as "fairness" (TRS, pp. 127 & 134-5), "liberality" (TRS, p.127), "equal protection" (TRS, p.353), "equality" (TRS, p.127), and "dignity" (TRS, pp. 127-9).

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[27]At other times Dworkin refers to this as the "institutional morality of the community" (TRS, p.129). It will be assumed that these expressions are intended to be taken as equivalent in meaning.

It is important to be very clear that Hercules must never attempt to decide a hard case on the basis of his own personal moral principles or convictions. He must always attempt to discover the "political morality presupposed in the laws and institutions of the community", and it is quite possible that this morality might on some occasions diverge considerably from Hercules' personal view as to what community morality ought, morally, to be -- from Hercules' own views regarding "background morality".[28] Dworkin argues, however, that if Hercules in fact has a scheme of values that approves of the concept he must elaborate, then the "sharp contrast between background and institutional morality will fade, not because institutional morality is displaced by personal conviction, but because personal convictions have become the most reliable guide he has to institutional morality" (TRS, p.128, emphasis added). So Hercules must, in the end, always rely on his sense of the community's political morality -- and not on his own moral beliefs.[29]

Dworkin employs the concept dignity to illustrate how Hercules will collect his "sense of what the community's morality provides" (TRS, p.129). He will not, Dworkin

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[28]This would be especially so if his legal system were a "wicked one". See TRS, p.342. Quaere: If Hercules' system were a wicked one, in what sense could he discover fundamental principles of community morality which justify, or are presupposed by, that system?

[29]Cf. TRS, p.93 for Dworkin's discussion of "background" versus "institutional" rights.

insists, rely upon the common man's judgment of what dignity requires. As Dworkin notes, it

> does not follow from the fact that the man in the street disapproves of abortion, or supports legislation making it criminal, that he has considered whether the concept of dignity presupposed by the Constitution, consistently applied, supports his political position (TRS, p.129).

To the contrary, Hercules will employ the method described earlier for the elaboration of contested concepts. Dworkin suggests that Hercules can, and will, follow this method even if he himself does not value dignity in any way, though Dworkin suggests it is likely that he will.[30]

> It is, of course, necessary that Hercules have some understanding of the concept of dignity, even if he denigrates that concept; and he will gain that understanding by noticing how the concept is used by those to whom it is important. If the concept figures in the justification of a series of constitutional decisions, then it must be a concept that is prominent in the political rhetoric and debates of the time. Hercules will collect his sense of the concept from its life in these contexts. He will do the best he can to understand the appeal of the idea to those to whom it does appeal. He will devise, so far as he can, a conception that explains that appeal to them (TRS, p.127).

Since a conception is a set of fundamental principles which shows why the standard cases of the concept are as they are held to be, Hercules will elaborate the concept dignity presupposed by the community's political morality by constructing a set of 'moral' principles which best explains why the standard cases are cases of dignity. But

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[30] See TRS, p.128.

if this is so, then it is not clear that Dworkin's appeal to the dimension of political morality is sufficient to answer Mackie's incommensurability argument. That argument seems to apply equally well to Dworkin's account of how Hercules will get his sense of what the community's political morality provides. Is it not possible that there will sometimes be more than one set of fundamental principles none of which is better than all the others -- and yet they are not, necessarily, equally and finely balanced? If so, then is it not possible that Hercules will have to choose from among alternatives which the community's political morality, thus conceived, leaves open -- on the basis, perhaps, of his own moral beliefs about what is morally right?[31] It would appear so, especially in light of the fact that the 'benchmark' or 'standard' cases against which conceptions are to be 'tested' must all be cases in which the community is widely, if not unanimously, agreed that they instantiate the contested concept in question. But for truly contested concepts such as justice, fairness, equality, liberality, dignity and so on, the range of cases in which there is, at any point in time, widespread or unanimous agreement that they instantiate the concept in question is far narrower than would perhaps be necessary to eliminate all

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[31] -- in which case will he not be forced to exercise strong discretion -- if it is "community morality" which is "decisive of legal issues"?

but one competing conception. It is a fact of moral psychology that people's intuitions or "considered judgments" quite often diverge on even the most fundamental matters.[32] What is a standard case of fairness for an act utilitarian is very often a clear case of unfairness for, say, a proponent of Rawls' principles of justice.[33] So even if one could perhaps find some common ground among individuals within the community, it is far from clear that one would have enough common ground (enough data) to distinguish one conception as uniquely best.[34]

So the first general point to be made against Dworkin's argument (that it is extremely unlikely that there should ever be 'ties' in mature legal systems) is that it gets a good deal of its plausibility from an unjustified assumption: that to say of two or more theories, justifications or conceptions that none is better than the other is necessarily to say that they are equally or finely balanced. Dworkin's attempt to meet this objection seems to

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[32]On "considered judgments", see John Rawls, A Theory of Justice, p.47 ff.

[33]See Ibid., passim.

[34]As noted above, Dworkin seems to concede ("NRA?", pp.83-84 & TRS, pp.286-287) that the probability of 'ties' between theories declines as the amount of material to be accommodated increases. What I am suggesting is that the number of cases one could truly count as benchmarks, i.e. as fulfilling much the same role as facts in the empirical sciences, is perhaps sufficiently low that the probability of ties, or incommensurable cases, is substantial. This would explain why philosophers who attempt, for example, to provide theories of justice have disagreed radically over the ages on which theory is best -- indeed on which theories are even plausible.

fail (a)because the same point applies regardless of whether theories must explain the 'trend' of recent decisions, or a greater percentage of institutional history, and (b)because it also seems to apply to Dworkin's explanation of how the dimension of political morality (the elaboration of contested moral concepts) figures in the justification of institutional history.

The second major point to be made against Dworkin's argument is that it may well rest on a somewhat misleading analogy with historical and scientific explanation. It is common to both science and history that when 'evidence' or 'data' is scarce there is often a range of theories each of which offers an explanation of the data which is no worse than its competitors. For example, at one point astronomers might have had insufficient empirical data at their disposal to choose between the Ptolemaic and the Copernican cosmological theories.[35] There may well have been a point in time when the theory that the Sun and the (other) planets revolve around a stationary Earth, in complicated geometric patterns, provided no worse, but no better, an explanation of the available empirical data than the theory that the Earth and the remaining planets revolve around the Sun. (This is not to say, of course, that these theories were 'finely balanced'.) Yet as the body of evidence grew in size and quality, the superiority

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[35]On the competition between the Ptolemaic and the Copernican theories, see Thomas S. Kuhn, The Structure of Scientific Revolutions.

of the Copernican model became apparent. The same seems to be true of historical explanation; plausible theories tend to fall by the wayside as the body of data to be explained increases in size and variety. The principal reason for this, of course, is that competing theories entail divergent consequences -- consequences which, in general, are more liable to falsification as new facts become known. In principle, at least, a satisfactory scientific or historical theory must be capable of consistently explaining all the known facts -- the supposed truth.

But now consider the extent to which this picture can be applied to Hercules and his attempt to discover the uniquely best conceivable legal theory, justification or conception. There is an important difference: the 'data' to be explained and justified, i.e. institutional history, are liable to contain a good deal of inconsistency. There may, of course, also be a certain degree of inconsistency in the data of science and history; the 'facts' cannot be inconsistent perhaps, but the data which purports to report those facts accurately may be inconsistent and thus sometimes false. But the amount of inconsistency Hercules will discover may well be much more than he would encounter were he a scientist or an historian working on a typical problem within those fields. As Dworkin himself notes in his discussion of Hercules' theory of mistakes, "the legislators and judges of the past did not all have Hercules' ability or insight,

nor were they men and women who were all of the same mind and opinion" (TRS, p.119). This, of course, is why Hercules requires a theory of mistakes. Yet if the 'data' with which Hercules must deal are provided by men and women of differing minds and of less-than-perfect ability and insight, then it is not clear that the likelihood that one unique theory will emerge as supreme will increase in proportion to the amount of data he must attempt to explain and justify. Is it not at least as likely that an increase in divergent, inconsistent and sometimes mistaken data will result in there being an increase in the range of theories each of which is capable of providing an explanation and justification of some of the data which is no worse and no better (but by no means precisely equal to) the explanations and justifications provided by its competitors -- theories which may well recognize different mistakes? An increase in the data, i.e. institutional history, will not result in an increased awareness of one single reality -- the way the world is or was -- against which Hercules can test competing theories, but rather an increase in the number of moral, political and legal 'points of view', 'outlooks' or 'perspectives' he will in some way have to accommodate within one theory. It seems likely that under these conditions he may well be left with a range of theories none of which is objectively better than the others -- even if some of the data can be excluded as mistaken. It would seem, then, that the fact that "mature"

legal systems are "thick with constitutional rules and practices, and dense with precedents and statutes" provides little in the way of support for the claim that in these systems there will always be, in practice, one uniquely best theory of law which determines right answers in all cases. One still has little reason to doubt that in mature legal systems, as in primitive ones, the law will fail to control all decisions fully.

For these reasons, and for the various other reasons noted in section II above (e.g. circularity), I conclude that one must be skeptical about whether there will always be one uniquely best theory, conception or justification for Hercules to discover -- even if his jurisdiction is thick with rules, practices and precedents. Dworkin quite readily admits that Hercules' theory (etc.) will differ from those adopted by other, fallible judges, and that the theories of two or more fallible judges will be different. But there is no reason to suppose that the theory of a further ideal judge, say Mackie's Rhadamanthus, would always be identical with Hercules'.[36] There is no reason to suppose, in other words, that they would necessarily be compelled to adopt the same theory -- that they would not have 'alternatives' amongst which a 'free choice' must be made -- and that their answers will necessarily be the objectively right

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[36] "The Third Theory of Law", p.13. Mackie borrows his example from Plato's The Apology of Socrates, 40e - 41a.

ones determined by binding law. There seems little reason to doubt that at some point even Hercules and Rhadamanthus will be forced to choose between competing theories none of which offers a better explanation or justification of institutional history than its competitors. Yet if this is so, then there is no reason to suppose that they will not have strong discretion. My arguments do not, of course, demonstrate that sometimes there will be no uniquely best theory, and that Hercules and Rhadamanthus will necessarily have strong discretion in some cases. Thus I cannot legitimately claim to have demonstrated the truth of NT(1). They do, however, cast considerable doubt on the success of Dworkin's attempt to refute NT(1), and to that extent they serve as a defence of that thesis.

IV

In this final section I shall consider Dworkin's challenge to the second of the two necessity theses that were distinguished in chapter three: NT(2). Reasons will be provided for supposing it very likely that judges would come to exercise strong discretionary judgment if the procedures sketched in section II were followed -- as Dworkin claims they are in the Anglo-American legal systems. Thus even if the skeptical arguments in the preceding section are all unsound, and there always would be a uniquely best theory which defines right answers in all cases, it would remain true that the exercise of strong

discretionary judgment by judges is virtually inevitable even if, as Dworkin supposes they do, judges follow the Herculean decision-procedure.

Earlier in chapter three, I considered the possibility that Dworkin meant to say that a sufficient condition of S's not having strong discretion on some matter is that standards S is bound or required to follow purport to control his decision fully -- P(1). On this view, to say that judges lack strong discretion is not to say that their decisions are in fact always fully controlled; it is to say rather that they are not at liberty ever to assume that, and decide as if, they are not fully controlled. It is to say that judges are required by binding rules of adjudication -- the ground rules of the enterprise -- to "eliminate ties from the range of answers they might give" (TRS, p.286). (It was argued, of course, that P(1) leads to absurd consequences and that it is more likely, though perhaps not certain, that Dworkin meant to suggest P(2), that S lacks strong discretion on some matter if and only if standards which S is bound to follow actually succeed in controlling his decision fully.) In any event, Dworkin argues that a requirement that judges eliminate ties from the range of possible answers they might give is rational and reasonable only if the probability of there ever being a tie is very low, as it is, he argues, when the system is a mature one. Dworkin suggests further that the requirement "does not deny the theoretical possibility of a

tie, but it does suppose that, given the complexity of the legal 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 of the case" (TRS, p.286, emphasis added).

Dworkin's view, then, is that the density and complexity of the institutional history of mature legal systems, such as are found in Great Britain and North America, ensures not only that there always will be one right answer (in practice), but that judges will inevitably come to think or believe of a particular answer that it is the right one. Yet if judges will, in all cases, have this belief, then as was seen in chapter three, they will not exercise strong discretionary judgment -- all cases will be like Case D.[37] To the contrary, they will always conceive of themselves as accepting what they have reason to believe is the right answer determined by standards they are bound to follow. In such cases they will, most probably, be forced to exercise weak discretionary judgment; but if their choice is a choice of what they believe is the right answer they are bound to accept, they will not be forced to exercise, and indeed will not exercise, strong discretionary judgment. This will be so regardless of whether, in theory, the law has in fact failed to provide a right answer and they therefore have strong discretion.

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[37]Case D is the one where the judge believes both that there is a right answer and that it is one answer in particular.

Dworkin argues, then, that the density and complexity of the materials with which judges in mature legal systems must deal ensures that they will never exercise strong discretionary judgment. In such systems it is not inevitable that judges will exercise strong discretionary judgment; to the contary, it is inevitable that they will not. I should like to begin my defence of NT(2) by arguing that the above argument is not open to Dworkin and that he has therefore failed to make his case against NT(2).

My argument turns on the fact that many judges within the so-called mature legal systems of Great Britain and North America, judges such as Holmes, Cardozo, Macmillan and Radcliffe, claim to have found it necessary, in some instances, to exercise their strong discretion.[38] Dworkin clearly wishes to assert the following two propositions.

(1) Judges within the Anglo-American legal systems always follow criterion B and the Herculean decision-procedure, to the best of their limited abilities, when deciding hard cases.

and

(2) If a judge within a mature legal system follows criterion B and the Herculean decision-procedure, to the best of his limited ability, when deciding a hard case, then he will inevitably be led to believe both that there is a right answer to that hard case and that it is one answer in particular.

Yet since the Anglo-American legal systems are clearly "mature" systems, in Dworkin's sense of that notion, it follows from (1) and (2) that any judge within the Anglo-

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[38]See chapter three above.

American legal systems will inevitably be led to believe, in any hard case in which he must make a decision, both that the case has a right answer and that it is one answer in particular. Yet the testimony of Holmes, Cardozo, Radcliffe and Macmillan bears witness to the fact that at least some judges in some hard cases do not have these beliefs; they believe instead that there is no right answer.[39] But it follows from the fact that they believed there was no right answer that they exercised strong discretionary judgment, and that the density and complexity of the materials with which judges in mature legal systems must deal does not ensure that they will never exercise strong discretionary judgment. So unless Dworkin is prepared to give up his claim that judges in Great Britain and North America follow criterion B and the Herculean decision-procedure -- a move which would deal a fatal blow to so many of his arguments against the necessity and existence theses -- his argument will not stand.

Perhaps Dworkin would wish to respond to this objection in the following manner. Granted it does not

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[39]Dworkin argues that judges never in fact believe, of particular cases over which they preside, that there is no right answer. They only take this point of view, he suggests, when they engage in speculative jurisprudential thought about law and legal reasoning -- when, that is, they are philosophizing and not judging. In actual cases, judges never believe that there is no right answer. Yet if judges share Lord Macmillan's view that it is better not to advertise what they are about when they exercise discretionary judgment, it is hardly surprising that judges seldom, if ever, say, in particular cases, that the law is consistent with more than one answer and that they must therefore choose.

follow from (1) and (2) that judges in the Anglo-American legal systems will never exercise strong discretionary judgment. But this is not what is implied in chapter thirteen of TRS. There it is claimed that "judges will, if they think long and hard enough, come to think that one side has, all things considered and marginally, the better of the case" (TRS, p.286, emphasis added). If any judge carries the Herculean procedure far enough, and does not give up prematurely because he is convinced by arguments such as are offered by Professor Hart that he must at some point choose freely, he will inevitably come to believe, in any hard case, that one particular answer is the right one he is bound to accept.

This response is, of course, logically open. But is it a good one? Is it even remotely plausible to suppose that judges of the calibre of a Holmes, a Cardozo, a Macmillan or a Radcliffe failed to think long and hard enough about the decisions they had to make in hard cases, and did not attempt, to the best of their limited abilities, to find an answer which their judicial duty required that they accept? Surely it is reasonable to assume that they gave their decisions considerable thought, care and attention, and that they tried as best they could to find answers which the law required them to accept. But if we must assume this, then we must not accept that it was inevitable that they should have come to think that their decisions were fully controlled if they had only thought long and hard

enough. Indeed we should be inclined to accept the very opposite. It does not, of course, follow from the mere fact that judges sometimes do exercise strong discretionary judgment in hard cases that its exercise is inevitable, i.e. that any reasonable and competent person would, given the same circumstances, and even if he thought very long and hard about the case, come to exercise such a judgment. Yet if judges of the calibre of Holmes, Cardozo, Macmillan and Radcliffe, who, we may surely trust, gave the hard cases over which they presided very considerable thought, care and attention, were all led at some point to the exercise of such judgment, then if, as Dworkin suggests, they have been following criterion B and the Herculean decision-procedure, then we have very good evidence for the claim that the exercise of strong discretionary judgment would be virtually inevitable even if judges followed the procedures sketched in section II above. This surely shows that Dworkin has failed to make his case against NT(2).

Yet even if one sets aside the testimony of these judges, it is still doubtful whether Dworkin's argument against NT(2) can succeed.[40] Given the awesome complexity of the Herculean task, should we not expect

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[40]Their testimony is, strictly speaking, somewhat irrelevant if Anglo-American judges do not, contra Dworkin, follow criterion B and the Herculean decision-procedure. It was argued in chapter five, of course, that Dworkin's evidence for the claim that they follow criterion B is less than convincing.

that an ordinary judge, who does not have Hercules' ability or insight, will sometimes be left with a choice between answers (i.e. theories, conceptions or justifications) which are such that he cannot, in all honesty, claim that he believes one to be better than all the others he has considered? We should not, perhaps, expect this if a judge has only the following three options: (a)he believes that the plaintiff has the better case; (b)he believes that the defendant has the better case; or (c)he believes that the case for the plaintiff and the case for the defendant are precisely equal in force.[41] Yet as my arguments in chapter three, together with Mackie's incommensurability argument, would appear to show, a judge has far more options than simply (a), (b) and (c). It was argued in chapter three

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[41] It may seem unlikely, perhaps, that a judge in a mature legal system should ever believe that the case favouring the plaintiff and the case favouring the defendant are, as Mackie puts it, 'finely balanced'. But see, for example, Ealing London Borough Council v. Race Relations Board ([1972] A.C. 342) where the relevant issue was whether the United Kingdom's Race Relations Act of 1968, which prohibits discrimination on the grounds of race, colour or ethnic or national origin, prohibits discrimination on the grounds of an individual's legal nationality. In dissent, Lord Kilbrandon said: "The arguments in favour of either interpretation are finely balanced". See also Donoghue v. Stevenson ([1932]A.C. at 609-610; 1932 S.C. (H.L.) at 64) where Lord Macmillan said: "[I]n the discussion of the topic which now engages your Lordships' attention, two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other, there is the equally well-established doctrine that negligence, apart from contract, gives the right of action to the party injured by that negligence..." (emphasis added). For a detailed discussion of Donoghue v. Stevenson and of how the court used "consequentialist reasoning" to choose between "equally well-established" doctrines, see MacCormick, Legal Reasoning and Legal Theory, pp.108-128.

that one should distinguish between four types of cases. In the first (ideal) case, Case A, the judge believes that his decision is not fully controlled; in the second, Case B, he neither believes that the decision is fully controlled nor believes that it is not fully controlled -- he withholds judgment; in Case C he believes that the decision is, in theory, fully controlled, but does not believe, of any particular answer or solution which seems to him a possibly-right answer or solution, that it is the right answer which he believes does exist; Case D is the one which, in Dworkin's view, represents all hard cases in mature legal systems -- it is the one in which the judge believes that the decision is fully controlled and that it is controlled in one particular way -- i.e. that one of the possibly-right answers is the actually-right answer.

Now given that there are clearly these four logical possibilities, and that the strength of competing theories, conceptions and so on are sometimes incommensurable on a linear scale, it is clear that to options (a), (b) and (c) must be added the following:

(d)the judge believes that the case for the plaintiff and the case for the defendant are incommensurate;

(e)the judge neither believes that the case for the plaintiff is better than the case for the defendant, nor believes that the case for the latter is better than the case for the former, nor believes that they are incommensurate or precisely equal;

(f)the judge believes that, in theory, either the plaintiff or the defendant has the better case, but cannot say, in all honesty, that he sees any good reason for supposing it is the one but not the other.

Now the question is 'How likely is it that cases will arise in which the judge's state of belief is as described in (d), (e) or (f) -- if he always attempts to follow the Herculean decision procedure?'. Once it is seen that to say that a case (or theory) favouring the plaintiff is no better but no worse than the case for the defendant is not necessarily to say, or imply, that they are finely balanced, it seems rather likely that cases should arise in which (d) obtains. Given that the Herculean task is just that -- a task suitable for a Hercules -- it also seems rather likely that cases should sometimes arise in which (e) and (f) obtain. As seen in this and previous chapters, the Herculean task requires that a judge make extremely complex judgments about the community's 'political morality' and about an institutional history which is often inconsistent and sometimes 'mistaken'. In adjudicating between the claims of litigants in hard cases, judges must often 'weigh' and interpret competing standards (some of which may, of course, be mistaken) and develop competing conceptions of essentially contested concepts when there are insufficient data (bench-mark cases) to isolate one conception as best. Yet as was seen in chapter four, the manner in which competing standards are to be weighed against one another -- indeed what is meant by 'weight' -- and the various ways in which rules, principles and policies interact, and the ways in which 'mistakes' are detected, are all highly controversial

and very difficult issues of political and moral theory. These must be dealt with and settled by a judge if his 'right answers' are always to emerge and help him to decide his hard cases. Is it not likely that an ordinary judge might sometimes find these issues and this Herculean task so complex and baffling that he would, in the end, be forced to admit that in all honesty he cannot claim sincerely to believe that the case (or theory) favouring the plaintiff and the case(or theory) favouring the defendant are equally balanced, incommensurate, or that the one case (or theory) is better than the other? It seems reasonable to suppose that he might, and that in the end he would inevitably be led to abandon the Herculean task and to exercise strong discretionary judgment -- to decide on grounds other than those which argue that one answer or theory is the one determined by binding standards. Once it is seen that it is not necessary for the exercise of strong discretionary judgment that a judge <u>believe</u> that the case for the plaintiff is <u>precisely equal in force</u> to the case for the defendant, but that it will (necessarily) occur when his state of belief is as described in (d), (e) or (f), it no longer seems plausible to deny that a judge would, if faced with the awesome Herculean task, inevitably be led, at least sometimes, to the exercise of strong discretionary judgment. Given the awesome nature of that task he could not help but do otherwise. And would this not be the rational thing for him to do? Would it not be

better if, when his state of belief is as described in (d), (e) or (f), he chose an answer which appeared to him to be reasonable, and gave up the pointless attempt to discover an answer which might conceivably exist, but which he has no hope of finding?

I conclude, then, that there is good reason to believe that judges would inevitably be led to the exercise of strong discretionary judgment if they attempted to follow criterion B and the Herculean decision-procedure. Dworkin's argument that the density and complexity of institutional history would ensure that judges always came to believe that one side had the better case seems to fail in light of the testimony of judges who, he must admit, do attempt seriously to follow that criterion and that decision-procedure. Yet even leaving aside the failure of Dworkin's argument in the light of this testimony, it is still doubtful whether Dworkin's argument against NT(2) could succeed. The awesome complexity of the Herculean task seems to show that the exercise of strong discretionary judgment would at some point be inevitable were judges to attempt seriously to take it on. This becomes apparent once it is fully realized that the exercise of strong discretionary judgment does not require that the judge believe that the case for the plaintiff and the case for the defendant are 'finely balanced'.

BIBLIOGRAPHY

Books

Benditt, T.M. Law as Rule and Principle: Problems of Legal Philosophy. Hassocks: Harvester Press Ltd., 1978.

Cross, R. Precedent in English Law. Oxford: Clarendon Press, 1977.

Dworkin, R.M. Taking Rights Seriously. London: Duckworth and Co. Ltd., 1977. Reprinted with corrections and a Reply to Critics, 1978.

Finnis, J. Natural Law and Natural Rights. Oxford: Clarendon Press, 1980.

Hare, R.M. Freedom and Reason. Oxford: Oxford University Press, 1963.

Hart, H.L.A. The Concept of Law. Oxford: Clarendon Press, 1961. Reprinted with corrections and notes, 1972.

Holmes, O.W. Collected Legal Papers. London: Constable & Co. Ltd., 1920.

Jaffe, L.J. English and American Judges As Lawmakers. Oxford: Clarendon Press, 1969.

Kuhn, T.S. The Structure of Scientific Revolutions. Chicago: University of Chicago Press, 1949.

Levi, E.H. An Introduction to Legal Reasoning. Chicago: University of Chicago Press, 1949.

Lyons, D. Forms and Limits of Utilitarianism. Oxford: Clarendon Press, 1965.

MacCormick, N. Legal Reasoning and Legal Theory. Oxford: Clarendon Press, 1978.

Perry, T.D. Moral Reasoning and Truth: An Essay in Philosophy and Jurisprudence. Oxford: Clarendon Press, 1976.

Plato. The Apology of Socrates.

Radcliffe, Lord. The Law and Its Compass. Evanston: Northwestern University Press, 1960.

Rawls, J. A Theory of Justice. Oxford: Oxford University Press, 1972.

Raz, J. The Concept of a Legal System: An Introduction to the Theory of Legal System. Oxford: Clarendon Press, 1970.

--------. Practical Reason and Norms. London: Hutchinson and Co. Ltd., 1975.

--------. The Authority of Law: Essays on Law and Morality. Oxford: Clarendon Press, 1979.

Sartorius, R.E. Individual Conduct and Social Norms. Encino: Dickenson Publishing Co. Inc., 1975.

Smith, J.C. Legal Obligation. London: Athlone Press, 1976.

Articles and Parts of Books

Bell, R.S. "Understanding the Model of Rules", Yale Law Journal, Vol. 81, 1972.

Christie. "The Model of Principles", Duke Law Journal, 1968.

Dworkin, R.M. "Judicial Discretion", Journal of Philosophy, Vol. 60, 1963.

--------. "The Elusive Morality of Law", Villanova Law Review, Vol. 10, 1965.

--------. "Philosophy, Morality and Law-Observations Prompted by Professor Fuller's Novel Claim", University of Pennsylvania Law Review, Vol. 113, 1965.

--------. Book review of Robert M. Cover's Justice Accused, Times Literary Supplement, 5 December, 1975.

--------. "No Right Answer?", Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. J. Raz and P. Hacker. Oxford: Clarendon Press, 1977

Fuller, L.L. "Positivism and the Separation of Law and Morals -- A Reply to Professor Hart", Harvard Law Review, Vol. 71, 1958.

Gallie, W.B. "Essentially Contested Concepts", Proceedings of the Aristotelean Society, 1955.

Greenawalt, K. "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges", Columbia Law Review, Vol. 75, 1975.

--------. "Policy, Rights and Judicial Decision", Georgia Law Review, Vol. 11, 1977.

Hart, H.L.A. "Positivism and the Separation of Law and Morals", The Philosophy of Law, ed. R.M. Dworkin. Oxford: Oxford University Press, 1977. Originally in Harvard Law Review, Vol. 71, 1958.

--------. "Legal Positivism", Encyclopedia of Philosophy, ed. P. Edwards, Vol 4, New York: Macmillan and Free Press, 1967.

--------. "Problems of the Philosophy of Law", Encyclopedia of Philosophy, ed. P. Edwards, Vol. 6, New York: Macmillan and Free Press, 1967.

--------. "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream", Georgia Law Review, Vol. 11, 1977.

--------. "1776-1976: Law in the Perspective of Philosophy", New York University Law Review, Vol. 51, 1976.

Hughes, G. "Rules, Policy and Decision Making", Yale Law Journal, Vol. 77, 1968.

Lyons, D. "Principles, Positivism, and Legal Theory", Yale Law Journal, Vol. 87, No. 415, 1977.

MacCallum, G. "Legislative Intent", Essays in Legal Philosophy, ed. R.S. Summers. Oxford: Blackwell, 1970.

Mackie, J. "The Third Theory of Law', Philosophy and Public Affairs, Vol. 7, No. 1, 1977.

Macmillan, Lord. "Law and Ethics", Law and Other Things. Cambridge: Cambridge University Press, 1948.

Marshall, G. "Positivism, Adjudication and Democracy" Law, Morality and Society: Essays in Honour of H.L.A. Hart, ed. J. Raz and P. Hacker. Oxford: Clarendon Press, 1977.

Munzer, S. "Validity and Legal Conflicts", Yale Law Journal, Vol. 82, 1973.

---------. "Right Answers, Preexisting Rights and Fairness", Georgia Law Review, Vol. 11, 1977.

Nickel. "Dworkin on the Nature and Consequences of Rights", Georgia Law Review, Vol. 11, 1977.

Note. "Understanding the Model of Rules", Yale Law Journal, Vol. 81, 1972.

Note. "Dworkin's 'Rights Thesis'", Michigan Law Review, Vol. 74, No. 6, 1976.

Raz, J. "Legal Principles and the Limits of the Law", Yale Law Journal, Vol. 81, 1972.

---------. "Professor Dworkin's Theory of Rights", Political Studies, Vol. 26, No. 1, 1978.

Sartorius, R. "Social Policy and Judicial Legislation", American Philosophical Quarterly, Vol. 8, No. 2, 1971.

Soper, E.P. "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", Michigan Law Review, Vol. 75, No. 473, 1977.

Tapper, C.F. "A Note on Principles", Modern Law Review, 1971.

Ten, C.L. "The Soundest Theory of Law", Mind, Vol. 88, No. 352, 1979.

Waismann, F. "Verifiability", Logic and Language: First Series, ed. A.G.N. Flew. Oxford: Blackwell, 1960.

Weiler, P. "Two Models of Judicial Decision Making" Canadian Bar Review, Vol. 46, 1968.

Woozley, A.D. "No Right Answer", Philosophical Quarterly, Vol. 29, No. 114, 1979.