

*Spring 1980*

## Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis

John M. Farago

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

### Recommended Citation

John M. Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 Val. U. L. Rev. 371 (1980).

Available at: <https://scholar.valpo.edu/vulr/vol14/iss3/1>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



# Valparaiso University Law Review

Volume 14

Spring 1980

Number 3

## JUDICIAL CYBERNETICS: THE EFFECTS OF SELF-REFERENCE IN DWORKIN'S RIGHTS THESIS

JOHN M. FARAGO\*†

INTRODUCTION .....	371
BACKGROUND: WHAT IS THE RIGHT ANSWER HYPOTHESIS? ..	373
<i>Deep Background: Where Does the Rights Thesis Come From?</i> .....	373
<i>What Is the Rights Thesis?</i> .....	375
<i>What Is the Right Answer Hypothesis?</i> .....	377
THE CERTAINTY OF UNCERTAINTY .....	380
RECURRING FALLACIES .....	385
<i>Uncertainty and Controversy</i> .....	386
<i>Uncertainty and Discretion</i> .....	389
<i>Certainty and Completeness</i> .....	391
<i>Judicial Self-Reference</i> .....	392
<i>The Right Answer Hypothesis and the No-Right-Answer Thesis</i> .....	394
"CAN RIGHTS BE CONTROVERSIAL?" .....	396
"NO RIGHT ANSWER?" .....	407
CONCLUSION: THE RIGHTS THESIS REDIVIVUS .....	420

### INTRODUCTION

Ronald Dworkin has defended with energy and eloquence the proposition that in virtually every civil case either the plaintiff or the defendant has a *right to a particular decision*.<sup>1</sup> This is a very

\*Assistant Dean of the Valparaiso University School of Law.

†At various times the following people have criticized and contributed to this article and its earlier versions: Richard Baepfer, Ronald Dworkin, John Griffiths, Jack Hiller, David A.J. Richards, Eugene Schoon, Amber Smith, and Richard Stith. The author retains sole responsibility for all errors.

1. R. DWORKIN, TAKING RIGHTS SERIOUSLY, at xiv, 71, 279, 288, 290, 327-28, 330, 332, 334 (1977) (all citations are to the revised paperback edition); Dworkin, *No Right Answer*, 53 N.Y.U.L. REV. 1, at 2, 3, 5, 11, 21, 29, 32 (1978) (this is a revised version of an essay that appeared in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART (P.M.S. Hacker & J. Raz eds. 1977); Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624, 636-37 (1963)).

special claim, and one that, as we shall see, is ultimately untenable. Dworkin's claim is stronger than the assertion that parties to a dispute have a right to a particular process of adjudication, for a process of adjudication need not inevitably entail a particular decision in every case.<sup>2</sup> It is considerably stronger than the claim that in many cases there will exist rights within the legal system requiring the judge to reach a particular decision in a case, for such a claim does not suggest that this will *always* be true.<sup>3</sup> His claim is, I would argue, even stronger than the proposition that the *winner* of virtually all cases within a legal system may be determined by an examination of the rights of the litigants, for Dworkin seems to suggest that not merely the outcome is determinate but also the holding and the line of reasoning on which both outcome and holding rest.<sup>4</sup>

Dworkin's tenacious defense of his stark claim is surprising. His proposition does not follow directly from his rights thesis, as Dworkin will at times admit and at times appear to deny.<sup>5</sup> The right answer hypothesis stands or falls on its own, with admittedly distinctive corollaries, but without essential ties to the other portions of Professor Dworkin's argument. Thus, he acknowledges that he cannot demonstrate the validity of the right answer hypothesis, and even accepts that it cannot be said to hold for absolutely every case.<sup>6</sup> And yet he continues to urge his claim, suggesting at times that it is essential to the remainder of his work.<sup>7</sup>

---

2. See Richards, *Taking Taking Rights Seriously Seriously*, 52 N.Y.U.L. REV. 1265, 1314-15 (1977).

3. R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 199-202 (1975). Sartorius, like Dworkin, accepts that there will be some cases for which no right answer exists. Their claims, however, are different. Dworkin permits only ties as exceptions to his right answer hypothesis. Text accompanying notes 113-17, 162-78, *infra*. Sartorius claims that the exceptions are not ties but rather cases for which we possess no defining mechanism at all. Thus, though cases without right answers may exist, we cannot know which ones they are. He makes this same argument at greater length in a recent essay. Sartorius, *Bayes' Theorem, Hard Cases, and Judicial Discretion*, 11 GA. L. REV. 1269 (1977). This claim may be more plausible. See text accompanying notes 182-86, *infra*. Even so, his arguments are premised upon a significant flaw. Note 116, *infra*.

4. R. DWORKIN, *supra* note 1, at 282. See Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 379 (1975).

5. R. DWORKIN, *supra* note 1, at 282-83, 290, 330, 332; Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 32.

6. R. DWORKIN, *supra* note 1, at 285-87, 332, 334, 359; Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 2, 30, 32.

7. R. DWORKIN, *supra* note 1, at 280, 332; Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 2; see Perry, *Book Review: Taking Rights Seriously*, 88 ETHICS 80, 86 (1977) (discussing Dworkin's recurrent interest in the right answer hypothesis).

It is not. Indeed, the falsity of the right answer hypothesis is itself a fundamental element of any humane legal system, as I have sought to demonstrate elsewhere.<sup>8</sup> In this article I will closely examine the two essays in which Professor Dworkin most clearly asserts the right answer hypothesis.<sup>9</sup> I attempt to detail the gaps in his argument, and explain why his hypothesis must fail. I neither mean nor wish to controvert the rights thesis, however. Indeed, I will conclude that the failure of the right answer hypothesis actually supports the remainder of Dworkin's argument by providing a sounder and more descriptively accurate justification for it.

#### BACKGROUND: WHAT IS THE RIGHT ANSWER HYPOTHESIS?

##### *Deep Background: Where Does the Rights Thesis Come From?*

Ronald Dworkin's work has generated such an extensive body of responsive literature that it hardly seems necessary any longer to summarize his jurisprudence. Nevertheless, I will begin with a short statement of what I think the rights thesis is about and the stimuli to which it responds.

The essays in which Dworkin developed the rights thesis reflect a gradual transition from a narrow refutation of some of H.L.A. Hart's tenets of legal positivism to a broad and independent descriptive and normative legal theory.<sup>10</sup> Initially, Dworkin seemed to be concerned that Hart's philosophy accepted too many of the

---

8. Farago, *Intractable Cases*, 55 N.Y.U.L. REV. \_\_\_\_\_ (1980) (forthcoming). This article and the one in the *New York University Law Review* are connected in important ways and are meant to complement one another. The NYU article seeks to demonstrate a general observation about the nature of jurisprudence. I argue there that it is impossible to develop a theory of law which provides a single substantively correct answer for every legitimately brought case without allowing recourse to some arbitrary or dictatorial decision-making mechanism in at least some cases. In this article I seek to apply that observation to Dworkin's apparent claims to the contrary. I have provided a sufficient summary of the other article here (text accompanying notes 43-59, *infra*) to permit the reader to understand the nature of that claim. This does not mean, of course, that the summary will provide an adequate sense of the argument supporting the claim, and I urge readers who remain skeptical about the arguments in text accompanying notes 43-59, *infra*, of this essay to consult the other article.

9. R. DWORKIN, *supra* note 1, at 279-90; Dworkin, 53 N.Y.U.L. REV., *supra* note 1.

10. This development may be seen even by comparing chapters 2 and 4 of R. DWORKIN, *supra* note 1. The former, originally published in 1967 (which itself is an expansion of the ideas in Dworkin, 60 J. PHILOSOPHY, *supra* note 1, published in 1963), is almost solely a critique of Hart's positivism. The latter, originally published in 1975, is an endeavor at a comprehensive theory of judicial behavior.

rule-skeptical claims of the legal realists.<sup>11</sup> In particular, he could not accept the residual discretion that Hart accorded the judiciary in responding to lacunae in the law.<sup>12</sup> Hart's notion of the law's "open texture" violated Dworkin's sense of the process of judging, perhaps drawn from his own experience as a judicial clerk.<sup>13</sup> For Dworkin it seemed unacceptable that judges could ever be licensed simply to decide as a legislature would. Rather, he felt that judges were always constrained to seek the answers that were somehow required by their legal systems.<sup>14</sup>

David Richards has suggested that this concern may well have political roots. He notes that the differences between British and American political history may account for the differences in Hart's and Dworkin's jurisprudence.<sup>15</sup> Both men have sought to express theories of law that, at their root, protect the rights of individual litigants by empowering an anti-majoritarian judiciary to address questions left unanswered (or answered wrongly) by the legislature. Richards points out, however, that in the United States, where a Constitution explicitly provides a normative framework for rights-based litigation, arguments favoring judicial discretion permit the judge to *ignore* the principles embodied in that document. Conversely, in the United Kingdom, where no such document exists, judicial discretion is the only mechanism whereby the judiciary may recognize, at least initially, the existence of human rights as a basis for their decision-making.<sup>16</sup>

Richards' recognition is quite helpful. It directs our attention to Dworkin's role as a political as well as legal philosopher. More particularly, it reminds us that Dworkin's arguments, even at their most complex, almost always seek to provide a theoretical basis for relatively simple and common claims. As recent history has unfolded, Dworkin's interest has closely paralleled the unravelling of the currently prevailing American social concerns.<sup>17</sup> And his work

---

11. R. DWORKIN, *supra* note 1, at 15-16, suggesting that positivism and realism differ from one another "mainly in emphasis."

12. H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961); R. DWORKIN, *supra* note 1, at 14-45.

13. The concept of "open texture" is derived from Friedrich Waismann. Waismann, *Verifiability*, in *LOGIC AND LANGUAGE* 122 (A. Flew, ed. 1965). See H.L.A. HART, *supra* note 12, at 249. Dworkin clerked for Judge Learned Hand during 1957-58.

14. R. DWORKIN, *supra* note 1, at 81.

15. Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1338.

16. *Id.*

17. Dworkin's essays in the pages of the *New York Review of Books* have touched on civil disobedience, reverse discrimination (three times), the Nixon Supreme Court, and the legislation of morality (homosexuality, prostitution, and pornography). See R. DWORKIN, *supra* note 1, chapters 5, 8, 9, and 10; Dworkin, *Why Bakke Has No*

has provided an articulation of and justification for the position taken by "liberals" with respect to each of these.<sup>18</sup> His articles thus respond to a crying need: while the spokespersons of both the conservative right and the radical left have been able to draw upon underlying theoretical bases (*laissez faire* and Marxist economics respectively), the modern liberal position, prior to Dworkin, had little legal or political theory on which it could rely.

Thus, for example, we may view Dworkin's initial concern about judicial discretion as a response to criticisms of the Warren Court from the right. The critics suggested that the Supreme Court was guilty of acting like a legislature; that the justices were enacting their own political preferences rather than defending the existing law of the land.<sup>19</sup> Often the liberal position responded that the Court was the conscience of the country. Its decisions were merely vindications of the Bill of Rights.<sup>20</sup> But that claim rested upon twin unvalidated (indeed, unexplored) assumptions: First, it required a denial of the possibility of judicial discretion. If the justices were to be defended from the charge of capriciousness, it would have to be demonstrated that their actions were not optional, but were required by the definition of their political task. Second, their practice of relying upon underlying principles as a source of authority would have to be vindicated. Such underlying political principles would have to be shown to be not merely one of many sources of judicial legislation. They must be the sole basis for any response to the existence of a gap in the law. In discussing these two assumptions,<sup>21</sup> Dworkin validates the liberal approval of the Warren Court's actions both procedurally, by demonstrating that the justices had a *duty* to seek out an underlying political theory, and substantively, by demonstrating that the particular political theory of this country required the specific holdings reached in their important rights-based decision making.

### *What is the Rights Thesis?*

Over time, Dworkin's various defenses of the liberal political model have yielded a coherent and exciting theory of law, and par-

---

Case, N.Y. REV. BOOKS, Nov. 10, 1977, at 11; Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37.

18. See Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (S. Hampshire, ed., 1978).

19. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-33 (1959).

20. See, e.g., *Proceedings of Friday, April 10, 1959*, 4 S. TEX. L.J. 179, 190 (1959); Rostow, *The Court and Its Critics*, 4 S. TEX. L.J. 160, 177 (1959).

21. R. DWORKIN, *supra* note 1, chs. 4 and 12, respectively.

ticularly of judicial decision-making. His distaste for judicial discretion has led him to outline a demanding but intuitively appealing regimen for judges faced with hard cases.

Judges have a duty to seek out, determine, apply, and enforce the pre-existing rights of the parties to the cases presented to them.<sup>22</sup> Citizens have institutional rights, based on the content of the legal system.<sup>23</sup> Among these institutional rights is the right, which may be possessed by one of the parties to a lawsuit, to a favorable decision in that case.<sup>24</sup> If such a right exists, the judge must seek it out and abide by it.

Such an institutional right may be relatively uncontroversial, as is the case when there exists a settled rule of law directly on point. But, as Hart pointed out, there are many cases for which no such rule exists. There are gaps in our system of rules.<sup>25</sup> The heart of Dworkin's argument is that institutional rights are not coterminous with legal rules. When the rules are apparently exhausted, rights may nevertheless be present and dispositive.<sup>26</sup> There are, specifically, background rights that underlie the legal system. These, no less than legal rules, may be a source of a litigant's institutional right to prevail in a particular case.<sup>27</sup>

The judge's responsibility then, is to ferret out the background rights when no settled rule of law disposes of a case. The legal principles that embody background rights are distinguished, at least experientially, from the rules of the system by being implicit and unstated. A complex process of critical induction is needed to ascertain precisely what is captured by these principles.<sup>28</sup>

The process of critical induction is not Dworkin's invention. Its roots are in the natural law philosophy of Aquinas, who suggested that natural law could be ascertained by the application of human reason.<sup>29</sup> Given the empirical data which we observe—whether it be the motion of the planets or the rules of a legal system—we can intuit back to an underlying theory on which such observations may

---

22. R. DWORKIN, *supra* note 1, at 81.

23. *Id.* at 93, 101-05.

24. *Id.* at 279-80.

25. H.L.A. HART, *supra* note 12, at 121-32.

26. R. DWORKIN, *supra* note 1, at 279-80.

27. *Id.* at 93, 101-02.

28. This process is discussed at some length in Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171 (1979).

29. Aquinas, *Summa Theologica, Treatise on Law, Question 90, First Article*, in 2 BASIC WRITINGS OF ST. THOMAS AQUINAS 742-44 (A.C. Pegis ed. 1945).

be based. By applying Occam's razor—which favors the least complex among several competing possible explanations otherwise not relevantly distinguishable—we may well ascertain a single best underlying explanatory theory.<sup>30</sup> Of course, we will not have demonstrated the absolute validity of that theory, for we cannot observe its tenets or test our hypotheses directly. We can only argue that, so long as our model continues to fit new observations, it at least presents an adequate guess. And, of course, competing models may garner competing adherents, so that at any given time there may be several conflicting theories which nevertheless fit existing observation sufficiently well that, even while we espouse a particular one, we cannot claim that those who espouse another have fundamentally misconstrued their inductive task.<sup>31</sup>

In this way, Dworkin's rights thesis proceeds on two levels at once. He asserts that judges have a duty to engage in this sort of critical induction when faced with a hard case. And he argues, or at least seems to argue, in favor of a particular constellation of principles that underlie our own legal system. This article is concerned primarily with one aspect of the former claim.

That claim calls on judges to seek out a set of principles underlying the existing legal system whenever they are faced with a case without a clearly settled answer. They should emulate Dworkin's superjudge Hercules by searching for a *single* political theory that best fits the empirically observable legal behavior (such as settled legal rules). Once they have found that theory, they must ask which of the litigants possesses an institutional right to prevail when those principles, as well as the settled rules, are taken into account.

#### *What is the Right Answer Hypothesis?*

H.L.A. Hart's jurisprudence cannot accept principles as a source of law unless fundamental changes are worked on what Hart calls the "rule of recognition."<sup>32</sup> That rule provides for a pedigree, telling us whether any particular proposition is or is not a proposition of law.<sup>33</sup> By tracing the genesis of a particular proposition, we

---

30. See Chaitin, *Randomness and Mathematical Proof*, SCIENTIFIC AMERICAN, May, 1975, at 47, 48-49.

31. R. DWORKIN, *supra* note 1, at 128-29.

32. See H.L.A. HART, *supra* note 12, at 97-107; R. DWORKIN, *supra* note 1, at 39-45, 64-68.

33. We might view Hart's model as an instrumental application of deductive logic to jurisprudence. Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § I B. Thus, the



can determine whether it is a part of the system of rules. But principles cannot be validated by any realistic rule of recognition, since we have only an inductive basis for hypothesizing their existence. Hart's model provides an essential deductive tool for analyzing legal cases, but it provides nothing for the instances when that rule fails.<sup>34</sup> Dworkin's rights thesis does not contradict the broad strokes of Hart's theory, when Hart's positivism works. But it adds an important next step for when that theory falls short: when deduction fails, try critical induction.<sup>35</sup>

In a Platonic sense, the conflict between the two may be resolved. If Dworkin is correct that, as a matter of theory, there is a single "best" set of principles underlying any plausible legal system, then once that set of principles is identified it may serve as part of that system's rule of recognition. But it cannot be positively identified from within the legal system, since by definition we do not possess adequate tools to do so. As a practical matter, then,

---

rule of recognition provides a single undefined assumption, against which we can evaluate the various axioms (rules) of our system. Propositions of law are demonstrably true (or false) by application of the rule of recognition and the primary and secondary rules. The rule of recognition itself provides a recursive rule for determining whether any given proposition is a theorem of the system. See H. DELONG, A PROFILE OF MATHEMATICAL LOGIC 152-60 (1970).

34. By accepting the notion of open texture, Hart implicitly admits that there are propositions which are neither true nor false within his deductive system and for which no recursive rule exists. His use of deduction, then, avoids being reductionist. Farago, 55 N.Y.U.L. REV., *supra* note 8, at § I B. The instrumental use of deduction may be seen to be the unifying element linking the various versions of positivism.

35. If we carry the logical deduction analogy further, Dworkin's rule is not recursive; there is no way to be certain that application of his rule will necessarily determine whether any given proposition is a theorem of the system within a finite number of steps. To the extent that this is true, Dworkin's model differs from Hart's in its treatment of hard cases. But, though Dworkin seems to feel that he has avoided cases without answers, he has merely glossed them over. Assuming that the legal system is capable of dealing with potentially infinite sets of fact patterns, such intractable cases must continue to exist. The advantage of Dworkin's theory over Hart's lies in its power of expression, not its ability to provide answers. Thus, Hart's logical model cannot even express the cases for which no answer exists, those spawned by the law's open texture. Dworkin provides expression for them, but cannot provide answers. We are tempted, however, to believe that such answers exist, simply because the questions may be phrased. This temptation is similar to that which existed concerning the formalization of arithmetic in the early part of this century. I discuss the necessity of uncertainty to any theory of law founded upon a logical base in Farago, *supra* note 8, at § IV B. The basic arguments of that article are summarized in the text at notes 43-59, *infra*. For a description of the analogous development in arithmetic, see H. DELONG, *supra* note 34, at 1-187.

Dworkin's thesis differs fundamentally from Hart's. Furthermore, Dworkin focuses on process rather than pedigree. Institutional rights are validated by a continuous process of comparison and reevaluation. The underlying set of principles must change as necessary, in order to fit a changing body of empirical observation. Thus, it would be troublesome to seek to capture that collection of norms, once and for all, and stabilize them as part of a relatively static rule of recognition.<sup>36</sup> Dworkin's validating mechanism thereby differs qualitatively from that of Hart.<sup>37</sup>

This conflict between the two philosophers cannot be underestimated. Dworkin convincingly demonstrates that Hart's notion of open texture, though necessary within the model that Hart develops, is over-inclusive when it suggests that judges will be without guidance for many cases. In these, Dworkin would argue that one of the parties has a right to prevail (and the judge, therefore, a correlative duty so to rule). But does this destroy utterly the utility of the concept of open texture?

The fact that there are important sources of judicial guidance other than legal rules is not an argument that these sources necessarily close up *all* of the gaps. Consider, for example, the sergeant who is told by his lieutenant to pick his five most intelligent men for a particularly complex assignment.<sup>38</sup> Initially, this order appears unambiguous because in each soldier's file there is a rating of intelligence based on an objective test. To the sergeant's dismay, however, there are ten men with identical scores on the test, all of whom are tied for first place. Hart's model would presumably tell the sergeant that he should select at random (or on any basis he desires) among these men. But Dworkin's theory would take him a step further. It tells him to look for the principles underlying the lieutenant's command. Precisely what sorts of intelligence will this mission require? If two men are equally intelligent, will courage or brute strength be more important to the mission's success? Is there any experience that would be particular-

---

36. Self-reference in the law is discussed in the text accompanying notes 79-86, *infra*, and in Farago, 55 N.Y.U.L. REV., *supra* note 8, §§ I C, IV B.

37. See R. DWORKIN, *supra* note 1, at 64-68. It is also an integral element of Dworkin's theory that the "rule of recognition" which identifies legal principles must call for a variety of internal moral and political judgments. See N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 240-46 (1978).

38. The example is based on one of Dworkin's. R. DWORKIN, *supra* note 1, at 32. A parallel argument concerning the validity and utility of scientific theories which answer some questions but leave others open has been made by Waismann. Waismann, *supra* note 13, at 138-39.

ly helpful to the success of the mission? The answer to these and similar questions undoubtedly will guide the sergeant further in his choice. Yet even though the sergeant may have substantially less discretion than appeared initially, is there anything about the sum total of the sergeant's guidelines (both rules and principles) that absolutely eliminates the possibility that two or more individuals will all be equally qualified and that the selection will ultimately have to be made by the sergeant's exercise of absolute discretion?

Clearly not. The rights thesis cabins judicial uncertainty, but it does not appear to eliminate it.<sup>39</sup> The claim that the application of the rights thesis will always lead to a single correct answer (one and only one institutional right), is a separate and distinguishable claim. That claim, which I will call the "right answer hypothesis," seems historically important to the development of the rights thesis. It is closely related (though not identical) to Dworkin's discomfort with judicial discretion, from which the entire theory seems to have grown.<sup>40</sup> If it were demonstrably true, it would serve as a compelling justification of many of Dworkin's normative claims, particularly the claim that not only *do* judges utilize the rights thesis in practice, they *should* utilize it as a matter of sound political theory.<sup>41</sup> Perhaps because the right answer hypothesis is so tightly bound up with the origins and potential justification of the rights thesis, Dworkin has sought to validate that hypothesis as an integral part of his theory.

There are, however, fundamental problems with doing so. As I elaborate elsewhere (and in summary in the following section), uncertainty is a necessary element of the rights thesis.<sup>42</sup> There will continue to be an important group of cases that remain intractable, even after application of the Herculean decision-making efforts which Dworkin prescribes. And, because this is the case, the two essays in which the right answer hypothesis is defended differ from most of Dworkin's work. Their arguments are less clear, their line of reasoning more obscure. Most importantly, however, although they take the form of a defense of the hypothesis against a variety of arguments, they uniformly ignore the strongest among these.

#### THE CERTAINTY OF UNCERTAINTY

If there is a single weakness that runs throughout Professor Dworkin's work, it is an underestimation of the value and impor-

---

39. See N. MACCORMICK, *supra* note 37, at 249-50, 251.

40. See text accompanying notes 72-78, *infra*.

41. See R. DWORKIN, *supra* note 1, at 123.

42. Farago, 55 N.Y.U.L. REV., *supra* note 8, at § IV A.

tance of uncertainty in the law. I would argue that, as a matter of theory, uncertainty will be particularly difficult to banish from any legal theory. And, as a matter of practice, it is impossible to avoid. I would go further and urge that uncertainty is in some ways vital to our very conception of what law is, and this fact explains why Dworkin's theory has garnered so much attention.<sup>43</sup>

After all, the rights thesis purports to be a general theory of what law is,<sup>44</sup> but it nevertheless is silent about the role of constitutions, the duties and responsibilities of legislatures,<sup>45</sup> the functioning of the criminal law,<sup>46</sup> and the disposition of the overwhelming majority of the cases that come before the judiciary—the “easy” ones.<sup>47</sup> But though Dworkin's voice is muted in all of these arenas, his work demands and receives considerable attention.

The reason for this is that he, more than anyone else before, has pointed to the pivotal role that hard cases play in the law.<sup>48</sup> His theory has, from its very beginnings, been grounded in issues of judicial discretion and the adjudication of hard cases.<sup>49</sup> It is Dworkin, therefore, whose work has captured, or at least examined, an essential truth that has evaded the other regnant theories of law. By embracing the hard cases, the exceptions to the rules espoused by other theories, Dworkin implicitly expresses the intuitive claim that no theory of law can be satisfying so long as it fails to acknowledge the fundamental import of the role of uncertainty in the law.

Dworkin is correct, then, in rebelling against other theories (such as Hart's) that relegate hard cases to the judicial hinterlands as rare or unimportant exceptions to what law is really about.<sup>50</sup> The

43. See Nickel, *Dworkin on the Nature and Consequences of Rights*, 11 GA. L. REV. 1115, 1142 (1977).

44. R. DWORKIN, *supra* note 1, at vii-ix, xi-xii, 123.

45. The closest he has approached this question is his recent discussion of statutory interpretation. Dworkin, *How to Read the Civil Rights Act*, *supra* note 17.

46. See R. DWORKIN, *supra* note 1, at 94, 100 (Dworkin here acknowledges that his theory merely “touches on” criminal law).

47. Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 505-06 (1977).

48. See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615 (1958); Hart, *Kelsen's Doctrine of the Unity of Law*, in ETHICS AND SOCIAL JUSTICE 171, 172 (H. Kiefer & M. Munitz eds. 1970) (acknowledging that the hard cases exist at the frontiers of his theory of law and have not yet been explained or understood); Weaver, *Herbert, Hercules, and the Plural Society: A Knot in the Social Bond*, 41 MODERN L. REV. 660, 660 (1978).

49. Dworkin, 60 J. PHILOSOPHY, *supra* note 1, at 626; Dworkin, *Philosophy and the Critique of Law*, in RULE OF LAW 147, 153-54 (1971); see R. DWORKIN, *supra* note 1, chs. 2 and 4.

50. R. DWORKIN, *supra* note 1, at 14-22.

regimen that Dworkin demands of his Hercules is admirable because it forces the judge and the parties to deal with uncertainty. Dworkin's model does not permit the system to disown any cases, and it requires it to answer all those for which an answer exists. By cutting away all else, Dworkin exposes the nerve of the law: the intractable cases. But just as he does so he vitiates his own insight by insisting on the truth of the right answer hypothesis. The intuitive excitement of his theory, its apparent recognition of the importance and centrality of uncertainty in the law, is made to disappear by a philosophical sleight of hand.<sup>51</sup>

These are strong assertions. Some rely on experience and intuition. But at their heart, they rely on the demonstration that uncertainty is, in fact, unavoidable in any practical legal theory. Specifically, within the rights thesis we will expect uncertainty to arise from four separable potential sources.

The rights thesis argues that judges facing difficult cases should seek inductively to reconstruct an underlying political theory embedded within a collection of legal principles. Once such a theory is identified, it should be applied to the specific fact pattern involved, and an outcome should be determined. Initially, then, this presents two levels of inquiry. First, the fundamental norms should be identified; then they should be applied. Uncertainty could enter at either level.

At the first level, the judge must identify a set of principles that underlies the legal system. But why should that set of principles be unique? Dworkin argues that it should be the set which "best" accounts for existing empirically observable legal behavior.<sup>52</sup> We are, however, familiar with many areas in which there may be multiple "bests."

Economics provides the most exact analogy: Microeconomic theory assumes that the choice of goods any consumer will purchase results from a multivalent balancing of many inputs. At any given income level there will be continuous trade-offs between any pair of goods. These trade-offs yield an entire surface (in as many dimensions as there are goods to select among), representing an optimal allocation of income. By definition the consumer will be indifferent as between any two points on that surface, and each will represent

---

51. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Adjudication*, 63 CORNELL L. REV. 707, 783 (1978).

52. R. DWORKIN, *supra* note 1, at 66. See also R. DWORKIN, *supra* note 1, at 66-68, 126-28, 340-41; Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30-31.

an optimal (or best) allocation of income. Thus, there will likely be an infinite number of "bests."<sup>53</sup>

Similarly, there may well be many possible legal theories that would account for the existing observable legal behaviors. And many of these may seem equally good. Furthermore, for reasons that I detail later, the technique we use for narrowing the field in related sorts of inquiry (such as the scientific method) is inappropriate here.<sup>54</sup> The virtue of simplicity of explanatory force (Occam's razor), relies upon assumptions that we cannot make about the law.

Assume, however, that we have somehow narrowed the field to only one set of principles. This does not mean that uncertainty has been exiled from our theory, for there is nothing about that single set of principles which suggests that they would necessarily yield a single substantively certain answer to every question of law. Indeed, I argue that no finite set of starting assumptions can possibly yield a correct outcome in every conceivable legal case.<sup>55</sup>

Thus, uncertainty may enter at either level. There may be conflicting best theories, or a single best theory may leave the outcome uncertain for at least some cases. It is possible to divide these sources of uncertainty still further, however, and to recognize that at each of these two levels uncertainty may arise for either of two reasons.

In choosing among potential best theories we can distinguish between theories that are tied, and those that derive from contradicting sources of authority. This distinction reflects an ambiguity in Dworkin's definition of his concept of a "best" explanatory theory. It is unclear whether all potential theories may be compared on a continuous scale. If, on the one hand, they can, then there exists a continuous scale on which to evaluate competing theories, and we cannot rule out the possibility that two theories will be equally good according to our criterion. There may be, in short, a tie. But if, on the other hand, our theories are incommensurable, we may well be left with a large number of theories that simply cannot be compared to one another.<sup>56</sup>

---

53. See E. MANSFIELD, *MICROECONOMICS* 34-44 (2d ed., 1975); P. SAMUELSON, *ECONOMICS* 443-47 (10th ed., 1976).

54. Text accompanying notes 169-73, *infra*.

55. Farago, 55 N.Y.U.L. REV., *supra* note 8, at § IV B.

56. See Mackie, *The Third Theory of Law*, 7 *PHILOSOPHY AND PUB. AFF.* 3, 9 (1977); cf. R. DWORKIN, *supra* note 1, at 359-60.

An example of the first sort of uncertainty is the sergeant's choice on the basis of the soldiers' intelligence as defined by the test scores in their files. Ten of the soldiers, according to this single continuous criterion, are equally intelligent. The criterion provides no basis for judging among them. Similarly, two or more competing legal theories might be equally good when measured against some continuous metric. Litigants might be able to appeal to competing, equally balanced, sets of background rights.

Alternatively, suppose that the sergeant does not have comparable test scores for each of his men. Intelligence tests are actually clusters of examinations testing a collection of different and not necessarily related types of intelligence. Suppose that all the information that the sergeant has about any one soldier is the sub-score from one of these scales. Thus he will know that Private Adams has a considerable amount of general knowledge, Private Brown can repeat long strings of numbers he has heard only once, Private Connors can deal very well with spatial relations, and so on through the squad. Without some further basis for comparing these sorts of intelligence, the sergeant may be without guidance in his decision, and different soldiers might be "most intelligent" according to different and incommensurable intellectual metrics. Similarly, the definition of what it means for a legal theory to be "best" might be such that many theories would also be incommensurable. Litigants might be able to appeal to incomparable sets of background rights.

The same distinction between ties and conflicting sources of authority could be applied to outcomes generated by any particular "best" set of principles. Such a set of principles might not exclude a situation in which, when all the arguments of principle are weighed and balanced, the two litigants are tied. The scales are at equipoise. This would yield a situation in which neither party had a clear institutional right to prevail. Finally, nothing about the rights thesis would seem to require that the principles we select need necessarily be internally consistent. In fact, I argue that absolute consistency would be impossible if the principles would yield an outcome for every conceivable case. Like incommensurable "best" theories, contradiction within a single theory leads us to conflicting outcomes without providing a basis for selecting between them. We may find, that is, that each of the parties has an institutional right to prevail.<sup>57</sup>

None of these four sources of uncertainty is incompatible with the basic thrust of the rights thesis. In fact, though Dworkin rejects

---

57. MacCormick, *Dworkin as Pre-Benthamite*, 87 PHILOSOPHICAL REV. 585, 597 (1978).

the possibility of incommensurable best sets of principles (without demonstrating why that should be the case),<sup>58</sup> he accepts the possibility of ties on both levels, and simply ignores the possibility of paradoxical outcomes.<sup>59</sup>

There are, then, at least four sources of potential uncertainty, even within the rights thesis. The judge seeking a best set of underlying legal principles may find that two or more such sets exist, either because their explanatory force is equal (they are tied) or because their explanatory force emanates from distinct and non-comparable sources (they are incommensurable). Similarly, even after a single best theory is selected, uncertainty may arise either because that theory is at equipoise with respect to the rights of a particular set of litigants or because the theory provides contradictory institutional rights for each of the parties.

#### RECURRING FALLACIES

If I am correct, then, the rights thesis does not and cannot exclude the potential for uncertainty within any given legal system. Professor Dworkin would, I think, agree.<sup>60</sup> But he argues that such uncertainty is necessarily exceedingly rare and that judicial discretion may be totally absent from a sophisticated legal system.<sup>61</sup> And he couches these arguments in essays entitled, "Can Rights Be Controversial?" and "No Right Answer?" which seem to suggest that uncertainty is not merely rare, but conceptually unnecessary.<sup>62</sup> Finally, although he routinely accepts the existence of certain forms of uncertainty, his arguments so denigrate the importance of their existence that many commentators read these essays as flat rejections of any meaningful uncertainty in the law.<sup>63</sup>

Taken together, these two essays constitute an effective rebut-

58. R. DWORKIN, *supra* note 1, at 360.

59. R. DWORKIN, *supra* note 1, at 285-87; Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 29-32; text accompanying notes 90-179, *infra*.

60. Dworkin does, after all, acknowledge at least the possibility of tie decisions. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 29-32. This is by no means clear, however, particularly if TAKING RIGHTS SERIOUSLY, *supra* note 1, is the sole basis for our interpretation of Dworkin's theory. See Coleman, Book Review (TAKING RIGHTS SERIOUSLY), 66 CAL. L. REV. 885, 908, 910 (1978); MacCormick, 87 PHILOSOPHICAL REV., *supra* note 57, at 591.

61. Dworkin, 53 N.Y.U.L. REV., *supra* note 1.

62. R. DWORKIN, *supra* note 1, at 279-90; Dworkin, 53 N.Y.U.L. REV., *supra* note 1.

63. Note 60, *supra*, and R. DWORKIN, *supra* note 1, at 285-87.



tal to a new breed of legal realist, whom we might call "principle skeptics." Dworkin seems particularly concerned to protect the rights thesis from the claims of this group. Their argument would run roughly as follows: We accept the notion of legal rules, which after all are clearly settled and seem to impose some sort of duty on judges faced with them. But we cannot accept this vague and indeterminate talk of principles which seem to be mere ghosts of legal rules. Indeed, the very vagueness of these norms argues against their existence, for how can it be claimed that any controversial question possesses a single correct answer?

To the best of my knowledge, no genuine principle skeptics exist. Perhaps this is because Dworkin was careful to undermine their arguments before they could even be adequately phrased. I suspect, however, that it is more likely that principle skepticism is without serious appeal as a philosophical argument. The argument that is commonly phrased is more defensible, and resembles the one that I have already suggested. Although Dworkin's introduction of principles to the act of judging is an important step forward, he has not exhausted the need for some theoretical acceptance of uncertainty as an implicit part of the decision-making enterprise.<sup>64</sup>

Dworkin's two essays often seem to address this concern, but in practice they leave it unscathed. The remainder of this article is devoted to a careful examination of the reasons why we may reject the right answer hypothesis even after we have read all that Professor Dworkin seems to say in its defense.

I begin by noting five fallacies that recur in the two essays addressed to the right answer hypothesis. First, Dworkin seems to equate theoretical uncertainty in the law with practical controversy. Second, he equates uncertainty in the law with the availability of judicial discretion. Third, he ignores the crucial self-referential quality of judicial decision-making. Fourth, he fails to distinguish between certainty in the law and the completeness of a legal system. And, finally, his work seems to obscure the difference that I have just outlined between the right answer hypothesis on the one hand and principle skepticism on the other.

### *Uncertainty and Controversy*

Dworkin seems primarily concerned with arguments arising from the controversial nature of many judicial decisions.<sup>65</sup> But con-

---

64. See, e.g., Perry, 88 ETHICS, *supra* note 7.

65. For example, chapter 12 of R. DWORKIN, *supra* note 1, is entitled "Can Rights Be Controversial?"

trovercy is itself an ambiguous term, and it is by no means synonymous with theoretical uncertainty. We will especially want to introduce a distinction between theory and practice in jurisprudential argument.<sup>66</sup>

Theoretical arguments are not necessarily workable ones. It may be useful to discuss the theoretical nature of a legal system, even when we know that any observation of the system in practice will be tainted, less than pure. The distinction here is similar to the one that exists between theoretical physics and engineering. The former is concerned with abstract conceptual model making; the latter is a less than ideal application of theory to the real world. It is in the nature of our tools, our devices for measurement, and the crudeness of our own senses that we can never operate in practice at the level of precision that we can hypothesize.

Controversy in normative systems would seem to be a creature of this disjunction between theory and practice. Even though we may acknowledge that there is a theoretically correct answer to a normative question, our techniques of critical judgment may be too fallible or not sensitive enough to ascertain the content of that answer with absolute precision. Thus, different judges seeking to replicate one another's thought experiments may legitimately reach opposing results. There may, in short, be controversy.

But their controversy is not an argument that no judge can be correct to the exclusion of the others. It is merely an acknowledgment that we cannot tell *which* of them has reached the right solution. To the extent that a correct answer does exist, the persistence of controversy is simply a continuing reminder of our own limitations.<sup>67</sup>

Controversy, however, may also be used to express a theoretical claim. We may wish to assert that some question is inherently controversial. We may wish, that is, to assert that arguments will persist not because of the limits of our senses, but because of the abstract nature of the question involved.<sup>68</sup>

Whichever definition of "controversy" we accept, the concept is significantly different from uncertainty in the law. And it is the latter to which the right answer hypothesis is addressed. The two,

---

66. See Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § I.

67. See, e.g., R. DWORKIN, *supra* note 1, at 280-81.

68. See Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 167 (1965); see also Soper, 75 MICH. L. REV., *supra* note 47, at 488.

however, are not unrelated, and this relationship may be the source of considerable confusion.

Of the four potential sources of uncertainty within the rights thesis, two will yield theoretical controversy and two *may* yield practical controversy: If our definition of a best set of principles relies upon incommensurable metrics, we may well continue to argue over which of our proposed opposing theories is the proper one. If, for instance, we are critics engaged in an argument over whether Van Gogh's *Starry Night* is a better work of art than Bruckner's *Seventh Symphony* we will likely argue until exhaustion. Whatever standards we may be able to develop and articulate about the assessment of works of art within a particular genre, they will likely be incommensurable across genres. There is no aesthetic philosopher's stone that could reduce all of our judgments to some common metric and allow us to compare these two works.

Similarly, if there is a paradox within a single best set of principles, a theoretical and irresolvable controversy will exist. If the sovereign has commanded that all left-handed persons be taxed, and has similarly commanded that all blond-haired persons be exempt, absent any rule for ranking these commands with respect to one another there will be an essential, continuing, and theoretical controversy: How should a blond-haired, left-handed person be treated?

Thus, either of these sorts of uncertainty will yield a controversy that cannot be avoided. Ties, either between competing sets of principles or between outcomes posited under a single specific best theory, are another matter entirely. The tie decision need not be controversial at all. If we view equipoise as one of an infinite number of possible points on a continuous metric, the accuracy of calling a decision a tie will be essentially identical to the accuracy of making any judgment within the system. To the extent that the practical limitations of our techniques make it impossible to be absolutely certain that our judgment accurately reflects the theoretically correct outcome, all of our decisions will be more or less suspect, and this will include the tie decision.<sup>69</sup>

Of course, not all controversy will reflect theoretical uncertainty. Where our techniques are relatively clumsy, many close cases may engender practical controversy even though they have a theoretically correct solution.<sup>70</sup> And not all uncertainty will be con-

---

69. R. DWORKIN, *supra* note 1, at 285-87.

70. See Sartorius, 11 GA. L. REV., *supra* note 3; note 116 *infra*.

troversial. Where our techniques are relatively sophisticated, many tie decisions will seem to be uncontroversially uncertain—we will all agree (or at least very many of us will agree) that the interests of the parties are at equipoise.<sup>71</sup> We should therefore be cautious about confusing the two concepts. This caution, however, is not always heeded in Dworkin's essays.

### *Uncertainty and Discretion*

There is, then, an important difference between uncertainty within a legal system and controversy over the outcomes generated by that system. There is an equally crucial line that may be drawn between judicial uncertainty and judicial discretion. Dworkin, however, often glosses over the distinction by equating the availability of judicial discretion with the existence of theoretical uncertainty. In doing so he simply echoes H.L.A. Hart's tacit assumption that where there are gaps in the law judges must exercise discretion.<sup>72</sup>

It is precisely this claim that seems most to have concerned Professor Dworkin in his initial forays against Hart's positivism. He sought to demonstrate the impropriety of judicial discretion, not the impossibility of legal uncertainty.<sup>73</sup> Of course, one way to demonstrate the bankruptcy of judicial discretion would be to show that the law always provides a theoretically certain outcome. A judge exercising discretion in the face of such an outcome could be criticized for failing to fulfill an important duty. But this argument only works in one direction. Its converse is not necessarily true; even if we eliminate discretion from the law, we may nevertheless have to respond to legally uncertain questions.

It is not surprising that this important distinction is not remarked upon by Hart. Where uncertainty exists, the practical arguments favoring discretion over other arbitrary techniques for reaching a conclusion seem quite compelling. Once the necessity of uncertainty is clear, the remedy for it may well be relatively uncontroversial. But the distinction becomes critically important when Dworkin introduces arguments phrased against discretion rather than uncertainty.

---

71. *Id.* at 1274-75.

72. H.L.A. HART, *supra* note 12, at 77-96, 125-27, 201. Other assumptions are also possible. See Coleman, 66 CAL. L. REV., *supra* note 60, at 912.

73. See Dworkin, 60 J. PHILOSOPHY, *supra* note 1; R. DWORKIN, *supra* note 1, ch. 2.

Because we tend to accept discretion as the remedy for uncertainty, policy arguments against discretion appear to be policy arguments against the existence of gaps in the law. But the connection is a false one. The two concepts are necessarily distinct. Moreover, the nature of their difference is particularly helpful in understanding the source of the confusion that they may spawn. Uncertainty is an observable, empirical part of the legal behavior for which any theory must provide an account. Judicial discretion, on the other hand, is a procedural technique. It is only one of a large number of ways in which a system may respond to the existence of uncertainty.

For this reason, it is possible to express policy arguments against judicial discretion. It has no theoretical or empirical source, but is simply a technical response to a particular theoretical difficulty. It may well be a flawed response, and there may well be (though few of us may think there are) better ways to deal with the existence of uncertainty. We can discuss the merits and problems of judicial discretion and disagree about whether, on balance, it is the best solution to our problem.

If we do not keep this particular distinction clear, however—if, that is we equate judicial discretion (a solution) with legal uncertainty (the underlying problem)—we open ourselves to a profound sort of logical error. So long as we understand the way in which the two differ, we will recognize that policy arguments against judicial discretion necessarily lead us to ask whether a better response exists to the problem of uncertainty in the law. But when we lose sight of the disjunction, we may be tempted to accept a description of the shortcomings of judicial discretion as an argument that legal uncertainty cannot exist.

That argument has a limited sort of validity. The conclusion that uncertainty *cannot* exist is, of course, unacceptable. But we may acknowledge that arguments against judicial discretion (particularly when that appears to be the best available response to uncertainty) suggest that uncertainty *should* not exist. Uncertainty may be essential to any legal system, but the weakness of judicial discretion urges us to keep uncertainty to its absolute minimum. Thus, if properly phrased, an argument against discretion may have an impact upon the way in which we go about deciding what sort of processes we will want to accept for our legal system. But it does not address the right answer hypothesis directly, and, by definition, must yield to any argument which does.

*Certainty and Completeness*

A third important distinction that is often passed over by Dworkin is the one that I have made between legal certainty and legal completeness.<sup>74</sup> This is roughly parallel to the difference between substance and procedure in law (and therefore is related to the distinction between uncertainty and discretion).<sup>75</sup> It is precisely the difference between the claim in any particular case that one *particular* litigant has a right to a *particular* outcome, and the claim that both litigants have the right to insist that the court reach some outcome.<sup>76</sup>

The latter is a claim that the legal system is complete; it includes both a definition of its own jurisdiction, enumerating the cases over which it asserts authority, and a definition of the way in which its authority will be exercised. Every legal case will have an answer, but it is by no means true that every case (or, for that matter, all but a small handful of cases) will have a specific, theoretically antecedently determinable, unitary correct outcome.

Thus, we can imagine a legal system in which very few legal cases have substantively certain results. Suppose that judges toss coins to determine the winner of a lawsuit. Or that they select the more attractive litigant as the winner, or the litigant with the shorter name or the greater wealth. Any of these would produce a decision, and we might have important social reasons for wanting an authoritative source of decisions, even when we could not have guessed antecedently what those decisions would be.

Alternatively, of course, we might want to have extensive substantive content to our law. We might want to have a theory, that is, which justifies not only the process whereby a decision is reached, but also the content of the decision itself. This would provide substantive certainty for the law, in addition to procedural completeness.

Litigants will have rights both when the system is certain and when it is complete. But the nature of their rights will differ significantly. In a complete legal system, all litigants will have a procedural right to an outcome (and more particularly an outcome legitimated by a specific process). In a certain system, an individual

---

74. Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § I B.

75. It is also parallel to the difference between semantic and syntactic truth in logic.

76. Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1314-16.

litigant may have a highly specific substantive right to a particular outcome.

One effect of this distinction relates to the availability of judicial discretion. The existence of a substantive right to a particular outcome banishes discretion. If rights have any meaning at all, they must function as trumps.<sup>77</sup> When present, they create a correlative duty on the part of a judge to abide by them. Thus, a judge faced with a litigant who has a substantive right has no legitimate basis for making a discretionary decision. But the existence of procedural rights need not have any impact at all on judicial discretion. Judicial discretion is, in fact, merely one form of procedural determination of outcome that might be utilized by a legal system.<sup>78</sup> And, though substantive rights are fundamentally incompatible with judicial discretion, the latter may coexist quite peacefully with the existence of procedural rights.

The distinction has even greater import for the right answer hypothesis. That claim is precisely the claim that a legal system will be simultaneously procedurally complete and substantively certain. For every case there will be an outcome, and that outcome will be substantively determinable. Thus, to demonstrate the validity of the right answer hypothesis it is necessary to demonstrate the existence of coincident procedural and substantive rights in every possible case. If this distinction is not honored, it becomes deceptively easy to confuse an argument in favor of the existence of *an* answer in every case, for an argument in favor of a *specific* answer in every case.

### *Judicial Self-Reference*

Cybernetics is the study of self-regulatory mechanisms, mechanisms that can monitor themselves and change their own state.<sup>79</sup> One of the most persistent jurisprudential questions is whether the judicial process is in this sense a cybernetic one. Dworkin repeatedly assumes that judges discover, rather than create, the law.<sup>80</sup> This assumption is itself terribly controversial and,

---

77. See R. DWORKIN, *supra* note 1, at xi.

78. Whether or not discretion should be incorporated into a particular system is a policy matter of the sort discussed briefly at notes 72-73, *supra*, and at greater length in the conclusion, at notes 179-91, *infra*.

79. See generally, N. WIENER, CYBERNETICS: OR CONTROL & COMMUNICATION IN THE ANIMAL & THE MACHINE (2d ed. 1961).

80. R. DWORKIN, *supra* note 1, at 280, 281-82, 293.

I believe, essentially unsupportable.<sup>81</sup> It assumes that the acts of judges are not cybernetic, that they have no impact on the content of the law.

Certainly, to the extent that all legal questions are ultimately answered by a legislature or a dictator,<sup>82</sup> it may be possible to have a system in which the judiciary plays no law-creative role. But this hardly seems an accurate description of any vital contemporary system.<sup>83</sup> The common law is a creature of judicial creation. The gravitational force that even Dworkin acknowledges accompanies precedent is a way in which judges influence one another and the law.<sup>84</sup>

The point is not that judges write on a clean slate, or that they may validly ignore the other makers, including other judges, of the legal system in which they find themselves. Rather, it is that we cannot strictly say that judges either create or discover law. They do something in between.<sup>85</sup> Their decisions are made with reference to their own decisions and those of other judges. They must in some sense have jurisdiction over themselves and their process.

Judicial self-reference, the influence that the judiciary exerts on the theoretical model that it uncovers, is a critical aspect of the legal process. It has certain theoretical implications about the role of uncertainty in the law, but these are of less import here.<sup>86</sup> In the context of the right answer hypothesis, judicial self-reference argues that we must be careful to compare the process of legal judgment only with that of other, similarly cybernetic systems. Failing to do so would permit us to simplify our task in a subtly fallacious way. It is easier to address the right answer hypothesis when the system against which we evaluate the "rightness" of our answers is totally external to the system that generates them. Once the two can be

81. Even Sartorius concedes this point, urging only that judges make law in a different way from the one in which legislators do. See Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHILOSOPHY Q. 151, 159, 160 (1971).

82. Kenneth Arrow has demonstrated that recourse to a legislature will not guarantee the absence of uncertainty in the law. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). I discuss these possibilities in Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § IV C.

83. Nor is it the model Dworkin presents. See R. DWORKIN, *supra* note 1, at 110-23.

84. *Id.* at 111-12.

85. See, e.g., Ely, *Foreword: On Discovering Fundamental Values*, 91 HARV. L. REV. 5, 55 (1978); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 848; Summers, 63 CORNELL L. REV., *supra* note 51, at 710.

86. See Fargo, 55 N.Y.U.L. REV., *supra* note 8, at §§ I C, IV B.



folded into one another, important complexities are triggered. But when we analogize the law to a non-cybernetic system, we permit our argument to ignore those complexities and we draw upon subliminal assumptions that are not necessarily applicable to systems which include self-reference.

*The Right Answer Hypothesis and the No-Right-Answer Thesis*

Finally, we should be aware of the distinction between two very different claims. The first is that there is virtually always a substantively correct answer to every legal question. This is what I have been calling the right answer hypothesis. Second, there is the claim that whenever the settled law does not provide an answer, there is necessarily a theoretical uncertainty in the law. This appears to be the heart of what Professor Dworkin calls the no-right-answer thesis.

While these two possible theses are in fact incompatible, neither is the direct negation of the other. The right answer hypothesis is controverted by the claim that there remains some significant group of intractable cases—cases with no right answer. We must recognize that this intractability claim is much *weaker* than the no-right-answer thesis, which would assert that *all* hard cases are necessarily without solution. The no-right-answer thesis is controverted in turn by the claim that there exists at least one controversial case for which there is a right answer. And this, in turn, is of course far weaker than the right answer hypothesis, and may well be true even when that stronger claim proves to be false. The rights thesis stripped of the right answer hypothesis makes precisely this weaker claim. We will therefore wish to be cautious lest we confuse these four very separate propositions (a caution not always heeded by Professor Dworkin).<sup>87</sup>

---

87. Specifically, the four propositions outlined in the text may be represented formulaically as follows:

$x$  = a variable over the domain of hard cases

RA(x) = the fact that there exists a right answer to the problem posed by hard case "x" (a variable)

1. no-right-answer thesis:  $(\forall x) \neg RA(x)$   
(no hard case has a right answer)

2. rights thesis (– no-right-answer thesis):  
 $(\exists x) RA(x)$   
(some hard cases have right answers)

3. right answer hypothesis:  $(\forall x) RA(x)$   
(all hard cases have right answers)

4. intractability thesis (– right-answer hypothesis):  
 $(\exists x) \neg RA(x)$

(there are some cases which have no right answer)

No one today, including I think H.L.A. Hart, would seriously assert the truth of the no-right-answer thesis. It is a product of principle skepticism, and principle skeptics seem to inhabit the realm of elves, gnomes, and trolls. We can conceive of them but we can't find any.

I think it is equally implausible to assert the truth of the right answer hypothesis, and I have gone to some length to demonstrate the reasons for that belief.<sup>88</sup> Nevertheless, Dworkin's essays on judicial certainty are often taken to express precisely that claim, perhaps because they frequently fail to distinguish between the no-right-answer thesis and the right answer hypothesis.

Part of the reason for this confusion may be that Dworkin feels that uncertainty is a theoretically rare and exceptional attribute of any complex legal system. In fact, he suggests that it may be so rare as to be unworthy of consideration.<sup>89</sup> To the extent that this is

---

An example of the sort of difficulty encountered in seeking to keep these propositions straight is Dworkin's own apparent inability to identify clearly what he means by the "no-right-answer thesis." In R. DWORIN, *supra* note 1, at 279, that thesis is implicitly linked to the argument that "there is sometimes no single right answer, but only answers." As such, it would take the form of #4: there are some cases which have no right answer. In Dworkin, 53 N.Y.U.L. REV., *supra* note 1, he notes that "it has been debated under many titles, including the question whether judges always have discretion in hard cases, and whether there are what some legal philosophers call 'gaps' in the law." *Id.* at 2. These respectively translate into #1: no hard case has a right answer; and #4: there are some cases which have no right answer. And in yet another place Dworkin states that his claim *against* the no-right-answer thesis is simply that, "there is often a single right answer to complex questions of law," R. DWORIN, *supra* note 1, at 279, which is a version of #2: some hard cases have right answers (and which in turn is a controversion of #1: no hard case has a right answer). As the above schema makes clear, for the purposes of this article I take the no-right-answer thesis to be the strong claim I have designated as #1: no hard case has a right answer. This has the virtue of meshing with at least some of Professor Dworkin's use of the term, even if it is impossible to pin down a meaning which would coincide perfectly with all that he has to say on the subject.

Still more difficulty arises because it is never clear whether Dworkin is asserting the right answer hypothesis or denying the no-right-answer thesis. The latter is indeed hostile to the rights thesis (as can be seen by comparing #1 and #2, above), and, if asserted, would require refutation by Professor Dworkin. Disproving it, however, would say little if anything about the necessity of uncertainty in the law (the intractability thesis, #4, above) or the role of discretion in responding to such uncertainty. The former claim, conversely, is hostile to uncertainty and discretion, but is not a direct corollary of the rights thesis. By muddying these various lines of definition, Dworkin permits interpretations of his work which would assert that arguments favoring the rights thesis (#2) disfavor judicial discretion (a symptom of #4). *See also* N. MACCORMICK, *supra* note 37, at 83.

88. Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § IV.

89. R. DWORIN, *supra* note 1, at 286-87.

true, the two theses are brought closer together. Thus, Dworkin makes many perfectly valid arguments against the rather vaguely articulated no-right-answer thesis. He virtually never addresses the right answer hypothesis. But he argues in each essay that the residue of uncertainty will necessarily be almost infinitesimal. And this argument serves as a bridge linking the two claims. If it is true, then all of his arguments against the no-right-answer thesis become arguments in support of the right answer hypothesis.

For this reason, the scarcity argument he advances becomes particularly important to Dworkin's essays. Unfortunately, it is the weakest and most tentative of all his claims. Nevertheless, by linking his generally sound (if largely unnecessary) attack on the no-right-answer thesis to his tenuous rarity argument, he encourages his readers to believe that he has presented a strong case in support of the right answer hypothesis.

In reading Dworkin's two essays, then, we will want to remain alert to these five important distinctions. We should recognize that arguments concerning controversy do not necessarily reach claims concerning uncertainty. We will want to be wary not to assume that an argument against the utility of judicial discretion is the equivalent of an argument against the possibility of legal uncertainty. We must guard against confusing a claim of procedural completeness for an assertion of substantive certainty. We should bear in mind the complexities that accompany self-referential systems. And we will want to examine the scarcity claim quite closely in order to evaluate the relation between the right answer hypothesis and the no-right-answer thesis.

#### "CAN RIGHTS BE CONTROVERSIAL?"

The shorter and less complex of Professor Dworkin's two forays into the right answer morass is the penultimate chapter of *Taking Rights Seriously*.<sup>90</sup> This is an abbreviated version of the second essay, "No Right Answer," which initially appeared in a collection of essays written in honor of H.L.A. Hart,<sup>91</sup> and which has subsequently been revised and published in the *New York University Law Review*.<sup>92</sup> Although the two essays overlap conceptually, they each present surprisingly distinct arguments, and each bears independent evaluation.

---

90. R. DWORKIN, *supra* note 1, at 279-90. This is the concluding chapter of the hardcover edition.

91. See note 1, *supra*.

92. Dworkin, 53 N.Y.U.L. REV., *supra* note 1.

"Can Rights Be Controversial?", like much of Dworkin's prose, employs a particularly devastating stylistic device. Dworkin sets up his opponents' arguments with great clarity and even beauty, only to demonstrate with still greater lucidity how those arguments are hopelessly nugatory.<sup>93</sup> In the process of doing so, however, the arguments that would have been most effective are somehow lost in the shuffle. Only those that may be readily disposed of are laid out, often to the accompaniment of any number of compliments about their authors' skill or insight.<sup>94</sup> Of course, once they are decimated, the only conclusion we are left to draw is that Dworkin's own skill and insight are even better still.<sup>95</sup>

Using this technique, Dworkin sets up two versions of a no-right-answer argument at the outset of the essay. The first, termed the "practical" argument, is that even though one of the parties may have the right to a particular conclusion, we are not justified in using the rights thesis in deciding the case because we lack the conceptual tools to determine to the satisfaction of all the interested parties what the content of the existing right is.<sup>96</sup> Clearly, this is a practical argument about controversy, not uncertainty, and Dworkin is right to reject it (though we may wonder why he would articulate it at all). It is the argument that most human judges more closely resemble Dworkin's fallible Herbert<sup>97</sup> than they do his superhuman Hercules.<sup>98</sup> While we would scarcely deny such a claim, it is difficult to view it as an argument against urging even the most fallible human judge to emulate Hercules as closely as possible.<sup>99</sup>

On some level the practical argument may also be a theoretical one. It is possible that its hypothetical proponent is claiming not only that we lack the tools to unearth the applicable rights in all

---

93. This sort of straw man argumentation also characterizes Freud's description of his own theory. See, e.g., S. FREUD, A. GENERAL INTRODUCTION TO PSYCHOANALYSIS 27-29 (rev. ed J. Riviere trans. 1943).

94. "How can so able a legal philosopher [Munzer] have gone so wrong here?" R. DWORKIN, *supra* note 1, at 336; see generally R. DWORKIN, *supra* note 1, at 291-368. A particularly telling insight into Professor Dworkin's attitude towards criticism is the opening of the original version of the appendix to *Taking Rights Seriously*. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977).

95. R. DWORKIN, *supra* note 1, at 280-81.

96. *Id.*

97. *Id.* at 125.

98. *Id.* at 105-06.

99. This is an example of confusing controversy for uncertainty. See text accompanying notes 65-71, *supra*.

cases, but that those tools do not even exist.<sup>100</sup> Whether the argument is phrased as an absolute or as a comment on a particular system, however, Dworkin's criticism of it is perfectly accurate. He suggests that the reason for adopting the rights thesis in some cases may not itself sound in a substantive right of any of the parties. It may derive instead from the simple pragmatic fact that the rights thesis works better than other systems; that it is fairer, more practical, or more dependable than other alternatives.<sup>101</sup>

Dworkin accurately asserts that his arguments in favor of the rights thesis suggest that it is all of these. Thus, even if the rights thesis occasionally lacks the theoretical tools to unearth the existing rights of the parties involved, it might nevertheless be validated procedurally. Of course, while this is strictly true, it muddles the notions of certainty and completeness. Such a claim would argue in favor of the rights thesis as a procedural mechanism for reaching *an* answer, not as a substantive technique for determining *the* answer.

Suppose that this version of the argument is true. Perhaps rights are genuinely and theoretically unknowable, deriving from the will of a capricious, irrational, and peculiarly laconic god. Can there be such a thing as a legal right that is, by definition, unknowable? Perhaps, perhaps not; it is a semantic question. If we wanted to we could call such things "rights," just as we can call the sound of one hand clapping a "sound." For some purposes it may have meaning to do so, but these are purposes rooted in metaphysics, not jurisprudence. If we cannot even venture an educated guess as to what a person's rights are, those rights must be, regrettably, irrelevant to any practical legal analysis.<sup>102</sup> As a legal matter, then, any theoretically unknowable right could not be a legal right at all. Questions answered by recourse to such rights would only be addressable procedurally, and Dworkin is therefore correct

---

100. R. SARTORIUS, *supra* note 3, at 201; Sartorius, 11 GA. L. REV., *supra* note 3, at 1269; Perry, *Judicial Method and the Concept of Reasoning*, 80 ETHICS 1, 4, 19 n.10 (1969).

101. R. DWORIN, *supra* note 1, at 281; see D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63, 82-83 (1979).

102. I am using "educated guess" to mean a quite specific probabilistic assertion: A guess is "educated" if we are able to assert that the likelihood of its success is somehow greater than the probability of success were we to select among the options randomly. If there are two possibilities, a system of selection will be preferable to randomness if it yields the "right" answer more than fifty per cent of the time. If we cannot even venture an educated guess, we will be unable to distinguish our technique from random selection on the basis of outcome.

in relying upon a procedural justification for the rights thesis in such a circumstance. But it would be wrong to claim that that reliance is an argument in favor of the right answer hypothesis. Cases answered in this way by the rights thesis would have procedural answers, but they would still lack substantive certainty.

Dworkin addresses this "theoretical" argument by phrasing it in a particular way.<sup>103</sup> His version of the argument asserts that whenever a right is inherently controversial it cannot meaningfully be said to exist at all. This of course brings in the notion of "controversy," made still less clear by the qualifier "inherently," suggesting that not all controversy would support the theoretical argument. The sorts of controversy that Dworkin does *not* explore include precisely those circumstances in which I have suggested that genuine uncertainty would necessarily yield controversy: incommensurable best theories and internal paradox within a single best theory. Each of these will be inherently controversial in the sense that controversy must arise when there is compelling reason to decide in each of two opposing directions and no procedural mechanism exists for selecting between the alternative necessary decisions.

If we wish to understand how such a seemingly intolerable situation might be permitted in a legal system, we need only look at the truism that reasonable persons often differ about legal questions.<sup>104</sup> This is what it means for a legal proposition to be controversial. We may even carve away the situations in which they will differ because their conceptual tools are simply not very good; where each is acting more like Herbert than Hercules. After all, in that circumstance reasonable persons will agree that if they had access to better tools they would probably agree.

So the question remains, why else would reasonable persons differ? Suppose that I say the capital of France is Paris, and you claim that it is Hackensack. We will differ because you are wrong. Our difference, however, is not reasonable. Perhaps we did not have access to an authority that would demonstrate which of us was right and which wrong; perhaps, that is, we had poor conceptual tools. We

---

103. R. DWORKIN, *supra* note 1, at 281.

104. The discussion which follows parallels in important ways that in N. MACCORMICK, *supra* note 37, at 246-49, 251-55. MacCormick uses a different nomenclature and does not distinguish between paradox within a single theory and the incommensurability of competing theories. Nevertheless, he reaches the fundamental conclusion that not all judicial questions may be even theoretically amenable to a single right answer.

have just agreed to eliminate this sort of artificial controversy from consideration. If you continue to insist that the capital of France is Hackensack, even after I show you an atlas or the appropriate statute of French law, then even you would have to agree that you are being unreasonable.

But there is a second, much more plausible, way in which we may disagree. Suppose I say that Kansas City is the largest metropolitan area in the state, while you claim it is not. Suppose further that I am speaking of the state of Kansas, while you are speaking of Missouri. The fact of the matter is that both of us are correct. In a very real way, as reasonable persons without a technique for selecting between two equally good underlying theories for what we mean by "state," we will continue to disagree until we become exhausted.

So incommensurable best theories could lead to controversy. Paradox within a single best theory would yield a similar dispute. Suppose, for example, that we were in a legal system which treated both property rights and the right to life as dispositive. Could a slaveholder kill a slave? The system has a single explanatory theory, but that theory includes potentially conflicting assumptions. The conflict becomes real in the context of this problem, and no solution is available.

Finally, controversy may, but need not, arise from tie decisions, either between theories or within a single theory. Whether it does so will depend upon the accuracy of our conceptual tools, and the existence of a procedural technique for allocating ties.<sup>105</sup> Thus, these cases would not present inherent controversy, although they do embody substantive uncertainty.

The theoretical argument from controversy, therefore, appears to be an indirect and obscurantist way to approach the problem of uncertainty. But, once phrased, what does Dworkin do with it? He begins by referring to other disciplines in which controversial opinions are tolerated as the basis for statements of fact. In particular, he alludes to history and science.<sup>106</sup> But the kinds of conclusions that controversial opinions may support are very different in these relatively non-self-referential fields from what they are in the law. In

---

105. One such technique (which should be familiar to us) is simply requiring that the finder of fact hold for one party or the other, at its discretion. R. DWORKIN, *supra* note 1, at 286-87; text accompanying notes 144-46, *infra*.

106. R. DWORKIN, *supra* note 1, at 281-82.

science there may be contingent conclusions; if the theory underlying them proves wrong, the conclusions may be revised.<sup>107</sup> Thus, for some time after Einstein proposed a revised model of the universe based on his theory of relativity, that theory was not demonstrably better than Newtonian physics. Whether one chose to believe Einstein or Newton was a matter about which reasonable scientists could differ. As more data flowed in, however, it became clear that Einstein's model was the better of the two. At that point reasonable scientists could no longer differ, and the scientific community was reunited by reason of a change in the conclusions drawn by a portion of its membership.

But legal questions can be very different. The law is cybernetic, self-creative. When judges choose to adopt one controversial version of the best explanatory theory over another, their acts are not totally contingent. They cannot go back if proven wrong and undecide all their cases.<sup>108</sup> What is more, their own choices will have an impact on their own case and on future cases, subtly altering for all time the empirical legal behavior that a best explanatory theory must seek somehow to fit. For this reason, the argument by analogy to non-self-referential systems is deceptive and unhelpful.<sup>109</sup>

Dworkin next turns to a story. He asks us to imagine a legal system in which judges may occasionally differ, but in which, when they do, they "understand the arguments of their opponents sufficiently well enough to be able to locate the level of disagreement, and to rank these arguments in rough order of plausibility."<sup>110</sup> He introduces a professional skeptic into this society, a philosopher who claims that the fact of their disagreement should be enough to assure them that there can be no right answer to their disputes.<sup>111</sup>

---

107. See R. SARTORIUS, *supra* note 3, at 199. This constitutes at least part of the difference between science and law.

108. Even Dworkin includes a limitation on the theory of mistake as part of the rights thesis. R. DWORKIN, *supra* note 1, at 122.

109. The argument in the text is too simplistic. Readers familiar with the Principle of Uncertainty in physics will argue that even in science the presence of an observer has an impact on the observation which is both essential and impossible to determine. Nevertheless, the role of self-reference in science is crucially different from its role in the law. In the latter, the function of the experimenter (that is, the court) may itself become the focus of inquiry in questions of jurisdiction and procedure. In science it cannot. Dworkin seems to be aware of this, though that recognition has not been reflected in his development of the rights thesis. See Dworkin, *Social Science and Constitutional Rights*, 61 EDUC. F. 271, 274 (1977).

110. R. DWORKIN, *supra* note 1, at 283.

111. *Id.*



The philosopher, of course, is making a claim that is stronger than necessary to demonstrate that there may be some cases without a right answer. Dworkin implicitly relies on this fact when he demonstrates that the philosopher must be wrong.

The success of Dworkin's demonstration is built into the society that he posits. For, if the judges may agree on a ranking of their conflicting theories, then the only real disagreements will come in the context of those propositions of law that are generally perceived to be ties. The sort of general ranking that Dworkin presupposes definitionally excludes incommensurable underlying theories. Paradox within a single theory would be reduced to the far simpler imagery of a tie decision by means of the ranking system. This would create practical problems for the judges,<sup>112</sup> but its primary value here is to permit Dworkin to avoid having to discuss internal paradox at all. His philosopher is left with a residue composed of ties. Dworkin then examines the nature of the tie decision.<sup>113</sup>

In doing so he initially merges the two different sorts of tie decision into one, claiming that a tie is precisely the same sort of decision as one favoring one or the other of the parties.<sup>114</sup> This is true of ties within a system, but it is not true for ties between competing best explanatory theories. Ties within the system represent situations in which the judges will agree that the parties are at equipoise. This is the same sort of decision that the judges might reach if they were to agree that one party or the other had a right to a decision. But it is a very different sort of decision from the one that acknowledges that two explanatory theories are tied. The latter takes place on a higher level of abstraction, and does not resemble at all the usual balancing of opposing within-system arguments. Merging the two into the within-system tie example, however, allows Dworkin to ignore between-system ties. Furthermore, by asserting that the tie decision is structurally identical to all other decisions he can deny that it is any more inherently controversial than any other decision.<sup>115</sup> This, of course, is so, though the nature of our tools may make it more frequently behaviorally controversial.<sup>116</sup> But the fact

---

112. Paradox and equipoise are fundamentally distinct concepts. See text accompanying notes 56-57, *supra*; Farago, 55 N.Y.U.L. REV., *supra* note 8, at § III.

113. R. DWORKIN, *supra* note 1, at 285-87.

114. *Id.* at 285.

115. *Id.*

116. This is a claim that Sartorius has recently made. Sartorius, 11 GA. L. REV., *supra* note 3. To understand the derivation of that claim, which is both similar to and

that all judges may agree to rank two arguments equally and thereby view them as uncontroversially tied does not mean that

---

distinct from Dworkin's, we should look at the development of Sartorius' understanding of the nature of judicial uncertainty.

Initially, Sartorius seemed to feel that the question whether any case existed for which there was no right answer would be impossible to evaluate in any conclusive way. Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171, 185 (1968). (As is suggested by the title of that essay, Sartorius has often been more interested in the reasoning in which a judicial decision is couched than in the abstract question whether that decision embodies the single correct answer.) He has come gradually to concede (more and more explicitly) that there are cases without right answers. He first hypothesized that such cases might exist. Sartorius, 8 AM. PHILOSOPHY Q., *supra* note 81, at 159. Most recently, he has accepted the fact that such cases actually *do* exist. Sartorius, 11 GA. L. REV., *supra* note 3, at 1275.

Granting then, that the sort of uncertainty that I am arguing for exists in the abstract, Sartorius has turned his attention to more practical concerns. First, he examines the issue of the sort of justification that might be expected. He concludes that for *all* cases, right answer or no, judicial decisions should be expressed in the language of rights. R. SARTORIUS, *supra* note 3, at 201-03. See R. DWORKIN, *supra* note 1, at 286-87. I have no quarrel with this conclusion, and would tend to accept it myself. Text accompanying notes 179-91, *infra*.

He acknowledges that the strongest argument against the right answer hypothesis comes from the sort of source that I have identified. R. SARTORIUS, *supra* note 3, at 194. But he immediately turns away from that argument to the more expansive claim that the right answer hypothesis must fail whenever no right answer is demonstrable. That claim is a very broad one, identical to what I have called the no-right-answer thesis (*supra* note 87), and Sartorius proceeds to reject it. R. SARTORIUS, *supra* note 3, at 195. See R. DWORKIN, *supra* note 1, at 179-90. He also wishes to eliminate discretion, arguing that not only is there a right answer in the vast majority of cases, but it will be impossible to determine in which specific cases the right answer hypothesis will fail. R. SARTORIUS, *supra* note 3, at 201.

If I read him correctly, he is saying that not all controversial cases will be without a right answer, but that all cases without a right answer will be controversial. While I agree with the first leg of this argument, I have rejected the second. See text accompanying notes 65-71, *supra*. The model that Sartorius seems to accept would suggest an axis along which cases could be arrayed. Let us assume that cases in which a decision for the plaintiff is the right answer are to the right, cases in which a decision for the defendant is the right answer are to the left, and cases without a right answer are near the origin:

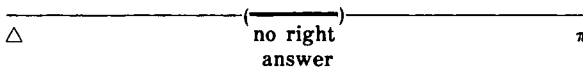


FIGURE A

Let us assume further that we can delineate controversy as the fact that, in any given case, our analytic tools are such that we cannot be certain that we have located the point on the axis where the case actually lies, but, instead, can only be certain that we have landed within a certain distance of that point. Thus, for a particular case in which plaintiff has a right to win, our conceptual tools are such that we may be certain that we will fall within the area marked on the axis, but uncertain that we will hit the actual point:

they have eliminated uncertainty. If the arguments point in opposing directions, then the within-system tie decision remains a sub-

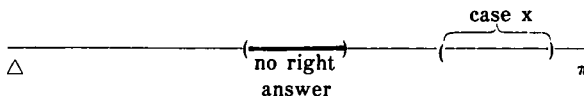


FIGURE B

Now that would not make any difference in the example depicted above, because all points within the zone of controversy lie on the portion of the axis which denotes plaintiff's right to win. This case, then, would not be controversial. But suppose that there were another case with the following mapping:

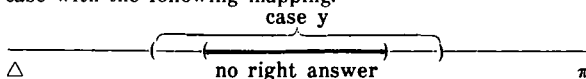


FIGURE C

Here some judges will believe that plaintiff has a right to win, others will believe that there is no right answer, and still others will believe that defendant has a right to win. In the abstract, plaintiff may still deserve to prevail, but the decision will be controversial. In this case it is quite clear that, at least if the margin of error surrounding the accurate point remains constant and as large as it is in Figure C, all no-right-answer cases will be controversial. That is, any case that falls on the no-right-answer portion of the axis will have a margin of error that includes some portion of the other portions as well:

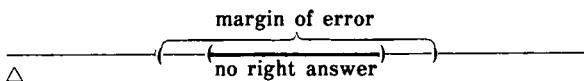


FIGURE D

This, of course, need not be the case. Instead, it might be that the margin of error is so narrow (or the no-right-answer portion of the axis so large) that there will be some non-controversial answerless cases:

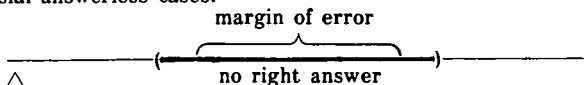


FIGURE E

To make his point stick, then, Sartorius must show that this last version is never the case and that Figure D is always a more accurate interpretation. Nothing in his book proves this to be so.

Recently he has used Bayesian statistics to show that, even if some uncontroversial unanswerable cases exist, they will be exceedingly rare. His demonstration relies on a faulty assumption, however, without which the same technique actually proves the opposite of his conclusion. Sartorius, 11 GA. L. REV., *supra* note 3. His claim relies on the assumption that the criterion on which we will base the decision that there is a high antecedent likelihood that a case has no right answer is itself independent from judicial interpretation. That is, he suggests such criteria as "constitutional cases" and "appellate cases" as the basis for predicting when a specific case will be without an answer. *Id.* at 1271. But I would argue that the cases in which we are likeliest to find no right answer are precisely those cases in which a reasonable judge using the rights

stantively uncertain one. The between-system tie is more troublesome still.

Dworkin stresses the distinction between behavioral controversy (in which judges disagree because they cannot perceive the underlying existing answers clearly enough) and a genuine tie decision (in which they can clearly perceive that the underlying existing answer is within-system tie).<sup>117</sup> He notes that it might be possible for some legal systems to combine the two, but argues that they need not do so and in practice tend not to do so.<sup>118</sup>

This argument is generally sound, highlighting again why it is largely irrelevant to introduce the concept of controversy into a discussion of uncertainty. Nevertheless, it is interesting that the example he chooses undermines his own argument: He presents a rule from a hypothetical racetrack that defines a tie as any race in which a photo finish yields a picture so blurred that the actual winner is indistinguishable.<sup>119</sup> This rule eliminates fallibility and controversy over tie decisions. There may in fact be many legitimate tie decisions, even though better equipment might have identified a winner. But, Dworkin claims, courtrooms are not racetracks, and we have no reason to define our notion of a legal tie in such a way. Perhaps not, but this particular argument hides a remarkably subtle series of

---

thesis concludes that there are incommensurable best theories underlying the law, or that there is a tie between best theories, a tie within a best theory, or a contradiction within such a theory. Text accompanying notes 185-87, *infra*. Obviously, these determinations will not be independent of the judge's analysis of a particular case. In fact, using Sartorius' symbols, the probability that any given case which meets my criterion will be intractable,  $P(A)$ , will be maximized. In the class of cases that meet my criterion, the probability that the judge will correctly identify the case as an intractable case,  $P(B)$ , will have to equal 1.0, for by my definition all cases meeting the criterion will be ones that a reasonable judge would consider intractable. Following out the mathematics to fill in the rest of Sartorius' formula is unnecessary. It amounts to a demonstration of the point that the analogy to the axis of rights already made evident: Whether or not it makes sense to claim, as Sartorius does, that it is highly unlikely that unanswerable cases will ever be accurately identified will depend on a single variable. On the axis, that variable was the ratio of the margin of error to the span of the no-right-answer portion of the axis. In the statistical context it is simply the probability that a case determined by a reasonable judge to be unanswerable is, in fact, unanswerable [ $P(A)$ ]. And although this appears to be an empirical question, it concerns the measurement of relative quantities which are definitionally hidden from us. In short, we may conjecture about whether such intractable cases are rare or frequent (*see, e.g.*, text accompanying notes 165-78, *infra*), but we necessarily lack the equipment with which to measure directly their actual frequency.

117. R. DWORKIN, *supra* note 1, at 285-86.

118. *Id.* at 286.

119. *Id.*

non-sequiturs which derive from the self-referential nature of the law.

In reality, it is difficult to imagine accepting a rule such as the one Dworkin proposes for the racetrack. We may accept the assertion that we can do no better, given our equipment, than to declare the race a draw, but we would hardly accept the claim that because of this the outcome actually became a tie. In a sense, unless we change the meaning of the concept quite drastically, Dworkin is proposing a rather Orwellian racetrack: history is rewritten to accord with the outcome we wish to espouse.<sup>120</sup> This would make the race self-referential, when in common experience it is not. The actual outcome of the race would be made contingent upon our judgment of that outcome. But while this seems an odd rule to impose on racing, it is quite a familiar rule in the law. The outcome is determined by the judge (as it is in the race by the camera), even when that outcome may itself be shown eventually to have been a mistake. Crucially, even after the mistake has been demonstrated, the gravitational force of precedent will encourage us to rewrite history. Future judges cannot merely dismiss the decision as mistaken; they must reckon with its precedential force.<sup>121</sup> Over time, and as more decisions come down, that force may actually change the content of the law so that what once appeared to be a mistake is eventually transmogrified into the right decision. Thus, Dworkin uses the horseracing analogy for precisely the wrong reason. Our discomfort with self-reference in athletics subtly segues into a claim that it is novel and inappropriate in the law.

---

120. If you are a fan of both baseball and jurisprudence, you have probably already considered the following question: Assume that the umpire calls a player out, for example, at third base, but the videotape replay clearly demonstrates that the third baseman didn't touch the ball until after the runner stepped on the bag. What is the relation of the call to reality? We would probably agree that, even though he violated no rule, the player is in fact "out." That is, we allow the umpire to define "out" in close calls. But do we also accept that the runner was "tagged?" I would think not. We can watch the tape and see that he wasn't tagged at all, so even though we accept the outcome as the umpire defines it, we don't rewrite the experience of the game to fit that outcome.

In the race it is a trickier question, since we use the word "tie" to define both outcome and actual behavior. We would be better to name the outcome something like "too close to call," to distinguish it from an actual "tie" between two horses. The anomaly of Dworkin's argument is made evident by this distinction: He seems to be proposing a world in which we deem the horses to have "tied" whenever the race is "too close to call." That world is, as I note, counterintuitive in the world of sports, though it is not unrelated to the world of the law.

121. See, e.g., R. DWORKIN, *supra* note 1, at 111, 120-23.

Dworkin concludes with two arguments. First, he argues that the tie decision is a rare and unlikely outcome for any complex legal system.<sup>122</sup> This is a crucial claim which merits close scrutiny. But the argument is spun into much finer thread in Dworkin's other essay, and is best analyzed in that context. We need only recognize here that in acknowledging the existence of the tie decision, Professor Dworkin accepts uncertainty as part of the law. This essay should ultimately be read as a repudiation of the no-right-answer thesis, rather than a defense of the right answer hypothesis.

Finally, Dworkin turns to a claim that the no-right-answer thesis might yet be an accurate representation of the law if the legal system were viewed from an external perspective.<sup>123</sup> Since we agree with Dworkin that the principle skeptic's arguments are without merit, we need not pause to analyze the way in which he disposes of them a second time. But no matter how many times Dworkin responds to the no-right-answer claim, we cannot take those arguments to count against the existence of uncertainty in the law.

#### "NO RIGHT ANSWER?"

This longer and considerably more interesting essay provides no clearer statement of purpose than does the shorter one. Again, we are never quite certain about the way in which Dworkin would choose to define the no-right-answer thesis, but must somehow seek to infer it from his arguments. These commence with the introduction of the notion of "dispositive concepts"—concepts that must by definition be either true or false, and for which the absence of truth implies the necessity of falsity.<sup>124</sup> Dworkin suggests that many legal concepts are of this sort. That is, they are not opposites, like "full" and "empty," but complements, like "full" and "less than full."<sup>125</sup>

The things that Dworkin terms dispositive legal concepts are things like our common law notions of "liability," "crime," "contract," and so on. Dworkin, then, is suggesting that someone is either liable or not, either criminal or not, that a document is either a contract or it isn't.<sup>126</sup> So far, this seems reasonable enough. But implicit in this claim is an argument that these are, first, matters of right (so that if the plaintiff does not have a right that the defen-

---

122. *Id.* at 286-87.

123. *Id.* at 287-89.

124. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 2.

125. *Id.*

126. *Id.*

dant be held liable, the defendant has the explicit right to be held not liable), and, second, by extension, that they are the specific propositions that a court must decide. Thus, Professor Dworkin wants us to accept that courts are in the business of deciding whether or not a dispositive concept holds, in every case brought before them.

Still, this is reasonable enough. We should, however, recognize two things: First, the notion of dispositive concepts is a notion that ignores self-reference. It assumes that there is an objective reality that requires that something either is or is not a contract. There are no contingent possibilities allowed by the concept, possibilities such as the claim that a document is a contract if, and only if, a court decides that it is. Second, the notion collapses what must be a two-stage decision-making process into a single-staged one. It is the responsibility of the finder of fact ultimately to decide whether or not the defendant is liable. But *initially* the finder of law must decide what "liability" itself is to mean in this case. While there are only two outcomes, there are an infinite number of potential definitions of liability, and which of these we choose will depend on the settled law and the best explanatory theory.

Having created the notion of dispositive concepts in the law Professor Dworkin proceeds to categorize the claims he wishes to criticize into two distinct heaps. There are those claims that argue that Dworkin has excluded some middle value, and those claims that argue that bivalence—the either/or requirement inherent in logical complements—must necessarily break down.<sup>127</sup> It is not difficult to allocate the sources of uncertainty in the law to these two heaps. Cases for which no answer exists because there is a tie between two competing best theories or between the arguments put forth by the parties present an excluded third category of case—the tie decision. Thus, we would argue under this theory that there will be cases in which the defendant is neither liable nor not liable, but in which, instead, the case for liability is equally balanced against the case for its lack.

By contrast, cases that manifest internal contradiction, either between incommensurable best theories or within a single such theory, are definitional examples of the failure of bivalence. When Dworkin describes the failure of bivalence, however, he does so in

---

127. *Id.* at 3-5. Of course, all examples of an excluded middle are also examples of a failure (or actually a nonexistence) of bivalence. The point is that the excluded middle is a very special form of lack of bivalence—when there is a middle category we don't even expect bivalence to succeed. Similarly, whenever bivalence fails there must be some excluded third category into which those cases fall—an excluded middle.

an unusual way. Bivalence is usually said to fail when it is possible to demonstrate that there are two statements which are simultaneously true in spite of the fact that they contradict one another. Bivalence fails when *both* (p) *and* (-p) are true. Dworkin suggests, however, that bivalence fails when *neither* (p) *nor* (-p) is true.<sup>128</sup> Logically, these definitions are equivalent. But, conveniently for Dworkin's argument, the latter version makes it easier to ignore the otherwise evident example of paradox.

Dworkin typifies the first heap of arguments as "semantic."<sup>129</sup> That is, they are claims about the meaning of legal concepts, and should be supported by the ways in which those concepts are typically used.<sup>130</sup> He then notes that we never speak of the hypothesized excluded middle category.<sup>131</sup> Someone is either liable or not liable; no one is "sort of liable" or "almost liable." Something is criminal or not criminal, nothing is "criminous." And this is true. We should recognize that the outcomes of judicial decisions are, for all practical purposes, bivalent. It would even be hard to conceive of what we would do to persons whom we found to be criminous. Perhaps we would put them in prison but also give them the key.

And yet, from the judge's perspective, outcome is only half, and far from the most important half, of the decision-making process. Indeed, usually outcome is determined by juries, and not by judges. The major responsibility that judges have is to answer the initial questions about what we mean by our various dispositive legal concepts. That decision, the definition of "criminal" or "liable," is not a binary one. Because it is not binary, it is never spoken of in binary terms. Instead, lawyers urge various different definitions on judges, arguing quite commonly for any of several alternatives. Competing definitions are supported by competing "best" theories, and ties between competing best theories yield competing alternatives. This is a fact that is internal to the process of judging, but it is nonetheless a fact.<sup>132</sup>

---

128. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 4-5. See E. NAGEL & J. NEWMAN, GÖDEL'S PROOF 14 (1958).

129. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 6.

130. *Id.*

131. *Id.*

132. Judges speaking of their work often do use language that makes evident their concern with multivalent choices in the definition of common law. *This* language, not the arguments of lawyers alleging their clients' purported rights to opposing outcomes, is what we should investigate in evaluating the "semantic" argument. And when we do so we find that argument upheld. See B.N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19-31 (1921).



Dworkin acknowledges the possibility of this sort of tie.<sup>133</sup> In "Can Rights Be Controversial?" he addressed the within-theory tie.<sup>134</sup> Here, he drops all reference to that sort of uncertainty, and addresses the claim for the between-theory tie just described. Oddly, however, he attributes these ties to the other heap, claiming that they are arguments against bivalence.<sup>135</sup> Clearly, they are not, or, if they are, they are so only in the sense that all arguments in favor of an excluded middle will argue against the bivalence of the two initial concepts.<sup>136</sup> This heap juggling is made plausible in part by the way in which Dworkin defined the failure of bivalence. Just as the simultaneous truth of opposing propositions suggests paradox, the simultaneous failure of those propositions suggests a tie.<sup>137</sup> But ties are a separate middle category, and represent a necessary source of uncertainty from Dworkin's first heap, not his second one, if the distinction between the heaps is to have any meaning at all.

Having recognized this, it is most convenient to return to the argument when Dworkin does. The argument in favor of within-system ties, however, finds no home at all in Dworkin's essay, even though such ties clearly may exist. And if they exist they will have to be dealt with, either by creating a middle category of outcomes or by allocating the tie decisions to one side or the other. The former is plainly impossible so long as outcomes are ruthlessly dichotomous. If someone is either liable or not, there can be no middle ground. But the fact that we neither have nor speak of a middle ground in these cases is merely mute testimony to the fact that we have chosen the other alternative—we have allocated tie decisions

---

133. Dworkin, 53 N.Y.U.L. REV. *supra* note 1, at 30-31; See R. DWORIN. *supra* note 1, at 285-87.

134. R. DWORIN. *supra* note 1, at 285.

135. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30-31.

136. See note 127, *supra*.

137. Two propositions:

$$A > B$$

$$A < B$$

If both are true, we have a paradox. But if both are false, a third proposition may be true:

$$A = B$$

While this follows from the fact that equality was an excluded middle possibility in the first pair, it accurately captures the intuitive sense that mutually incorrect opposing statements imply a tie. For a brief discussion of paradox in the law arising from each litigant possessing an opposing right, see N. MACCORMICK, *supra* note 37, at 256-57.

to one side or the other, generally as the finder of fact sees fit. Once the judge has defined the concept, we do not allow the jury to claim that the facts don't quite fall on either side of the line of demarcation but fall instead precisely on that line. We tend to leave the choice of which side to place it on to their discretion, guided solely by vague instructions about which side must carry the burden of persuasion and to what degree.<sup>138</sup>

Thus, Dworkin's argument against the first heap, the "semantic" heap, fails because, at the relevant level of discourse—the one relating to questions of law, rather than the ultimate bivalent question of fact—we *do* use language that suggests a multivalent decision-making process. Indeed, the version of the semantic argument that I have put forward *expects* the verbal behavior of lawyers advocating conflicting outcomes to appear dichotomous.<sup>139</sup> It suggests, however, that we should not be surprised if outside the courtroom—in discussions among judges, in conversations between attorneys and clients, and in colloquy on the pages of scholarly journals—questions of law are treated as multivalent. I would simply note that such behavior comports well with our common experience.

In turning to the second heap of claims, we should note at the outset that Dworkin never even addresses the single claim that best exemplifies the failure of bivalence—the claim of internal paradox. Instead, he directs his attention to three other versions: the argument from vagueness,<sup>140</sup> the argument from positivism,<sup>141</sup> and the argument from controversy (remember controversy?).<sup>142</sup>

The argument from vagueness is the claim that the concepts used in the law are inherently vague. They are like the idea of

138. Of course, lawyers generally *speak* of a right to a particular outcome. They are, after all, advocates for their clients' claims. See note 129, *supra*; Greenawalt, 75 COLUM. L. REV., *supra* note 4, at 383, 385; Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1038 (1977). The mechanics of how we use burden of proof as an outcome allocation mechanism for disputed questions of fact is discussed admirably by Glanville Williams. Williams, *The Mathematics of Proof*, 1979 CRIM. L. REV. 297, 303.

139. The fact that there is always a procedural right to some outcome also leads to the semantic practice of claiming a right to a particular outcome. Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20, 34-35 (1977); Greenawalt, 75 COLUM. L. REV., *supra* note 4, at 385. Even this, however, is limited to their behavior in litigation. As counselors and negotiators they may speak very differently. See D'Amato, 1 CARDOZO L. REV., *supra* note 101, at 72-73.

140. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 12-16.

141. *Id.* at 16-23.

142. *Id.* at 23-32.

"middle-aged" or "heap," impossible to define precisely.<sup>143</sup> This argument is a veiled form of the uncertainty deriving from competing best theories. As Dworkin notes, legal theories include rules and principles of statutory interpretation.<sup>144</sup> In addition the rights thesis presents a model for the way in which judges are to go about answering the questions of definition that are posed to them as part of their responsibilities. It is only when that system fails to yield a single best explanatory theory that we can meaningfully speak of a vague term in the law. It is only then that competing best theories will offer competing best definitions.

Professor Dworkin suggests that his rights thesis is a way to eliminate uncertainty.<sup>145</sup> With the exception of the uncertainty just described, there is considerable truth to that claim. But with respect to the uncertainty that derives from competing best theories, his thesis serves to draw our attention to, rather than eliminate, indeterminacy in the law.<sup>146</sup> What, then, are we to do? As already discussed, such cases may either be treated as a separate category, thus creating an excluded middle, or they may be allocated to one or the other of the existing sides.<sup>147</sup>

Dworkin's solution, and the only one he offers to supplement the rights thesis, is to allocate all ties to the defendant,<sup>148</sup> which amounts to an irrational preference for the status quo.<sup>149</sup> This is precisely where we must recall the distinction between discretion and uncertainty. Perhaps a policy argument can be made that the allocation of ties to the defendant is preferable to granting judges permission to follow their fancy. But these arguments speak only to

---

143. *Id.* at 12. Inherent in Dworkin's description of this argument is a rejection of Friedrich Waismann's claim that open texture, or, as he puts it, the "possibility of vagueness" in definition is impossible to avoid. Waismann, *supra* note 13, at 126.

144. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 12-16.

145. *Id.* at 12-13; *but see* Dworkin, *supra* note 49, at 153-54.

146. "[T]he question is not whether these items are ambiguous or vague, but whether their ambiguity contributes to the paradoxes, so that removing a bit of vagueness, clearing up an ambiguity, will destroy enough of the argument within the paradox to remove the resulting contradiction." J. MACKIE, TRUTH, PROBABILITY, AND PARADOX 246 (1973). Dworkin's concentration on controversy rather than uncertainty allows him to parlay a procedural claim from the rights thesis—that judges should rely on the canons of statutory construction—into a substantive claim favoring the right answer hypothesis—that, after all vagueness is removed, no uncertainty will ever remain. It's a nice trick.

147. Since judges must always decide, however, a separate category is rather implausible. Perry, 88 ETHICS, *supra* note 139, at 31; J. MACKIE, *supra* note 146, at 267.

148. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 12-13.

149. *See* Steinberg, *The Voter's Paradox Regained*, 83 ETHICS 163, 166 (1973).

the folly of judicial discretion, not the absence of substantive uncertainty. These cases must ultimately be decided arbitrarily, another way of saying that they are without any right answer.

Dworkin next turns to the "argument from positivism."<sup>150</sup> This is a critical turning point in the essay, for it is here that Dworkin moves from defending the right answer hypothesis to decrying the no-right-answer thesis. He switches from trying to show that there will always be a substantively certain outcome to the more defensible claim that there will be right answers on at least some of the occasions when the law would appear to be uncertain.

He rejects a variety of different arguments from a variety of different breeds of positivism. His method of doing so is strict logical deduction, a method he normally eschews. Used in the context of eliminating arguments about paradox by rejecting any claim allowing contradiction, this sort of approach exhibits a striking circularity of reasoning.

Dworkin argues against semantic positivism as follows: All forms of positivism require that propositions of law are true if, and only if, someone or something acts in such a way as to make them true. If we symbolize the proposition of law as (p), then the positing act may be symbolized as L(p). Semantic positivism argues that L(p) means precisely the same thing that (p) means. Dworkin argues that:

If a particular form of semantic positivism supplies the value of 'L' such that L(p) and L(-p) cannot both be false, then the argument for the second version of the [claim that there is no right answer] does not, for this form of positivism, go through. But if it supplies some value for 'L' such that L(p) and L(-p) may both be false (as the command form of semantic positivism does) then it contradicts itself because, since (p) and (-p) cannot both be false, it cannot be that (p) means the same as L(p) and (-p) means the same as L(-p)."<sup>151</sup>

What a marvelous argument! Dworkin rejects semantic positivism because it manifests precisely the characteristic that he is examining it to find. Of course, if we reject all theories of law that permit internal paradox, we will find to our surprise that the systems that are left will be devoid of that noxious characteristic.<sup>152</sup> Unfortunately, they would also be very unrealistic.

---

150. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 16-23.

151. *Id.* at 17; see also J. Raz, THE AUTHORITY OF LAW 59-61 (1979).

152. See J. MACKIE, *supra* note 146, at 256.

Take, for example, the command form of positivism that Dworkin repudiates. We must surely admit that if there is a sovereign, and if the law is whatever the sovereign says it is, then the law will be contradictory whenever the sovereign capriciously so desires. If we eliminate all theories of law that permit such inconsistency, our sovereign's declarations will never be legal. This is an argument that will be difficult to explain to the person sitting in jail for violating one of the sovereign's conflicting demands.<sup>153</sup>

We can hardly complain that we have developed a theory that deprives such willful monarchs of the mantle of legitimacy. But, since internal contradiction is a potential aspect of all practical legal systems, we will also have eliminated any plausible theory of law. The fact of the matter is that paradox exists.<sup>154</sup> Arguments based on the assumption that it does not are not merely fallacious empirically, they are wholly without force when used to demonstrate the premise on which they are founded.

Similar claims can be made about all of Dworkin's "refutations" of the arguments from positivism. Towards the end of this section, however, he introduces an extended metaphor on which he bases the remainder of the essay. This is the metaphor of "narrative consistency," a concept he introduces as an aspect of literary criticism.<sup>155</sup> As the essay continues, he suggests a series of general theories of critical judgment that look increasingly like analogues of his own rights thesis.

These analogues ask us to imagine a group of literary critics discussing *David Copperfield*. Some facts about the character David will be clear in the book. Others will be uncertain. Professor Dworkin suggests that the uncertain facts may be subject to arguments of narrative consistency. That is, even though it is not clear whether David had a homosexual affair with Steerforth, different critics might point to different facts from within the book to argue that the book, taken as a whole, more strongly suggests that such an affair did happen than that it did not.<sup>156</sup> From this analogy,

---

153. Although Dworkin would reject Hart's version of positivism because it permits contradiction, he need not go to the effort of demonstrating that it does so by means of pure logic. Hart concedes as much. Hart, *Kelsen's Doctrine of the Unity of Law*, *supra* note 48, at 184.

154. See Farago, 55 N.Y.U.L. REV., *supra* note 8, at § I B.

155. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 19-22.

156. *Id.* at 22-29.

Dworkin draws the claim that we must "reject the idea that there is no right answer whenever the right answer is not demonstrable . . ."<sup>157</sup>

This conclusion strikes me as unobjectionable enough, but the manner of getting there is a bit treacherous. First, this is another use of a non-self-referent metaphor for the self-referential judicial process. In Dworkin's literary game the players are all critics. Let us suppose the other extreme possibility: They are not critics but Dickens himself. The first thing we would have to acknowledge is that, at least before the book is sent off to the printers, narrative consistency is not worth a damn to Dickens.<sup>158</sup> David did whatever Dickens pleased him to have done. If Dickens says that David had a homosexual affair, we will be forced to agree. If Dickens wished to turn David into a duck, he could. And if Dickens wanted to say on page 12 that David had type-A blood, and on page 25 that his blood was type-O, we readers would be stuck with having to deal with the contradiction.<sup>159</sup>

If we relax the requirements a bit and posit a version somewhat closer to the reality of our legal system, let us suppose that our players are all collaborators on the book that they are criticizing. Though they do not always agree among themselves as to what their words imply, they are all forced to accept even those portions not written by themselves. Their opinion about narrative consistency will have a more complex relation to what we may actually draw from their book than would the opinions of a separate group of literary critics. And, within the sections written by each individually, that individual will have something of a stranglehold on its appropriate interpretation.<sup>160</sup>

From all this we may draw a number of conclusions. First, authors, even partial authors, do not have the responsibility to produce a coherent interpretation in the way that critics do. Second, once internal inconsistency is introduced, no critic will be able to ex-

157. *Id.* at 29.

158. The question is less clear after the book is out of the author's hands. While we might wish to defer to the author's interpretation even at this stage, it is defensible to claim that once the manuscript leaves the author's hands the author becomes just another literary critic.

159. Some authors seem to revel in this sort of manipulation. Joyce and Beckett are notorious examples. See also Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055, 1057 (1977). Command positivism, as just described, would yield a similar difficulty.

160. This assertion is similarly subject to the reservation expressed in note 158, *supra*.

plain it away. And, finally, the conclusion that Dworkin would draw from his metaphor—that there is sometimes a right answer even though the facts are controversial—is not connected, even here, to a claim that uncertainty is not an important element of the law. There may, that is, be times, in every legal system, when the right answer is not demonstrable either simply because our technique is inductive rather than deductive, or, more likely, because no such answer exists.

With this understanding of narrative consistency, we may turn to Dworkin's description of the argument from controversy. In a sense, this portion of "No Right Answer?" echoes the arguments presented in the shorter essay.<sup>161</sup>

Once again, he concludes by conceding the technical possibility of a tie decision. He returns to the possibility that two best theories might imply opposing arguments.<sup>162</sup> Actually, what he suggests is that there are analogues to the literary game's possibility that there will be some questions for which the critics, try as they may, can make no arguments at all, not even arguments of narrative consistency.<sup>163</sup> As an example, he suggests the question whether David had a particular blood-type.<sup>164</sup>

Somehow he makes the leap from this literary example to the possibility of a tie between potential best political theories. The leap is an odd one, since the direct possibility of silence within a legal system seems at least worthy of discussion. Nowhere else is Dworkin so demanding of his concept of an underlying set of legal principles. This jump, however, suggests that all acceptable legal theories must be perfectly substantively certain. That is, they must include some answer, win, lose, or draw, for every case that might be brought within the political system. If that were not the case, it would be possible for a theory to be simply silent. Then silence and not a tie between conflicting theories would be the logical analogue to the example of David's blood type.

But Dworkin does not follow that path, choosing instead to examine between-theory ties. As I have already noted, these would

---

161. Compare Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 23-32, with R. DWORGIN, *supra* note 1, at 279-90.

162. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30-31.

163. *Id.* at 29-30.

164. *Id.* at 29. This kind of question is an example of the special version of internal tie that results from internal silence. It is like the property allocation questions discussed in Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1314-15.

have seemed more appropriate to the earlier discussion of the excluded middle version of the argument, but it is developed here instead, as an example of the failure of bivalence.

And it is here that Dworkin seeks to evaluate how common it will be to find a tie between best theories. He proposes two dimensions along which we may evaluate theories to see just how good they are. One is goodness of fit, the other is political morality.<sup>165</sup> Oddly, he embraces here a version of goodness of fit that he has rejected elsewhere<sup>166</sup>—the strict notion that a theory is better “if someone who held the theory would, in its service, enact more of what is settled than would someone who held the other.”<sup>167</sup> Since I have just argued that it would be futile to demand consistency within the work of an author who wished to be inconsistent, however, I suppose that I have waived my right to cavil.

Dworkin then suggests that in a complex, highly developed, modern legal system it will be very rare to find such a tie with respect to the goodness of fit of competing theories.<sup>168</sup> This seems to make intuitive sense since there will be an almost infinite number of legal events for which a system would have to account.<sup>169</sup> But reality in this case may well be counter-intuitive.

Suppose that there is some specific legal system that is at a very primitive level of development. There may be several, indeed many, parallel theories that might, in a particular hard case, suggest conflicting determinations. As each successive legal behavior is added to our primitive legal universe, making it thereby more complex and sophisticated, each of these parallel theories may be modified to take the new observations into account. There is no theoretical reason why we should not be able to make the modifications by adjusting the balance of some principles or by adding new

---

165. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30-31.

166. R. DWORKIN, *supra* note 1, at 360-61.

167. Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30.

168. *Id.* at 30-31. This is precisely the response that Bernard Williams predicts will be engendered by certain sorts of paradox. B. WILLIAMS, PROBLEMS OF THE SELF 200 (1973). It is also the claim that Dworkin makes with respect to ties within a single best explanatory theory (ties which are, from the judges' perspective, decisions precisely like decisions favoring one side or the other). R. DWORKIN, *supra* note 1, at 285-87.

169. While there is some intuitive appeal to Dworkin's perception, others have suggested precisely the opposite. See, e.g., Hart, 71 HARV. L. REV., *supra* note 48, at 629; Merrills, Book Review (R. Dworkin, *Taking Rights Seriously*), 29 U. OF TORONTO L.J. 74, 75 (1979); Munzer, 11 GA. L. REV., *supra* note 159, at 1058-59.



ones. When we get done, the altered theory will explain the new observations as well as the old. If this can be done, then, as the legal system becomes more complex, there is no concomitant diminution in the number of available theories that adequately explain the system. And, at any point in the development of the system, a case may be introduced that will cause the theories, which agree perfectly on their descriptions of the past, to require divergent outcomes with respect to the present.

This sort of model is common in other disciplines. As more data was observed about the functioning of the solar system, for example, the Ptolemaic system had to be modified to take into account observations it would otherwise not have predicted. At some point the relative simplicity of the Copernican theory became compelling. But that relative simplicity does not mean that an earth-centered solar system is incorrect, although it might be very complex to describe mathematically. In fact, any point in the solar system could be taken arbitrarily as the center and a theory developed based on that assumption. There are, thus, an infinite number of possible explanatory theories for the arrangement of the solar system, theories whose number does not decrease as the observed data about the system increases.

Similarly, the complexity of legal behavior need not lead us to believe that the number of political theories that might explain the behavior is dwindling. Such a contention would be acceptable only if we were to adopt, as one of our assumptions, a value of simplicity—Occam's razor.<sup>170</sup> But such an assumption ignores self-reference. It may be valid on the level of the grossly observable physical sciences, but it loses any appeal in any system that will be affected by the choice itself.<sup>171</sup> We may pick Copernicus over Ptolemy because we know that if future observations make the Ptolemaic system more attractive we can always swap back. But a choice of one political theory over another is more of a one-way street.<sup>172</sup> Once

---

170. Dworkin does intimate, in the context of a discussion of political theories, that some modified version of Occam's razor may be applicable. Dworkin, *Liberalism*, *supra* note 18, at 121. See also Munzer, 11 GA. L. REV., *supra* note 159, at 1057.

171. See R. SARTORIUS, *supra* note 3, at 199; Kennedy, *Legal Formality*, 2 J. OF LEGAL STUD. 351, at ¶¶ 56-57 (1973).

172. Gallie, *supra* note 68, at 179. This line of argument, which seems to be accepted by Sartorius in R. SARTORIUS, *supra* note 3, at 199, contradicts Dworkin's scarcity hypothesis and Sartorius' identification of jurisprudential reasoning with that of physics. *Id.* at 185.

chosen, the choice itself will make it harder to reject the theory in the future.<sup>173</sup>

And although Dworkin does not here discuss the scarcity claim with respect to ties within a theory, an analogous argument will hold there as well.<sup>174</sup> The chances that the scales will be perfectly balanced about any point of law in any complex legal system are infinitesimal. The constitutive principles are presumably complex and highly interrelated in such a system; reaching perfect balance would be like picking out a single point on a number line that has an infinite number from which to select. But that need not be the case, precisely because the principles do not develop in isolation but rather become defined by reference to one another.<sup>175</sup> So it may well be that each principle brings with it, as it springs into being, some equal and opposite principle that precisely counterbalances it in at least some circumstances. Thus, when we view an internal conflict, between, say, property rights and civil rights,<sup>176</sup> or between the guarantee of a free press and that of a fair trial,<sup>177</sup> it is by no means a foregone conclusion that equipoise is a virtually impossible end result.

We should not hasten to embrace Dworkin's scarcity claim, then, at least without a careful consideration of the second dimension that he suggests is necessary for the evaluation of competing best theories—political morality. Does this dimension make ties substantially less likely? Perhaps, but then again perhaps not. The answer to that question will depend on precisely what Dworkin means by political morality, and how that concept is to be used in the specific context of evaluating possible political theories. The fact that he has thus far failed to provide such explanations is not just a shortcoming in the argument favoring the right answer hypothesis, it is a significant hole in the rights thesis itself.<sup>178</sup>

---

173. Notions such as elegance or simplicity are irrelevant to many sorts of judgments about competing bests. For example, the economic model discussed in the text accompanying notes 53-55, *supra*, cannot appeal to simplicity as a basis for selecting among points on an indifference curve. See also Perry, 80 ETHICS, *supra* note 100, at 15.

174. Because he focuses on different sorts of tie in the two different essays, without explicitly distinguishing the two, the essays may appear to be somewhat contradictory. Compare Dworkin, 53 N.Y.U.L. REV., *supra* note 1, at 30, with R. DWORKIN, *supra* note 1, at 340-41.

175. We may view the balancing of principles as a continuous series of trade-offs, yielding a continually infinite set of equibalanced points. This is precisely the nature of economic judgments between commodities. See text accompanying notes 53-56, *supra*.

176. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948).

177. See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966).

178. Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1298-1302.

Where, then, do we find ourselves at the conclusion of the second of these two attempts to evaluate the right answer hypothesis? Professor Dworkin has adeptly put to rest the no-right-answer thesis, but that had never been strongly articulated in the first place. He has never addressed the most important of the sources of uncertainty in the law—internal inconsistency within a single theory of law. Elsewhere he has simply rejected the analogous conflict between theories, the possibility of incommensurability.<sup>179</sup> He has acknowledged in these two essays both the possibility that the best available explanatory theory will itself yield tie decisions, and the possibility that there will be two or more possible explanatory theories that will be tied according to his definition of what constitutes a “best” theory. He has asserted, without demonstrating, that each of these will be very rare. For my part, I have suggested that that assertion—which bridges the gap between the relatively weak claims that Dworkin succeeds in demonstrating and the much stronger right answer hypothesis that he seems to want to support—cannot sustain intense scrutiny.

At the outset, I suggested that the failure of the right answer hypothesis did not threaten the fundamental soundness to the rights thesis. How can that be? The rights thesis will not provide an outcome for every possible case. Indeed, it will not even supply us with a procedure for reaching such an outcome. Does it nevertheless retain the kind of explanatory and normative force that Dworkin claims for it? Or is it, like Hart’s positivism, fatally weakened by its failure to tell us how to decide intractable cases?

#### CONCLUSION: THE RIGHTS THESIS REDIVIVUS

Dworkin’s rights thesis, stripped of any version of the right answer hypothesis, amounts to the proposal that judges, faced with a decision for which there is no settled answer in the existing law, must continue to search for a solution. The law is not exhausted by a list of settled rules. Rather, those rules may be seen as data, effects pointing in the direction of their cause. Underlying the rules of a legal system there must be a political theory that justifies them. And that theory must provide answers to many of the problems that the rules themselves leave unsolved. To the best of his or her ability to discern, the judge faced with a difficult case must determine whether that case is intractable.

---

179. R. DWORKIN, *supra* note 1, at 359-63.

In order to do so judges must continually construct explanatory theories, based on the data provided by the constantly changing system of rules. And, since many theories may be possible, judges should have some criterion whereby they select among those possibilities. They are to choose the *best* theory, the theory that best accounts for all the data and that best fits the applicable political morality.

There are difficulties in any adaptation of this theory to practice, difficulties that I have mentioned in passing and others have discussed in detail. In particular, it remains to be seen whether Dworkin can establish an adequate explanation of how judges are to select a single best theory.<sup>180</sup> But the rights thesis also has many virtues. On an important intuitive level it seems likely that there will be some cases for which recourse to rights and principles will yield widely acceptable decisions. For these cases, the rights thesis provides an answer (and a justification) where none had existed before.

But the thesis presents a much more compelling reason for its own adoption. Rights are trumps, they are reasons for their own enforcement. Where a political right exists, nothing less than a right will justify a political process that does not enforce it. Thus, wherever we may believe that we will unearth rights we must, if we are to act responsibly, adopt that mechanism most likely to discern and enforce them.<sup>181</sup> If it could, therefore, be said that there will always exist a right to a particular decision in every conceivable case, we would be phrasing implicitly a very strong argument in favor of the rights thesis. That is, if rights were always involved in litigation, judges would by definition be required to seek out those rights and apply them dispositively in their decision-making process.

But two objections may be raised immediately. The first is the one that I have made here at length— not all cases may be decided by recourse to an investigation of the parties' rights. Some cases will not be just difficult, they will be genuinely and irretrievably intractable. The second objection is that the rights thesis may not be the best way of ascertaining the rights of the parties involved. The rights thesis *qua* normative theory suggests that where rights exist judges must unearth them. But the claim of the rights thesis *qua* descriptive theory must rely on the ability of Professor Dworkin's practical model to respond to the demands of his theoretical one.

---

180. Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1298-1302; Mackie, 7 PHILOSOPHY AND PUB. AFF., *supra* note 56, at 3.

181. It is this insight that leads Sartorius to seek a rights-based justification in all cases. Sartorius, 11 GA. L. REV., *supra* note 3, at 1270, 1273.

The first of these objections is fuel for the fire of the second. If the rights thesis provides no basis for determining the rights of the parties in some particular cases, then perhaps some other, more complex or complete, theory does. In short, granted that we must enforce whichever rights can be determined to exist, why do it in this way? This is a practical question, and the response must be phrased in practical terms.

There are important conceptual ties between the idea of having a right and the reflective process that Dworkin recommends to judges for the determination of the parties' rights to particular outcomes. If rights are at all susceptible to human contemplation, Dworkin's procedure (subject to further clarification and delineation) will be likely to root them out. And if they are not, then how can we meaningfully claim that such rights exist at all? Thus, if rights may be found by having people look for them, and if they are linked to existing political structures in the way Dworkin supposes— that is, if there are such things as Dworkin's "institutional rights"— then the only way we will be able to identify them is to ponder the facts, ponder the political system, and ponder the theory that these must embody.

But perhaps rights may not be identified, or at least not identified any better by this system than they would be by some sort of random selection process. I have suggested that a totally unknowable right is an oxymoron, a concept we must reject by reason of its internal contradiction.<sup>182</sup> We may have unknowable responsibilities, such as those imposed by a silent and demanding god, but how can we have totally unknowable rights, at least unknowable rights against an existing political system? If such rights exist, and we almost universally believe them to be part of the contemporary human condition, then they must in some way be linked to the kind of reflection required by the rights thesis.

We cannot prove that rights exist by recourse to this sort of argument, but we can demonstrate that if they do exist, even if we only concede that they *may* exist, we will be obliged to adopt the structural mechanism most likely to find them out. And if we can never be certain that, in any given case, our mechanism has not in fact unearthed a right to a particular decision, so long as that is the best available mechanism we will be bound to enforce its determina-

---

182. See text accompanying notes 100-03, *supra*.

tions.<sup>183</sup> Thus, there may be substantial surface differences among legal systems and the specific rights they locate and enforce. But so long as we acknowledge the possibility that there are any institutional rights at all, all legal systems will reflect a certain core similarity in the way they go about searching for those rights. And, by our definition of what it means to possess a right, any mechanism that does not seek and enforce rights will be susceptible to fundamental criticism.

Thus, wherever we suspect that rights may exist we will necessarily look towards the rights thesis for insight. There will, of course, be controversial cases. But Dworkin *has* demonstrated that the existence of controversy, taken alone, is not sufficient to disprove the existence of rights even in these cases.<sup>184</sup> We may make the claim that there is a better way to determine rights in controversial cases than by allowing a single idiosyncratic judge to decide their outcome. We might seek the agreement of a larger group, or we might identify some individual whose judgment we particularly trust and allow him or her to make the final decision. In effect, our system of appellate courts reflects a combination of these two concerns. But neither is a claim against the rights thesis; each is merely a proposed model for improving its effectiveness in practice.

The rights thesis, then, is important whenever we believe that an institutional right *might* be dispositive of a dispute, not only when we antecedently know that it *must* be.<sup>185</sup> But what of the various sources of essential uncertainty that I have outlined? In these cases we know that the rights thesis will be of no help. We know that they will elude solution even after we have searched for the parties' respective rights. What justification do we have for applying the rights thesis to Dred Scott's or Allan Bakke's case? Can we isolate these cases in some way, can we, that is, improve the reliability of the application of the rights thesis by removing these sorts of cases from its application?

---

183. Perry, 88 ETHICS, *supra* note 139, at 35. We may, and perhaps should, therefore act as if the rights thesis were always capable of providing a right answer. See MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 2 (1973); see also Richards, 1 CARDOZO L. REV., *supra* note 28, at 204-05.

184. R. DWORKIN, *supra* note 1, at 279-81.

185. This is the conclusion that Sartorius reaches. R. SARTORIUS, *supra* note 3, at 202; Sartorius, 8 AM. PHILOSOPHY Q., *supra* note 81, at 159. As far as it goes, it is unobjectionable. Difficulty is encountered only when he seeks to leap from this claim to the claim that, in practice, cases without right answers will be too infrequent and too difficult to discern to make them worthy of judicial consideration. See note 116 *supra*.

It would be tempting to believe that we could do so, that we could identify some hallmark of uncertainty, snare these intractable cases, and remove them from the jurisdiction of our standard decision-making mechanism. The Sirens' song of that endeavor is tempting, but it emanates from a deceptive assumption. The model of the rights thesis that I have outlined here suggests that rights are inseparable from our ability to discern them by application of the sort of inductive reflection that Professor Dworkin advocates (which is not the same as an ability to demonstrate their existence). Rolf Sartorius has shown statistically how unlikely it would be for us to be able to identify intractable cases by means of some variable independent of judicial reasoning.<sup>186</sup> Dworkin's and Sartorius' work suggest why this should be so in theory. It is precisely the reflective process of the rights thesis that leads not only to right answers when they exist, but to the most reliable determination that any particular case is in fact intractable.

Thus, it is inappropriate to ask how the rights thesis may be applied to intractable cases, or to denigrate it for failing to provide solutions to these judicial dilemmas. It is precisely a value of the rights thesis, perhaps even its most important attribute, that it provides a way to spotlight, identify, and validate uncertainty in the law. It is the rights thesis that leads us to intractable cases, and it is only by recourse to the rights thesis that we may ever believe that any particular case is immune to solution. For a court faced with a genuinely intractable case there can, by definition, be no hope that the rights thesis (or any conceptual model) will yield a right answer where none exists. But even though this may be so, we are not without standards against which to evaluate the actions of the court, and it is the rights thesis that provides those standards.<sup>187</sup>

Let us return to Dworkin's courtroom and his judge Hercules. Hercules is a special judge, a superhuman one, presumably precisely because his decisions are without controversy. Hercules is special because he is free of the kinds of questions of fact and poor conceptual tools that misleadingly create controversies among reasonable

---

186. Sartorius, 11 GA. L. REV., *supra* note 3; *see* note 116 *supra*.

187. "In these circumstances there may be thought to be a justification for describing the act of interpretation as one of discretion, even within the definition which has been given. But this would be to obscure what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding officer to reach what *he* thinks is *the* right answer." H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 168 (1958), *quoted in* Sartorius, 8 AM. PHILOSOPHY Q., *supra* note 81, at 159. *See* E. NAGEL & J. NEWMAN, *supra* note 128, at 101.

persons even though none exist in theory.<sup>188</sup> Where a right answer exists, Hercules will ferret it out by application of the rights thesis in its purest and most abstract form. But where there is no right answer, where the kinds of uncertainty that I have been describing crop up, Hercules will unearth these facts as well. He will not suddenly don blinders and ignore what he knows is the truth. Instead, he will be forced to conclude that the rights thesis itself leads him inevitably to the conclusion that he is faced with a case for which there is no answer.

We might observe that the rights thesis must therefore fail even Hercules in some small but important group of cases. But failure is the wrong word, implying tacitly that some other technique would unequivocally yield a single correct outcome. In truth, the thesis has succeeded, for it has accurately identified a case for which no such outcome exists.

In this way it is the rights thesis that leads us to embrace rather than reject discretion. For, even in a world in which judges are not Herculean but only human, we should prefer their judgment to the mechanistic application of some arbitrary rule.<sup>189</sup> The central lesson of intractable cases is that, faced with a case that to the best of our judicial abilities appears to be uncertain, we do not choose to give in to mechanistic rules.<sup>190</sup> Instead, we inject our collective humanity, in the person of our judges, into the making of impossible decisions.<sup>191</sup> And, though Professor Dworkin's model cannot explain the inexplicable center of the law, it can and does draw our attention to that core of uncertainty in a way that no other contemporary theory of law does or can.

188. It may well be that Dworkin does not mean for his Hercules to be quite *that* superhuman. He suggests on several occasions that different Herculean judges will reach different outcomes. See, e.g., R. DWORKIN, *supra* note 1, at 128-30, 280; Dworkin, *supra* note 49, 153-54. Nevertheless, if the answer that Hercules seeks is indeed substantively correct, it must be substantively certain, and if Hercules operated under the ideal circumstances he could reach only that single correct answer. To do so he might require the skills of Richards' super-Hercules, Oberon, who is designed precisely to do Hercules' task under ideal circumstances. Richards, 52 N.Y.U.L. REV., *supra* note 2, at 1285-88.

189. Fargo, 55 N.Y.U.L. REV., *supra* note 8, at § V C.

190. We learn, with Grant Gilmore, "that certainty . . . can be bought at too high a price." Gilmore, *Law, Logic, and Experience*, 3 HOWARD L.J. 26, 37 (1957); see Calabresi, *Bakke as Pseudo Tragedy*, 28 CATH. U. L. REV. 427, 428 (1979).

191. See G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 146 (1978); Brilmayer, *The Institutional and Empirical Basis of the Rights Thesis*, 11 GA. L. REV. 1173, 1199 (1977). Justice Cardozo was particularly aware of this aspect of the judicial process. B. N. CARDOZO, *supra* note 132, at 164-67.



