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TOWARD A THEORY OF JUDICIAL DECISIONMAKING: A SYNTHESIS OF IDEOLOGIST JURISPRUDENCE AND DOCTRINALISM

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The two most frequently debated issues in modern jurisprudence are the relationship between law and morality and the degree to which judicial decisionmaking is rational. This essay explains and critically analyzes the two most recent attempts to answer these questions. It discusses the ideological position of certain neo-Marxists as well as the position taken by Ronald Dworkin in his right answer thesis. Finally, the paper borrows freely from both positions to devise a synthesis which depends heavily on the enterprise of moral reasoning.

In evaluating a theory of jurisprudence, the following seven tests will be used: (1) Does it account for the phenomenology of law as experienced by judges and ordinary citizens?; (2) Does it account for the significant amount of rational constraint which is noticed in the judges' justificatory enterprise?; (3) Does it explain and rationalize a significant amount of legal doctrine and decisions and criticize the remaining doctrine and decisions?; (4) Is it compatible with certain elements of the rule of law such as treating like cases alike and providing prior notice and predictability?; (5) Does it recognize concrete social reality?; (6) Is it clearly articulable?; and (7) Is it viewed as plausible by the larger society?

What justification can be marshaled for these seven tests? First, such

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tests assume that the descriptive and prescriptive aspects of law are related closely, and that certain formal and logical requirements are necessary if the law, taken as a whole, may claim even the possibility of systemic coherence. To deny, at the outset, these elements of the rule of law fails to account for the view that legal materials form a coherent whole, while including a minimalist conception of the rule of law falls far short of reconciling the question in favor of that view.

Second, the seven tests presume that the experiential element of judicial decisionmaking is necessary to a sound theory of law. Judges *feel* they may take certain actions, but may not take other actions, in discharging their functions, thereby acknowledging constraints on judicial behavior which they either respect or circumvent. In doing so they recognize, at least tacitly, that they are not totally free from the legacy of past doctrine and practice.

Judicial constraints, however, should not be considered merely in the abstract; the present economic, political, and cultural conditions which comprise concrete social reality also must be considered. The input of citizens as recipients, reinforcers, and initiators, of that "concrete social reality" must be accounted for in any jurisprudential theory because such input greatly affects the actual decisions and perceptions of both judges and legislators. Further, the presuppositions of the law must be viewed as plausible by the larger lay society; otherwise, the legal system could exist only by means of brute force, and its prescriptive dimension would be meaningless.

Third, a legal theory must be articulable. This is no trivial requirement, and its importance may be seen by way of an analogy to the philosophical theory of ethical egoism. Opponents of ethical egoism argue that the doctrine is self-contradictory because its proponents cannot consistently articulate the doctrine to others and simultaneously fulfill the doctrine's substantive demands. To avoid this dilemma, any moral or legal theory must be constructed so as to allow its proponents to advocate and practice it without the charge of inconsistency.

Lastly, a sound legal theory cannot be constructed in a conceptual vacuum, but must confront an already extant body of judicial decisions, legislative enactments, and executive orders. A legitimate theory must explain and rationalize much of legal doctrine, while concomitantly possessing the critical power to label as mistakes those doctrines and decisions it cannot explain. The theory, then, must at once be both explanatory and critical.

The use of these seven tests reflects this author's inclination, when composing a legal theory, to combine the theoretically abstract and formally necessary with the experiential. Ultimately, this set of criteria will be contestable and controversial. However, there exists such a strong intuitive appeal in combining the abstract and the concrete that one trusts

most readers will find this method viable.

This essay argues that both the neo-Marxists' and Dworkin's theories fail certain of the seven tests. Moreover, in this writer's opinion, the view presented in Part Three passes the seven tests and thereby constitutes an improvement over the other views. The tacit assumption of such a claim is that the scheme proposed in Part Three can better reconcile the traditional ideal of justice with the phenomenology of judicial decisionmaking.

The ideal of justice requires that judges arrive at legal decisions in an objective, rule-like fashion. To maintain a government of laws and not men, judicial decisionmaking should not be the product of individual judges' prejudices, self-interests, and ideologies. While the law may not be totally complete and coherent, the traditional ideal of justice demands that its gaps be relatively few and that the doctrine of *stare decisis*—the conscientious, although not absolute, following of precedents—prevail.

The phenomenology of actual judicial decisionmaking often appears to stray from this ideal. A layperson may too easily conclude that judges first decide cases on the basis of political ideology and then invent or manipulate the conceptual devices of the law to rationalize their decisions. It is this apparent conflict between the idea and the phenomenological which the proposed legal theory resolves.

I. LAW AS IDEOLOGY

The layperson's impressions of the legal process have led some to adopt the view that law is ideology.¹ Under this view the law is a fluid

¹ One commentator, in particular, has repeatedly enunciated and criticized the philosophies, policies, and principles found to underly modern legal reasoning. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983). Professor Unger postulates that the formalist and objectivist traditions form the basis of modern legal thought. *Id.* Formalism "invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning." *Id.* Objectivism promotes "the belief that the authoritative legal materials . . . embody and sustain a defensible scheme of human association. They display . . . an intelligible moral order." *Id.* at 565. These two views, however seemingly irreconcilable, encompass one another since "formalism presupposes at least a qualified objectivism." *Id.*; R. UNGER, *KNOWLEDGE AND POLITICS* 191-200 (1975); R. UNGER, *LAW IN MODERN SOCIETY* 43-46 (1976); see also Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976). Duncan Kennedy adopts the view that "there are two opposed rhetorical modes for dealing with substantive issues [found in American private law opinions, articles, and treaties] . . . —individualism and altruism." Kennedy, *supra*, at 1685. Additionally, Chaim Perelman posits that "formal justice" encompasses the notion of imperfect equity wherein inevitably contradictory and incompatible rules may be simultaneously applied in a minimally arbitrary manner based upon the underlying values of a common normative system. C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 59-60 (1963); see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 2 (1977); Balbus, *Commodity Form and Legal Form*, 11 LAW & SOC'Y REV. 571, 575-76 (1977); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of*

process which is not embodied in stable legislative doctrines or judicial holdings but which is revealed in the ideological arguments underlying judicial decisions and legislative histories. These ideological arguments are based on political perspectives, such as libertarianism, Marxism, socialism, liberalism and conservatism, which in turn are not grounded in rational conceptions, but instead reflect a web of attitudes, passions, and emotional responses to empirical events. Additionally, such perspectives are less coherent, less clear, and less stable than rational conceptions. These ideologies not only emanate from social, political, and economic reality, but they also reflect back on that reality and are used to persuade people to accept it. The traditional jurisprudence of reasoning from precedents, distinguishing cases, and applying settled doctrines is considered a catalog of rationalizations which serves to shroud the process with a veneer of objectivity. Although judges *appear* to provide rational demonstrations of their decisions, their actual method of argument is one of nonrational persuasion structured by their political perspectives.

This portrayal of law is one consisting of several ideological structures, each accounting for and explaining a significant portion of lower level legal doctrine and criticizing the rest. Taken cumulatively, these structures explain and rationalize almost all lower level doctrine while criticizing the little that remains.² The requirement that a theory of law must "rationalize a significant amount of legal doctrine and criticize the rest" immediately eliminates an enormous amount of ideology from being considered legitimate legal ideology. The few remaining legal ideologies are in constant conflict with one another. Moreover, the ideologist asserts that ideological conflict is unremitting and fundamental, a conflict inca-

Critical Social Thought About Law, 11 LAW & SOC'Y REV. 527, 541-42 (1977); Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81. Professor Tushnet traces the development of American law and comments upon the dual influences of societal norms and "autonomous internal dynamics," and their impact on the legal structure as well as on the social order. Tushnet, *supra*, at 82-83; see Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method For Critical Legal Theory*, 61 MINN. L. REV. 601, 601-02 (1977). Professor Peter Gabel best sums up the argument that the law is composed of "interpretive activity, arising in concrete social situations . . .," and thus the legal structure encompasses a "mode of interpretation at the level of the implicit legal consciousness moving within the whole of social discourse." Gabel, *supra*, at 601-02. See generally Klare, *Law-making as Praxis*, 40 TELOS 123 (1979). Although the theorists under discussion here do not comprise a recognized school of thought, they reflect the common assumptions that ideal conceptions animate the law and that law embodies a recurrent battleground for ideological conflict. Further, they share the view that societal visions of an ideally ordered world comprise legal theories.

² Since passions, prejudices, and politics comprise the basis of judicial opinion, some lower level doctrine conceivably may fall outside the bounds of legitimate ideology. See Kennedy, *supra* note 1, at 1713 n.74 (describing lower legal level doctrine as without "spirit").

pable of mediation by any sort of arbiter or by appeals to objectively grounded metaethical or metaepistemological principles. Therefore, any judge who consciously accepts the ideologist position presumably agrees that his perspective is subjectively based and not objectively verifiable.

There are three main versions of the ideologist position that might be advanced. The extreme theorist holds that judges may embrace *any* ideology as the basis of judicial decisions so long as that ideology is not viewed as totally implausible by that judge's society. For example, a blatantly Nazi ideology would be an impermissible theoretical ground for decision in contemporary America. On the other hand, the extreme theorist does not require formal consistency of judges. A judge may validly render one decision based on ideology X (a legitimate ideology), others based on ideology Y (a competing legitimate ideology), and still others based on ideology Z (a non-legitimate legal ideology, but one not viewed as totally implausible by the citizens of the judge's society).

The extreme theorist's position appears untenable.³ The danger is that the lack of formal consistency inherent in unremitting ideological conflicts would bring about ad hoc decisionmaking. Judges who are constrained only by the requirement that their decisions reflect an ideology not considered totally implausible by their society, may choose among the available alternatives without regard for consistent judgments. As a result, the public would not only have unstable expectations but also virtually no notice of the requirements of the law. Even if a single judge ruled on all cases in a single jurisdiction this problem would exist under the extreme theorist's jurisprudence. A citizen might well be unable to step into the same judicial river twice.

The less extreme theorist holds that judges do, and should, make decisions on the basis of legitimate legal ideologies only, but does not require that judges consistently ground decisions on the same ideology. That is, a judge could make one decision based on ideology X, others based on ideology Y, but none based on ideology Z. Hence, judicial discretion is constrained only marginally by a limited field of ideologies from which a judge may choose.

The less extreme theorist's position is not quite as objectionable as the extreme theorist's, but retains elements of simplistic legal realism.⁴ It

³ The extreme theorist's position is presented here for illustrative purposes only. It is not suggested that any authority seriously has advanced it. Indeed, though an autonomous advancement of law arguably leads to the conclusions that social values coincidentally mold legal doctrine, Tushnet, *supra* note 1, at 85, the law nonetheless maintains a relationship to the wider society, while not precisely mirroring it. *Id.* at 82-83.

⁴ Judge Frank, a noted exponent of legal realism, has observed that conventional, complacent theories about the workings of the judicial system perpetuate the myth that law is certain and predictable. J. FRANK, *A MAN'S REACH* 151 (F. Kristein ed. 1965); see J. FRANK, *COURTS ON TRIAL* 1-3 (1949) (public ignorance of how the judicial system functions obscures

denies that a judge decides cases in part because he feels constrained by prior precedents and interpretations, even though he would like to have decided the case in a contrary way.⁵ The less extreme theorist asserts not only that legal decisions do not *sometimes* have a uniquely correct answer determined by prior legal materials, but that such decisions never or almost never have a uniquely correct answer. In effect, the theory contends that there is no such thing as an easy case. All or almost all decisions are penumbra cases resulting from an almost unbridled exercise of judicial discretion. The less extreme theorist is thus at the opposite pole from the radical legal formalist who would embrace a strictly mechanical jurisprudence,⁶ for he claims that there exist neither objective criteria nor rational constraints which compel judges to render decisions in any given case. Under the less extreme theorist's doctrine, if enough judges felt significant ideological conflict within themselves, the same pernicious results endemic to the extreme theorist's doctrine could occur. The difference between the two doctrines is one of degree, not one of kind.

The moderate theorist would require both a legitimate ideology and consistency.⁷ That is, once a judge chooses ideology X all his decisions do

the institution's shortcomings); J. FRANK, *LAW AND THE MODERN MIND* 127-28 (1970).

Additionally, Felix Cohen espouses the desirability of appealing to realism to supplant the value judgments that ground judicially and legislatively created myths. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 810-12 (1935). Cohen criticizes the familiar definition of law as "prophecies of what the courts will do in fact." *Id.* at 835 (quoting Holmes, *Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897)). Interestingly, Cohen objects to Judge Frank's argument that the definition of law must be found as much in "what courts do" as in what courts are. Cohen, *supra*, at 835 n.72.

⁵ See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142-55 (1932) (natural law based on standards of justice and community habits suffices as basis of decision when the law leaves the situation uncovered by any preexisting rule); A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 556 (1956) (noting cases in which judges upheld laws which they believed led to wrongly decided cases).

⁶ Mechanical jurisprudence is one method of assessing the various influences on the development of formal law. See M. WEBER, *LAW IN ECONOMY AND SOCIETY* 61-64 (M. Rheinstein ed. 1954). There are five postulates involved in the mechanical jurisprudence process:

First, every legal decision is an "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least be treated as if it were such a gapless system; fourth, that whatever cannot be "construed" legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or an "execution" of legal propositions, or as an "infringement" thereof.

Id. at 64 (footnote omitted); see also, Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *HARV. L. REV.* 195, 204-13 (1914).

⁷ See B. CARDOZO, *supra* note 5, at 149-52. Justice Cardozo ascribed to the proposition that "adherence to precedent should be the rule and not the exception," *id.* at 49, lest defendants be surprised unfairly by a lack of notice of liability, *id.* However, he conceded that the

and should emanate from *X*. If any conclusions are based on ideology *Y* or *Z* the judge may be criticized for being internally inconsistent and arbitrary. The judge may use an argument based on *Y* to reach a conclusion compatible with *X*, but cannot reach a conclusion based on *Y* incompatible with *X*. This moderate breach of ideology places considerably greater importance on the consistency of legal decisions rather than on the consistency of argument patterns.

The moderate theorist's descriptive position is that judges unconsciously manipulate legal materials to conform to their own ideological suppositions. The only essential constraints on judges are political prudence and a desire to persuade. Traditional perceptions of rational constraints are thought to be disintegrating, although this alleged trend admits variations and degrees. The moderate theorist's prescriptive position counsels judges and legal analysts to become conscious of the multi-ideologies generating judicial decisions and of the decisionmaking process judges in fact employ. Some modern theorists then proselytize for a certain one of these ideologies,⁸ although they acknowledge that neither objective principles nor existing legal materials necessitate a choice among competing legitimate legal ideologies.⁹ Others suggest that all existing legal ideologies are inadequate and call for evolution to more refined theories.¹⁰

The moderate theorist's presentation of the argument that "law is

rules of precedence must be abandoned or relaxed when "a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare . . ." *Id.* at 150. Thus, *stare decisis* retains its validity only when grounded on a legitimate ideology. *Id.* at 150-52.

⁸ See, e.g., Kennedy, *supra* note 1, at 1713-22 (describing the contents of the ideals of individualism and altruism and concluding that a connection exists between individualist's preference for rules, and altruist's preference for standards in the rhetoric of private law); Unger, *supra* note 1, at 564-67 (discussing the concerns of formalism and objectivism, and their dual influence upon the elements of lawmaking).

⁹ Existentialist philosophy suggests an analogy to moderate theorist jurisprudence. See EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 11-51 (W. Kaufman ed. 1956); K. JASPERS, REASON AND EXISTENZ 107-26 (W. Earle trans. 1955); S. KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 169-224 (D. Swenson & W. Lowrie trans. 1944).

Existentialist philosophers differ considerably among themselves, but certain elements are common to them all. For example, the body of existentialists seek to strip away all illusions and self-deceptions in order to allow man freedom to choose and acknowledge responsibility for his choices. The existentialist denies the validity of tradition and objective norms, and revels in subjectivity, openness and awareness of freedom.

Similarly, the moderate theorist seeks to strip away the sham of distinguishing cases and the self-deception of reliance of precedential reasoning. A judge should recognize his freedom and avoid becoming remote from present conflict by hiding behind the cloak of legal pseudorationality.

¹⁰ Richard Parker posits that a majority's conscious acknowledgment of ideologist jurisprudence would lead to a partial dismantling of the current legal system.

ideology" is the most plausible of the three discussed herein, and it is to that position that the words "ideology" or "ideologist" will refer in future use. Confinement of criticism to this moderate form of the ideologist's position is warranted by the serious nature of the challenges it presents to traditional jurisprudence. The ideologist's claims that there are no objective criteria for judicial decisionmaking, that discretion is all-encompassing, and that judicial constraints are virtually nonexistent must be met by any successful theory of law. It is the task of the next few sections to meet those claims.

II. OBJECTIVITY IN THE LAW

Several different notions of "objectivity" in the law can be explained and examined. *Metaphysical objectivity*¹¹ is embraced by those who contend that the structure of reality, independent of and external to all individual perceivers, provides the basis for determining correct judgments. On the moral level, correct judgments are those corresponding to the reality of the impersonal nature of the universe, or the nature of human beings, or the imperatives of a supernatural being. On the level of judicial decisionmaking, correct judgments are those corresponding to the reality of a completely coherent set of legal materials—rules, norms, principles, policies, etc.—which insures a logically correct result for each case. Such a process need not be totally mechanical, at least not in hard cases, for judges would still have to discern the proper set of materials to apply to the individual fact pattern at hand. But presumably, a judge's own prejudices, political beliefs and ideological perspectives would not enter into the decision. A judge should reason as follows: "I realize that I possess perspective X, but X is totally irrelevant to my decisionmaking. I am constrained by legal materials which determine the results of my decisions. My role is one of dispassionate inquiry toward the correct result that I discover and do not invent."

Communal objectivity may be of two sorts. *Societal consensus* suggests that the moral and legal beliefs of the community ultimately confirm or nullify the conclusions judges reach.¹² Insofar as the community's consensus transcends a judge's personal political or moral beliefs it im-

¹¹ An important exponent of metaphysical objectivity can be found in the work of Thomas Aquinas. See 2 F. COPLESTON, *A HISTORY OF PHILOSOPHY* 302-439 (1957).

¹² See Reynolds, *The Concept of Objectivity in Judicial Reasoning*, 14 W. ONT. L. REV. 1, 22-27 (1975). Noel Reynolds asserts that within the last half century the concept of objectivity has become accepted in both jurisprudence and the philosophy of science. *Id.* at 20. In jurisprudence, as in science, the appropriate form of objectivity lies not in mechanical procedures but in "publicly corrigible claims" about law and its case-by-case application. *Id.* at 23. Reynolds agrees with Ronald Dworkin that the demand for justification forces a judge to depend upon a "coherent theory of the law and morality in . . . society." *Id.* at 27.

poses an objective, external constraint on him. This does not transform the community's beliefs into a metaphysical *entity*. In accordance with a theory of communal objectivity, a judge should reason as follows: "I realize that I possess perspective X, but X is totally irrelevant to my decisionmaking. I am constrained by legal materials, and in their absence, by the moral and legal beliefs of the community. I cannot make decisions on the basis of my perspective and then buttress such decisions by the use of a *plausible* legal argument. I must decide on the basis of legal materials and objective community standards which should reflect the *best* legal argument."

Principles may be communally objective, not because they are considered true by societal consensus, but because they are presupposed by the institutions and constitution of that society.¹³ To illustrate, it is conceivable that a majority of modern Americans would reject a number of the guarantees insured by the Bill of Rights. Nevertheless, these guarantees reflect principles objectively presupposed by our governmental institutions and may thus be considered communally objective.

Neither societal consensus nor principles presupposed by our institutions need be considered examples of timeless truths or reflections of the structure of reality. Proponents of communal objectivity claim only that judges are engaged in reasoning of a public nature with society and that public standards ultimately verify or invalidate judges' opinions. Hence, they serve as objective constraints on judicial decisionmaking.

Perspectival objectivity contends that judges are constrained by certain requirements of the judicial point of view. Formal requirements of impartiality, attentiveness, disinterestedness, and rationality mark the bounds of justified judicial latitude in decisionmaking. Thus, judges are required to treat like cases alike; to avoid conflicts of interest and favoritism; to attend carefully to the legal materials applicable to the case, and to discern their significance to the instant case; and to arrive at the best decision.¹⁴ Unlike the previously discussed positions, perspectival objectivity does not contend that the metaphysical structure of reality dictates uniquely correct decisions, or that community consensus serves as the

¹³ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 79-80 (1977). Dworkin advances the communal objectivity notion that principles are presupposed by societal institutions. *Id.* at 79. For a more detailed discussion of Dworkin's analysis, see, Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1968); *infra* notes 19, 22-23, 25, 28 and accompanying text.

¹⁴ Perry, *Judicial Method and the Concept of Reasoning*, 80 ETHICS 1, 8-9 (1969). Thomas Perry postulates that in all case decisions, a judge must first select "the legally relevant facts of the case and the controlling standard." *Id.* at 8. During this pre-deductive stage, the judge is expected to: (1) carefully study the case, (2) remain impartial, (3) be free from any conflict of interest, and (4) be rational. *Id.* Perry suggests refining the self-imposed judicial controls by requiring judges to advance some formal justification composed of judicial reasoning and arguments where no clear decision under the law exists. *Id.* at 17.

prime external constraint on judicial decisionmaking. It suggests instead that certain formal requirements of the judicial frame of mind possess a sufficiently objective character so as to restrain a judge from justifiably deciding cases on the basis of personal ideology.¹⁵

The ideologist criticizes the objectivist on several grounds. In the first place, he argues that belief in metaphysical objectivity is self-delusion. It assumes that too much of the law is unambiguous and that completeness and total coherence pervade legal materials. Further, it cannot prove its assertion that every case has a right answer. It attempts to disguise the phenomenon of arbitrary judicial decisionmaking with rational pretense, and ignores the judicial role in creating the law.¹⁶ It wrongfully denies that judges' emotions and prejudices color their reactions to fact patterns and the application of legal concepts, and that the light of reason may not be adequate to reach a right answer in all situations. Just as the believer in natural moral law rested his dogma on implausible metaphysical assumptions—the existence of a supernatural being, or a natural order of the universe, or the discernible, unchanging essence of a human being—so, too, his jurisprudential cousin rests his dogma on the implausible assumption of a complete, coherent set of legal materials.

The ideologist rejects the communal objectivist's arguments as well.

¹⁵ Thomas Perry addresses the undesirable possibility that "judicial temperament" or "judicial point of view" may form the primary basis for judicial decisions to the denigration of principled decisionmaking. *See id.* at 8. Perry proposes that this potential danger will be removed when a judge studies the relevant precedents and statutes invoked, distinguishes fact situations, decides the case based upon the relevant facts rather than the identity of the parties, does not give special advantages to those parties in his own professional, social, racial, religious or economic class, and renders a decision he honestly believes is best, as supported by the best available and plausible arguments. *Id.* at 8-9.

¹⁶ Many authorities deny that every case has a uniquely correct answer. *See, e.g.,* Kennedy, *supra* note 1, at 1685 (there is a division of views based upon "irreconcilable visions of humanity and society, and between . . . aspirations for our common future" influencing the adjudication of private law cases); Perry, *supra* note 14, at 1 ("many cases apparently have no uniquely correct decision under the law"); Tushnet, *supra* note 1, at 83-84 (both economy and society as well as autonomy have influenced American legal history, thus creating some cases responsive to social or economic needs, and other cases, not responsive to social or economic needs); Unger, *supra* note 1, at 565-66 (although the results of divergent theories suggest that areas of established law and legal doctrine were "mistaken," this conclusion is clearly erroneous).

Moreover, the moderate theorist's theory that law is in a constant state of flux presupposes that cases decided one way at one time may correctly be decided another way later. *See supra* note 9. Indeed, pretending to follow prior legal authority may be deemed a device to avoid present responsibility and therefore, an exercise of judicial bad faith. *See Perry, supra* note 14, at 8-9. A judge "is not free to reach any result he pleases as long as he is able to give some legally plausible argument for it," *id.* at 9, since good faith requires that the decision rendered must be the best available at the time, *id.* In this way a legally correct decision, or more precisely, one that "is not definitely incorrect," will emerge. *Id.*

He argues that societal consensus is better understood as "intersubjective agreement" rather than "communal objectivity," because decisions rendered on this basis rest upon a shared group of values and not upon a feature of reality that is independent of human attitudes and perceptions. Although this mode of objectivity avoids reliance on the subjective attitudes and perceptions of a single judge it may be termed "objective" only in that it is external to the judge, not because it transcends human attitudes and desires.¹⁷

The notion of societal consensus runs counter to the ideologist's assertion that a judge has a duty to remain true to his own beliefs, even in the face of community agreement. On the other hand, if societal consensus is taken to mean only that the judge is engaged in a continuing reasoned dialogue with society, it differs little from the ideologist's acknowledgement that political prudence is a genuine constraint on judges. To call constraint of this nature "objective," works violence upon the language.

So too, principles presupposed by societal institutions may not claim objective force. Not only are individual principles controversial, but the interplay of conflicting principles exacerbates this controversy. Our institutions seem so complex that many different sets of principles can equally well explain their nature. To posit one and only one set as their unique explanation seems presumptuous. Even if such a venture could be undertaken, it would result in a morass of conflicting principles which would need to be considered in relation to one another. Such an endeavor could only be accomplished by appealing to ideological perspectives. Hence, for the ideologist, objective principles presupposed by our institutions either are a set of fictions, or, if discernible, still presuppose ideologies for the process of relative weighting.¹⁸

¹⁷ See Perry, *supra* note 14, at 9, 15-17. The solution to the problem of defining judicial reasoning lies in the acknowledgment that interpersonal checks and balances lend credence to and bolster legal rationales. See *id.* at 16-17; see also Kennedy, *supra* note 1, at 1710 (delineating rules and standards which comprise human attitudes and desires); Tushnet, *supra* note 1, at 94-95 (the particular doctrines existing in the legal system stem partially from the ethical reasoning in the society); Unger, *supra* note 1, at 579 (legal doctrine includes authoritative rules and precedents, as well as ideal principles, purposes, and policies of society and the judge).

¹⁸ See Kennedy, *supra* note 1, at 1710-13. The contextual argument that only one set of principles can logically explain the rationale of a decision "leaves out of account the common sense that the choice or form is seldom instrumental or tactical." *Id.* at 1710. Indeed, debates over which values and what visions of the universe are applicable cloud the underlying basis of legal decisions. *Id.* Therefore, one could conclude that the historical "experience of unresolvable conflict among . . . values" will not disappear. See Perry, *supra* note 14, at 1-2. Clashing beliefs must be analyzed and weighed because the conclusion that the existence of contradiction makes one decision false is clearly erroneous. *Id.* On the other hand, some concepts may be adjusted so that "something like both of the conflicting beliefs" re-

Finally, the ideologist regards perspectival objectivity as a set of formal requirements which lack content. Judges fill in the meaning of "attentiveness," "impartiality," and "disinterestedness," from their own perspectives, and therefore the use of such phrases is a failed attempt to shroud judicial manipulation with a cloak of justification. Formal requirements are too vague and too open to interpretation to serve as substantive constraints on judges.

The ideologist's critique of objectivism is partially successful. It is true that a theory of law as a coherent, complete system which never falters, seems a fiction. Unless all moral principles, policies, and notions are designated as part of the law, it appears that, in hard cases at least, decisionmakers will have to resort to extra-legal materials. If all our moral principles, policies, and notions are designated as part of the law, the concept of law will have been trivialized, for it will include by definitional fiat all possible moral criteria to which judges might appeal. While some moral notions clearly are part of the law, they are not so numerous as to establish a complete, coherent legal system. In fact, it is usually argued that the incorporation of numerous moral notions into the law compounds, rather than alleviates, the incoherence and incompleteness of a legal system. The ideologist therefore, may well be correct in denying the existence of a complete body of legal materials that never exhausts.

Judges may nonetheless feel constrained by communal objectivity. Any legal system needs stability, both to satisfy the legitimate expectations of citizens and to provide notice of what actions are illegal. For example, if the doctrine of *stare decisis* were abandoned, the citizenry could not depend on the force of prior decisions, the boundary line separating illegal from legal conduct would be obscured, and public anxiety would increase significantly and dangerously. Judges often justifiably rely on communal objectivity to insure public expectations and to provide notice. Acknowledgment of communal objectivity's role in decisionmaking does not abrogate the judge's freedom, but recognizes that he should not usurp the freedom of others. Citizens have a right to the consistent application of the principles which ground governmental institutions, and the controversial nature of such principles does not of itself render them indiscernible.¹⁹ Indeed, many principles uncontroversially explain several institutions of government. In each case, a judge must make his *best*

mains. *Id.* at 2 (emphasis in original).

¹⁹ R. DWORKIN, *supra* note 13, at 279-90. Dworkin notes that not only in law, but also in a large variety of other enterprises, there may be no absolutes, but the theorist believes his judgment to be truth. *Id.* at 281. For example, historians and scientists suppose that what they say is true even though it cannot be proved. *Id.* at 281-82. Judgment "represents a choice rather than a decision forced . . . by reason." *Id.* at 282. The choice is the person's best characterization and judgment. *Id.*; see *infra* note 20 and accompanying text.

judgment concerning the imperatives of the public principles and standards that he must use in deciding cases. A judge is not free to advance his own moral and legal views as such, but he must recognize elements of communal objectivity and maintain perspectival objectivity in weighing competing claims.²⁰ The existence of competing claims or principles does not suggest that each claim and each principle are equally well established.

Moreover, although formal requirements comprise perspectival objectivity, it does not follow that these requirements are so devoid of content that a judge may fill in their meanings from his own ideological perspective. Formal requirements furnish citizens a set of prejudgment conditions that a judge must meet in order properly to exercise his function and to avoid completely ad hoc decisionmaking. Public opinion excoriates any judge who ignores these restraints. Consequently, the requirements of perspectival objectivity go beyond the constraint of mere political prudence. They serve instead as minimal duties which the judge knowingly assumes upon becoming a member of the judiciary. In short, they define, in part, what it means to be a judge.

III. UNREMITTING IDEOLOGICAL CONFLICT

The ideologist accepts the view that no objective standard of epistemology or morality can validate the individual ideological perspective of a judge.²¹ An ideologist judge would consequently admit that his perspective is subjective and not objectively verifiable.

If this is so, under what conditions may an ideologist judge feel justified in persuading others to his views and in basing his own legal decisions upon them? The public, according to hypothesis, would have no rational basis for adopting such a judge's perspective. Usually, attempts at persuasion proceed from a *belief* that one's view is objectively truer, fairer, better, or more utilitarian than the opposition's view. That is, one

²⁰ Sartorius, *The Justification of the Judicial Decision*, 78 *ETHICS* 171, 171 (1968) [hereinafter cited as *Judicial Decision*]; see also Sartorius, *Social Policy and Judicial Legislation*, 8 *AM. PHIL. Q.* 151, 154 (1971) [hereinafter cited as *Judicial Legislation*]. Sartorius states that:

[a] judicial decision must be principled in the sense that it can be justified only by an appeal to a general rule or principle, the applicability of which transcends the case at hand. . . . [I]n some very hard cases [the principle] may be so finally balanced so as to render it necessary for the judge to make a discretionary choice [However], it is still a principle which must be chosen.

Judicial Decision, *supra*, at 171. Sartorius explains that in difficult cases, the judge must demonstrate that extra-legal reasoning "is an established part of the law, or is made relevant by some other principle or policy that is an established part of the law." *Judicial Legislation*, *supra*, at 154.

²¹ Kennedy, *supra* note 1, at 1762.

assumes there is an objective standard by which to decide which of two perspectives is truer, fairer, better, or more utilitarian. Such an objective standard—whether it be metaphysical, communal, or perspectival—furnishes a common ground from which to argue the merits of competing perspectives. But the ideologist scorns this approach. He simply does not believe his perspective is objectively truer, fairer, better, and so on, than his opponent's perspective.

A confrontation between two proponents of competing views could produce three possible responses: (i) Perspective X is my view and perspective Y is your view. Each of these perspectives is on equal footing regarding truth, fairness, utility, and so on. Your perspective is no better or worse than mine; (ii) Perspective X is my view and perspective Y is your view. My view is truer, fairer, more utilitarian, and so on. But this is *only* from the viewpoint of my perspective itself; (iii) Perspective X is my view and perspective Y is your view. My view is truer, fairer, more utilitarian, and so on, for reasons independent of our perspectives.

The ideologist shuns approach (iii) because it implies the possibility of objective criteria by which the competing claims of differing perspectives can be measured. Regardless of whether such objective criteria *in fact* exist, most people, contrary to the ideologist, *assume* they do in ordinary dialogue and argument. Approach (i) is a crude, nihilistic relativism that considers any perspective as good as any other. Approach (ii) is the ideologist's most likely stance. He admits there are no objective criteria that could validate his ideology, but still maintains his perspective should be adopted by others. Effectively, he claims his perspective is self-validating.

Ultimately, the ideologist may be a crusader for his own ideology. He is not a crusader armed with claims of objective truth, but one who has nonrationally made a commitment to a certain ideological perspective and who tries to proselytize others to make the same commitment. His crusade is presumptuous, however, for his commitment admittedly lacks objectivity, and his invitation to adopt his position is an invitation to make a certain "leap of faith." In fact, cannot a losing litigant claim that he has been punished by a judge *in effect* for not adhering to the judge's own, admittedly subjective, ideology? And does this not foster the precise situation that the traditional ideal of justice wishes to avoid: justice administered in accord with the subjective whims of individual judges and not in accord with objective, rule-like laws?

Ideologist jurisprudence thus raises two fundamental questions. Has the ideologist conferred too much discretion upon judges? Does this grant of discretion undermine the traditional concepts of *stare decisis* and the role of law?

As a descriptive thesis, the ideologist denies what judges often say they do and appear to do—search for the best legal argument upon which

to base their decisions despite a personal commitment to a competing ideology. Judges often say they feel constrained to ignore their own ideologies because they feel that discretion of the type the ideologist recommends is not a legitimate decisional ground.

While a nonideologist might acknowledge that personal preferences sometimes play a part in decisionmaking, he sincerely believes that such preferences are objectively correct.²² This point marks an important distinction between the ideologist and the nonideologist. The nonideologist judge conceives that his preferences best meet the independent criteria of existing legal materials and the extra-legal moral order. He considers that these criteria objectively ground his choice of perspective and the validity of his decisions. He views his venture as nonegotistic. Although application of his perspective may be nonaltruistic and may frustrate the desires of others, he believes that the demands of reason or necessity or objectivity require the imposition of his view. The nonideologist claims that the ideologist usurps the freedom of others and frustrates the legitimate expectations of litigants. He asserts that the ideologist makes the law unstable under the guise of asserting his own justified freedom and judicial discretion.

The ideologist's claims are more extreme. The ideologist judge imposes his preferences because they are his preferences, and represent his free, nonrational choice. He engages in an essentially egotistic venture through imposition of self and self's view, although the content of his perspective may be altruistic, and may result in satisfying the desires of many. He asserts that the nonideologist's belief in objective constraints on judicial behavior is held in bad faith.

The role of *stare decisis* is jeopardized in ideological decisionmaking because the judge is responsible only for selecting a plausible argument which emanates from a legitimate legal ideology. Suppose two conflicting ideologies, *L* and $-L$. Suppose further that Judge Jones and Judge Smith are each called upon to decide cases similar in all factual particulars and under the same jurisdictional, substantive and procedural conditions. Judge Jones adopts *L*, Judge Smith adopts $-L$, and each judge decides his case in conformity with his chosen ideology. The ideologist might say that Jones and Smith each decided "correctly"—in accord with their respective legitimate legal ideologies.²³ The ideologist, in effect, invites

²² R. DWORKIN, *supra* note 13, at 123-30. *But see* Reynolds, *supra* note 12, at 11.

²³ Dworkin would say that at least one of the judges decided incorrectly. There exists one right answer for Dworkin—one that conforms to the single best theory explaining the law—and it is not possible that both judges could have decided correctly under the circumstances described. In addition, the possibility exists that neither decided correctly if neither ideology conforms to the single best theory of law. *See* R. DWORKIN, *supra* note 13, at 81-130.

judges to manipulate legal arguments and materials to reflect personal ideologies.

The ideologist is in the paradoxical position of imposing his own subjective preferences upon litigants while acknowledging that these preferences are not objectively better than their contradictories. He is charged with bad faith decisionmaking by his nonideological counterparts. To rebut the charge, the ideologist notes that it is common human experience to treat subjective choices *as if* they met objective criteria, and that judicial decisionmaking must inevitably be understood in like fashion. In the case of job selection or house selection or other areas of mundane decisionmaking, this technique may be permissible, and even necessary. The nonideologist retorts, however, that such technique is not permissible, however, where citizens' legitimate expectations are involved and where the functioning of society's most important institutions are concerned. Indeed, the ideologist appears to have replaced nonideologist claims of objectivity with the more pernicious fiction that judges act as if their subjectively based preferences were objectively grounded.

Finally, ideologist jurisprudence admits of no criticism of judicial decisions on other than prudential grounds. Assuming, for example, that libertarianism and socialism are legitimate legal ideologies, the libertarian's criticism of socialist decisionmaking is limited to criticism of the latter's consistent application of socialist principles. All criticism is actually directed at the choice level of ideology and not at the level of individual judicial decisions. And even that criticism is admittedly concerned with totally subjective preferences and not with choices that are considered epistemologically or morally erroneous on objective grounds.

IV. RATIONAL CONSTRAINT IN THE LAW

Do the materials of the law rationally constrain legal decisions? Four answers are commonly given to this question: (1) Legal decisions are *radically open* and admit of no right answers because the deliberative grounds for decisionmaking inherently conflict and no objective principles exist for rationally adjudicating among decisional bases; (2) legal decisions are *open* because the deliberative grounds impose a framework for choosing viable alternatives, but no right answers exist because these deliberative grounds do not focus on the uniqueness of the alternative; (3) legal decisions are *structured* because the deliberative grounds constitute a framework which gives some right answers, but describes an open penumbral area which allows the exercise of judicial discretion; (4) legal decisions are the *right answers* which a determinative body of deliberative grounds generates. If an adjudicator fully reflects on the grounds available he can discern a rule or set of principles, coherent with the whole body of legal materials, which yield a right answer in all cases.

Accounts of rational constraint exhibit logical connections with accounts of the types of grounds deliberated upon and modes of reasoning used in legal decisionmaking. The grounds of decision can be legal materials, extra-legal materials, or a combination of the two. The mode of reasoning can be normative or instrumental. Normative reasoning classifies a situation according to rules and derives conclusions therefrom. Instrumental reasoning places primacy on the proper means for obtaining an answer which reflects a prior value judgment.

This paper confines its discussion to two main positions regarding decisional grounds and modes of reasoning: right answer theory, as proposed by Ronald Dworkin, and ideology.²⁴ The former proposes the law as principles,²⁵ according to which higher level norms are basic; noninstrumental ideals are most important; rational constraint is granted as right answer; the grounds of deliberation are extra-legal moral principles which have been incorporated into the law; and the mode of reasoning is normative. Under the view that law is ideology,²⁶ higher level, conflicting ideals are basic; social vision is most important; rational constraint is granted as structured decision or denied as radically open or open decision; the grounds of deliberation are conflicting ideologies; and the mode of decisionmaking is instrumental, reflecting emotional reactions stemming from irrational value choices.

²⁴ In addition to the right answer and ideological theories, three other positions exist with regard to decisional grounds and modes of reasoning. One position is that of natural law, where high level objective moral ideals are most important and determine what really is the law. Rational constraint is grounded as right answer; the deliberative grounds are legal materials passing moral tests and the extra-legal moral order; and the mode of reasoning is normative. See d'Entreves, *The Case for Natural Law Re-Examined*, 1 NAT. L.F. 5, 29-40 (1956); Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 385-86 (1946); Selznick, *Sociology and Natural Law*, 6 NAT. L.F. 84, 100-08 (1961).

The second position is that of law as rules where lower level norms are basic and rules are most important. Rational construction is granted as structured legal decision; the deliberative grounds are strictly legal except for penumbral cases; and the mode of reasoning is normative. See generally H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961); H. Kelsen, *THE PURE THEORY OF LAW* 193-278 (1967).

The third position is that of law as policies where high level norms are basic and the attainment of valued ends is most important. Rational constraint is granted as structured decision; extra-legal and legal materials form the grounds of decision; and the mode of reasoning is instrumental. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-67, 380-81 (1978). See generally Pound, *supra* note 6, at 195-234.

²⁵ R. DWORKIN, *supra* note 13, at 71-80; Dworkin, *supra* note 13, at 22-31. Dworkin explains the differences between rules and principles, which he believes are often confused. R. DWORKIN, *supra* note 13 at 72; Dworkin, *supra* note 13, at 22-31. Dworkin illustrates the difference by noting that principles play an important role in supporting the judgments that enunciate rules of law. After a case is decided, a rule will be adopted, but the court cites principles as its justification for the new rule. Dworkin, *supra* note 13, at 28.

²⁶ See R. UNGER, *supra* note 1, at 32-40.

Suppose two legitimate legal ideologies, X and Y, which if applied to identical civil disputes would result in judgments for the defendant and plaintiff respectively. The ideologist claims that legal materials do not dictate which of these competing ideologies ought to be adopted and do not posit a right answer other than from the perspective which grounded it. The right answer theorist responds that one best theory of law exists, and asserts that a complete theory acknowledges the presence of each perspective and assigns weights to the competing principles involved under the assumption that each set of principles need not be equally well established in legal materials and in societal institutions. The supposition is that even if legal materials do not dictate results in a mechanical or self-evident fashion it does not follow that there is no rational way of justifying one decision as superior to another.²⁷ The ideologist retorts that for any given legal conclusion numerous arguments and principles can be advanced. Thus, the belief that some master theory could make the complex materials of the law coherent is a fond hope which ignores the actual phenomenon of judicial decisionmaking.

Several important questions emerge from this debate. Are there any practical differences between the ideologist, who draws conclusions from a single legitimate legal ideology, and the right answer theorist, who posits a master theory which assigns weights to principles reflected by competing legal ideologies? For example, does the right answer theorist do little more than choose perspective X principles, when he claims that perspective Y principles must be assigned lesser weights? Or does the ideologist ignore much relevant legal material by adopting perspective Y principles and totally discarding perspective X principles? Finally, does the right answer theorist's use of multiple, conflicting principles actually collapse into the ideologist's unbridled judicial discretion to choose one among several competing, conflicting legal ideologies?

The practical differences between the right answer theorist and the ideologist's jurisprudence can be seen by examining the general methods used by judges, as adherents of the respective theories. The right answer theorist judge adopts perspectival objectivity from which he attempts a good-faith discovery of the conflicting principles underlying available legal material which he structures into a theory. He must construct a

²⁷ Weiler, *Two Models of Judicial Decision-Making*, 46 CAN. B. REV. 406, 435-36 (1968). Weiler states that principles of a legal system can be both substantive and jurisprudential. *Id.* at 433. The fact that there are competing established principles leads some to believe that judges have the right to decide cases based on their own principles. *Id.* at 433. However, since the litigant has a right to the most supportable decision, rationality and objectivity are the ends toward which to strive. *Id.* at 433-34. Institutional characteristics in appellate court decisionmaking make such ends achievable. The judge can never be certain he is right, but by the force of argument he can reconcile opposing views. *Id.* at 434.

roughly coherent justification of the common law, statutes, constitutions and so on, by reconciling the extant materials of the law with the general reasons justifying them. The ensuing theory will not be wholly uncritical and this internal critical element will help account for change in the law. The judge then seeks a fit between the most settled doctrines of law and the justificatory theory. Moreover, notions of institutional communal objectivity will constrain further his decisions.²⁸

The ideologist judge must choose subjectively one among the several legitimate legal ideologies available, adopting some, although not all of the elements of perspectival objectivity. He then applies the suppositions of his chosen ideological perspective to the instant case.²⁹ To widen its appeal, he may supplement his argument by advancing rhetorical devices from competing ideologies that support his conclusion.

Suppose that *P1*, *P2*, and *P3* are three ideologies which pass the threshold requirement of explaining much of the legal decisions and materials of a given judicial system while criticizing the rest. Suppose further that principles derived from ideology *P1* account for 50% of the legal decisions in the system, principles from ideology *P2* account for 25%, principles from ideology *P3* account for 22%, and the remaining 3% of the legal decisions emanate from "ideology without spirit." An ideologist who personally subscribes to *P1* uses it consistently, basing all his decisions upon it and acting in effect as if *P1* accounts for 100% of the system's legal decisions. The good-faith adherent to *P1* cannot accuse his counterparts who choose *P2* or *P3* of deciding erroneously but must recognize that, under ideology jurisprudence, decisions based on one legitimate legal perspective are not subject to challenge by proponents of others. While the *P1* adherent does not base *his* judgments on *P2* or *P3*, the tenets of ideologist jurisprudence restrain him from labeling as mistakes judgments based on those ideologies.

A right answer theorist judge must extract principles from *P1*, *P2* and *P3*, evolve a theory assigning relative weights to each set of principles, and base his decisions accordingly. He does not claim that *P2* or *P3* play no role in his decisionmaking, but theirs is a limited role prescribed by their assigned importance. Since the right answer theorist maintains that the best theory of law stigmatizes as few past decisions as possible, his theory of mistakes cannot condemn broadly all *P2* and *P3* decisions.

²⁸ This methodology roughly tracks the one outlined by Dworkin. See R. DWORKIN, *supra* note 13, at 17. Dworkin states that community law comprises those special rules the community uses for "determining which behavior will be punished or coerced by public power." *Id.*

²⁹ It is possible that the ideologist can mechanically apply his ideological perspective to a given case, if his perspective contains few or no internal conflicts among its suppositions. A mechanical application of ideologist jurisprudence is unlikely, however, if an ideologist perspective has internal contradictions which are fatal to straightforward thinking.

So the class of decisions which the Dworkinian labels mistakes normally will not be extensionally equivalent to the class of decisions which the ideologist *P1* adherent chooses to ignore.

This difference, however, is not conceptually or logically necessary. Suppose that *P1* accounted for 97% of legal decisions and materials, *P2* accounted for 2%, and *P3* accounted for 1%. It is now likely that the right answer theorist's class of mistaken decisions and the ideologist's class of decisions based on unchosen perspectives would be extensionally equivalent. In that case the right answer theorist would call decisions based on *P2* and *P3* mistakes, while the ideologist would claim that *P2* and *P3* failed to pass the threshold requirement of legitimate legal ideologies.³⁰ The point is simply that while it is not a conceptual necessity that the class of decisions which the Dworkinian labels mistakes and the class of decisions which the ideologist adherent to *P1* chooses not to base his judgments upon are not extensionally equivalent, these two classes will not be extensionally equivalent in any legal system where more than one ideology passes the threshold requirement of being a legitimate legal ideology.

A further difficulty remains. May not the theory evolved by the right answer theory judge assign such a low relative weight to *P2* and *P3* principles that for all practical purposes his method reduces itself to *P1* ideologist decisionmaking? This suggestion bolsters the ideologist's claim that right answer theory is a flawed attempt to provide rational legitimization for what is essentially an irrational, subjective process.

No simple answer is forthcoming. The possibility that a right answer theory judge can manipulate legal theory, however, suggests only that right answer theory jurisprudence can be misused, and not that the theory dictates the abuse. Moreover, the right answer theorist and the ideologist disagree most dramatically where a plurality of legitimate legal ideologies obtain, and where no one of them explains a disproportionately large share of legal decisions and institutional practices. In such situations, the right answer theory judge takes seriously his duty to evolve a theory of law which conscientiously weighs conflicting principles and which proclaims few decisions as mistakes.

Further, should the force of *P2* and *P3* principles in a given case preclude a rational decision based on *P1*, the right answer theorist who privately espouses *P1* must base his decision on grounds other than *P1* principles. Under the conditions stipulated, therefore, there should be a practical difference between the ideologist adherent to *P1* and the right answer adherent who privately adopts *P1*.

³⁰ In such a judicial system, the prevalent ideology would be so well entrenched that jurisprudence would be essentially mechanical and it would matter little to what school of legal thought one subscribed.

Assuming that the rule of law ought to function in common-law society, the right answer theory judge's jurisprudence more likely approximates society's perception of how judges ought to act. The ideologist might accuse the right answer theorist of illicitly arguing from "ought" to "is." Nonetheless, in devising a legal system, one begins with evaluative notions of what ought to be enacted, and then tries to insure the acceptance of these ideals by the judiciary. That is, one derives the "is" from the "ought." Concrete variances from the ideals are grounds for criticism, and the entire judicial process should act as positive reinforcement for judges to adopt those procedures most likely to insure that the ideals are achieved or at least approximated. Thus, for example, the assumption that the rule of law ought to prevail places imperatives on judges to see that it does.³¹

Ideologists formulate the descriptive version of their thesis by noting that most judges, most times, choose in accordance with ideologist jurisprudence. But the ideologist appears to concentrate only on the very hard cases which make the legal textbooks, not on the thousands of cases that are decided more or less straightforwardly. What would serve as a counter-example to the ideologist's descriptive version? Would a critic have to prove that 51% of judges choose in ways different from ideologist jurisprudence 51% of the time? Testing the descriptive version would require forays into legal anthropology and sociology far beyond the scope of this essay. Even if the ideologist's descriptive version of judicial activity is correct, however, at most, that is a good reason to *criticize* the judiciary. It is not a good reason to proclaim the *inevitability* of ideologist methodology.

In summary, recognizing all conflicting principles imbedded in legal materials holds open the distinct possibility that a judge will not decide all cases on the basis of what the ideologist calls a single perspective. Such a judge will be more likely than his ideologist counterpart to appreciate the force of assumptions at variance with his own. The latter will acknowledge other ideologies only in so far as doing so proves useful; the former will understand that he *must* give weight to principles imbedded in legal materials even if such principles vary from his own. Hence, a right answer theory judge feels the demands of rational constraint more so than the ideologist. Moreover, the demand that judges recognize all conflicting principles reflected in legal materials provides a criterion for

³¹ The reasons for striving for the rule of law are well known—to establish and ensure citizens' legitimate expectations; to avoid the implementation of retroactive laws as much as possible; to put citizens on notice of the boundaries between legal and illegal behavior. It is undoubtedly true that judicial decisionmaking, as experienced, falls short of completely realizing these goals. But the ideologist's alternative to rule-of-law adjudication can lead easily to pure *ex post facto* power over litigants.

criticizing judicial action. This criterion is lacking in ideologist jurisprudence which demands only that judicial conclusions consistently flow from a legitimate legal ideology. There do exist, therefore, differences between the two jurisprudential methods.

Finally, despite deficiencies in the right answer theorist's view, there are good reasons to *act as if* such theorists are correct. In the first place, right answer theory jurisprudence insures continuing awareness of the rule of law. More importantly, it gives judges independent criteria for identifying those cases in which a right answer may be lacking.³²

V. DWORKIN AND THE RIGHT ANSWER THESIS

The elements of Ronald Dworkin's jurisprudence are by now well known. Judges must make decisions that they can justify within a comprehensive theory of general principles and policies which form the grounds for other decisions thought to be correct.³³ They enforce the concrete, preexisting rights of litigants which furnish the justification for their decisions. Finally, the basic tenet of the theory is that there exists a right answer to all cases.

Dworkin draws a crucial distinction between principles and policies. Thus, under Dworkin's theory, arguments from principle are said to justify political decisions that benefit some person or group by showing that the person or group has a *right* to that benefit. In contrast, arguments from policy justify such decisions by showing that the benefit advances a *collective goal* of the political community.³⁴ Judicial decisionmaking may rely only on arguments from principle, while legislative decisionmaking may include policy considerations as justifications for statutory enactments.³⁵

³² See *Judicial Decision*, *supra* note 20, at 185.

³³ R. DWORKIN, *supra* note 13, at 105-22. The literature is replete with references to the principles and policies distinction. See, e.g., Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 993-96 (1977); Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 848-51 (1972); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 222-29 (1973); see *infra* note 34.

³⁴ R. DWORKIN, *supra* note 13, at 82. Dworkin illustrates the difference between principle and policy. He states that things such as the subsidization of national defense would be a policy determination, while anti-discrimination judgments would be illustrative of a principle. *Id.* Dworkin notes, however, that policy and principle are not the only justifications for decisions. *Id.* at 83. For example, benefits for the disabled may be defended as an act of public generosity or virtue. *Id.*

³⁵ *Id.* at 83-84. Dworkin feels that even in hard cases where no settled rule dictates a decision, the determination should be made by principle and not policy. *Id.* He explains that even when a litigant's right comes from a statute grounded in policy considerations, his right "no longer depends on any argument of policy because the statute made it a matter of principle." *Id.* at 83.

Consistent with Dworkin's jurisprudence, judges must construct a scheme of abstract and concrete principles that provides a coherent justification for all common-law precedents and for constitutional and statutory provisions as well. This scheme is ordered vertically into four levels: constitutional provisions, decisions by the United States Supreme Court, legislative enactments, and lower court decisions. The justification for lower level principles must be consistent with the principles providing justification for higher level materials. The scheme is ordered horizontally in that the principles which justify a decision or act on one level must be consistent with the justification offered for other decisions and acts at that level.³⁶ The resulting judicial theory reflects only what the constitution, common-law precedents, and statutes themselves require, and ignores the judge's independent personal convictions about morality or optimum policy.

At each vertical level of justification the judge's task is somewhat different. At the constitutional level he must develop a comprehensive theory of principles and policies that justifies the constitution as a whole. He does this by: (a) generating possible theories justifying different aspects of the scheme; (b) testing the resulting theories against broader political institutions; and (c) upon exhaustion of the effectiveness of that test, elaborating the successful theory's contested concepts. At the statutory level, judges must decide what arguments from principle and policy might properly have persuaded the legislature to enact particular statutes, looking to actual motivations only when necessary to adjudicate between equally appropriate theories.³⁷ At the common-law level, judges must recognize that earlier decisions exert a gravitational force on later decisions insofar as arguments from principle justify common-law decisions.

This comprehensive scheme incorporates a theory of mistakes. That is, the scheme must limit the number and nature of events that can be considered mistakes, and sketch the limits of future argument when an event is found to be a mistake. This theory must exploit the difference between the gravitational force of a political event and its specific institutional authority to effect the specific institutional consequences the event describes. To stigmatize an event as a mistake is to deny its continued gravitational force, but not its specific institutional authority. A mistake

³⁶ *Id.* at 117. Judgments on each scheme will invariably differ from judge to judge because each proceeds from his own philosophical and intellectual convictions. *Id.* at 118. However, his subjective judgments will have no force because "they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than the body of law he must justify." *Id.* at 117-18.

³⁷ See *id.* at 107-09. Dworkin makes two points with regard to statutory justification: first, that the legislation is not supplemented or carried to situations which the legislators did not consider, *id.* at 109, and second, that the terms of the statute will provide a limit to the case, *id.*

will be embedded when an event's specific institutional authority is fixed and survives the loss of its gravitational force. The constitutional level of a judge's scheme will determine which mistakes will be embedded.³⁸ A mistake will be corrigible when the event's specific institutional authority depends upon its gravitational force.

Dworkin concedes that individual judges reflecting different backgrounds ordinarily will construct different theories. Thus, often, it will be impossible to demonstrate that only one of those theories is uniquely correct. In fact, all of them may be incorrect. Nevertheless, a judge must believe that there is some single theory which gives rise to a single solution for the instant case. Dworkin rejects the notion that the truth of a proposition of law must be demonstrated on the basis of both physical facts and facts about human behavior. In his view, the presence of controversy among reasonable lawyers acting reasonably is not logically sufficient to yield the inference that right answers do not exist.³⁹

Although there is disagreement about what constitutes the best justification for legal materials, two criteria appear to provide a fair basis for making that determination. The best justificatory theory should provide a more consistent fit with the remaining legal materials than do competing theories, and should furnish a more compelling moral justification in light of background morality. Suppose, however, that theory X provides the more consistent fit, while opposing theory Y better meets the expectations of background morality. Dworkin apparently suggests that the consistent fit criterion is a threshold requirement. Once two or more competing theories meet this requirement, background morality becomes the adjudicating factor.⁴⁰

³⁸ *Id.* at 121-23. A theory of legislative supremacy, for example, ensures that any statute treated as a mistake will lose its gravitational force. Its specific authority, however, survives because the limitations of the statute must still be respected. *Id.* at 121.

³⁹ *See id.* at 280-83. Dworkin addresses the arguments of his opponents in this regard. *Id.* The first of these arguments is that since there is no way to prove that any single answer is in fact right, it is pointless to demand that a judge seek the right answer. *Id.* at 280. The second argument contends that if it is controversial whether a litigant has a right grounded in the law or policy then he has no right to win his case. *Id.* at 280-81.

⁴⁰ Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1252 (1977) [hereinafter cited as *Seven Critics*]. Dworkin posits the view that a jurisprudential question is raised when a theory based on one principle is a better fit and another theory with a contrary principle is morally advantageous. *Id.* Although Dworkin views his answer to the question as "crude," he suggests that the theory which is a better fit—that one which characterizes less of the material as mistakes—should prevail. *Id.* When two theories adequately fit, however, Dworkin feels that the theory which is morally more sound should prevail, even if it exposes more mistakes. *Id.*

In a morally pernicious judicial system, those theories passing the threshold requirement could not also conform with prevailing notions of background morality. The problem of what a judge ought to do in such situations is one that will confront any jurisprudential

Dworkin categorizes rights as background or institutional. The former are moral rights which do not depend upon the existence or authority of a political structure, and thus, serve as evaluative criteria for judging and changing legal norms. Institutional rights are concrete rights derived from the constitutions, enactments, and judicial decisions within a political structure. Because Dworkin maintains that the most important moral rights are institutionalized in American law, an American judge has less need to appeal to background rights than does a judge in a more corrupt political system. Dworkin thereby endorses the notion of institutional autonomy, which restricts direct appeals by judges to background rights⁴¹ in all cases but those in which the standard legal materials provide uncertain guidance. In the exceptional case in which a clearly settled institutional right conflicts with background morality, the judge is faced with the dilemma of whether to decide the case in accordance with background morality or with clearly settled institutional guidelines. His solution to this dilemma will draw upon such factors as the importance of the background right in question, the overall wickedness of the given legal system, and the foreseeable consequences of deciding in each of the two ways.

VI. THE CONSTRUCTIVE MODEL OF REASONING

A key element of Dworkin's theory is his often misunderstood account of moral reasoning which forms an analogue to his account of judicial reasoning. He advances a constructive model of reasoning wherein moral intuitions are stipulated features of the general jurisprudential theory each judge must construct, and are unlike scientific observations which point to their correlative objective facts.⁴² Judicial decisions may not exceed the explanatory powers of a judge's theory. Far from presupposing relativism, this model remains neutral with respect to the objectivity of moral intuitions and beliefs. The constructive model may be con-

theory. It is not indigenous to Dworkin's theory alone. Only the natural-law theorist avoids the dilemma by advancing the simplistic notion that a morally corrupt "law" is not law at all.

⁴¹ R. DWORKIN, *supra* note 13, at 101-05. Dworkin further limits the rights to which judges may appeal by stating that institutional rights must be legal in nature and not of some other form. *Id.* at 101.

⁴² *Id.* at 160-62. The constructive model, says Dworkin, "does not assume . . . that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way." *Id.* at 160. For example, a judge presented with a novel question will apply the precedents which appear to be relevant, and along with his moral intuitions and sense of responsibility for consistency, form a principle to justify his decision and which will act as a precedent for later decisions. *Id.* at 160-61. In short, the constructive model provides that precedents act to guide our moral intuitions in reaching sound decisions. *Id.*

trusted with the natural model⁴³ of reasoning which presupposes the existence of an objective moral reality.

The natural model considers that intuitions and beliefs possess a character similar to scientific observations and yield clues to the existence of fundamental principles. Although observations may sometimes exceed the observer's explanatory powers, the natural model presupposes that a correct explanation exists. The natural model requires consistency between decisions and moral intuitions on the assumption that moral intuitions are accurate observations, while the constructive model favors consistency, because fairness requires public officials to act in conformity with a public standard for testing and evaluating their actions.⁴⁴

The advantage of the constructive model lies in its independence from the metaphysical assumptions underlying the natural model.⁴⁵ Its adherents are at a disadvantage, however, because none can claim that his theory is the best possible justification for moral and legal reasoning. Adherents to the natural model claim that their inquiry produces objective moral principles by which all existing and proposed laws may be evaluated. The constructive model adherent, however, may only claim to advance the best theory of law or morality for his society, since he stipulates the existing legal materials and prevalent moral convictions of that society as features of the legal theory he constructs.

Dworkin's account of constructive reasoning appears ambiguous because he does not present his notion of background morality clearly. He writes as if background morality furnishes objectively correct moral principles, yet admits that the constructive model cannot produce such principles. The constructive model can discern only those moral criteria that are relevant to a given society, and if these criteria serve as that society's background morality, the result will be a legal system valid only in that society. Hence, a society's moral and legal theory derived according to the tenets of constructive reasoning cannot be the best from all possible viewpoints. At a minimum, the emergence of an objectively best theory in any one society would be unknowable, since there exist no objective criteria by which to judge competing theories.

Dworkin claims that because American legal materials incorporate background rights, American judges have little need to appeal to them

⁴³ *Id.* at 160. Under the natural model, "[t]heories of justice . . . describe an objective moral reality; they are not, that is, created by men or societies but are rather *discovered* by them . . ." *Id.* (emphasis added). Moral reasoning is viewed as a reconstruction process of concrete judgments in that it is believed the reconciling principles must exist. *See id.*

⁴⁴ *See id.* at 161-62; *see also Seven Critics, supra* note 40, at 1258-59.

⁴⁵ *See R. DWORKIN, supra* note 13, at 162. It is possible that Dworkin may adhere to background morality based on objective moral facts, but not based on the natural model. His writings, however, provide no conclusive evidence for this observation. *See id.* at 163-64; *Seven Critics, supra* note 40, at 1258; *supra* notes 42-44 and accompanying text.

directly.⁴⁶ He proposes further that no coherence model can justify morality.⁴⁷ Such passages strongly suggest that Dworkin inclines toward the natural model as the justification for moral reasoning. Yet his express disavowal of that model's validity indicates a preference for the constructive model. The reader cannot discern whether Dworkin's constructive model contemplates that objective moral principles serve as background morality according to natural-law theory, or whether it contemplates that each society's best moral and legal theory creates unique closed systems that resist independent evaluation.

Four reasons suggest that Dworkin advocates the consistent use of the constructive model. First, while Dworkin never says that use of the constructive model produces the best legal theory from all possible viewpoints, he urges that judges must use it to produce the best available theory of law given the existing legal materials. Second, in treating Rawls' work, he strongly suggests that the question of the existence of objective moral facts must remain an open one. Thirdly, although Dworkin asserts that no coherence theory of moral reasoning can justify morality, this does not imply his belief that the natural model is preferable to the constructive model. Both models can be based on the coherence theory. His remark is best considered an expression of doubt concerning the relation between coherence accounts and justificatory claims. Finally, his attacks on the metaphysical underpinnings of the natural model are simply too powerful to ignore.⁴⁸

Use of the constructive model can establish at best that there is a necessary connection between law and morality within each legal system.

⁴⁶ See MacCormick, *Dworkin as Pre-Benthamite*, 87 PHIL. REV. 585, 586-89, 591 (1978). Legal theory, in essence, becomes a part of moral and political theory. *Id.* at 586.

⁴⁷ See *Seven Critics*, *supra* note 40, at 1258. Dworkin himself states that he is "unclear that any form of coherence theory, whether based on the constructive or natural model, would be adequate for [this purpose]." *Id.* Under the coherence methodology, one should abandon his anomalous intuition in order to find the preferable moral theories. See Shaw, *Institution and Moral Philosophy*, 17 AM. PHIL. Q. 127, 132 (1980). Commentators have had difficulty in grappling with "coherence theories" of justification of morality. See, e.g., R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 20-21 (1979) (because beliefs may lack credibility, their organization into a coherent system will not render them credible); J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 42-49 (1977) ("there is a real issue about the status of values, including moral values"); Noble, *Normative Ethical Theories*, 62 THE MONIST 496, 497 (1979) (the moral theorist, in trying to form a coherence among moral standards, attempts to categorize an "apparently endless diversity of moral judgments"; the theorist himself recognizes that because of this, absolute order or unity is realistically impossible); Singer, *Sidgwick and Reflective Equilibrium*, 58 THE MONIST 490, 516-17 (1974) (moral theories, as tested against our moral judgments, can prove unreliable); see *supra* text accompanying note 44.

⁴⁸ See R. DWORKIN, *supra* note 13, at 161-62; *supra* note 45. See generally Shaw, *supra* note 47, at 131-32 (considering the criticisms of moral philosophy that rely on intuition).

But it does not forge a conceptual link between law and absolute principles of morality. Background morality based on the constructive model retains validity within individual societies, but a particular background morality has no validity in other societies.⁴⁹

Thus, Dworkin's theory does not bridge the gap between the descriptive account of law in a particular society and objectively sound moral principles against which the quality of all existing laws may be judged. This difficulty, however, is not as problematical as the critics have suggested.⁵⁰ Indeed, the aforementioned gap will be present in any jurisprudential theory except an extreme version of natural-law theory. In this author's opinion, Dworkin does not claim that he has closed this gap, but merely that jurisprudential issues are basically issues of moral principles and not issues of legal facts as had been generally supposed.

Nonetheless, the constructive model remains open to challenge. Several powerful arguments have been advanced which cast doubt upon the use of intuitions and coherence in moral reasoning:⁵¹

- (a) Moral intuitions and considered judgments differ among various people and cultures and even within the same individual. These intuitions and judgments are a result of training and reflect nothing more than societal biases.⁵²

⁴⁹ An individual society of people retains certain common moral judgments to be used in their constructive model. Societies, like individuals, are quite diverse, and given the great diversity of moral judgments, one society's constructive model cannot be applied to another society. See Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 260-64 (1979); *infra* note 51. One commentator states that Dworkin's theory leaves open the possibility that the principles of different societies, and hence their law and morality, may differ enormously. Blackstone, *The Relationship of Law and Morality*, 11 GA. L. REV. 1359, 1385 (1977). It is submitted that this argument would hold true unless the constructive model was based on the moral judgments of all people; in such a case, the establishment of a single moral code would be problematic.

⁵⁰ See Daniels, *supra* note 49, at 264-67. Daniels argues that "wide reflective equilibrium . . . allows far more drastic theory-based revisions of moral judgments," and thus moral judgments are not taken at face value, but are tested as moral principles against a relevant background theory. *Id.* at 266-67 (emphasis in original); see *infra* note 53.

⁵¹ One commentator has charged that Dworkin himself is guilty of a merely conventionalist account of morality in that he bases background morality on the constructive model. See Blackstone, *supra* note 49, at 1385.

⁵² See R. BRANDT, *supra* note 47, at 21-22. Brandt argues that our beliefs are largely the product of our culture and environment, and presumably if we had been exposed to a different learning situation, our beliefs would be similarly altered. *Id.* at 20. He further asserts that:

[M]oral intuitions differ from one individual or culture to another. Where one person thinks promise-keeping or sexual taboos are highly important . . . and another does not, the search for reflective equilibrium will only produce different moral systems, and offers no way to relieve the conflict. . . . Moral disagreement does not exist only between our own reflective equilibria and those of some primitive tribe, . . . it exists among civilized persons and in core areas.

(b) The fact that such beliefs are firmly held does not bestow upon them special epistemological or moral status. They are unlike scientific facts which are initially credible for reasons independent of their coherence with a set of beliefs held most firmly.⁵³

(c) Even if shared moral judgments and principles can be evolved into a coherent whole, the resulting structure lacks justification because it lacks independent support. The process merely arranges prejudices and biases into a consistent scheme.⁵⁴

In the first place, it should be noted that these objections relate to the question of whether coherence methodology can provide justification for objective moral principles and judgments. The criticism may be unjustified, particularly since the variance of moral intuitions and considered judgments is often exaggerated. For example, while complicated moral questions concerning abortion and euthanasia are often controversial, widespread agreement upon fundamental propositions can be established. The purpose of coherence theory is to build upon agreements on such propositions, clear up factual disagreements, and arrive at broader based agreement on the more complicated issues by isolating the factors causing disagreement and checking them against society's most firmly held moral principles. Any remaining disagreements will be disagreements of fact which cannot be resolved by any theory of morality.

Second, individuals abandon early intuitions and judgments to adopt new moral beliefs upon mature reflection. Coherence methodology attempts to make judgments and principles consistent by eliminating those convictions which are essentially unfounded prejudices and biases.⁵⁵ Moreover, the adjustment of raw intuitions and principles in order to reflect the fact that one individual has advanced morally in isolation is not justified. There exists, together with explanatory reasoning, a more public process by which the individual's society scrutinizes its moral judgments and principles. While the process need not purport to establish metaphysically grounded truths, the method draws its logical strength from its

Id. at 22; *see supra* notes 49-50.

⁵³ *See* R. BRANDT, *supra* note 47, at 22. Brandt states that methods of intuition are merely "an internal test of coherence, which may be no more than a reshuffling of moral prejudices." *Id.* Rather than hold views firmly and on blind faith, one should assess them from an outsider's perspective in order to find those which are most useful and justifiable today. *Id.* at 21-22. Arguably, one's beliefs will not have moral status under this viewpoint if retained without reflection, but rather, only if they are subject to evaluation.

⁵⁴ *See id.* at 20-21. Merely because beliefs are organized into a coherent whole does not necessarily give them any greater weight. *Id.* at 20. If these beliefs are not "initially credible," instead of merely initially believed, their organization into a coherent scheme only creates a coherent "set of fictions." *Id.*; *see supra* note 47.

⁵⁵ *See* R. DWORKIN, *supra* note 13, at 160-61. The weighing of all relevant materials in considering moral or legal questions provides for consistent judgments and principles. *See id.*; Shaw, *supra* note 47, at 132; *supra* note 49 and accompanying text.

rejection of classical moral reasoning.

Critics correctly note that scientific observations function differently from moral judgments, and that it is unrealistic to expect scientific objectivity in such judgments. The former are such that the conditions under which they are made play a significant role. Considered moral judgments, although conceivably most reliable when made under conditions of cool reflection, do not rely on simple objective properties of "rightness" or "wrongness," but are supported by theoretical considerations. Despite cultural variations, the widespread agreement in moral belief heightens the possibility that objective moral facts exist, at least insofar as their existence might be the best explanation for the phenomenon of agreement. Although widespread agreement does not ensure the truth of a moral proposition, it does not follow that widespread agreement bears no relevance to the truth of such propositions, for the public process of moral reasoning and explanation has as one of its goals the production of widespread agreement.

The process of Wide Reflective Equilibrium⁶⁶ provides an example. The process contemplates a set of considered moral judgments and a set of moral principles, in addition to independent fundamental theories of the person, of procedural justice, and of the role of morality in society. These fundamental theories generate arguments which test competing sets of moral principles and provide a device for selecting principles. This test or device is independent of the coherence test because the beliefs producing the fundamental theories differ from those used for that test.⁶⁷ Moreover, any resulting moral code must pass additional tests which are independent of the considered moral judgments used for the coherence test. That is, a viable moral code must be teachable, psychologically tenable, socially feasible, able to be complied with, universal, able to resolve most conflict situations, and compatible with nonmoral facts.

Hence, intuitions or considered moral judgments do not form the sole standard for isolating the various moral codes that pass the self-consistency test. Sets of moral principles are first tested by the fundamental theories mentioned above or by the selection device which these theories produce. They are tested further for coherent fit with prevalent considered moral judgments. Finally, the resulting moral codes must meet the additional criteria of teachability, social feasibility, and so on. Presumably, persistent disagreements ordinarily will have roots in a disagreement of fact or a disparity about some aspect of a fundamental theory. Such disagreements are more manageable than those at the level of considered moral judgments or moral principles.

⁶⁶ See *supra* note 50; see also J. RAWLS, A THEORY OF JUSTICE 48-51 (1971).

⁶⁷ See Daniels, *supra* note 49, at 258; *Seven Critics*, *supra* note 40, at 1240, 1252.

Clearly, this process does more than arrange common prejudices and biases into a consistent scheme. The process advocates extensive *revision* of considered moral judgments to ensure their fit into a coherent whole of moral principles derived from the selection device generated by fundamental theories. No one set of considered moral judgments is held as absolutely fixed. Since theory-based revisions pervade attempts to evolve an acceptable moral code,⁵⁸ thus precluding the absolute fixation of any set of considered moral judgments, more than a merely conventionalist account of morality emerges.⁵⁹

Nonetheless, while coherence theory methodology does not guarantee the objective truth of its moral code, neither does it preclude its possibility. Much will depend on the status of the fundamental theories used. Currently, however, the unsophisticated nature of existing fundamental theories argues against a legitimate claim to the discovery of objective moral truth. But some justification can be found in that the acceptance of various moral claims depends upon a system of interconnected fundamental theories already found acceptable, not solely upon the systematization of considered moral judgments into a coherent whole. This may be a limited justification. Nevertheless, it represents an advance beyond the simple procedure of fitting considered moral judgments into moral principles.

The purpose of this discussion has been to show that a coherence method of moral reason in legal reasoning can provide: (1) a limited justification for a moral code and the moral judgments emanating from it; (2) a suitable moral code to serve as background morality for Dworkin's theory; (3) no clear present claim to the discovery of objective moral truths; and (4) more than a merely conventionalist account of background morality.

VII. CRITIQUE OF THE RIGHT ANSWER THESIS

The most controversial feature of Dworkin's theory is his assertion that there exists a single right answer to the problems posed by hard cases. Some critics find this assertion indefensible unless it can be demonstrated that there exists one right answer to questions of morality and social welfare.⁶⁰ Others believe the assertion involves a fundamental con-

⁵⁸ See A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 10-11 (1980); *supra* note 49.

⁵⁹ See J. RAWLS, *supra* note 56, at 580-81. Rawls contends that "the agreement in considered convictions is constantly changing and varies between one society, or part thereof, and another. Some of the so-called fixed points may not really be fixed, nor will everyone accept the same principles for filling in the gaps in their existing judgments." *Id.* at 580; See A. GOLDMAN, *supra* note 58, at 15-17.

⁶⁰ See R. DWORKIN, *supra* note 13, at 81; Greenawalt, *supra* note 33, at 1037-38. Dworkin

tradiction, for on the one hand, Dworkin's constructive model leaves open the question of the objectivity of moral judgments, while on the other, the assumption that there exists one right answer to questions of morality indicates reliance on the natural model.⁶¹ This criticism, however, appears unwarranted. Dworkin appeals to background morality in those situations where standard legal materials yield uncertain guidance as to the legal rights citizens possess, or where competing justifications of legal materials seem equally coherent with those materials.⁶² Dworkin assigns adjudicatory force to background morality in providing the correct answers to legal questions posed in those situations alone. Moreover, notions of background morality derive from the constructive model. The right answer thesis, therefore, does not depend on the existence of one objectively sound answer to questions of background morality, but on the existence of one answer, whether objective or subjective, which meets the criteria of the constructive model. Thus, Dworkin need not be charged with a contradictory dependence on both models.

The resolution of this contradiction, however, fashions the grounds for a more telling criticism of right answer theory. If right answer theory depends on the existence of a single right answer to questions of background morality based on the constructive model, two problems remain. Do single right answers exist for questions of morality which meet the criteria of the constructive model? If they do exist, is their discovery any more certain than the discovery of the right legal answer to a hard case absent an appeal to background morality? In summary, Dworkin may yet be charged with a contradictory reliance on the natural and constructive models. To escape such a charge, he must recognize that his notion of background morality results from the constructive model of moral reasoning. However, the nature of the constructive model suggests that more than one moral code will emerge, and thus, references to background morality cannot supply single right answers to questions of morality, or of law. Even if right answers do emerge from the constructive model, their

claims that a unique right answer can be found for every moral question. Greenawalt, *supra* note 33, at 1037. Further, he states that by weighing all relevant materials in a legal system, a right answer could be reached for every difficult legal problem. *Id.* Goldman argues that "when parties disagree on specific issues or on the relative weight given to specific norms, we may assume that one of the parties is mistaken on the nonmoral facts, or inconsistent in his specific judgments, or that he takes some principle to have implications that it does not have." A. GOLDMAN, *supra* note 58, at 19; see *supra* note 55 and accompanying text.

⁶¹ See Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 VAL. U.L. REV. 371, 378 (1980). Dworkin's theory asserts that "there is a single 'best' set of principles underlying any plausible legal system Once that set of principles is identified it may serve as part of that system's rule of recognition." *Id.*; see Greenawalt, *supra* note 33, at 1037-42.

⁶² See R. DWORKIN, *supra* note 13, at 160-61; Farago, *supra* note 61, at 402-05.

discovery will prove so uncertain that references to background morality will cease to provide single answers in difficult cases. Since there is good reason to suspect that the most difficult cases in law are just those cases where moral principles are most uncertain, and since a judge's appeals to background morality in such cases may only increase their uncertainty, it is difficult to perceive how references to background morality can serve the function for which they are intended. The plausibility of the right answer thesis appears diminished.

Ideologist critique of right answer theory provides a further challenge to Dworkin's theory. There may be no objective way to choose between two or more self-consistent but mutually incompatible sets of values, particularly if one denies the existence of objective moral facts. It may be that judgments about the rational or moral superiority of a given moral system merely beg the question in favor of that system.⁶³ Nonetheless, it does not follow that no right answer exists to disputed moral issues, for mutually incompatible value systems presuppose and share at least some moral principles and data.⁶⁴ Judges (a) discern particular moral decisions where the competing sets of values reach similar conclusions; (b) extract general moral principles from such cases; (c) thereby acknowledge a background of shared commitments and judgments; (d) attempt to clear up any nonmoral factual disputes; and (e) reason about the more controversial moral decisions by (i) drawing out the implications of shared principles and data, (ii) arguing by analogy with the agreed upon decision, and (iii) exposing internal inconsistencies in the nonshared frameworks. In sum, competing value systems exhibit a common framework which provides a vehicle for attaining answers to disputes about specific moral issues. Thus, it does not follow from the ideologist's assumption of the non-existence of objective moral facts and criteria that right answers are *never* discoverable or that ideologist jurisprudence is inevitable.⁶⁵

Just as the ideologist was incorrect in assuming that the absence of objective moral facts results in no right answers to specific moral questions, the Dworkinian is incorrect in assuming that the constructive model of reasoning can produce right answers to all specific moral questions. Some of the moral codes which share a common framework will

⁶³ See R. BRANDT, *supra* note 47, at 21-22; R. DWORKIN, *supra* note 13, at 186-87; *supra* note 49.

⁶⁴ See Farago, *supra* note 61, at 394-95 (although the "right answer hypothesis" and the "no-right-answer thesis" are incompatible, "neither is the direct negation of the other").

⁶⁵ It is submitted that judges have a professional duty to use the common framework of competing value systems to resolve controversial moral and legal issues. They should not simply embrace one of the competing value systems and follow its dictates, because that would be a violation of their role. To abrogate reliance upon the common moral framework is to violate the rule of law. Hence, to concede for argument's sake that no objective moral facts exist does not mandate a resigned acceptance of ideologist jurisprudence.

include principles others lack, and some will weigh differently those principles which are shared. Hence, argument by analogy can be notoriously suspect. There is, thus, little reason to believe that conflicting moral codes can be so closely reconciled as to achieve agreement about all controversial moral questions. For this reason, the constructive model of reasoning will produce many, but not all, single right answers to specific moral questions. Therefore, it can be seen that both the ideologist and the Dworkinian positions on the existence of right answers to legal questions represent untenable extremes.

The right answer thesis is problematical. Because the constructive model of legal and moral reasoning may produce more than one "best" legal and moral theory, no single right answer will exist for some questions of the legal and moral order. Furthermore, appeals to the common legal and moral frameworks which these theories presuppose cannot resolve all difficult questions. Moreover, it is very questionable whether any finite set of starting assumptions can yield a correct outcome to every conceivable legal and moral issue.⁶⁶

Dworkin's observation, that the existence of practical controversy does not imply the absence of a right answer to a legal or moral question, does not strike at the heart of the theoretical uncertainty that will arise where (1) incommensurable best theories underlie the law, (2) commensurable theories are equally explanatory and neither is clearly morally preferable, (3) a best theory of law produces equally cogent arguments for both the plaintiff and defendant and background morality is equally ambiguous, or (4) internal paradox within a best theory of law is present. Such examples of possible theoretical uncertainty undermine the plausibility of the right answer thesis. Moreover, the right answer thesis does not rule out the possibility that a "tie" judgment may be a right answer.⁶⁷ Despite Dworkin's denial that the presence of theoretical uncertainty which grounds the possibility of "ties" undercuts the right answer thesis, it can be argued that in order to break ties, judges must employ discretion of the sort Dworkin claims is absent. This demonstrates that the right answer thesis preserves an area for the exercise of discretion.

Dworkin claims that judges discover and do not create the law. But this claim ignores the self-regulatory mode of judicial decisionmaking by which legal principles develop in reference to each other, and from which the common law emerges in an atmosphere of judicial respect for precedents. A judge who adopts a controversial version of the best theory of

⁶⁶ See R. BRANDT, *supra* note 47, at 20; *supra* notes 54 & 61.

⁶⁷ See R. DWORKIN, *supra* note 13, at 284-85. A "tie" judgment results when the proposition on one side is just as strong as that supporting the other. *Id.* Dworkin conceives of a scale with a "tie point" as the single point in the center. *Id.* at 285; see Farago, *supra* note 61, at 383-85.

law cannot go back and decide differently those cases adjudicated in accordance with the incorrect theory. The original choice of theory has an impact on the instant case, future cases, and on the law itself. Although a sophisticated theory of mistakes might allow avoidance of decisions ultimately proved incorrect, Dworkin sketches only the rudiments of a relatively simple theory of mistakes. Moreover, Dworkin's theory precludes the advisability of eliminating a relatively large body of common-law decisions as mistakes. More subtly, despite the use of distinctions and analogical reasoning, the self-regulatory nature of the common law implies that the allegedly mistaken decisions already have had an effect of some sort on the very nature of legal materials and the best explanatory theory of law. Thus, certain aspects of Dworkin's extreme right answer thesis find little support in the common experience of the judiciary.

VIII. TOWARD A SYNTHESIS

The right answer thesis, although ultimately unsound, provides a practical guideline in the quest for legal answers—judges must assume that there is a right answer to particular legal decisions. In those instances where no right answer is present because of the theoretical uncertainty, a judge has discretion in deciding the case. That discretion is constrained by the requirement that a judge chooses from the alternatives presented by legitimate legal ideologies and from the alternatives emerging from the constructive model of moral reasoning. While there is no mechanical or strictly deductive way to distinguish those cases where right answers are present from those admitting of judicial discretion, judges who act in good faith in applying the Dworkinian constructive method will be assured of a viable vehicle for making the relevant calculation despite persistent theoretical uncertainty.

The truth of Dworkin's method rests in the power of the constructive model of moral and legal reasoning and its notion of the external constraints upon the judiciary. The truth of ideological jurisprudence rests in its acknowledgement that more than one ideal structure can fulfill the requirements of explaining most and criticizing the rest of the extant law. Stripped of their exaggerated claims, ideology and right answer theory can serve as a foundation for building a more reasonable view of judicial decisionmaking.

The hybrid theory suggested by this discussion would recognize several essential factors: (1) legal theory yields a rational, although not fully determinate, structure to open-ended legal precepts; (2) in a pluralistic society, no all-embracing theory can account for a complex set of legal materials because of the nature of these materials and the limitations of the constructive process of legal and moral reasoning; (3) despite this lack of an all-encompassing theory, the resulting theories which satisfy the cri-

terion of explaining most and criticizing the rest of extant legal materials presuppose a common framework; (4) this common framework prevents unarbitrable, unremitting ideological conflicts; (5) right answers favoring plaintiffs or defendants exist to most legal questions; (6) questions which elude right answers are subject to judicial discretion; (7) this discretion is further constrained by the alternatives presented by those theories surviving the constructive process; (8) direct appeals to background morality derived from the constructive model should occur as Dworkin suggests. The following schematic presentations indicate the methods of moral and legal reasoning which this author endorses.

Method of Moral Reasoning

Plateau 1: Wide Reflective Equilibrium (no belief is incorrigibly fixed)

Stage A: Fundamental Theories (of the person, of procedural justice and of the role of morality in society) produce *either*:

- (i) arguments testing competing sets of moral principles, *or*
- (ii) a device for selecting moral principles.

Stage B: Coherence Test occurs between sets of moral principles tested by (i) or produced by (ii) and considered moral judgments about specific cases.

Stage C: Moral Codes are produced by the earlier stages.

Stage D: Additional Tests that moral codes must pass: teachability, psychological tenability, social feasibility, compliability, universality, ability to adjudicate most conflict situations, and compatibility with non-moral facts.

Stage E: Fewer moral codes survive. These are "legitimate moral ideologies."

Plateau 2: Moral ideologies in conflict on specific issues

Stage A: The legitimate moral ideologies emerging from *Plateau 1* analysis will often seem to be in conflict. So, we (1) discern individual moral decisions where the competing sets of values reach similar conclusions; and (2) extract general principles from such cases.

Stage B: A common framework of shared commitments and data is produced from the prior stage. Now, remaining nonmoral factual disputes must be resolved.

Stage C: Those specific judgments still in conflict are resolved by:

- (1) drawing out the implications of the *shared* framework; (2) arguing by analogy with and disanalogy from the agreed-upon decisions; and (3) exposing (i) internal inconsistencies, (ii) unnoticed consequences and (iii) poorly defined or unclear concepts in the *nonshared* frameworks of the competing ideologies.

Stage D: *Stage C* will produce some "right answers" based on the given data and reasoning, but many specific moral questions will admit of

no "right answer" from this process. Further *Plateau 1* and 2 developments—particularly at the level of *Fundamental Theories*—hold promise for future movement.

Method Of Legal Reasoning

Plateau 1: In search of theories

Stage A: A set of principles and policies justifying extant *constitutional provisions* must be established by means of coherent methodology. First, possible sets are generated. Next, they are tested by broader political institutions. Finally, elaboration of the contested concepts such sets employ must be undertaken.

Stage B: A set of principles and policies justifying United States Supreme Court decisions must be established by means of coherence methodology. A theory of mistakes is essential here.

Stage C: In accordance with coherence methodology, a set of principles and policies justifying *legislative enactments* must be established by discerning what arguments might have persuaded the legislature to enact the particular statutes. If equally appropriate sets of principles and policies are generated then look to the *actual* motivations of the legislators.

Stage D: Establish by means of coherence methodology a set of principles and policies justifying lower court decisions. Earlier decisions exert a gravitational force on later ones and if prior decisions *D* are justified by principles and policies *P*, and *P* dictates a certain conclusion *C* in the instant case *I*, and *P* has neither been recanted nor institutionally regretted, then conclusion *C* is justified.

Stage E: Establish by means of coherence methodology a set of principles and policies for all prior stages taken as a whole. The best justification of legal materials will label few decisions and statutes as mistakes and will fit consistently with extant materials. Appeals to background morality—based on the method of moral reasoning—will adjudicate between two or more equally appropriate justifications of legal materials. The only other time direct appeals to background morality will occur is when legal materials themselves provide uncertain guidance to a legal question.

Examples of policies: general safety, community welfare, facilitation of democracy, public health, promotion of family harmony, and so on.

Examples of principles: conscionability, punitive desert, justified reliance, restitution for unjust enrichment, comparative blame, due care, relational duty, and proportionality of remedy. Obviously, no exhaustive list is intended by the above.

Stage F: A variety of legal theories are produced from the earlier stages.

Stage G: Additional tests that a legal theory must pass: it must ac-

count for a significant amount of legal doctrine and criticize the rest; it must be compatible with certain elements of the rule of law such as treating like cases alike and providing notice and predictability; it must assert significant rational constraint on judges; it must recognize concrete social reality; it must be articulable; it must be viewed as plausible by the wider society; it must accord with the phenomenology of law as experienced by judges and ordinary citizens, and it must cohere with nonmoral, moral and nonlegal facts. In fulfilling the above, no independent assessment of the judicial role itself is required.

Stage H: Fewer legal theories survive. These are "legitimate legal ideologies," e.g., liberalism, conservatism, socialism.

Stage I: These ideologies must be forged into *Master Theories* as judges must take principles and policies from each and assign relative weights. This requirement is one not found in moral reasoning and occurs because of the judge's role in our system. Nonetheless, no single, uncontroversial theory is likely to emerge.

Plateau 2: Deciding individual legal cases

Stage A: The legitimate legal (master) theories emerging from *Plateau 1* analysis will often appear to be in conflict. So, we replicate *Stage A, Plateau 2* of the methodology of moral reasoning. Although here, of course, we look at legal and not moral decisions.

Stage B: Replicate *Stage B, Plateau 2* of the methodology of moral reasoning. This establishes the *common framework*.

Stage C: Replicate *Stage C, Plateau 2* of the methodology of moral reasoning. Particular attention must be paid to the future applications of possible decisions.

Stage D: *Stage C* will produce some "right answers" based on the given data and reasoning, but many legal questions will admit of no "right answer" from this process. In such cases, a judge has the discretion to apply directly the answer suggested by his legitimate legal (master) ideology, but lacks the discretion to introduce justifiably an answer suggested by or reasoning emanating from any ideology failing to pass the *Plateau 1* analysis.