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THEORIES OF PROFESSORS H.L.A. HART AND RONALD DWORKIN — A CRITIQUE

JOHN W. VAN DOREN*

I. INTRODUCTION

JURISPRUDENCE HAS EXPERIENCED A RECENT REVIVAL under the stimulation of professors H.L.A. Hart and Ronald Dworkin, both of Oxford. In the United States, jurisprudence has long been believed to be esoteric and lacking in practical significance. However, if it is true that every law professor teaches jurisprudence, then it is also true that every lawyer practices it. Conscious and unconscious decisions made by professors, judges and practitioners reflect jurisprudential preferences.

Nevertheless, it is not always easy to recognize what is at stake in a jurisprudential controversy for such disputes often leave in obscurity any practical result. To some extent, Professor Dworkin's criticism of Professor Hart's positivistic jurisprudence sharpens the focus of the issues. Thus, an illumination of how the legal process operates in settling such disputes can hopefully be sharpened by a critique of *both* Hart and Dworkin. Even though Professors Hart and Dworkin mix traditional jurisprudence with their own original contributions, the end result subverts and obscures much of the actual workings of the legal process. This article will attempt to summarize the views of Professors Hart and Dworkin and engage in a critical evaluation of their thinking to demonstrate what will be perceived as a disparity between their theories and the way the legal machinery operates today.

II. PROFESSOR HART'S LEGAL POSITIVISM

Professor Hart gave his classic restatement of legal positivism in his book, *THE CONCEPT OF LAW*.¹ Hart basically believes that law should be looked at internally as a set of rules.² These rules are divided into two major categories: primary and secondary.³ In a primitive or prelegal society, there is no distinction between the primary rules and the moral tenets.⁴ The difference enters at an advanced stage of legal development

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¹ H.L.A. HART: *THE CONCEPT OF LAW* (1961) [hereinafter cited as HART].

² *Id.* at 78-79.

³ *Id.* at 78-79.

⁴ *Id.* at 165.

where the primary rules become the substantive rules of law that govern society.⁵ An additional distinction between prelegal and advanced legal societies is the presence in the latter of secondary rules. These rules, known as the rules of recognition, change and adjudication,⁶ enable one to distinguish society's legal rules from its moral rules.⁷ Such a separation is essential in that it allows legalists to *exclusively* use these legal rules in deciding controversies without relying on society's moral canons.

A. *The Secondary Rules*

An important aspect of the secondary rules is that it is through their application that we find the primary rules.⁸ As stated, the secondary rules are clearly divided into three categories: Rules of recognition, rules of change and rules of adjudication.⁹ Rules of recognition are the canons in a society which designate authoritative sources of the law.¹⁰ For example, the secondary rule may refer to a body which has the right to enact primary rules—such as a legislature—or it may refer to past customary practices, or designate judicial decisions as a source of primary rules. These rules of recognition may be simple or complex. With them society evolves toward the realization of a legal system and, indeed, to the essence of the idea of legal validity.

Rules of change are closely related to rules of recognition. These rules empower certain individuals or bodies to change primary rules usually accomplished pursuant to prescribed procedures.¹¹ For example, the rule might provide for a change promulgated by a majority vote of the legislature, or there may exist a related private power-conferring rule which can be thought of as a delegated legislative power given to individuals to create and alter private legal relationships. Examples of these private rules include partnership and contract law.

Rules of adjudication are those secondary rules which give persons or institutions authority to determine whether primary rules have been broken.¹² These rules allow, for example, the courts to decide a controversy. Their decisions necessarily lead back to the idea of rules of recognition; when courts have the power to make decisions, their decisions in turn will be a source of the identification of primary rules. In ad-

⁵ *Id.* at 78-79, 165.

⁶ *Id.* at 92-94.

⁷ *Id.* at 165.

⁸ Society's primary rules are not necessarily its codified statutes. The foremost example is the common law.

⁹ HART, *supra* note 1, at 92-94.

¹⁰ *Id.* at 92.

¹¹ *Id.* at 93-94.

¹² *Id.* at 94-95.

dition, a court's use of the rules of recognition tend to determine primary rules by referring to the appropriate source where these primary rules are found. Thus if a person is murdered, society goes to court to see which primary rules govern the situation and the court determines if the primary rules have been broken. The court in its decision-making process may refer to the legislative enactment concerning murder. The fact that a court is authorized to determine if a primary rule has been broken identifies a secondary rule of adjudication *i.e.*, that the court is the adjudicative body. This is a use of the rules of adjudication. The court's selection of the legislative enactment for murder as the governing primary rule involves the court's use of the rules of recognition. Thus two secondary rules are used in the process, recognition and adjudication.

The most important secondary rule used in the murder example is clearly the rule of recognition. When the court refers to the laws against murder, it identifies the source of the primary rule. In this example, it is ordinarily the legislature. The court may also refer to its previous decisions on murder and introduce mitigating factors such as the insanity defense. By doing this, the court identifies a source of the primary rules on insanity as a defense—their own past decisions. It must be noted that the use of these insanity decisions for analagous situations may be imperfect because they may be couched in general terms *e.g.*, legislative enactments. Culling a rule from a case, Hart suggests, may involve a shaky inference and the reliability will fluctuate with the skill of the interpreter and the consistency of the judges.¹³

In a complex legal system such as that found in the United States, there are multiple sources of law, including legislative, judicial, customary and constitutional. Since some of these are treated as being more important, there exists a hierarchy which presumably is part of the rules of recognition.¹⁴ The general practice of officials, private persons and their advisors in identifying and applying the primary rules establishes both the source for primary rules and their rank-order within the heirarchy.¹⁵

While these secondary rules are not always totally clear, they are nevertheless observable as a matter of objective fact. If their existence is doubted, they can be verified by observing the way courts in practice identify what is to be considered the "law" and the general acquiescence by the public in the court's conclusion.¹⁶ Thus, the *fundamental* primary rule that one arrives at when tracing the question of whether a given primary rule is valid can be discovered by reference to the secondary

¹³ *Id.* at 95.

¹⁴ *Id.* at 98.

¹⁵ *Id.*

¹⁶ *Id.* at 105.

rules of recognition.¹⁷ For example, in determining the legality of such as a traffic ordinance (a primary rule), its validity may be traced through varying authenticating sources from the city council all the way to the federal constitution.

There remains an essential caveat: As stated, the rules of recognition are the most important of the secondary rules, but they are only identified as a matter of fact.¹⁸ Officials accept the rules of recognition because other officials accept them; the rules are discoverable from observation of the sources that these same officials generally use.¹⁹ Indicating that a given rule of recognition is valid, however, means only that it is "valid given the system's criteria of validity."²⁰

B. *Two Criteria For Determining Primary Rules:
Promulgation Through Valid Authority and
Characteristic Use by Officials*

There are two ways that primary rules can be determined through the secondary rules. One is where the primary rule is validated by creation pursuant to a secondary rule: For example, validity through a valid legislative enactment, or through private power conferring rules, such as the constitution of a private club.²¹ The other is a type of official use of the rules of adjudication and recognition already referred to and which may be called acceptance through characteristic use by officials.²² The standards utilized in this second approach are valid because of their acceptance by those judges and officials applying them.²³ When deciding matters governed by the standards accepted by other officials, the official making the decision will rely on those standards to justify his decision. Circuitously, reliance on the standard is substantiated by pointing to the standard's acceptance by other officials. In addition, officials will criticize those who deviate from the accepted standard. Hart refers to this process whereby the decision maker agrees with and applies a given standard because of its acceptance by others, as the "internal point of view."²⁴

In summary, acceptance by officials of the sources of law leads us to the primary rule governing a problem. Upon this recognition, the rule

¹⁷ *Id.*

¹⁸ *Id.* at 107 (the rule of recognition exists as a "matter of fact").

¹⁹ *Id.* at 106-107.

²⁰ *Id.* at 107. Hart also refers to a rule of recognition as being supreme. *Id.* at 102-103. The example he provides is a legislative enactment by Parliament. *Id.*

²¹ *Id.* at 144. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 20-21 [hereinafter cited as DWORKIN].

²² See notes 12-13 *supra* and accompanying text.

²³ HART, *supra* note 1, at 98.

²⁴ *Id.* at 99.

qualifies as a legal rule.²⁵ The fact of acceptance can be noted from outside the legal system. It is the fact of acceptance by officials rather than the moral or political correctness of the rule that determines its character as a legal rule. This leads to a separation of law and morals.²⁶

Primary rules then generally govern cases either by direct application or by "a settled core of meaning" clearly applied to the primary rule.²⁷ For example, a law may prohibit a vehicle in a park. The word "vehicle" connotes a settled core of meaning which includes automobiles, trucks and tractors. But there also exists what may be called an open-textured area, an area where the application of the rule remains unclear.²⁸ These open-textured areas give rise to the exercise of judicial discretion, which apparently may amount to the emulation of standards that judges "characteristically use" in such cases. Whether a tank on a pedestal commemorating local veterans is a "vehicle" may be determined by the standards found in the open-textured area. In the application of standards judges characteristically use, judges simply find the standard in use, cite it upon inquiry, criticize others if they fail to follow it and manifest an "internal point of view" simply because of the fact of its acceptance.²⁹ However, Hart admits that judicial discretion is exercised in these open-textured areas and that this judicial discretion can permeate at least those areas not covered by characteristic use.³⁰ Thus a particular judge's decision is not clearly predictable in some of these areas.

C. *Criteria for the Existence of a Legal System*

Hart believes that for a legal system to exist, the officials must accept the secondary rules and for whatever reason, the populace must obey them.³¹ Thus, if laws are valid by the system's tests, and are obeyed by the bulk of its citizens, there is a valid legal system. However, this idea that the populace is in the habit of obedience cannot apply to the attitude of officials in their application of the secondary rules.³² While a citizen's obedience may be the result of fear, the attitude of an official toward the rules of recognition must be one that "manifests an internal point of view."³³ That is, for a legal system to exist, officials must have the internal point of view that at least the ultimate rule of recognition is a common standard of correct judicial behavior, not something that each

²⁵ *Id.* at 103.

²⁶ See notes 44-56 *infra* and accompanying text.

²⁷ See HART, *supra* note 1, at 132, 140-42.

²⁸ See *id.* at 128, 141.

²⁹ See *id.* at 144; DWORKIN, *supra* note 21, at 20.

³⁰ See HART, *supra* note 1, at 93-95.

³¹ *Id.* at 111.

³² *Id.* at 99.

³³ See note 24 *supra* and accompanying text.

judge obeys for his part only.³⁴ It is this internal point of view of officials which allows validity through official acceptance that distinguishes the orders of the sovereign, which are laws, from the orders of a gunman, which though obeyed, are not laws.

D. *Hart's Game Analogy—Law as a System of Rules*

The game analogy is an important part of Hart's analysis. He uses it to refute the assertion by legal realists that rules are only myths merely providing data for predicting future court responses. Hart bases his analogy on the fact that a legal system is a set of definite rules that can be compared to the rules of squash or tennis.³⁵ Hart contends that a sport, such as squash, and a legal system both have an established set of rules that have an accepted "core of meaning" and that are applied to actual situations by the officials.³⁶ But on closer scrutiny, it seems apparent that the rules in both of these situations possess an open-textured area where a highly discretionary system of standards exists. The problem in both squash and the legal system, for the referee or judge, is the existence of discretionary rules, and the application of these rules to existing facts.³⁷

Hart admits that referees and judges may make deviant interpretations of the rules, but argues that this behavior would not continue for long because of criticism and adverse reactions of other officials in the legal system or the game commission.³⁸ Be this as it may, I think there is nothing in the rule structure that dictates one result over another in the open-textured areas. Referees calling the same game might point to conflicting rules or interpret or apply the same rules differently so as to substantiate their own decisions.

Hart continues the game analogy by stating that in the closed-textured areas where rules are clearly applied, the legal system cannot be regarded as being governed by the judge's discretion.³⁹ In other words, Hart argues that in the legal system, as in games, the law is not precisely "what the court says it is."⁴⁰ Hart does state that in the open-

³⁴ HART, *supra* note 1, at 111, 112.

³⁵ *Id.* at 99, 109-14.

³⁶ *Id.* at 140.

³⁷ The game of squash has rules that fall into three types: 1) rules "proper" which are rigid rules that declare the ball is out if it hits the "tell tale"; 2) "rules" with large areas of discretion in the referee's decision on whether to call a game if a player is late; and 3) "rules" or standards which seem to carry their own negation where no standard governs application of the rule, or conflicting rules exist, such as whether a player who hits the ball in front of him has unduly hindered his opponent behind him in trying to reach the ball. This kind of decision will vary from referee to referee.

³⁸ HART, *supra* note 1, at 141.

³⁹ *Id.* at 138.

⁴⁰ *Id.* at 138-39.

textured areas, courts have a law-creating power far wider and more significant than that left to game referees.⁴¹ However, he disputes that the legal system is analogous to any game in which the scorer makes the rules as he goes along.⁴² He asserts that even a supreme court exists in a system of rules which are determinant enough at the center to apply correct standards to judicial decision-making.⁴³

E. *Hart Separates Morals from Law:
The Clash of Natural Law and Positivism*

By defining law according to the practice of officials in finding primary rules, Hart separates law and morals.⁴⁴ The validity of rules only means validity according to how officials ferret out these rules.⁴⁵ Hart does not deny that there is a relation between law, as a set of rules, and morality.⁴⁶ Law may shift with the moral tenets of the day, but positive law can be valid without any necessary relationship to morality.⁴⁷ Hart contends that to clearly understand the law it is necessary to consider the effects of bad law.⁴⁸ He asserts that naturalists obscure the difficult decision of the citizenry as to whether to obey a law when they declare that positive laws in conflict with natural laws are not to be considered as part of the legal system. By separating law and morals, Hart argues that individual attitudes toward law will not be confused with the law.⁴⁹ It is not Hart's contention that citizens must obey all laws of society, he merely believes that each citizen must make his own decision without the confusion added by the naturalist view that some state promulgated rules are not "law."⁵⁰

Hart argues that through separation of law and morals, one can avoid the dangerous reactionary position that whatever is law, is right.⁵¹ Hart contends that a rule can be law, and yet be wrong if morals are kept distinct.⁵² This separation, he finds, allows the law to be more easily sub-

⁴¹ *Id.* at 141.

⁴² *See id.* at 139-41 (a general discussion of scorer's discretion).

⁴³ *Id.* at 138-43.

⁴⁴ *Id.* at 163, 181.

⁴⁵ *Id.* at 203.

⁴⁶ *See id.* at 198.

⁴⁷ *Id.* at 207.

⁴⁸ *Id.* at 201-07.

⁴⁹ *Id.* at 204-06.

⁵⁰ *Id.* at 205-07. Hart views a regime composed of primary and secondary rules as constituting a legal system irrespective of whether it is good or bad. Thus, Hart considers that the Nazi regime made laws as legally valid as any other regime, even though they were morally reprehensible.

⁵¹ HART, *supra* note 1, at 163-176.

⁵² *Id.* at 205-208.

jected to moral criticism.⁵³ But Hart's premise that law and morals should be separate does not necessarily help the citizen decide whether to obey an act of state. Seemingly, a citizen can equally well decide the morality of a state rule declaring that Jews should be sent to the gas chamber whether he takes Hart's view or the natural law view. In the former, he would subject the law to moral criticism. In the latter he would find the rule so morally reprehensible that it is not a law and therefore should not be obeyed.

One advantage to Hart's positivist view is that it gives a more certain indication of what is considered law than the natural law view that law and morality are interconnected. Natural law presents difficulties in that it is very difficult to agree as to what rules are morally desirable. However, a positivist view of law as a static photograph does not seem as accurate as a natural law view of law in motion toward moral goals. Even Hart indicates that in the penumbral area, law is in motion toward some concept of policy and morality in the mind of the interpreter.⁵⁴

Hart continues to argue for a separation of law and morals by pointing out: "[i]t does not follow that, because the opposite of a decision reached blindly in the formalist or literalist manner is a decision intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals."⁵⁵ Hart's example here seems to suggest that because a judicial penal sentence may be immoral, such as one to reinforce the authority of a repressive regime, there is not a necessary intersection here in the penumbra between law and morals.⁵⁶ In other words, the opposite of a mechanical decision is not necessarily a moral decision, but may in fact be an immoral decision. Apparently, this is another reason for separating law and morals. What Hart appears to fear is the subversion of the rule of law by decisions which produce immoral results. Admittedly, there is this danger, but by taking the view that law is a set of rules derived from rules of recognition accepted by officials, one avoids the possibility that law may change for the better by a direction toward moral goals.

Hart's final argument for the separation of law as it is and law as a reflection of morality revolves around the idea that the aims of the policies behind rules are not to be considered law themselves. If this were the case then all law would be subject to reexamination in light of social policy and would refute Hart's concept of rules with a settled core meeting.

⁵³ See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958).

⁵⁴ *Id.* at 609.

⁵⁵ *Id.* at 612.

⁵⁶ *Id.* at 613-614.

III. EVALUATION OF HART

A. *Evaluation of Hart's Rule Theories*

Hart's legal system postulating that rules are easily found and applied in solving legal problems does not adequately reflect the legal process. His limited analysis overlooks the human spirit which refuses to be bound by rules deemed unfair. Thus, the need for change will be competing against the need for stability. The process of officials locating rules applicable to controversies through acceptance of secondary rules relied upon by other officials does not seem to provide for rule changes by judges.

Hart allows a process of change to enter his system through the use of the secondary rules. The secondary rules of recognition, change and adjudication give some answer to the question of *who* makes or applies *what* rules according to *what* procedures.⁵⁷ But Hart's rules of change seem more applicable to legislative change, *e.g.*, by majority vote.

Hart does not apply his concept of a secondary rule of change to explain judicial rule changes in the open-textured areas *i.e.*, the situation when courts overrule existing law or overrule it *sub silentio* by the process of distinguishing precedent. Furthermore, Hart's system offers little aid in determining *which* standards control judicial change of rules. It may be easy to ascertain who will make the changes, but what standards will be employed in the change is an entirely different matter. For example, the law governing class actions not only lacks clarity, but shifts according to the views of different judges. Thus, Hart's rules do not aid in finding a source which will facilitate comprehension of the standards decision-makers characteristically use when they change rules. There is no criteria controlling the change or guidance in determining what standards will be applied to a particular fact pattern. Even if characteristic standards or reasonings could be found applicable in the open-textured areas, judges in minority jurisdictions do not necessarily feel bound by a rule in the majority jurisdictions even though they may be criticized for not following the more popular view. Therefore, contrary to Hart's system, judges often do not have any ascertainable, consistent or helpful standards or reasons which they "characteristically use" when solving problems in the open-textured areas. Dworkin also makes this point, and deserves the credit for originating it, or formulating it with clarity.⁵⁸

While Hart's system emphasizes the ease with which rules are identified and applied, courts often explicitly recognize a profound difference between finding and applying a rule. A rule which starts out as being clear may become uncertain when it is applied to facts not

⁵⁷ See notes 8-20 *supra* and accompanying text.

⁵⁸ See notes 88-91 *supra* and accompanying text.

previously envisioned as applicable to the rule. The net effect is to make a rule clear in the abstract, yet uncertain in its all important application.⁵⁹

Identification of rules are often hampered, then, because both the primary and secondary rules are subject to change on the basis of reasons and standards not easily perceived beforehand.⁶⁰ Thus, there is a multiplicity of secondary rules of recognition which indicate sources of law often in conflict with each other. Sources may be committee reports, ethical maxims, selective use of legislative intent, cases, etc. Thus, this conflict is the result of decisions being based upon no principles ascertainable *a priori*.

Other difficulties arise by the possibility that the official reasons given for the decision are not in fact the real reasons.⁶¹ This manipulation of rules, or lack of candor, leads to questioning the faith in the belief that a judge's opinion is truly the foundation for his decision. Moreover, manipulation of rules supports the thesis that judges do not necessarily base their decisions on a consensus, much less any consensus based upon majority acceptance by other officials. Hart's system can neither explain nor offer any guidance in dealing with this problem.

In summary, Hart's approach to a legal system as merely the identification and application of rules is an unduly limiting analysis. His belief that rules are binding because other officials follow them overlooks an important factor in the decision-making process, the element of human nature.

B. *Hart's Theories: Three Criticisms*

Hart's description of the legal system does not directly address the issue of how much of the legal system is predominantly a set of rules and how much is open-textured. Hart seemingly would not admit that a legal system is better characterized by use of judicial discretion among conflicting rules as opposed to a relatively easy application of a system of rules. In fact, this can be implied from the "internal point of view" term used by Hart indicating that officials would like to have a rule structure that is binding. However, it seems that more often than not, a judge cannot find an unambiguous rule to apply to the set of facts before him. What then seems to remain at issue is the validity of Hart's assertion that there is an inner core of certainty within the system of rules which comprise the legal system of the United States.

⁵⁹ See, e.g., *Chevy Chase Village v. Jagers*, 261 Md. 309, 312, 275 A.2d 167, 171 (1971) (rule found, application denied).

⁶⁰ See *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973). In *Hoffman* the Florida Supreme Court found comparative negligence to be the proper rule replacing contributory negligence.

⁶¹ See R.A. Wasserman, *The Judicial Decision* (1961) in R. ALDISERT, *THE JUDICIAL PROCESS* 422-24 (1976) (The judge's opinion may not be an accurate report of the judge's discovery of the solution to a case).

In truth, the open-textured areas are highly significant areas of American law. Hart does not explain how these areas of law work in a society. He underemphasizes the following three areas which tend to depreciate the value of the rule model: 1) how the decision-making process works to fill in the gaps of the open-textured areas; 2) the attitude of the society toward its rule structure; and 3) the fact that some rules are either ignored or modified after official enactment *i.e.*, "living law" v. official rules.

1. Filling the Gaps in the Open-Textured Areas

a. Ideology Rather Than Rules?

Though Hart mentions that the moral dimension enters into decision making in the open-textured areas, he does not emphasize this point. Hart mainly concentrates on decisions being made from discoverable rules and standards by relatively impartial judges. In contrast to this analysis, it may be asserted that officials are filling in gaps in the open-textured areas with ideology rather than through easy application of rule structures or some notion of a rigid *stare decisis*.⁶²

Broad social policy considerations play an important part in the creation of law in the hard case area. It is but one step to incorporate the sociological approach that rules of law reflect societal decisions on what interests deserve protection. Choices frequently exist. In the legal process, the choice of which policy or custom to enforce is often determined by preconceptions of proper social, political and economic results. These results often contain conflicting interests and agonizing choices. While sociological jurisprudence may help with the recognition that law essentially protects certain social interests, it may not help decide which interest should prevail.⁶³ This fundamental weakness also exists in the realist and natural law approaches where conflicting values may be stated, but not necessarily resolved. Thus, legal rubrics are often used to gloss over value choices.⁶⁴

⁶² Van Doren, *Ownership of Yugoslav Social Property and United States Industrial Property: A Comparison*, 26 RUTGERS L. REV. 73 (1972).

⁶³ See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 848 (1935).

An example of a legal principle that adds little to the understanding of the law would be the maxim: "he who seeks equity, must do equity." An example which shows the danger in using sociological material in actual decisions is *Brown v. Board of Education*, 347 U.S. 483 (1954). The decision was based in part on a study that blacks and/or whites did better school work in a mixed racial environment. *Id.* at 494 n. 11. If this study is subsequently disproven, the decision makers might be vulnerable. If the decision was based solely on the constitutional principle of "equal protection," however, it would have been clothed in judicial mystique and might appear more indisputable.

⁶⁴ Law is not alone in its use of rules and principles to gloss over value choices. These same concerns arise in the economic and political sphere where

There are numerous examples where social, political and economic interests are of value when determining the meaning of a term which varies in the course of time. For example, "property" is given content by the social, political and economic needs of the day as perceived by the decision-makers. The delineation of these ideological presuppositions often brings one closer to the understanding of a legal system than considering for example what constitutes "property" in terms of official rationalizations in the "taking" cases.⁶⁵

b. *Stare decisis*?

Implicit in the rules of recognition and the internal point of view is a sort of *stare decisis* - a looking to what other officials do in decision-making. It can be argued that *stare decisis*, the rigid following of precedent, is a myth, or at least highly misleading. Professor Edward Levi in his book, AN INTRODUCTION TO LEGAL REASONING,⁶⁶ states that no case controls another case and that the decision-maker is free to disregard facts considered relevant by the former decision-maker. Levi redefines *stare decisis* as a process in which all previous holdings are dicta because judges have the power to remake the law by finding new facts relevant, thereby ignoring precedent.⁶⁷ Accordingly, a rule subjected to this process has a strong capacity to self-destruct. Levi further states that no rule exists that instructs a judge which precedential facts are the most important.⁶⁸

Levi's theory that there may be no rules for a judge to follow in determining whether his case differs from precedent seems substantially to undermine Hart's idea that the judge is bound by the rules of recognition in the closed-textured area. In the open-textured areas, Hart asserts that judges create law, but they are subject to the standards that other judges characteristically use.⁶⁹ "Characteristic use" assumes

doctrines of supply and demand and non-governmental interference have an equally mythical quality similar to the law. These pat formulas do little for the understanding of economics or politics just as some legal principles give little aid in understanding the law. See T. ARNOLD, THE SYMBOLS OF GOVERNMENT 98-99 (1935).

⁶⁵ Van Doren, *supra*, note 61. Cf. *Pruneyard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980 (Marshall, J., concurring opinion) (Property does not take on its meaning solely from positive law—it has a normative dimension as well).

⁶⁶ E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-3 (1974).

⁶⁷ *Id.* at 2.

⁶⁸ *Id.* at 9-27. An example of the two pronged rule exists in the area of manufacturer's tort liability. A rule may start out as: There can be no recovery for defectively manufactured products unless the product is inherently dangerous. After later cases, the rule may become: There can be recovery if the product is imminently dangerous due to negligent manufacturing.

⁶⁹ See notes 28-30 *supra* and accompanying text.

facts not in evidence. Levi's theory more realistically illustrates the workings of the American legal system.

2. Rule Systems De-emphasize Societal Attitudes Toward Its Rule Structure

To understand law in society, one must understand the attitude of that society toward its official dispute-resolving machinery. The legal rule structure in a given society may not be considered the most important mechanism for social control or dispute resolution. One can look at traditional Chinese society for an illuminating example. Historically, in China the general assertion of rights is discouraged. The Chinese people view a situation that reaches the official resolution machinery as regrettable. The traditional society emphasizes conciliation, mediation and negotiation to resolve disputes before they reach the official machinery. The official machinery or legal system was designed to be painful to litigants and therefore discourage its use. Thus, even if legal rules were clear in the Chinese society, the fact of substantial non-use would be more important in the society than the primary rules themselves.⁷⁰

3. Rule Models Deemphasize the "Living Law"

Some of the rules which officials accept and use may be ignored by society. One seeking to understand a legal system vitally needs the information whether a gap exists between the rules propounded by officials and the living law of the society. The most frequently cited example in the United States is the prohibition laws which were openly ignored. Another example is the smoking of marijuana even in public places despite the fact that this action openly violates existing law. Other examples exist. In one rural Florida county, juries were reluctant to convict individuals on criminal charges because of the distaste for the operation of the sheriff's office.⁷¹ Thus, emphasis on rules should not be allowed to obscure the "living law." Law exists in a web of societal attitudes and practices and cannot be fully understood apart from them.

C. *Does Positivism Aid Predictability?*

One criteria used to determine the value of a jurisprudential model of law is the extent to which it facilitates prediction of phenomena in the system it describes. This standard is especially appropriate in evaluating jurisprudential systems. This question has substantial practical ramifications for part of a lawyer's work is the prediction of court responses.

⁷⁰ See Van Doren, *Chinese Law in Context—Aspects of the Legal Systems of the Republic of China*, 3 SOOCHOW J. OF LIT. AND SOC. STUD. 97, 121 (1973).

⁷¹ Interview with then county Judge Evelyn Flack, Wakulla County, Florida (October 1977).

In the closed-textured areas, Hart states that judges use rules as justification for their decisions.⁷² They manifest the internal point of view of acceptance of rules as creating binding standards for judicial decisions. The reason for the rule, therefore, is the rule. According to Hart, rules are much stronger determinants than mere predictors.⁷³ Hart argues that rules are standards to be followed in decisions controlled by the internal point of view. These rules, even in the open-textured area, limit, but do not exclude discretion.⁷⁴

If rules are, as Hart indicates, even stronger determinants of legal results than mere prognosticators, it seems fair to inquire into whether: 1) The legal system is predictable, and 2) To the extent that it is predictable, what model best facilitates prediction. The United States legal system is somewhat predictable. It can be argued that numerous property or commercial transactions are consummated without any legal problems, which might indicate that the participants understand the applicable rules.

Compromise in criminal cases also gives support to the thesis that law is predictable. Since criminal prosecutions are selective in that cases which actually reach adjudication are those where substantial proof may exist, plea bargained compromises are arguably based on the certainty of the rule structure. One can also argue that compromise in the area of civil litigation may be based on the certainty of the rule structure.

However, two other explanations are plausible. First, the legal structure can be analogized to an insurance policy which one can fall back on if the deal sours. Since most parties are relatively satisfied with their commercial transactions, any legal ramifications resulting from a possible rescission never became an issue. Secondly, compromise or negotiated settlement may be considered as evidence of the legal advisor's perception of an *uncertain* rule structure.⁷⁵

There is, of course, some regularity and predictability in the legal sphere, though more in some fields than in others. But assuming predictability, the question remains: On what basis can predictions be made? Hart's reliance on a rule model and "characteristic use" is not helpful in predicting results in the open-textured areas. Rules do reflect policies and

⁷² HART, *supra* note 1, at 132.

⁷³ *Id.* at 55-56.

⁷⁴ *Id.* at 132.

⁷⁵ A case I had while in practice in the 1960's involved the question of whether visible marks of entry are necessary to gain a recovery for theft of clothing from an automobile. The insurance policy said that there would be no recovery unless there were visible marks of entry. One or more decisions outside the jurisdiction held the "visible marks" test against public policy. Several other jurisdictions upheld the "visible marks" test. In any event, the practical resolution was a \$1400 settlement, halfway between the \$2800 loss and zero. The compromise was based, at least in part, on the uncertainty of the possible finding of the court, rather than the certainty of the rule structure.

aims of society, but individual officials may or may not apply them. The absence of a consensus in the United States as to the proper attitude toward rules, *stare decisis* and the proper role of judges, leads to uncertainty in identification of applicable rules.

For example, in the United States congressional legislation may be nullified by the courts in the process of interpreting its constitutionality.⁷⁶ Deference to the legislature is encouraged, but the fact that judges should play a creative role in preserving citizens' constitutional liberties is also well engrained. Hart's description of the open textured areas does not help one understand this phenomenon. The predictability that does occur is based less on a settled core meaning of words than on the fact that the expression or spirit of the statute or precedent conforms with the deeply held biases of the society or the decision-maker. In fact, studies of judicial behavior and personal experiences indicate that one can predict decisions by studying decision-makers in terms of the politics, personal preferences and past decisions, rather than looking at the "core of settled meaning" of the words construed.⁷⁷

A realist may point out that references of officials in opinions do not reflect the true basis of their decision. Subjectivity enters into the selection of pertinent facts by the official. The process of fact selection by a trial judge can be devastating because appellate courts do not usually reexamine all of the facts. Different facts are relevant to different people because of their backgrounds and preconceptions.

Hart's rule model does not seem to sufficiently allow for the role the jury plays in the legal system. Juries in the past have nullified whole areas of the law, most notably the Prohibition Laws of the 1920's.⁷⁸ Recent efforts to scientifically select juries illustrates the practical importance of this variable in the application of rules.⁷⁹ Moreover, consultation of rules does not give weight to other psychological factors present at trial. Reading a case often does not tell one whether the plaintiff in a personal injury case was "likeable."

⁷⁶ See, e.g., *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).

⁷⁷ See, e.g., Haines, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922).

⁷⁸ See M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 55 (1973).

Jury nullification of unjust laws is a continuing tradition. The classic historical instances include the jury's refusal to convict in a number of famous criminal libel cases until the law was changed to give juries the authority to acquit through general verdicts. Early English juries employed various strategies to avoid capital punishment, such as finding against the evidence that only 39 shillings had been stolen when to find 90 shillings or more would mean a mandatory death sentence. Later, in this country, we have witnessed the American jury's systematic nullification of the Prohibition laws during the 1920's—the most intense example of jury revolt in recent history. [Footnotes omitted]

⁷⁹ Shell, *Scientific Jury Selection: Does it work?*, 7 BARRISTER 47 (1980).

It is clear that a vital role of the lawyer is to predict court responses, but he gets little help from a rule model alone. The rule model must at least be leavened by realism's insistence on using the predispositions of the decision-maker as an effective explanation of legal results. This notion of predictability destroys the myth of the inevitable conclusion and concentrates on the relativity of fact finding and the preconceptions of the decision-maker.

In short summary, it has been suggested that Hart's rule model deemphasizes important factors in the legal process. First, the game analogy does not provide an accurate model for the legal system. Rules of games are not as clear as Hart indicates. Second, the quantum of the legal system that operates under a rule structure is not as extensive or as clearly delineated as Hart indicates. It would be more accurate to describe the legal arena as governed by principles often in conflict, than by reference to one rule that clearly applies. Third, officials do not simply follow rules because other officials do so. Fourth, excision of the moral and social policy element from the application of rules by decision makers is too great a distortion of reality. In other words, judges sometimes apply or refuse to apply rules for moral reasons, and not because other officials do so. Fifth, insofar as positivist analysis presupposes *stare decisis* as a rigid application of preexisting precedent, that is not an accurate reflection of the legal process. Sixth, a rule analysis does not help highlight the situation more or less present in societies, that individuals may not regard the legal rule structure as important or morally binding. Seventh, the practical test for the viability of a model—that it facilitates predictability—is not particularly aided by the rule model. Finally, one can be misled by looking at rules offered by officials in their official rationalizations because these rules may not be the real reasons for their decisions.

Some of these points are made by Professor Dworkin and the exposition of his views contains penchant criticism of Hart's positivist model. Thus, some of these lines of argument, particularly the third and fourth arguments above, originate with Dworkin or are particularly well-stated by him. I concur with Dworkin in his criticisms of Hart's positivism.

IV. PROFESSOR DWORBIN'S ATTACK ON HART'S POSITIVISM

Professor Dworkin argues that Hart's legal system collapses in the open-textured areas. Initially, Dworkin restates three essential positivist positions: 1) legal rules define and determine legal duties and obligations;⁸⁰ 2) the use of the secondary rules of recognition allows identification of primary legal rules which determine the decisions in legal controversies and these rules are separate and distinct from moral rules;⁸¹ and 3) despite the rules of recognition and the primary rules

⁸⁰ DWORBIN, *supra* note 21, at 17.

⁸¹ *Id.* at 21.

gleaned therefrom, there is an open-textured area where judicial discretion is exercised in the decision-making process.⁸² Dworkin argues that under positivism, if a judge decides a case through the exercise of his discretion, he is outside the binding rules and as a result, no legal obligation or duty exists.⁸³

Dworkin concentrates his criticism on the rules of recognition which are essential to a positivistic legal system. He would restate Hart's position as follows: the secondary rules of recognition can be viewed as the master rules that specify some essential feature or features. Possession of these features by a suggested primary rule is taken as a conclusive affirmative indication that the rule is a valid primary rule of law. The basis for validity of a secondary rule is that it is generally accepted and this acceptance imposes a duty upon officials to follow it. This duty to follow the secondary rule and in turn the primary rule distinguishes them from moral rules.⁸⁴ An example illustrating this acceptance would be the majority of officials looking to enactments of Congress to determine the solution to a legal problem. This practice then creates a duty within all officialdom to do likewise.

Dworkin asserts, however, that this does not answer why the courts have the duty to follow the legislature.⁸⁵ For example, how does one explain a judge's ordering distribution of an estate according to the statute of descent and distribution, as in *Riggs v. Palmer*.⁸⁶ Professor Hart would respond as follows: the internal point of view controls, and the fact that there are rules accepted by officials creates a duty for all to follow.⁸⁷ Thus, the rules of recognition find the sources of law, such as legislative enactments or judicial precedent. This in turn identifies the primary rule that ultimately controls, and finally, the primary rule is applied and the decision is made.

Dworkin argues that this process collapses in the open-textured areas due to the fact that the rules of recognition are measured by the standards that judges "characteristically use," and if the standards are subject to considerable disagreement, then there can be no such thing as

⁸² *Id.* at 23, 34.

⁸³ *Id.* at 35.

⁸⁴ *Id.* at 42, 49-50. Moral rules may or may not involve a duty to follow them. For example, there may be a practice that no one wears a hat in church. It becomes a social rule or a duty when: 1) each person removes his hat before entering church; 2) the churchgoer refers to the rule that requires him to do it when questioned; 3) the churchgoer believes that it is an appropriate rule; and 4) criticism of others who do not follow the no hat in church rule occurs. These preconditions convert a social rule into a social duty if there is sufficient social pressure.

⁸⁵ DWORKIN, *supra* note 21, at 50.

⁸⁶ 115 N.Y. 506, 22 N.E. 188 (1889) (discussed at notes 107-109 *infra* and accompanying text).

⁸⁷ See HART, *supra* note 1, at 111-113.

"characteristic use."⁸⁸ This is intuitively known because officials constantly disagree on standards and sources of standards to be applied in solving legal problem. Therefore, the rules of recognition cannot explain the process of judicial decision-making in the open-textured areas.

A. *Judicial Acceptance of Rules Does Not Lead to a Duty to Obey Them*

Dworkin claims that there is no discernible pattern of official acceptance which allows for the selection of relevant rules or principles which govern cases.⁸⁹ Dworkin further states that, in any event, mere acceptance of a rule does not necessary lead to the creation of a duty to follow it.⁹⁰ There is a fallacy in the argument that because the majority of judges accept a rule, the rest are therefore duty-bound to follow it. This is like saying that whatever is the law, is the law, which offers no guidance in the decision-making process in the hard case area.⁹¹ The hard cases make it impossible to talk meaningfully about any official acceptance of standards, since there is an absence of consensus on what standards judges "characteristically use."

B. *Uncontrolled Discretion Negates Rules in the Hard Case Area*

Dworkin finds that principles are open-ended precepts which do not dictate particular results.⁹² The positivist might account for decisions made upon principles by describing them as cases where judges have exercised discretion. Thus, in the open-textured areas, judges are not bound by rules and must necessarily use discretion which is often uncontrolled. To exemplify uncontrolled discretion, one can draw an analogy to the situation where a tenant has the option to renew his lease. The lease renewal is strictly left to the tenant's fancy.

The idea of uncontrolled discretion in judicial decision-making is repugnant to Dworkin. He believes judicial resolution of problems does not occur in a void where there are no standards governing particular decisions.⁹³ He draws an analogy to a sergeant who is ordered to select five experienced men to go on patrol.⁹⁴ Here the sergeant has discretion, but it is not unlimited. Reasonable men could differ on the selection and no obligation to select any particular man is present. Thus, Dworkin finds that limits can be placed on the principles used in deciding disputes in hard cases with such boundaries being derived from the

⁸⁸ DWORKIN, *supra* note 21, at 65.

⁸⁹ *Id.* at 42-43.

⁹⁰ *Id.* at 30.

⁹¹ See notes 98-102 *supra* and accompanying text.

⁹² DWORKIN, *supra* note 21, at 28-31.

⁹³ *Id.* at 31, 68-71.

⁹⁴ *Id.* at 32.

moral and political realm.⁹⁵ In sum, Dworkin states that judicial selection of principles in areas of discretion is subject to standards which have a normative content. Their primary claim to value is in their moral and political validity, and not in the happenstance of whether most, or perhaps any other, judge or official follows them.

Dworkin also argues that the positivist model which accepts uncontrolled discretion seriously undermines the force and effect of the model's rules.⁹⁶ A rule is a precept easily applied to a legal problem in an ironclad way. But if a rule can be changed or modified by a sea of principles and policies at the uncontrolled discretion of the individual judge, then this rule cannot exist as a rule in the positivist model. Therefore, if the positivist notion of a rule as an ironclad application is to be preserved, some standards which control rules must be recognized. For example, in *Riggs* the rules for distribution of estates according to a will were ignored when the heir shot the testator in order to prevent him from changing his will. The principle "no man shall profit from his own wrong" prevailed over the statute.⁹⁷

We may summarize Dworkin's arguments as follows: Some standards must control the application of rules in hard cases. A system where discretion to pick principles is uncontrolled is unacceptable and would undermine the positivist rule model. Principles enter into and create the standards by which the rules are to be changed, but since principles are often not agreed upon, there is no singular rule of recognition for principles; and *a fortiori*, there is none for the positivist's rules. New rules, such as that exemplified by the *Riggs* case, find their legal force through application of principles which are not governed by the secondary rules.

V. PROFESSOR DWORKIN CONSTRUCTS HIS RIGHTS THESIS

A. Cases—*Easy and Hard*

In TAKING RIGHTS SERIOUSLY,⁹⁸ Professor Dworkin attempts to explain how decisions are made in hard cases. Easy cases pose no problem for they can be decided with reference to rules which can be applied with logic and reason to the factual situation.⁹⁹ For example, if the speed limit is fifty miles an hour and a driver is traveling at sixty miles an hour, he is guilty of speeding. Dworkin finds that hard cases, however, present problems.

⁹⁵ *Id.* at 35.

⁹⁶ *Id.* at 33-34.

⁹⁷ *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) (discussed at notes 107-109 *infra* and accompanying text).

⁹⁸ DWORKIN, *supra* note 21.

⁹⁹ *Id.* at 4.

Dworkin is concerned with a very practical problem: When a judge decides a case, is he deciding on the basis of the preexisting rights of the parties? If not, the judge is making law *ex post facto*, and in effect depriving a party of some unspoken "natural" right.¹⁰⁰ Dworkin finds that courts should and do decide legal controversies on the basis of preexisting rights of the parties.¹⁰¹ In short, Dworkin argues that these rights are found, *inter alia*, from the gravitational pull of precedent. The rights there found are referred to as "institutional rights," hence the term "rights thesis."¹⁰²

B. *Dworkin's Concern with A Discretionary Model*

Dworkin argues that Hart is on the one hand too rigid in finding the legal system governed by rules easily discoverable in the closed-textured area, yet on the other hand, finds that Hart is too flexible in the open-textured area when Hart finds that judges have decision-making discretion.¹⁰³ Dworkin believes, as indicated previously, that standards judges "characteristically use" in the open-textured area are not easily discernable. That leaves the open-textured area without guiding standards.

Dworkin is critical of this discretion in the open-textured areas and his rights thesis seeks to plug up the floodgates that uncontrolled judicial discretion opens. There cannot be any justification, he feels, in allowing what is largely an appointed body, the judiciary, to have unrestricted power at the expense of an elected legislature.¹⁰⁴

C. *The Distinction Between Rules, Principles, and Policies*

Dworkin further refines his analysis by making a distinction between rules, principles and policies.¹⁰⁵ Rules can be illustrated by an analogy to a baseball game where three strikes to the same batter produces an out. Perhaps, rules need not be considered further because they apply to easy cases which Dworkin only addresses in passing. The distinction between a rule and a principle is that the latter does not dictate a result as clearly as the former. For example, the adage that no one may profit from his own wrongdoing is a principle because there are counter-examples where one may benefit from a wrong. It is the *essence* of a principle that the circumstance under which it applies to a given situation may be unclear in contrast to a rule which dictates a result. A policy is

¹⁰⁰ *Id.* at 85.

¹⁰¹ *Id.* at 86.

¹⁰² *Id.* at 89-90.

¹⁰³ *Id.* at 31-39.

¹⁰⁴ *Id.* at 81-85.

¹⁰⁵ *Id.* at 22-28.

simply an aim or goal to achieve a social, political, or economical result in a society, for example, national defense.¹⁰⁶

It may be easier to understand the application of principles to fact situations by using the well known cases of *Riggs v. Palmer*¹⁰⁷ and *Henningson v. Bloomfield Motors, Inc.*¹⁰⁸

In *Riggs* the court decided that an heir named in the will of his grandfather could not take because he had murdered the testator. The court said:

It is quite true that the statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, will give this property to the murderer. . . . [However,] all laws as well as all contracts may be controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit . . . from his own wrong. . . .¹⁰⁹

In *Henningson*, the plaintiff was not able to point to an established rule of law to prevent the defendant car manufacturer from standing on the contract both had signed. The contract limited the manufacturer's liability to "making good" defective parts, to the exclusion of defraying medical and other expenses incurred from the resulting accident. In the opinion which held for the consumer, the court considered and balanced principles of *caveat emptor* and freedom of contract against principles that the manufacturer has an unfair advantage over the purchaser due to superior bargaining position and the manufacturer's "special obligation" arising from society's general dependance on his product.¹¹⁰

These propositions, that no man shall benefit from his own wrongdoing, freedom of contract and inequality of bargaining power, constitute Dworkin's examples of principles. Principles, Dworkin argues, have the effect of controlling judicial discretion in the hard case area because judges affirm preexisting rights of the parties by the location and application of those principles.¹¹¹

D. *Hard Cases Are Controlled by Principles, Not Policies*

Dworkin argues that inquiry into decisions in hard cases cannot be glossed over by referring to either the goals of a society, such as justice, or economic efficiency, or by relegation of the task of legal process or

¹⁰⁶ *Id.* at 22.

¹⁰⁷ 115 N.Y. 506, 22 N.E. 188 (1889).

¹⁰⁸ 32 N.J. 358, 161 A.2d 69 (1960).

¹⁰⁹ 115 N.Y. at 509-11, 22 N.E. at 190.

¹¹⁰ 32 N.J. at 367-82, 161 A.2d at 76-95.

¹¹¹ DWORKIN, *supra* note 21, at 26.

jurisprudence to appropriate instrumentalities or procedures designed to advance society's goals. For Dworkin the central issue is whether decisions in hard cases can be viewed as an application of principles, and if such a model is appropriate, what standards apply to their selection.¹¹² His answer to this inquiry is that decisions in hard cases must be founded upon principles, and those principles are derived by judges from constructs of preexisting legal materials, *i.e.*, the constitution, cases and statutes.¹¹³

Policies, at least those policies which a particular decision-maker may think desirable as a matter of personal preference, should play no part in judicial decisions. In fact policies, the broad collective goals of a society, are more appropriately considered by the legislature. The judge may possibly implement a legislative policy, but he should not implement his own policy. Therefore, principles limit choice and govern cases between individuals;¹¹⁴ judicially based policies are irrelevant. Utilizing this theory, discretion would not be as prevalent as some theorists would suppose.

Dworkin gives an example of the difference between deciding cases on principles and policies. For example, in *Spartan Steel v. Alloys Ltd.*,¹¹⁵ Lord Denning was faced with a claim for damages from a factory owner against contractors whose negligent repair activities on a cable belonging to an electric company caused a temporary termination of electric service to a factory. As a result, two kinds of damages were sought: 1) damages for ingots then in process which were ruined, and 2) damages for lost profits on ingots which could have been manufactured but for the electric outage. Lord Denning refused to allow damages in the latter instance because he rejected both a traditional rights-duty dichotomy and also questioned the proximate cause concept of damages. Since this decision on damages was in effect a policy decision, Lord Denning asserted that the issues should be articulated in terms of public policy and the litigants should eschew the rights-duty jargon.¹¹⁶

Dworkin was highly critical of this approach. He believes that judges should restrict themselves to the controversy and not allow matters of general policy to influence their positions.¹¹⁷ Courts should not act as deputy legislatures making decisions based upon policy issues, and thus, judges should be restrained to decide controversies according to legal precepts, and not policies. Dworkin would conclude that Lord Denning's approach in *Spartan Steel* was wrong; he should have decided the damage issue on rights and duties, or in terms of proximate cause.

¹¹² *Id.* at 4-7.

¹¹³ *Id.*

¹¹⁴ *Id.* at 82-86.

¹¹⁵ 1 Q.B. 27 (1973).

¹¹⁶ *Id.* at 36.

¹¹⁷ DWORKIN, *supra* note 21, at 83-84.

The basic distinction between judges and the legislature in the decision-making process is that the former should refrain from legislating policy. The reasons are that legislatures as elected bodies are in a structurally better position to make decisions on policy according to concepts consistent with democratic principles.

The concept that cases should be decided on the basis of principles is at the foundation of Dworkin's "rights thesis."¹¹⁸ Its purpose is to delineate the proper area of court decision-making by rationally limiting judicial discretion. Consistency is deemed essential in the judicial process. For example, a legislature could properly vote a subsidy to an aircraft manufacturer one week, and deny a manufacturer a subsidy the next week, possibly on the grounds that the aircraft subsidy would not be in the best interests of the community. But in a judicial process based upon principles, a judge cannot allow one couple to use contraceptives and then deny them to others. Thus, judges are properly concerned with precedent based upon principles. If judges based their views on their own broad concept of policy, this would not be the case.

E. *The Thirteenth Labor of Hercules—the Hard Case*

Hercules is Dworkin's ideal omnipotent judge and is used as an example in illustrating the process used in deciding a hard case.¹¹⁹ Hercules first constructs a political system complete with a constitution and courts. He then asks what role the judge should play and whether precedent should be binding. Hercules would answer that the gravitational pull of precedent is an appropriate source of adjudicatory material. This decision, however, is not a simple matter. Dworkin states:

In fact, judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all. In some cases both the majority and the dissenting opinion recognize the same earlier cases as relevant, but disagree about what rule or principle these precedents should be understood to have established. In adjudication, unlike chess, the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified, the judge who does so is likely to be celebrated in law school lectures.¹²⁰

Nevertheless, the presence of a gravitational pull of precedent creates a judicial imperative not found in the exercise of legislative

¹¹⁸ *Id.* at 84.

¹¹⁹ *Id.* at 105-30.

¹²⁰ *Id.* at 112.

power. "The most important of these . . . [conclusions] is that . . . [a judge] must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions."¹²¹ This contrasts with decisions based on policy or legislative decisions where consistency is not particularly required. The rights which flow from the gravitational force of precedent can be referred to as "institutional rights."¹²²

Hercules then constructs a pattern from the law in the area in which he is dealing. If faced with conflicting precedents, it appears that Hercules can follow whichever he desires on the assumption that the other is a mistake. However, there are limits placed on his actions. He must show that the notion of allowing for mistakes is a stronger justification than any alternative that does not recognize mistakes, or that recognizes a different set of mistakes.¹²³ The judge should seek a principle which will not be inconsistent with other branches of law. Thus, in Dworkin's construct of Hercules, the judge by completing this process does not act with uncontrolled discretion when faced with conflicting precedents. His discretion is curtailed by the necessity of discovering preexisting rights.

In the decision-making process, Hercules must make political and moral judgments.¹²⁴ While judgments may differ among judges, decisions should not be decided solely on a judge's individual view of how a case is to be decided. Dworkin maintains that a judge should instead hold a "theory about what the statute or the precedent itself requires, and though . . . [a judge] will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his."¹²⁵

Hercules does not necessarily defer to the view of the majority and does not use precedent based upon a theory that judges exercise discretion in the open-textured areas. "[Hercules] uses his own judgment to determine what legal rights the parties before him have, and when that judgment is made, nothing remains to submit to either his own or to the public's convictions."¹²⁶

The discovery process of Hercules exemplifies the idea that principles governing hard cases are internal to the law.¹²⁷ He necessarily incorporates the realm of political morality, an area in which judges often dif-

¹²¹ *Id.* at 113.

¹²² *Id.* at 114-15.

¹²³ *Id.* at 118-23.

¹²⁴ *Id.* at 126.

¹²⁵ *Id.* at 117-18.

¹²⁶ *Id.* at 105-30.

¹²⁷ *Id.*

fer.¹²⁸ The entire system tends to result in a theory of substantive justice derived from a constitution. This theory is founded upon a concept of equality and involves the right of the individual to equal concern and respect. These values, which may be derived from the equal protection and due process clauses of the constitution,¹²⁹ should prevail even if they do not inure to the benefit of the majority.¹³⁰ Thus, rights guaranteed by the constitution prevail without regard to their impact on the majority or to their sometimes controversial nature.

F. *Dworkin Finds There is One Right Answer in Hard Cases*

Though rights may be controversial, Dworkin argues that there is still one right answer in hard cases.¹³¹ Dworkin arrives at this conclusion by rejecting alternative theories that there is no right answer to hard cases.¹³² These arguments he finds incapable of convincing proof. Dworkin characterizes the position of the no right answer theorist as one in which that theorist finds arguments on both sides, *i.e.*, a "tie."¹³³ A "tie" would be a situation where there is nothing to choose between the proposition favoring the plaintiff and the proposition favoring the defendant. The theorist would then affirmatively assert that it is wrong to say that either the proposition favoring the plaintiff was correct, or the proposition favoring the defendant was correct. Dworkin argues that the no right answer theorist cannot positively assert that the right answer thesis is incorrect because it does not conform to reality perceived outside the legal arena.¹³⁴ He concludes that such an affirmative statement would presuppose, by analogy, the very thing Dworkin proposes as true within the legal system—that there *are* right answers outside the legal system. Finally Dworkin asserts that the idea of one right answer is psychologically deeply ingrained and a coherent denial of it is therefore very difficult.¹³⁵

G. *The Rights Thesis Summarized*

Summarizing Professor Dworkin's rights thesis, we find at the heart of it is assertion that rights are inherent in the constitution and its interpretive cases.¹³⁶ This, together with several other factors, limits and controls the exercise of judicial discretion. Judges discover rights by

¹²⁸ *Id.* at 123-26.

¹²⁹ U.S. CONST. amend. V; amend. XIV. *See* DWORKIN, *supra* note 21, at 180.

¹³⁰ DWORKIN, *supra* 21, at 272-77.

¹³¹ *Id.* at 279-90.

¹³² *Id.*

¹³³ *Id.* at 279-87.

¹³⁴ *Id.* at 280.

¹³⁵ *Id.* at 281.

¹³⁶ *Id.* at 290.

constructing a political theory and then consistently applying historical precedents to a given factual situation. Though personal predilections may influence judges, they basically affirm what is already there.

Judges must make political and moral judgments, and while searching for the right answer to a hard case, they must also be aware that colleagues, if faced with the same situation, may come to a different result. But a decision must not rest solely on the basis of individual beliefs.

There is no absolute test to aid the judge in his quest for the right answer. However, the results of Hercules' efforts refute those skeptics who would say that one answer is no better than another. Thus, there is a right answer even in hard cases. Rights may be controversial for it is possible to have disagreement about the precise nature of a given right and still have one right answer.

VI. EVALUATION OF DWORKIN

Basically, my differences with Dworkin begin with a contrary view of his premises. The adjudicative process does not function as Dworkin would have us believe. First, the idea that judges discover rights which inhere in the constitution and cases interpreting it or other legal materials does not accurately reflect the legal process. Judges do not put aside their personal preferences when they decide cases. They often decide first and then rationalize later. Constructs from the constitution and its decided cases tend to be biased and accordingly, they offer little, or else too much, in terms of preexisting institutional rights. The theory that certain institutional decisions are mistakes allows the construction of a theory to fit the preconceptions of the decision-maker.

Second, courts do not limit their decisions to principles but do allow policies to enter into the decisions-making process. The example of Lord Denning in *Spartan Steel* may not be atypical. He may just have been candid about it. For another example, a policy question may exist as to whether a case should be decided on its facts or in light of its resulting effects. Also, Dworkin's distinction between principles and policies is founded upon the presuppositions that a degree of consistency is expected of the courts which often is not the case.

Third, Dworkin argues that rights can be controversial—it is possible to have disagreement about the precise nature of rights and yet hold that there is often one right answer. Thus, in order to have the one right answer among conflicting principles, there must be only one "best" principle among them. What ultimately do you say to another asserting that your decision in a particular case is wrong? Nothing allows one to assume that he is right while others are wrong on a given decision.

A. *The Notion of Discoverable Rights in Institutional History is Erroneous*

Dworkin contends that the principles governing hard cases are

discoverable from preexisting data *i.e.*, constitutions, statutes and cases.¹³⁷ Judges in citing broad ranging principles of political morality do not decide cases outside of the legal system. The major flaw in this analysis is that it overlooks reality. Generally, there is either too much institutional history or too little. An example of a great amount of institutional history is the constitution and decisions interpreting it. Dworkin would argue that the existence of a large amount of institutional history will lead to a conclusion of more clearly defined rights of the parties, yet, the voluminous amount of material often has the effect of providing no helpful guidelines or too many conflicting guidelines for reaching a result in the decision-making process.

Take for example the "institutional history" of first amendment rights of communists.¹³⁸ The same holds true where the institutional history is almost non-existent. The absence of precedent and binding law opens the floodgates, churning forth uncontrolled and unlimited discretion. Institutional history is not necessarily pregnant with a single discoverable answer, therefore its use as a pragmatic tool in justifying decisions is limited.

B. *The Distinction Between Principles and Policies Does Not Hold*

Principles are precepts which determine rights between parties to litigation whereas policies are general community goals which the legislature properly addresses in its law-making function. Dworkin contends that judicial decisions should be supported with principles. This, however, is not how the judicial process works. It has always been part of the judicial decision-making process to make a decision in light of the implications of a principle to its related policy. Principles can be abstracted, but they exist in a constellation where they are embodiments of policy.¹³⁹

¹³⁷ *Id.* at 82.

¹³⁸ N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 76-171 (4th Ed. 1967) (Communists and "subversives").

¹³⁹ See Hughes, *Rules, Policy and Decision Making*, 77 *YALE L.J.* 411 (1968). See also Dworkin, *Seven Critics*, 11 *GA. L. REV.* 1201, 1203-23 (1977) (Dworkin draws the distinction between arguments based on policy and arguments of principle depending on consequence to support his view).

Dworkin does address the question of counterexamples to his thesis that there ought to be a distinction between arguments on principles and policies. He states that there is such a counterexample where the judge decides that the plaintiff should prevail as a matter of community policy even though he has "no right" (in the sense of a moral right translated into a legal right) to prevail. Is Dworkin then only saying that it is rare for a judge to decide in a party's favor based on community policy while thinking they have no preexisting right—moral and legal—to such a decision? This is, I agree, not usually what occurs in decision-making. What usually happens is, however, that arguments of policy are inextricably connected with the question of whether the particular party has a right in the case. The judge may vindicate that right because it accords with his view

Dworkin further supports the distinction by stating that the desired values or expectations of consistency in the judicial process are different from those of the legislative process.¹⁴⁰ Judges should be consistent, he argues, but there is no such necessity with regard to legislators. This simplification overestimates the need for legislative consistency. For example, in the area of private property it is felt that vested rights should not be disturbed by the legislature. Furthermore, the idea of consistency involved in treating cases with a similar factual situation alike in the judicial arena can be and is avoided by the use of distinguishing precedent. Therefore, where principles conflict, and institutional history is no guide, where can we go except to policy? Precedents often conflict, and to ignore certain precedents as "mistakes" is highly subjective. The net result often may be to have a decision ultimately based upon policy grounds.

C. *Is There a Right Answer in Hard Cases?*

Dworkin's thesis that there is a right answer in hard cases is courageous in these times of moral relativity, but does it hold up? Dworkin shifts the burden nicely in his discussion of the "tie." There he argues that one asserting there is no right answer might be put in the position of saying that there is a "tie." He states that in an advanced legal system with an accumulation of institutional history, this is unlikely. I am not so sure.

Be that as it may, consider this hypothetical, if you think that desegregation is wrong and I think it is right, what can you say to me? We can make arguments, legal and otherwise, but you remain unconvinced. I can never be totally sure you are wrong. There is a question of time and place, backlash in other spheres, counter-productivity, the implementation of goals and so on. All I can say is I think I am right, I respect your right to differ, and there is nothing anywhere that allows us to resolve it in this life.

There may be "ties" in regard to a determination of in which jurisdiction venue should lie in breach of contract cases, for example. But if you really want to quarrel with me, I have to "fold" in the sense that I cannot rely on external standards to support my views. I have views. I make decisions. If you think I am wrong, you may be right. I cannot affirmatively say that definitely you are wrong. By all means let us ex-

of an appropriate broad community policy. Thus, a judge creates (not finds) a moral right, translates it into a legal right and finds that this right vindicates an appropriate community policy.

The process of decision-making, in my opinion, involves an inextricable weave of moral beliefs, conflicting principles and policy, in a gestalt that is not, aided by the principle/policy distinction urged by Dworkin.

¹⁴⁰ DWORKIN, *supra* note 21, at 112.

plore the situation as far as we can, but let us not put more of a burden on reason, morality or constitutional history than it can bear.

D. *Dworkin's Contribution*

Dworkin's view may be seen as a middle position between legal realism, natural law and positivism. The emphasis on the extent to which the selection of rules and determination of their applicability to facts is controlled by principles penetratingly shakes-up the "ruling theory" of positivism. The incorporation of political morality as the focal point which determines the selection of principles serves to reunite law and morality. These contributions are substantial and praiseworthy, but the insistence on the presence of preexisting rights in institutional history yielding one right answer is not descriptive of the legal arena or the world.

VII. CONCLUSION: LAW SHOULD SERVE THE CULTURE IN WHICH IT EXISTS

As this article has suggested, the positivist description does not adequately explain the legal process. Law is too much in a state of flux; society's values are too pluralistic; and the democratic process exposes too many moral and social values to make one content with a rule-oriented positivistic approach, or a rigid *stare decisis* approach.

The law should be viewed as a set of principles often inconsistent and in conflict, the choice of which is governed by a decision-maker's perception of appropriate policies. These policies may be political, economic and social and may or may not be directed toward changing society's mores and customs. The decision process further involves a moral judgment of which policies are appropriate.

Jurisprudential schools, and positivism in particular, are struggling with the problem of subjectivity and seeking theories which can be verified externally. However, the human factor does play an undeniably important part in decision-making. Legal positivism seems to underplay the essential validity of sociological jurisprudence, and unduly isolates the moral tenets of natural law. Dworkin seems to be closer to reality by including political morality in his decision-making process.

For the realist, forces of custom, morals and social practice, even if lacking in objective validity, are relevant and are called into play by the subjective application of the decision-maker. The realists are correct when they call for a conscious realization of the subjective role of the individual decision-maker and the abandonment of the idea that results are dictated.

Positivism obscures too much of what is actually going on in the legal process. If the positivists are correct in indicating that law can be derived from rules, cases or codes, then the element of choice is largely eliminated. If there is no choice, individual predilections play no part

and there is very little place for the moral realm. Also eliminated is the concept of a judicial choice between competing interests or decisions as to the proper relation between custom and law. If, with the positivists, we ask only the question of what rules officials accept, this tends to exclude the notion of goal, purpose and function. But in fact decision-makers are purposive and are guided by abstract notions of justice and fairness.

In indicating the limitations of positivism, however, we must not throw the baby out with the bath. Positive law has reasons for accepting it, such as the expectation interest and a need for order and continuity in the legal sphere. However, when the decision maker accepts positive law, he makes a moral choice.

Admittedly, what remains is not the neat, coherent analysis of primary and secondary rules, but something rather chaotic. But to suggest that there are conflicts between approaches to jurisprudence should not blind us to the fact that there are common and complimentary features. Moreover, the concept of total confusion is psychologically unacceptable. If it were true, we would have to invent a way out. Individuals who have to manipulate the system cannot live with the idea that it is a confusion. While inviting the reader to view the possibility that the legal realm is a jungle, at least some parameters have been narrowed. What we are led to is the addition of elements of natural law, realism, and sociological jurisprudence. Thus we are left with the desirability for a merger of the elements of natural with the positive law.

Thus, the world waiting on the other side of positive law is not neat and trim, it is controversial: the sociological analysis with a functional approach is there with its basic question—what is the effect of this law on society? The realists, or at least some realists, would ask the same question once they have cleared the opaque thicket of legal jargon. Natural law, unless perceived dogmatically, waits also to ask, what are the appropriate moral tenets of the society and, basically, is this the correct result?

What remains is not a system in which there is one right answer to hard cases. Perhaps the most crucial problem or crisis in jurisprudence today is the lack of an accepted moral authority and the moral relativity thereof. One other question recurs. If the United States Supreme Court is the secular heir to the legacy of the religious authorities of the past, can it preserve its moral authority in the face of revelations that there is no right answer in hard cases?

I would like to believe the answer to that question is yes. But in any event, work can fruitfully be done to refine a model further which would eclectically bring together the best of each of these approaches. It is true that the element of the random, the enigmatic and the mysterious will remain. Perhaps the best evidence of this is the way practitioners respond by combining approaches and shifting them according to the

various situations in which they find themselves.¹⁴¹ Nonetheless, the building of value systems should be attempted, and dialogue pursued to obtain a consensus on desired values.

¹⁴¹ See Van Doren, *Jurisprudence: What Does It Matter?*, 5 FLA. B.J. 326 (1980).

