

DWORKIN AS QUIXOTE

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I. INTRODUCTION

Just then they came in sight of thirty or forty wind-mills that rise from that plain, and no sooner did Don Quixote see them than he said to his squire: "Fortune is guiding our affairs better than we ourselves could have wished. Do you see over yonder, friend Sancho, thirty or forty hulking giants? I intend to do battle with them and slay them. . . . This is a righteous war and the removal of so foul a brood from off the face of the earth is a service God will bless."¹

So began one of the more famous adventures of Don Quixote de la Mancha, who "believed that it was necessary . . . for the service of the state, that he should . . . [roam] . . . through the world . . . redressing all manner of wrongs . . ." by reviving the ideals and practices of knight-errantry.²

So also began Ronald Dworkin's assault on the problem of judicial discretion. Inspired by a modern strain of idealism—one which idealizes the so-called ordinary man's language to a position of philosophical authority—Dworkin claimed that philosophical theories about judicial discretion were "dangerous," not only because they were wrong, but also because they undermined the important faith that the layman has in the objectivity of judicial reasoning.³ He felt it necessary to right these wrong theories.

Unfortunately, in his passion for objectivity in judicial reasoning and for ordinary language analysis, Dworkin has mistaken those involved in the philosophical discussion of judicial discretion for "hulking giants," for proponents of a "dangerous" and

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¹ M. CERVANTES, *DON QUIXOTE* 98 (W. Starkie transl. 1964).

² *Id.* at 59.

³ Dworkin, *Judicial Discretion*, 60 *J. PHIL.* 624, 638 (1963).

mistaken doctrine.⁴ He has mistaken friends for foes. The position he attacks is one which advocates a positive role for judicial discretion, using the word "discretion" in what Dworkin has identified as its "strong" sense, that in an area of discretion no standards bind the judge; but there is abundant evidence that the jurists he has criticized tend more often to use the term in what he calls its "weak" sense.⁵ The legal realists and the positivists, having finally achieved virtually universal acceptance of the reality and even the desirability of some judicial discretion, were so taken by surprise by the new attack that they failed to notice this sophisticated equivocation and have been returning blow for blow, with neither side actually answering the other's arguments.⁶

Before the middle of the twentieth century, jurisprudential discussion of certainty in the law or judicial discretion focused largely on the differences between the views of American legal realists and certain leading English positivists. The Americans had, in most cases, arrived at the smug conclusion that judicial discretion was not only commonplace in the administration of the law, but that it was also necessary, and even healthy. The positivist tradition had been identified with the contrary view, "that

⁴ *Id.* at 624-25.

⁵ For a more complete statement of the "dangerous and mistaken doctrine" which Dworkin means to attack, see text accompanying notes 9-24 *infra*. Dworkin differentiates between three senses of the term "discretion," two of which he characterizes as "weak" senses, and the third as a "strong" sense of usage. "Discretion" in its first weak sense refers to those situations in which the standards that are to be applied cannot be applied mechanically but require the use of judgment. The second weak sense use occurs when discretion signifies that an official possesses final authority to make a decision which is not susceptible to review or reversal by another official. Dworkin concedes that discretion in these two weak senses does exist as a judicial prerogative, arguing that it is discretion in its strong sense which is such a dangerous concept. Discretion in its strong sense means that officials, in resolving controversies, are not bound to follow standards set by the authorities in question. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32-33 (1967). These definitions are explored in the text accompanying notes 121-29 *infra*. In all of his discussions, Dworkin keys on the act of deciding a case. It is discretion in this context about which the debate has arisen.

⁶ "With little sleeping and much reading, his [Don Quixote's] brains dried up to such a degree that he lost the use of his reason." M. CERVANTES, *supra* note 1, at 58. This certainly cannot be said of Dworkin. The analogy is quite limited. I should add that I believe Dworkin is basically correct in his intuition that the legitimate sources of law are much broader than previously recognized, especially by analytic jurists. It is unfortunate that Dworkin chose "judicial discretion" as an entry point into that more basic discussion in the philosophy of law. The confusion he has generated on this subject tends to obscure and delay the important contribution that he could offer in the form of a systematic analysis of the nonformal elements of law, of those "public standards" not written into the law to which judges can rightfully appeal in difficult cases.

law in its proper functioning needs no recourse to other disciplines and that 'correct' legal decisions can be simply deduced by strictly logical means from purely legal premises"⁷

However, the mid-century adoption by positivist jurists of the philosophical tools of language analysis instigated a gradual rapprochement between these two schools on the question of judicial discretion. H. L. A. Hart was primarily responsible for the positivist discovery of the "penumbra of uncertainty" which surrounds all legal rules and concepts, thus making them unsuitable for strict deductive application in particular cases.⁸ With the acceptance of Hart's discovery in the positivist camp, the 1960's dawned with virtual universal acceptance of the reality and desirability of some judicial discretion.

The time was ripe for the development of formal models of judicial reasoning appropriate for discretionary situations. Several important questions needed to be pursued. How could a judge find the best solution in a decisionmaking situation where the law did not necessarily direct him to any particular correct solution? How can we explain the manner in which judges find solutions to judicial problems where the law does not dictate uniquely correct outcomes? What must be included in the list of acceptable sources of law?

II. DWORKIN'S NEW NOTION OF DISCRETION

It was at this juncture that Ronald Dworkin first appeared on the scene, undermining the confidence of both positivist and realist jurists in their hard-won rapprochement by advancing the radical claim that judicial discretion is an illusory concept, applying to nothing real. The vigor and persuasiveness of Dworkin's attack seems to have completely derailed the project of developing a unified theory of judicial discretion. Rather, the writers in jurisprudence over the past decade have dedicated their efforts almost exclusively to proving once again the reality of judicial discretion in a way that would satisfy Dworkin's objections.

⁷ Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 955-56 (1957). According to Hart, however, the positivists have always been cognizant of the need for and role of judicial discretion. Therefore from his perspective it is inaccurate to characterize the positivist tradition preceding him as hostile to the notion of judicial discretion. *Id.*

⁸ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-09 (1958).

In his original article, Dworkin took great pains to list a variety of criteria that tend to limit and clarify his notion of discretion. According to Dworkin, a judge does not have discretion merely because he is entitled to make final or nonappealable decisions. Nor does he mean by "discretion" that officials may make controversial or wrong decisions.⁹ Rather, in characterizing discretion, he focused on the *nature of the standard employed* in reaching a particular decision. In his opening statement, he suggested that a judge would have discretion if he were to invent new principles in the disposition of a case; that is, if, in a particular case, he was forced "to *choose* a solution" because the relevant rules of law dictated no result in that instance.¹⁰ He further clarified his interpretation by claiming that writers on judicial discretion meant that "*in* the area of discretion, he [the judge] is not bound to apply particular standards at all."¹¹ These academicians, according to Dworkin, believe "that the judge must sometimes reach his decision by means other than the application of standards" or "that such standards sometimes leave him [the judge] free to *choose*."¹²

Even though discretion may be limited to a narrow range of situations or to a certain range of possible effects, if the judge is allowed to pursue personal goals within those bounds, he still has discretion.¹³ Someone has discretion in decisionmaking when the governing standards "grant *him* the right to make any decision he wishes, and deny any other participant the right to claim a particular decision from him."¹⁴ In this sense, then, limited discretion would only mean that the range of choice was limited; within that range, the freedom of choice must be complete.¹⁵

If one accepts this definition of discretion, Dworkin is correct in his conclusion that the demonstration that a particular decision situation lies within an area of discretion is a sufficient justification for a discretionary decision.¹⁶ Conversely, it would be an adequate demonstration that discretion was not permissible if one could show that in a given situation, "the participants [were] *en-*

⁹ Dworkin, *supra* note 3, at 625.

¹⁰ *Id.* 624.

¹¹ *Id.* 625 n.2.

¹² *Id.* 625.

¹³ *Id.* 629. This inference is drawn from his discussion of the umpire in the game of "Limited Scorers Discretion."

¹⁴ *Id.* 631.

¹⁵ *Id.*

¹⁶ *Id.*

titled to the 'correct' result[s] . . ." or if one could show that the judge was not "*entitled* to decide as he wishes."¹⁷

It is this sense of discretion that Dworkin uses when he observes that judges of a difficult contest or of a moral conflict do not have discretion. For him, they are *morally* required to make a correct or best decision.¹⁸ It is in this same sense that he argues that businessmen and generals do have discretion, because no one is entitled to any particular decision from these people. Because their decisions are only limited by certain policies, such as the pursuit of victory or success, no one has a right to expect them to make any particular decision. It is of no concern how they pursue these policies in particular cases.¹⁹

Dworkin does introduce a third criterion: in cases of discretion, a judge would be justified in giving his private prejudices as reasons for a decision, rather than being expected to appeal to public standards. In positive terms, a judge would enjoy discretion if and only if he were free to adopt his personal preferences as standards in making a judicial decision.²⁰ He makes the claim even stronger in his discussion of the "argument from very hard cases," stating that a judge's having discretion implies that he is "*expected* to decide on the basis of his personal preference . . ."²¹

Dworkin does introduce some negative conditions to round out our list of criteria of what he means by judicial discretion. For him, having discretion implies that a judge is expected "to *rest* on private," rather than "to *argue* to public" standards.²² In this sense, decisions would not be discretionary if they were governed by certain policy requirements and "depend on the circumstances of the particular" decision situation as well as "on the pertinence of such circumstances to other policies . . ."²³ A decision would not even be discretionary if the judge were to follow broadly accepted community standards (that are not spelled out in the law) rather than following his personal preferences or the standards of only one portion of the community (referring to standards of fairness).²⁴

¹⁷ *Id.*

¹⁸ *Id.* 633-34.

¹⁹ *Id.* 633.

²⁰ *Id.* 634-35.

²¹ *Id.* 637.

²² *Id.* 636.

²³ *Id.* 630.

²⁴ *Id.*

III. DWORKIN'S DISCRETION ANALYZED

There are many important grounds on which Dworkin's views can and have been criticized. But a basic confusion will persist until it is more generally recognized that Dworkin has single-handedly legislated a new and radically altered meaning for the term "discretion." Traditionally the term has been employed to refer to that necessary leeway allowed judges for interpretation and application of general laws in particular circumstances; discretion has always been considered a practical necessity. But Dworkin insists on using the term in the moral sense alone. This leads him to the conclusion that if a judge is allowed discretion, we have the moral expectation that he use nothing more than his own private standards or prejudices in resolving the case. One cannot, therefore, assume that when Dworkin denies any legitimate place for judicial discretion in the administration of the law, he is denying the kind of discretion long recognized by most legalists and jurists as necessary for the daily administration of the law. Dworkin's mistake is that he has overlooked this crucial distinction.

A. *Ordinary English Usage*

Dworkin claimed to derive his notion of "discretion" from an examination of ordinary language.²⁵ It should not be inappropriate, then, to check his conclusions against the traditional usages of the term, such as those identified in the *Oxford English Dictionary*.²⁶ Even the most cursory reading of that reference work demonstrates that in ordinary nonlegal usage the term has accumulated a broad range of meanings. Of these, Dworkin's notion does correspond fairly well with one narrow set in which "discretion" does seem to indicate uncontrolled choice.²⁷

There are a number of common phrases which convey a variant of this meaning. "At the discretion of" is often taken to

²⁵ Dworkin, *supra* note 5, at 32. In this passage, Dworkin attempted a casual justification of his approach by asserting that "[t]he concept of discretion was lifted by the positivists from ordinary language, and to understand it, we must put it back *in habitat*." *Id.* This statement ignores the fact that the positivists came very late to the discussion of discretion; the term is much better established in the older literature of American realism and, of course, has a very solidly established position in the tradition of the law itself. This would provide the correct habitat for Dworkin to consider, not ordinary life as he asserts.

²⁶ 3 OXFORD ENGLISH DICTIONARY 435 (1933).

²⁷ *Id.*

mean as the subject "thinks fit or pleases." In an even stronger sense, "at his discretion" was often used when speaking of surrendering to an enemy, where a city or people could be disposed of as the conqueror saw fit, or would be "at his disposal," or "at his mercy," even "unconditionally." In a similar sense, it can refer to the "liberty or power of deciding, of acting according to one's own judgment or as one thinks fit," but still with the suggestion of "uncontrolled power of disposal."²⁸

However, equally strong traditions exist for using the term in a laudatory sense suggesting good or sound judgment, circumspection, prudence, or sagacity.²⁹ "Having discretion" means having the "ability to discern or distinguish what is right, befitting, or advisable, especially as regards one's own conduct or action." The phrase "age or years of discretion" is applied to that time of life "at which a person is presumed to be capable of exercising discretion or prudence." It can also refer to "the action of discerning or judging, judgment, decision, or discrimination."³⁰

Some interesting observations emerge from the foregoing comparisons. First, discretion is something usually allowed to individuals in areas where public agencies or rules are inadequate for guiding decisions. There seems to be a way in which necessity is associated with discretion. In these cases, discretion is unavoidable, as it were. But in this sense, discretion never amounts to simply the pleasure or whim of the agent; rather, there is the implicit assumption that his best judgment is required. So strong is this assumption that the term "discretion" is often synonymous with good or sound judgment. The recognition that such discretion is not rigidly controlled is a recognition of fact. There is still present the hope and moral obligation that the agent will make the best judgment possible, given his capabilities and the relevant *public* standards.

This analysis suggests that Dworkin's facile conclusion that in common usage "discretion" denotes unrestricted choice or reliance on personal preferences is hasty, and even naive. When we tell someone that he will have to use his discretion in the performance of some duty or task, we by no means relinquish our grounds for complaining or even criticizing if the discretion is not exercised in accordance with certain implicit standards. Rath-

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

er, when we instruct someone to use his discretion we agree on desired outcomes and trust him faithfully to pursue such results, but realize that the action situation is sufficiently novel or unique as to prevent us from determining fully adequate instructions in advance. In ordinary usage, we generally urge people to use discretion when certain shared standards *do govern*, but when the particular features of a situation are such that previously established rules alone are inadequate to achieve the proper results. The best judgment of the individual is invoked to solve the puzzle, to find a creative way to achieve the "correct" result.

B. *Traditional Legal Usage*

Although "discretion," as the term is used in ordinary language, can be seen to have range far beyond Dworkin's "strong" sense, the analysis cannot stop at this point. Dworkin is concerned specifically with discretion in the legal context; more narrowly, his analysis is pointed at *judicial* discretion³¹ in the process of deciding cases. To determine whether his analysis is valid, we have to examine the meaning of discretion in this context. When we do examine the legal and jurisprudential usage of the term, as found in legal dictionaries, judicial opinions, and the actual texts of the jurists whom Dworkin has accused of promoting the "heresy" of judicial discretion, a clear refutation of Dworkin's own claims begins to emerge.

The dictionaries consistently represent judicial discretion as an area of judgment "bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained."³² The very nature of such discretion requires the judge to use equity and justice in particular circumstances, and never to rely on his own will or arbitrary judgment. "It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge, but to that of the law."³³ A slightly older legal dictionary summarized the definition as follows:

A liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and whole-

³¹ See note 5, *supra*.

³² BLACK'S LAW DICTIONARY 553 (rev. 4th ed. 1968).

³³ *Id.*

some, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, *guided by the spirit, principles, and analogies of the law.*³⁴

Another law dictionary specifies that “[j]udicial discretion generally may not be arbitrary, and if abused, creates appealable error. In the same way the discretion of a public official, a trustee, or other fiduciary may not be arbitrary”³⁵ There is specifically recognized a class of situations in which official choices are made absolute by law. But these would be the exceptions by definition, and ordinary legal use of the term “discretion” would necessarily assume it could not be arbitrary in the sense of allowing the judge to rest on his personal standards. In ordinary instances of discretion, judges are expected to justify their decisions by appeals to legal or public standards. On Dworkin’s own grounds, this should constitute a refutation of the position he expounded in 1963.

Literally hundreds of instances of American judicial commentary on “discretion” are found in the reported cases. Only a miniscule selection of these instances display a usage that could conceivably be used to support Dworkin’s notion of “discretion.” For example, discretion has been defined as “freedom to act according to one’s judgment,”³⁶ and as “the power exercised by courts to determine questions to which no strict rule of law is applicable but which from their nature and the circumstances of the case are controlled by the personal judgment of the court.”³⁷ The Delaware Superior Court observed that “[d]iscretion, as applied to public officers, means the power or right to act in an official capacity in a manner which appears to be just and proper under the circumstances.”³⁸ But when these rather open statements are read in the light of the vast preponderance of more precise statements to the effect that discretion must always be ruled by principles of law, it becomes clear that Dworkin’s notion of “discretion” certainly does not accurately describe the term as it has been used in American law.

³⁴ BLACK’S LAW DICTIONARY 375 (2d ed. 1910) (emphasis added).

³⁵ M. RADIN, LAW DICTIONARY 96 (2d ed. 1970).

³⁶ *Reedy v. Reedy*, 175 Kan. 438, 440, 264 P.2d 913, 915 (1953).

³⁷ *State ex rel. Ricco v. Biggs*, 198 Ore. 413, 422, 255 P.2d 1055, 1059 (1953) (citation omitted).

³⁸ *Caras v. Delaware Liquor Comm’n*, 47 Del. 268, 271, 90 A.2d 492, 494 (Super. Ct. 1952).

In many of the cases, discretion is limited through the idea of a general, external standard. For example:

[1.] Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists.³⁹

[2.] We have said that "such a discretion does not mean a mere whim or caprice, but it means an honest attempt, in the exercise by the judge of his duty and power to see that justice is done, to establish a legal right."⁴⁰

[3.] Discretion implies knowledge and prudence and that discernment which enables a person to judge critically of what is correct and proper. It is judgment directed by circumspection. The discretion given by law to certain individuals . . . does not mean that they have a power of free decision or that they may pursue an undirected course. The discretion is one regulated by well known and established principles of law and equity. It must be legal and regular, exercised in the spirit of reason and not ruled or governed by humor.⁴¹

[4.] [D]iscretion . . . "does not mean the arbitrary will or merely individual personal view" of the judge. "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect . . . to the will of the law."⁴²

Other courts have focused more on the concept that discretion is choice according to principles.

[1.] Discretion, when applied to a court of justice, ordinarily means sound discretion, not wilful or arbitrary, but regulated by well-known and established principles of law, or such as may be exercised without violating any principle of law.⁴³

[2.] An appeal to a judge's discretion is an appeal to his judicial conscience. Such discretion must always be ex-

³⁹ *Monahan v. Jacobs & Politi*, 187 Misc. 332, 341, 66 N.Y.S.2d 207, 216 (Albany City Ct. 1946).

⁴⁰ *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 464, 136 S.W.2d 695, 698 (1939).

⁴¹ *Merritt School Dist. No. 50 v. Kimm*, 22 Wash. 2d 887, 891, 157 P.2d 989, 991 (1945).

⁴² *Potomac Small Loan Co. v. Myles*, 34 A.2d 609, 612-13 (D.C. Mun. Ct. App. 1943).

⁴³ *Davis v. Shigley*, 88 Ohio App. 423, 425-26, 100 N.E.2d 261, 263 (1950) (per curiam).

exercised not in opposition to, but in accordance with established principles of law. It is not an arbitrary power, but one which must be exercised wisely, fairly and impartially. It is well to remember that legal discretion can only be exercised in securing a party his absolute rights and their protection in some way, and when the discretion of a court is used for any other purpose, it becomes arbitrary and oppressive and degenerates them into tyranny.⁴⁴

[3.] "Discretion does not mean caprice. A discretion measured by a capriciously elastic yardstick would present a false measure of equitable right. This discretion is spoken of in the books as a 'sound discretion'—*sound*, meaning judicial." It is a discretion governed by solid and settled rules and principles.⁴⁵

[4.] Discretion is not the judge's sense of moral right; neither is it his sense of what is just. He is not clothed with a dispensing power or privileged to exercise his individual notions of abstract justice. With him there is no scope for judicial caprice. Principles of law are to be ascertained and followed. Justice is administered in the courts on settled and fixed principles. It does not vary, "like the Chancellor's foot." The rights of litigants do not rest in the discretion or grace of the judge. In all cases that come under his consideration a judge must act with discretion and discrimination and give weight to every circumstance bearing on the question to be adjudicated. He is not at liberty, in determining personal or property rights, to act at his own discretion unrestrained by the legal and equitable rules governing those rights.⁴⁶

From the above definitions, it is clear that American judges have used the term "judicial discretion" in a sense very different from that recommended by Dworkin. Their usage seems to be clearly in contradiction to the strong sense of discretion which Dworkin attributes to the tradition that he criticizes. The judicial use of the term seems to be much more in line with one of the "weak senses" of discretion as identified and rejected by

⁴⁴ *People v. Marinelli*, 37 N.Y.S.2d 321, 325 (Sup. Ct. 1942).

⁴⁵ *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 721-22, 111 S.W. 480, 494 (1908) (en banc) (Lamm, J., dissenting) (citation omitted).

⁴⁶ *In re Bond's Guardianship*, 251 App. Div. 651, 654, 297 N.Y.S. 493, 496-97 (1937).

Dworkin.⁴⁷ Even if his analysis of the weak and strong senses of the term were correct for ordinary English, Dworkin is clearly mistaken when he assumes that it accurately describes use in the judicial context.

The fact that "judicial discretion" in law does not mean an unrestrained choice, is further emphasized by the legal provision that even where discretion is allowed by law, a decision can still be challenged on the ground that the discretion was "abused."⁴⁸ As one judge explained, "discretion is abused whenever, in its exercise, a court exceeds bounds of reason . . ."⁴⁹ In other cases we read: "[I]t is an abuse of discretion to refuse to receive and consider evidence by which the court's discretion should be guided or controlled,"⁵⁰ and "[I]f there were no evidence to support the decision, there would be an abuse of discretion. But we do think that it follows that there can be no abuse of discretion if there be any evidence to support the decision."⁵¹

The governing term in cases involving "abuse of discretion" is "reason." The assumption is always that in instances calling for the exercise of discretion, the facts and the law should be sufficient for the judge's reason to lead him to the correct decision:

[1.] An abuse of discretion is an erroneous finding and judgment which is clearly contrary to the facts or the logical deductions from the facts and circumstances before the court—a judicial act which is untenable and clearly against reason and which works an injustice.⁵²

[2.] An abuse of discretion [reviewable on appeal] is an erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances or the reasonable, probable, and actual deductions to be drawn therefrom.⁵³

[3.] "Abuse of discretion" is synonymous with "a failure to exercise a sound, reasonable, and legal discretion."⁵⁴

⁴⁷ Dworkin, *supra* note 5, at 32. Dworkin recognizes, even in common parlance, the usage of "discretion" where we simply intend "to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment." *Id.*

⁴⁸ This idea is also reflected in statutes. See, e.g., 5 U.S.C. § 706(2)(A) (1970).

⁴⁹ *Kosloff v. Kosloff*, 67 Cal. App. 2d 374, 379, 154 P.2d 431, 434 (1944).

⁵⁰ *Cohen v. Young*, 127 F.2d 721, 726 (6th Cir. 1942).

⁵¹ *Stack v. Stack*, 189 Cal. App. 2d 357, 368, 11 Cal. Rptr. 177, 186 (1961).

⁵² *State v. Stubenrouch*, 499 S.W.2d 824, 826 (Mo. Ct. App. 1973).

⁵³ *Hollingsworth Tool Works v. Review Bd. of Ind. Employment Sec. Div.*, 119 Ind. App. 191, 194, 84 N.E.2d 895, 896 (1949).

⁵⁴ *Adair v. Pennewill*, 34 Del. 390, 393, 153 A. 859, 860 (1930) (citation omitted).

Clearly the net force of these, as well as hundreds of similar instances, to the use of the term "discretion" or "judicial discretion" in the actual administration of the law is such that discretion is always to be governed by reason, by standards of law, by public standards of equity and justice and never by the personal whim or preferences of the judge. The very fact that courts speak of "abuse of discretion" should warn us that Dworkin's strong sense of the term is invalid as a description of judicial practice. In Dworkin's analysis, "abuse of discretion" would seem to be a meaningless phrase. For if discretion entails the freedom to decide based wholly on one's personal preferences,⁵⁵ then it is hard to understand how this discretion could ever be "abused." Once the situation is given over to discretion in Dworkin's world, all standards (and hence all criteria for determining "abuse") evaporate. Thus it would seem that any system in which "abuse of discretion" is a meaningful concept, and that includes our own, cannot be part of the Dworkinian universe.⁵⁶

Like many other aspects of social life, the law requires decisions that cannot be completely predetermined by a body of general rules and standards. The uniqueness of individual concrete situations is such that a certain margin of ambiguity must be left in the rules so they can be fairly applied in each instance. That the judge is forced to choose a solution in such a controversy does not suggest that he is not expected to use his best judgment. When we allow the judge discretion, as in the traditional legal sense of

⁵⁵ See text accompanying note 21, *supra*.

⁵⁶ England would also appear to be outside Dworkin's ambit. A summary of English legal usage is found in J. JAMES, 2 STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES 792-93 (4th ed. 1972):

Where something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute. "According to his discretion," means, it is said, according to the rules of reason and justice, not private opinion . . . ; according to law and not humour; it is to be not arbitrary, vague, and fanciful, but legal and regular . . . to be exercised not capriciously, but on judicial grounds and for substantial reasons And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself . . . ; that is within the limits and for the objects intended by the legislature (citations omitted).

These criteria or statements of criteria make it clear that the judge is not permitted to rely on private reasons but must appeal to reasons which have their justification in the law in the exercise of his discretion. This suggests that the English use of the term is basically comparable to the American usage; neither uses "discretion" in Dworkin's strong sense, and both recognize the reality and even the necessity of judicial discretion in the administration of the law.

setting certain penalties, and so on, we implicitly expect him to use his best judgment and to adhere meticulously to relevant public standards.

In these cases, discretion is allowed precisely because it proves impossible so to phrase the law as to guarantee the fulfillment of the purposes of the law in each case. The requirement that the judge use his discretion does not so much make him free of law as it provides him with the necessary flexibility to achieve the true purposes of the law.⁵⁷ This practice merely recognizes the common phenomenon that a formalized principle or rule will often dictate results that are exactly the opposite of the desired results when the rule is applied in unanticipated particular circumstances. It is in this sense that discretion is necessary in the law in order to ensure that the law is enforced with the results intended, and not with undesirable and unanticipated results that flow from an overrigid adherence to established rules or statutes, as in "mechanical jurisprudence."

This analysis leads to the conclusion that Dworkin's notion of "discretion" is not fully consonant either with established legal usage, or even with ordinary usage, as he would like to claim. It remains now to determine whether his usage corresponds with that of jurists who have written on the subject of judicial discretion. For if, indeed, his usage fails to correspond to theirs, his attacks on their arguments must necessarily be specious; his will have turned out to be a straw man argument.

IV. THE DWORKIN INTERPRETATION OF THE TRADITION OF JURISPRUDENCE

Dworkin believes he finds exponents of judicial discretion in the strong sense throughout the tradition of jurisprudence, citing (among others) Pound, Cardozo, Cohen, Llewellyn, and Hart as proponents of this "dangerous and mistaken" doctrine.⁵⁸ Due in large part to their teachings, Dworkin finds it a law school cliché "that the exercise of judicial choice or discretion within areas circumscribed more or less tightly by rules is not an occasional misfiring but a characteristic feature of the legal process"⁵⁹

⁵⁷ See L. HAND, *How Far is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 103, 106 (I. Dilliard ed. 1960).

⁵⁸ Dworkin, *supra* note 3, at 624-25 n.1.

⁵⁹ *Id.* 624.

In a footnote Dworkin stipulates some qualifications of his interpretation. Admittedly, these jurists “do not mean that a judge should ever decide *whimsically*.”⁶⁰ Rather, Dworkin acknowledges, “[t]hey speak of judicial traditions or craft or other restraints which ‘limit’ or ‘hedge’ the discretion,” and “they speak of the ‘sound’ judge who will exercise his discretion so as best to serve his society.”⁶¹ Nevertheless, Dworkin goes on to insist that, in spite of these qualifications, when they speak of a judge as exercising discretion, they must mean that “*in the area of discretion, he is not bound to apply particular standards at all.*”⁶² It is clear from subsequent discussions of judicial discretion by Dworkin that when he says that a judge is not bound to apply particular standards, he means that we cannot expect him to, that he is not dutybound or morally obligated to apply any particular standards.

Any assessment of Dworkin’s criticisms of these authors must take into account that they wrote before he did; they were not responding to the ordinary language distinctions he has drawn. These distinctions introduce a new angle, and we can only conjecture what their responses might have been. As will be shown below, it seems they all would have grounds for claiming he has misread them.

A. *Roscoe Pound*

Dworkin cites Roscoe Pound as a prime example of the position that he wishes to criticize. It is true that Pound gave considerable attention to the problem of judicial discretion.⁶³ It is also true that he set forth the necessity of permitting the courts a degree of that “administrative element,” namely, discretion. But Pound did not recommend that courts should in any sense be free to choose their decisions without any constraints, even within a narrow range. Rather, Pound’s argument rests on the observation that formally stated rules are inadequate and must be supplemented by what he, like Dworkin, might call “other standards.” It is because of this need for supplementary standards that Pound recommended this fundamental role of the administration of justice to “the more or less trained intuition of experienced magistrates.”⁶⁴

⁶⁰ *Id.* 625 n.2.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See, e.g., R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 100-43 (1922).

⁶⁴ *Id.* 111.

Pound did criticize the nineteenth century jurisprudence for its abhorrence of judicial discretion. He recognized that employment of discretion necessitates the creation of legal fictions, and compared this to historical instances where executives have been allowed an "executive dispensing power," that is, the "royal power to dispense with the strict law in particular situations."⁶⁵ But even here, Pound did not see discretion as something that operates freely. As he pointed out, it was due to misuse of this discretionary power that the Stuarts met their downfall. Further, he explicitly added that the tribunal's discretion functions specifically to make a way for particular legal standards to be applied, standards which are not readily formulated in the law.⁶⁶ Pound's view is that only a mature form of law can recognize the necessity of assigning certain difficult standards to the area of judicial discretion for application in particular fact situations.

In justifying this idea, Pound went on to show that as many judges apply these standards in discretionary situations over time, the standards are eventually rendered more formal, giving examples from both Roman and Anglo-American law.⁶⁷ But even then, the standards are not formulated absolutely, "either by legislation or by judicial decision, but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand."⁶⁸ Some nineteenth century American state courts sought to eliminate this margin of discretion by completely absolutizing these standards. They failed, and, in many cases, were forced to assign out large discretionary questions either to juries or to administrative boards and commissions.⁶⁹

Pound placed his theory in a more historical context by arguing that the attempts of both analytical and historical theorists of the law "to exclude the administrative element wholly"⁷⁰ had only led to the production of fictions to cover up the inevitable discretionary elements of the law. He then pointed to "a new theory [that] has sprung up of late in continental Europe," which he called the "equitable theory."⁷¹ Even in this theory, which pro-

⁶⁵ *Id.* 113.

⁶⁶ *Id.* 113-14.

⁶⁷ *Id.* 117.

⁶⁸ *Id.* 118.

⁶⁹ *Id.* 119-20.

⁷⁰ *Id.* 126.

⁷¹ *Id.* 127.

vides much wider discretion than recommended by Pound, the judge is only free to use discretionary powers to meet "the demands of justice between the parties and accord with the reason and moral sense of ordinary men."⁷² The assertion that Pound believed in some kind of freewheeling choice is completely negated when we read his argument that the mechanical following of rules does not lead to certainty in the law. A vague reference to Bergson's theory of intuition⁷³ is used to lend credibility to his view that certainty in the law is actually increased by allowing judges discretion in individual cases. As Pound put it: "[T]he sacrifice of certainty . . . is more apparent than actual. For the certainty attained by mechanical application of fixed rules to human conduct has always been illusory."⁷⁴

It must be recognized that Pound did acknowledge the existence of the kind of discretion about which Dworkin speaks. He recognized that "[m]any courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the result desired."⁷⁵ He further admitted that there were some complicated areas of law "wherein cases may be decided either way according to which rule the court chooses in order to reach a result arrived at on other grounds."⁷⁶ But in these comments, Pound has only recognized the difficulty of finding correct solutions in individual cases. At no point did he suggest that judges are not obligated to find correct solutions. In a sense, his handling of these situations is very similar to Dworkin's own treatment.

B. *Benjamin Cardozo*

Perhaps one would expect that in turning to those more traditionally thought of as the American realists, Dworkin would more easily find proponents of the kind of discretion he proposes to refute. But his reference to Cardozo is no more justified than was his reference to Pound. It is true that Cardozo quite frankly recognized a role of judicial discretion akin to Dworkin's concept. He acknowledged that after history, philosophy and customs have all exercised their influence in the determination of a new legal

⁷² *Id.*

⁷³ See generally, H. BERGSON, CREATIVE EVOLUTION (A. Mitchell transl. 1913); H. BERGSON, TIME AND FREE WILL (F. Pogson transl. 1910).

⁷⁴ R. POUND, *supra* note 63, at 142-43.

⁷⁵ *Id.* 121.

⁷⁶ *Id.*

principle, "[a] residuum will be left where the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor."⁷⁷

The foregoing comments only demonstrate that Cardozo recognized that judges sometimes follow inadequate standards, even subjective standards in making their decision. But Dworkin needs to establish that Cardozo approved of this, that he did not see the judges in any way obligated to apply particular standards in these cases. And in this regard, Cardozo clearly took the stand that judges are obligated to observe certain guiding principles or policies in the resolution of questions of law.⁷⁸ Cardozo was at pains to point out that he did not mean

that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise . . . [Rather,] when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.⁷⁹

He repeatedly emphasizes "that judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom."⁸⁰

Cardozo accepted that continental theory that there are gaps in the law "yet unfilled, within which judgment moves untrammelled,"⁸¹ and focused on the principle which determines how they are to be filled. It is in this regard that he cited Justice Holmes' epigram: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined . . ."⁸² Cardozo also approvingly quoted the Czech professor Giza Kiss, who said:

The general framework furnished by the statute is to be filled in for each case by means of interpretation, that is, *by following out the principles of the statute*. In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function.⁸³

⁷⁷ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 53 (1921).

⁷⁸ *Id.* 130. *See also id.* 108-09.

⁷⁹ *Id.* 66-67.

⁸⁰ *Id.* 68.

⁸¹ *Id.* 69.

⁸² *Id.*

⁸³ *Id.* 70 (emphasis added).

It is to this rule, that the gaps are to be filled by "following out the principles of the statute," that Cardozo added his own "method of sociology" which "in filling the gaps, puts its emphasis on the social welfare."⁸⁴ Yet even when the judge is at his most active, he is not free to decide as he pleases.

Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.⁸⁵

Although Cardozo did not hesitate to describe judicial choice as creative,⁸⁶ he explicitly rejected the view of some foreign jurists that the norms of conduct and the patterns of social welfare can only be incorporated into the law as subjective standards.⁸⁷ Rather, he observed, "the traditions of our jurisprudence commit us to the objective standard."⁸⁸ This objective standard applies to the exercise of judicial discretion. As Cardozo himself concluded:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."⁸⁹

The foregoing seems almost identical to Dworkin's view. Dworkin recognizes that judging is difficult; that judges, in fact, are often mistaken, but that in terms of moral principle, they are obligated to make objective decisions in terms of certain governing public standards. It is very difficult to determine any signif-

⁸⁴ *Id.* 71.

⁸⁵ *Id.* 114.

⁸⁶ *Id.* 115.

⁸⁷ *Id.* 103-04.

⁸⁸ *Id.* 106.

⁸⁹ *Id.* 141 (citation omitted).

icant difference on this point between the views recommended by Cardozo and Dworkin. Why then does Dworkin list Cardozo as an example of the view that he finds mistaken?

C. *Morris R. Cohen*

Dworkin also lists Morris Cohen as a proponent of the "dangerous and mistaken" doctrine that judicial discretion, meaning unfettered freedom to decide cases, is necessary to the proper performance of the judge's role.⁹⁰ If we return to Cohen's own statement, however, it is difficult to categorize him as an apologist for judicial discretion in Dworkin's strong sense. Like Pound and Cardozo, Cohen recognized that the law is incomplete. As he said, "no actual set of rules devised by any human agency can possibly foresee all contingencies and make provision for dealing with them."⁹¹ From this observation, Cohen went on to conclude, "that the judge who has to decide all the cases that come before him must necessarily legislate and thus fill the gaps or incompletenesses in the existing law."⁹² But, like others who have advocated this kind of discretion, Cohen went on to argue against the theory of discretion based on personal standards which Dworkin attributes to him.

Cohen proceeded to distinguish between "formal and material completeness." Using the analogy of natural science (as he never tired of doing) he argued that "while the system of natural science is constantly changing through the assimilation of new information, it may be regarded as logically or formally complete because all the changes in it are made in accordance with the principles immanent in it."⁹³ In other words, though the law is not already complete, there are immanent *principles within the law* which enable a judge to complete it in individual cases as necessary. This would seem to be exactly Dworkin's position.

D. *Karl Llewellyn*

As evidence of Karl Llewellyn's endorsement of a strong notion of judicial discretion, Dworkin cites⁹⁴ Llewellyn's final great contribution to American jurisprudence.⁹⁵ In that discussion of

⁹⁰ Dworkin, *supra* note 3, at 624-25 n.1.

⁹¹ M. COHEN, *REASON AND LAW: STUDIES IN JURISTIC PHILOSOPHY* 4 (1950).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Dworkin, *supra* note 3, at 624-25 n.1.

⁹⁵ K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

judicial reasoning, Llewellyn did not address himself directly to the question whether judges are obligated to use certain processes in judicial reasoning; that is, to seek correct results. Rather, he restricted himself primarily—as do many realists—to the empirical possibilities and actualities. But even within that perspective, one must push Llewellyn's rather informal language very hard to make it represent the notion of discretion which Dworkin claims to be attacking. For example, in his discussion of legal doctrine, Llewellyn observed that a body of legal doctrine will, in some cases, leave some "real room for doubt" what the correct decision should be.⁹⁶ But even in these cases he insisted that "that body of doctrine is nonetheless to guide the deciding . . ." ⁹⁷ He further observed that even in the extremely difficult cases, that is, "when there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine."⁹⁸

In his urging judges to follow the language and spirit of a doctrine to cover cases where the doctrine itself is not fully clear, Llewellyn was in a metaphorical way urging them to do exactly what Dworkin demands, that is, to follow other standards which are not personal preferences, but rather are inherent or implicit in the law itself. Llewellyn was providing a principle to govern the resolution of hard cases.

This interpretation is supported by his further observation that the body of legal doctrine includes many "recorded directions" that judges can use as guides. These would include rules of law, whether gathered or scattered, whether rigorously or loosely phrased. It would also include "accepted lines of organizing and seeing these materials: concepts, fields of law with their differential importance, pervading principles, living ideals, tendencies, constellations, tone."⁹⁹ Admittedly, this presents an amorphous-appearing "body of doctrine" upon which a judge must draw in difficult decisions, but it is clear that it is a body of doctrine *in the law*, not in the personal preferences of the judges.

Llewellyn did not assert the strong position, apparently taken by Dworkin, that there is a correct decision for each case. He explicitly acknowledged that "if one looks at the authorities taken

⁹⁶ *Id.* 20.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

alone," then the possible interpretation of the language, the sizing up of the facts, or the choosing among divergent premises, would allow a fair technical case to be made several ways.¹⁰⁰ But even here, he left open the possibility that the other controlling standards, when brought to bear, might enable reasonable men to narrow the range of correct solutions all the way down to one.¹⁰¹

In the same work, Llewellyn freely spoke of a judge's "double duty to law and to justice."¹⁰² He advanced a model which made judges dependent both on rules and sense for guidance, not control, in making individual decisions. Llewellyn saw the judge as one required to examine each case in terms of both the requirements of formal rules and the requirements of justice. When these two are compatible, and are met in the same decision, that is the correct decision in the case. But when they are not compatible, the "decision depends on factors apart from rule, sense, or both."¹⁰³ At this point, Llewellyn focused on the difficulties of predicting judicial decisions in particular cases where rule and sense might be incompatible. Although he was not arguing that a lawyer can predict exactly what judges will decide in future cases through an analysis of previous decisions, it is of some interest for Dworkin's position that Llewellyn came to the conclusion that the decisions of state appellate courts are very highly predictable on examination of legal grounds alone. As the following language indicates, he did believe that there are extensive standards within the law that govern how these decisions shall be made, standards which challenge the most skilled craftsmen.

For the fact is that the work of our appellate courts all over the country is reckonable. It is reckonable first, and on a relative scale, far beyond what any sane man has any business expecting from a machinery devoted

¹⁰⁰ *Id.* 21.

¹⁰¹ *Id.* 24-25. Llewellyn did recognize the existence of the ideology "that there is and can be only one single right answer" for each legal controversy. *Id.* 24. It seems likely that he disagreed with this view. But this is somewhat hard to determine, for his criticism was primarily directed against the unhappy effects of that belief; that is, he feared judges might grab at the first solution as if it must be the correct one. His reservation was that if judges did not have this ideology, they would be more likely to persist until they found possibly the best solution. This would seem to betray an underlying faith in the existence of what he calls "puzzling cases," in which he claimed "tougher inquiry" might indeed lead to a discovery among the "known permissible possibilities" of the solution which "seems the probable best." This "probable best" solution does not seem to be too far from Dworkin's "correct" solution.

¹⁰² *Id.* 180.

¹⁰³ *Id.*

to settling disputes self-selected for their toughness. It is reckonable second, and on an absolute scale, quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.¹⁰⁴

The purpose of Llewellyn's book was to justify the view that appellate court decisions were this highly predictable. Such predictability would not seem possible under Dworkin's concept of unguided discretion.

Although Dworkin seeks to use Llewellyn's last work to justify his conclusions, it should be noted that Llewellyn explicitly rejected the idea that judges exercise the kind of strong discretion which Dworkin attributes to him, and did so as early as his 1929 lectures.¹⁰⁵

E. H. L. A. Hart

In *The Concept of Law*, H. L. A. Hart introduced the concept of a "penumbra of uncertainty" surrounding legal rules.¹⁰⁶ On the one hand, Hart recognized that "general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately."¹⁰⁷ On the other hand, he had clearly seen that the generality of language makes it impossible completely to specify how the law must apply in every particular fact situation.

Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guid-

¹⁰⁴ *Id.* 4.

¹⁰⁵ *What now of the judge himself?* . . . Is he a despot, free of all control, thanks to the leeway offered by the ambiguities of his material, and able at will, or as a favor, or in caprice, or for a price, to throw the decision this way or that? As to this last question, within limits, yes; but much more truly, no. He *can* throw the decision this way or that. *But not freely.*

K. LLEWELLYN, *THE BRAMBLE BUSH* 73 (2d ed. 1951) (emphasis in original).

¹⁰⁶ H.L.A. HART, *THE CONCEPT OF LAW* 12 (1960).

¹⁰⁷ *Id.* 121.

ance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable . . . but there will also be cases where it is not clear whether they apply or not.¹⁰⁸

These situations require judicial discretion. For as Hart has stated, “[i]f in such cases doubts are to be resolved, something in the nature of a choice between open alternatives must be made by whoever is to resolve them.”¹⁰⁹ This choice between alternatives is “discretion.” Hart continued:

The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purposes which may be attributed to the rule. To characterize these would be to characterize whatever is specific or peculiar in legal reasoning.¹¹⁰

Discretion is then required because “[n]atural languages like English are when so used irreducibly open textured.”¹¹¹ But this state of affairs is desirable, because “we are men, not gods.”¹¹² We are handicapped by “our relative ignorance of fact,”¹¹³ and by “our relative indeterminacy of aim.”¹¹⁴ A law without provision for judicial discretion would be possible only “[i]f the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us”¹¹⁵ In such a world, law could be so written that “provision could be made in advance for every possibility.”¹¹⁶ Dworkin seems not to realize that Hart was

¹⁰⁸ *Id.* 123.

¹⁰⁹ *Id.* 124.

¹¹⁰ *Id.*

¹¹¹ *Id.* 125.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

advancing a factual argument that such a description does not fit the world in which we live, that it is therefore virtually necessary that the law allow some room for flexibility in its application.

Hart's repeated use of the term "choice" could only fit Dworkin's notion of discretion if Hart had maintained that judges are not obligated to choose alternatives inherent in relevant legal standards. A careful reading of Hart's chapter entitled "Formalism and Rule-Scepticism"¹¹⁷ shows that, in fact, Hart saw very clearly that it is necessary that discretion be governed by considerations of law. He said that, at any given moment, judges

are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions Any individual judge coming to his office . . . finds a rule . . . established as a tradition and accepted as the standard of that office.¹¹⁸

These standards would clearly be "legal" standards in Dworkin's broad sense of that term.

Hart was arguing the need, even the unavoidability of a creative function for judges, a function which he calls "discretion." He saw this as the best compromise between two social needs: (1) "the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues,"¹¹⁹ and (2) "the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."¹²⁰ But at no point can Hart reasonably be read as arguing that in this creative role, where judges must necessarily choose answers to legal problems, they should be, or ever are, free from the obligation to follow standards implicit in the law itself. He consistently argued that the nature of the legal process requires judges to make choices, but that these choices are limited in that judges must necessarily adhere to a variety of legal standards and seek to effectuate the purposes of the laws. A fair interpretation of

¹¹⁷ *Id.* 121-50.

¹¹⁸ *Id.* 1-42.

¹¹⁹ *Id.* 127.

¹²⁰ *Id.*

his views makes it sound very much like the version that Dworkin recommends, not the one he criticizes Hart for holding.

V. DWORKIN'S SECOND ROUND

In the decade following Dworkin's initial adventure with judicial discretion, he has mounted up twice to defend that original statement against his critics.¹²¹ Although many of the clarifications and qualifications that he introduces in these later pieces may look like intellectual back-peddalling, Dworkin would insist that he has not abandoned the original position taken in 1963.

In his 1967 statement, Dworkin again distinguishes three senses of discretion—two weak senses and one strong sense. In the first weak sense, discretion occurs whenever “for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment.”¹²² As argued above, this is the usual sense of “discretion” as it is used in American law and by the jurists identified by Dworkin. The second weak sense occurs where “some official has final authority to make a decision and cannot be reviewed and reversed by any other official.”¹²³ This notion of discretion was also mentioned and rejected by Dworkin in the 1963 statement. It is generally of little interest to jurists.

His strong sense, however, is the case in which “on some issue [an official] is simply not bound by standards set by the authority in question.”¹²⁴ He thus clarifies that we use this strong sense “not to comment on the vagueness or difficulty of the standards, or on who has the final word on applying them, but on their range and the decisions they purport to control.”¹²⁵

What is striking in the 1967 statement is the deliberate addition of certain qualifiers. Undoubtedly responding to criticisms or misunderstandings of his 1963 statement, Dworkin here warns his reader that he “must avoid one tempting confusion”: This confusion would be to infer that “[t]he strong sense of discretion is . . . tantamount to license,”¹²⁶ or that it excluded criticism. He goes on to point out that all of our acts can be judged by “certain

¹²¹ Dworkin, *supra* note 5; Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972).

¹²² Dworkin, *supra* note 5, at 32.

¹²³ *Id.*

¹²⁴ *Id.* 33.

¹²⁵ *Id.*

¹²⁶ *Id.*

standards of rationality, fairness, and effectiveness"¹²⁷ which are relevant.

"An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion."¹²⁸ Thus when someone has discretion in the strong sense, "he can be said to have made a mistake, but not to have deprived a participant of a decision to which he was entitled, as in the case of a sports official or contest judge."¹²⁹ It remains to be seen if these cautious qualifications enable Dworkin to escape from the consequences of his straw man argument of 1963.

Anyone familiar with his 1963 statement would be struck by the tacit admission that the nominalists (presumably the American realists cited in 1963, including Cardozo, Llewellyn, Cohen, and even Pound) usually use "discretion" in one or the other of the weak senses. Of course this constitutes a complete withdrawal from the 1963 position in which they were explicitly listed as advocates of discretion in the strong sense. Having dropped his feud with the realists, Dworkin then developed a concentrated attack on the positivists and H. L. A. Hart in particular. From the foregoing interpretation of Hart and the apparent agreement between realists and positivists on this issue, one might expect this second round of arguments also to miss their mark. However, the influence of Dworkin's views merits some attention to the actual details of the argument.

Dworkin explicitly recognizes and admits that "[i]f we attend to the positivists' arguments for the doctrine we may suspect that they use discretion in the first weak sense to mean only that judges must sometimes exercise judgment in applying legal standards."¹³⁰ In recognizing this, Dworkin goes on to point to the positivist arguments emphasizing the vagueness or open texture of laws, the absence of established and suitable rules in some special cases, and that "judges must sometimes agonize over points of law, and that two equally trained and intelligent judges will often disagree."¹³¹

¹²⁷ *Id.* 34.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* 34-35.

But Dworkin is determined to prove the positivists guilty of adhering to a doctrine of judicial discretion in the strong sense, that is, that there are cases in which the judge "is not bound by any standards from the authority of law."¹³² He believes that the positivist arguments demonstrating the reality of discretion in the weak sense "are commonplace to anyone who has any familiarity with law."¹³³ In fact, Dworkin says these observations amount to nothing more than a tautology, that "when no clear rule is available discretion in the sense of judgment must be used . . ."¹³⁴ But, he maintains, because "the positivists speak as if their doctrine of judicial discretion is an insight rather than a tautology,"¹³⁵ they must be referring to a stronger sense of judicial discretion.¹³⁶

This, of course, is not a necessarily valid inference. Hart and other positivists defined their notion of judicial discretion relative to mechanical jurisprudence, a position which indeed does deny the commonplace knowledge that judges must judge. Whether or not there has ever been a real mechanical jurist to represent that extreme position is beside the point. The fact that positivists aimed their own insight against that position disposes of Dworkin's deduction. Moreover, Hart distinguishes his position from that of rule skeptics, who contend (as one might expect) that judges are not subject to rules. The rule skeptics seem to be the only group advancing Dworkin's strong notion of judicial discretion.¹³⁷ As Hart summarizes,

[Rule-scepticism] amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do. They may act with sufficient predictable regularity and uniformity to enable others, over long periods, to live by courts' decisions as rules. . . . There is nothing which courts treat as standards of correct judicial behaviour, and so nothing in that behaviour which manifests the internal point of view characteristic of the acceptance of rules.¹³⁸

¹³² *Id.* 35.

¹³³ *Id.* 34-35.

¹³⁴ *Id.* 35.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ H.L.A. HART, *supra* note 106, at 132-37.

¹³⁸ *Id.* 135.

Dworkin makes clear that in his view the controversial nature of a judicial decision is no indication of judicial discretion in that decision. Rather, he recognizes that many cases which are decided upon principle must be defended "by appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings"¹³⁹ in the justification of the particular principle invoked as the most authoritative in a particular decision. He goes on to recognize that "[t]here is no litmus paper for testing the soundness of such a case—it is a matter of judgment, and reasonable men may disagree."¹⁴⁰ Yet Dworkin argues that the judge, like the sergeant and the referee, has no discretion "because he is bound to reach an understanding, controversial or not, of what his orders or the rules require, and to act on that understanding."¹⁴¹ But if, in fact, a judge is not using discretion when he appeals to judicial practice, the implications of legislative or judicial history, or to the practices and understandings of his community, then no positivist would argue that judges exercise discretion. That is all they seem to mean by their term "discretion" and thus they seem to be substantially in agreement with Dworkin's model. His objections are grounded only on his own misconstrual of the terminology.

Dworkin's claim that the positivists must maintain the doctrine of judicial discretion in his strong sense rests on the statement attributed to Hart that when the judge's discretion is in play, you "can no longer speak of his being bound by standards, but must speak rather of what standards he 'characteristically uses.'"¹⁴² To Dworkin, if Hart believes that a judge has discretion when he runs out of rules, then Hart must also believe "that the legal standards judges cite other than rules are not binding on them."¹⁴³

But the crucial question is whether Hart actually does take the position Dworkin claims he does. Certainly, the reference Dworkin gives is not to be found where he places it. Rather, in that section of the *Concept of Law* we find Hart repudiating both formalism (or mechanical jurisprudence) and rule-skepticism,

¹³⁹ Dworkin, *supra* note 5, at 37.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* 35.

¹⁴³ *Id.*

the "Scylla and Charybdis of juristic theory."¹⁴⁴ He rejects the extreme realist view that judicial references to legal rules are nothing more than verbal coverings "for the exercise of an unfettered discretion"¹⁴⁵ and accepts the only other genuine alternative, that these judicial statements "must be the formulation of rules genuinely regarded by the courts from the internal point of view as a standard of correct decision."¹⁴⁶ To Hart, the challenge of legal theory is "to characterize in informative detail this middle path, and to show the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent."¹⁴⁷

Dworkin accuses Hart of saying that courts must cite regularities of behavior, and interprets this as meaning "what courts 'make it a principle' to do,"¹⁴⁸ taking this as evidence of Hart's acceptance of discretion in the strong sense. But on this point, Dworkin simply misreads Hart. As we have already noted, Hart sees judges relying on secondary rules when primary rules prove inadequate for the resolution of a particular case. Inasmuch as the "secondary rules" correspond in most regards to the "principles" to which Dworkin recommends judges refer, we must then ask whether Hart sees the secondary rules as being patterns of what courts make it a rule to do, or whether they are rules which, in fact, are binding on the courts. If Hart takes the former view, then indeed he does accept Dworkin's strong notion of discretion, but if the latter is actually Hart's position then Dworkin is still attacking a straw man.

This question is best resolved by reference to Hart's lengthy discussion of the difference between social rules and social habits. He observes that social rules are different from social habits in that when one deviates from a social rule he is subject to criticism, but no such criticism follows deviation from a social habit.¹⁴⁹ Furthermore, we generally acknowledge that a person's deviation from a rule is a good reason to criticize him, whereas his deviation from a habit would only be a reason to be interested in him as a curiosity (so to speak). The third difference is that social rules

¹⁴⁴ H.L.A. HART, *supra* note 106, at 144.

¹⁴⁵ *Id.* 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* 144.

¹⁴⁸ Dworkin, *supra* note 5, at 35.

¹⁴⁹ H.L.A. HART, *supra* note 106, at 58.

have what Hart calls an "internal aspect,"¹⁵⁰ meaning that a social rule must be looked upon "as a general standard to be followed by the group as a whole" having some moral binding force on the members of the society. Of course, a habit would have no such "internal aspect." Hart then goes on explicitly to identify some of his secondary rules as being examples of social rules, not social habits. His particular example concerns those rules which govern the continuity of legislative authority, which characterize most legal systems. This continuity "depends on that form of social practice which constitutes the acceptance of a rule, and differs, in the ways we have indicated, from the simpler facts of mere habitual obedience."¹⁵¹ This seems clearly to contradict Dworkin's interpretation that Hart would have judges refer to the standards courts characteristically use in this sense of habit.

In another context, Hart explains that rules could be regarded either as descriptions of a population's habits of obedience or as constitutive of the patterns of behavior in that the population took those rules as binding directions for their behavior.¹⁵² Hart clearly adopts the view that social rules are constitutive, rather than descriptive. He uses this insight to criticize earlier positivists, notably Austin.¹⁵³ Dworkin seems to have overlooked Hart's distinction between the external and internal points of view. As Hart describes it:

What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them, the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.¹⁵⁴

He then goes on to summarize his criticism of the predictive the-

¹⁵⁰ *Id.* 55.

¹⁵¹ *Id.* 58.

¹⁵² *Id.* 75.

¹⁵³ *Id.* 79.

¹⁵⁴ *Id.* 88.

ory of obligation with the observation that it defines out of existence the internal aspect of obligatory rules.

Although Hart has never published a response to Dworkin's criticisms, he has enjoyed a very sympathetic and capable defense from Joseph Raz.¹⁵⁵ Although Raz' response to Dworkin does not focus at length on the issue of discretion, it does have some relevance for the argument developed above. It is especially interesting to note Raz' tacit agreement with the argument developed here, that is, that Dworkin seems to insist on misinterpreting the people he is interpreting. Raz observed in a passing footnote that "I doubt, however, whether on examination we will find any legal philosopher who fulfills Professor Dworkin's definition of a positivist. His positivist is as rare an animal as the mechanical jurist. But that is a different story."¹⁵⁶ Raz further noted that Dworkin developed his concept of "principle" as something different than Hart's "rules" because Dworkin assumed that "when Austin was talking about commands he was referring to what Professor Dworkin calls rules."¹⁵⁷ On the contrary, Raz argues, neither Austin nor Hart "use 'rules' in the same sense as Professor Dworkin. By 'rules' [Hart] means what Professor Dworkin seems to mean by 'standards,' namely rules, principles or any other type of norm (whether legal or social)."¹⁵⁸

Dworkin responded to Raz' critique by attempting to show that Raz had misunderstood him. Raz, he said, was inclined "to convert discretion in the first sense into discretion in the third sense,"¹⁵⁹ and he further observed that the inclination "is extraordinarily common among legal philosophers."¹⁶⁰ To be specific, he accused three other of his critics of the same mistake including MacCallum, Christie, and Carrio.¹⁶¹ Dworkin might be well advised to take note of the fact that legal philosophers do not ordinarily conceive of discretion in his strong sense. In

¹⁵⁵ Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

¹⁵⁶ *Id.* 824 n.3. It is interesting to note that in Dworkin's 1967 criticism of the "nominalists" he accused them of basing their position upon an attack of mechanical jurisprudence, which Dworkin claimed was a position that no one had ever really held. Without pretending to get into the merits of that debate, it is simply noted here that the argument Dworkin used there against what he called "nominalists" applies exactly to him and his treatment of the "discretionists."

¹⁵⁷ *Id.* 845.

¹⁵⁸ *Id.*

¹⁵⁹ Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 880 (1972).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* 880 n.21.

fact, the only possible legitimate reason for insisting on that sense of discretion would be that which he mentioned: that this "is the sense a positivist needs to establish if he is to show that judicial duty is defined exclusively by an ultimate social rule or set of social rules."¹⁶²

It is odd, however, that in the very paragraph in which he correctly recognizes that Raz misinterprets his own notion of discretion he goes on to critique Raz' counterargument as if Raz had been using the notion of discretion advocated by Dworkin. This seems to be the same tack that Dworkin has used against all of his detractors—attributing his notion of discretion to their arguments—thus always winding up with a straw man argument.

Dworkin then advanced another new distinction to clarify his notion of judicial discretion. He said that we universally recognize the difference between circumstances where someone ought or ought not to do something, and circumstances where they have an obligation or a duty to do something or no right to do it.

Judgments of duty are commonly much stronger than judgments simply about what one ought to do. We can demand compliance with an obligation or a duty, and sometimes propose a sanction for non-compliance; but neither demands nor sanctions are appropriate when it is merely a question of what one ought, on the whole, to do.¹⁶³

He went on to use this distinction to define judicial discretion. "It may be that in some cases a judge has no duty to decide either way; in this sort of case we must be content to speak of what he ought to do. This, I take it, is what is meant when we say that in such a case, the judge has 'discretion'."¹⁶⁴

On the basis of this distinction it was only one small step to that final qualification which seems to dissolve any tenable difference between him and the positivists on the matter of judicial discretion. He says,

A judge may have discretion in both the first and second senses, and nevertheless properly regard his decision as raising an issue of what his duty as a judge is, an issue which he must decide by reflecting on what is required

¹⁶² *Id.* 879.

¹⁶³ *Id.* 857.

¹⁶⁴ *Id.* 858.

of him by the varying considerations that he believes are pertinent. If so, then this judge does not have discretion in the third sense, which is the sense a positivist needs to establish if he is to show that judicial duty is defined exclusively by an ultimate social rule or set of social rules.¹⁶⁵

When Dworkin accepted the notion that a judge does not have discretion if he has a duty to reflect "on what is required of him by the varying conditions that he believes are pertinent," the terminological confusion present throughout his ten year quarrel with the positivists was clearly exposed. The requirement that a judge rely on his own reflections on the conditions he believes pertinent is the essence of discretion from the positivist point of view. But while Dworkin wants to reserve the term for some other circumstance where the judge does not have this duty, the positivists would join Raz in calling this other circumstance "arbitrariness, whim and caprice."¹⁶⁶

VI. CONCLUSION

It is very possible that Dworkin would find this criticism equivocal. For certainly he has denied that earlier jurists identified discretion with whimsical choice. Nevertheless, he has clearly taken the position that discretion entails choices justified by appeals to personal preferences rather than to public standards. He has never abandoned that position.

The counterargument has simply been that as we try to assess how these earlier writers would have responded to Dworkin's distinction, they all seem to have assumed that in the exercise of what they call "discretion," the judge is bound to adhere to certain unspecified, yet definitely public standards of law, morality, and policy. In no case do they condone judicial appeals to primarily private standards, even within very narrow limits. What they do urge is that the judge has a duty to use his own best judgment in an appeal to a variety of public standards to resolve questions resulting from necessary ambiguities and vaguenesses in the law. If this interpretation of these earlier writers is more accurate and fair to them than is Dworkin's, then he will be very hard pressed to demonstrate any significant difference between

¹⁶⁵ *Id.* 879.

¹⁶⁶ Raz, *supra* note 155, at 848.

his own substantive views and theirs. The only disagreement is about how the term "discretion" should be used, not about whether judges have any discretion. And my analysis indicates that neither ordinary usage nor traditional legal usage of the term "discretion" supports Dworkin's definition.

Inasmuch as the relevant literature of the past decade has focused almost exclusively on Dworkin's critique, it has been something of a digression from the promising work being done in the area of judicial discretion. At this point, it would seem that the obvious strategy is to abandon the present debate and return to the pre-1963 statement of the issues. In so doing, we could well take for our guide Hart's statement in his chapter "Formalism and Rule-scepticism."

Much indeed that cannot be attempted here needs to be done to characterize in informative detail this middle path, and to show the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent.¹⁶⁷

¹⁶⁷ H.L.A. HART, *supra* note 106, at 144.