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1

Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute

E. Philip Soper

THE OBLIGATION OF A JUDGE

Confronted with standards beyond those obvious in purpose and rule, the positivist, says Dworkin, has two choices. He must either claim that such standards are only discretionary and hence not legally binding, or he may concede their binding status and argue that he identifies them as legal standards through reference, in some more complex way, to his theoretical master test.[1]

There is, however, a third possibility. The positivist might admit that some standards bind judges but explain that they play a role in the legal system sufficiently different from that of ordinary rules and principles to justify excluding them from the class of standards encompassed by the concept of "law." This position makes irrelevant the question whether such standards could be captured in advance by a master test: Even if "capture-proof," they would constitute no defect in a theoretical model designed to capture only legal standards. Dworkin insists that arguments of this sort can only beg the question in the present context because they assume the very distinction between legal and other kinds of standards that the positivist's rule of recognition is designed to establish.[2]

The aim of the present section is twofold: first, to develop the suggested distinction between two kinds of standards that bind judges, and, second, to consider whether all standards that bind judges must necessarily be deemed "legal" standards. In one sense, Dworkin is correct that the controversy at this point threatens to become merely verbal. But there is another, more important sense in which the difference between these kinds of standards appears sufficiently basic to justify (as more illuminating) a model of law that preserves, rather than dissolves, the distinction.

A. The Standards That Bind

At least some of Dworkin's principles exhibit one feature in particular that might seem to distinguish them from other legal standards. Principles appear

to function in the first instance as guides to the judge in deciding what rules require and only secondarily as guides to a citizen's conduct. They seem to guide conduct, if at all, not by directly declaring what is and is not permitted, but only in the indirect sense of informing an individual that certain principles and policies will be considered by courts in determining what a rule requires.[3] This decision-guiding, rather than conduct-guiding, feature is most obvious in the case of principles of statutory construction. It also appears to be true, though perhaps less clearly, of such judicial maxims and principles as "no man shall profit from his own wrong." If principles are controversial, and if equally applicable principles may conflict with one another within the context of the same decision, it is somewhat strained to suggest that principles guide primary conduct in the same way that rules do.[4]

By itself, however, this decision-guiding characteristic will not justify a refusal to call all such standards "law." We have agreed, after all, that "purposes" must and can be admitted by the positivist to be among a system's legal standards, even though such purposes may also perform a similar decision-guiding function. If a statute prohibiting vehicles in the park is known to be aimed exclusively at promoting an energy conservation ethic, rather than at the preservation of peace and quiet, and if that difference in purpose leads to differences in interpretation and application, then the purpose guides conduct as well as decision for the same basic reason: It supplements the meaning of the term "vehicle" in borderline cases to indicate to judge and citizen alike just what it is that has been proscribed.

The decision-guiding function does suggest, however, a possible further refinement in the classification of standards that bind judges—one that the following rough analogy will serve to introduce. Scientists and philosophers of science devote considerable effort to the attempt to isolate acceptable "principles of induction" to serve as guides or tests for determining when one may properly claim to have discovered a "law" of science.[5] In this context it has become commonplace to distinguish the principles governing the accepted methodology from the substantive results of applying the method—that is, from the scientific "laws" that govern particular events. Would both the accepted methodological principles and the substantive rules in this case count as scientific "laws"? In one sense perhaps they would. Accepted principles of induction might be viewed as themselves stating true laws about, for example, the nature of knowledge and how it is acquired. The scientific community would expect its members to heed these principles as well as already established scientific laws in deciding whether a given hypothesis was, in fact, a "law." But more important than the fact that both types of standards are in this sense "binding" is the fact that the methodological and substantive standards apply to areas of human inquiry that in important respects are worth distinguishing.

In similar fashion, some standards in the legal context may be viewed as analogous to rules for proper scientific induction because they arise out of the investigation of a subject matter that is, in important ways, distinct from that with which typical legal standards are concerned. The subject matter of the former is not the regulation of human behavior in a particular society through the prescription of norms, but the regulation of any rational attempt to apply standards or to interpret human communications. If principles can be ascribed

some such translegal status—in the sense that they are not peculiarly legal—then the claim that they are binding may be accepted, not because they are "law," but because they constitute minimally essential criteria for the proper conduct of certain types of rational activity. Such principles become clues, not to what "the law" requires, but to what the concept of "rationality" or "judging" requires. To the extent that legal systems require officials to be "judges," one discovers what that role entails, not only by inspecting particular provisions of the legal system (polling the system's officials to determine what they contingently happen to accept), but also by paying attention simply to what it means to apply standards rationally in a sense that transcends the particular context in which the role is assumed.

Which standards are candidates for such translegal status and what characteristics identify them? Our description of them as standards implicit in the concept of "judging" provides a starting point for answering the second half of the question: Standards binding on a judge are to be distinguished from legal standards if they are immune from deliberate change in the sense that an instruction to an official to ignore them makes the official no longer a "judge." While the task of defining the concept of judging may not be easier than the task of defining the concept of law, my only purpose at present is to suggest that some standards fall into this category, whether or not we can identify them all. They would include those principles referring to "characteristic judicial virtues" that Hart identifies as "impartiality and neutrality in surveying the alternatives, consideration for the interest of all who will be affected, and a concern that some acceptable general principle be deployed as a reasoned basis for decision."[6] They would also include, perhaps as a particular illustration of the last-named virtue, the principle of noncontradiction, reflected in the requirement that "like cases be treated alike." Dworkin insists that judges are subject to a strong requirement of "articulate consistency."[7] The source of the obligation even for Dworkin is not apparently the law, but a "doctrine of political responsibility."[8] It is not clear, however, that Dworkin means to suggest that the obligation is only "political," and thus subject to cultural variation or normative dispute, rather than, as the writings of Professor Lon Fuller suggest, an essential aspect of the concept of adjudication itself.[9] If to instruct judges to decide cases by flipping coins is to make them no longer judges, but agents of a legislative determination that any decision, right or wrong, is better than none,[10] it is hard to see that one does less violence to the concept of adjudication by instructing judges to ignore the demand for articulate consistency.

The process of distinguishing these standards (let us call them judicial technique principles) from other legal standards may be illustrated by considering one particular group of such standards: the maxims of statutory construction. Despite the tendency to debunk canons of construction as effectively cancelling each other, one may agree with H. M. Hart and Sacks that they at least perform the "useful function" of indicating "linguistically permissible" meanings, with final selection left to context.[11] In this respect, such maxims perform nicely the role Dworkin assigns to principles: They point, however weakly, in one direction while still leaving final results to await a complete stocktaking of all such pointers. Dworkin, in any event, appears explicitly to

include such "techniques of statutory construction" among his putatively trouble-causing principles.[12] It is not necessary to canvass in depth elaborate textbook listings and discussions of these maxims in order to make the point that the source of many of them lies in "logic and common sense"[13] rather than in the contingently accepted norms of a particular society. This is particularly evident in the cases of the three most commonly cited canons: *noscitur a sociis, ejusdam generis,* and *expressio unius est exclusio alterius.*[14] The fact that standard treatises, themselves venerable, reach this conclusion about the common-sense origin of hoary Latin maxims[15] is a testament not so much to the early emergency of such principles in Anglo-American law, as to their fundamental link to the prerequisites of rational interpretation in any context and in any society. As such they are easily viewed, not as peculiarly legal principles, but as principles belonging to a "science of hermeneutics" that prescribes a methodology for interpretation in general, whether the subject be suicide notes, Dead Sea scrolls, wills, or statutes:

> [W]e shall find that the same rules which common sense teaches every one to use, in order to understand his neighbor in the most trivial intercourse, are necessary likewise, although not sufficient, for the interpretation of documents and texts of the highest importance, constitutions as well as treaties between the greatest nations.[16]

Not all such maxims, however, will appear to exhibit the suggested identifying feature of immunity from deliberate change. Maxims directing strict construction of criminal statutes or of statutes in derogation of the common law, for example, appear context-specific to particular legal systems in ways apparently open to cultural variation. To explain why some of these precepts might nevertheless be viewed as standards arising out of the role of judge *qua* judge rather than out of the peculiarly legal standards of the system in which one occupies that role requires a further distinction between the concrete shape a principle has assumed in a particular legal society and the abstract "principle of interpretation" it represents. The abstract principle that the common-law derogation maxim represents may be phrased in some such manner as the following: "Assume settled practices and expectations have not been radically and deliberately altered, unless . . . (the context, language, other principles so indicate)." The concrete form of the abstract principle is context-specific to a common-law jurisdiction, but the abstract principle is not. It is a common-sense guide to rational interpretation that would normally be accepted in any context. Its justification lies in assumptions about human behavior that are grounded in reason and experience and that transcend particular community norms. One who intends sharply to change known, accepted patterns of behavior will normally take care to make his instructions precise; where instructions are imprecise, he probably did not intend the radical interpretation.

Having made this distinction, one may still be unpersuaded that deliberate countermand of the common-law derogation maxim, however clear its origin in common sense, would essentially undermine the concept of judging in those cases where the maxim would otherwise apply. No less eminent an authority than Holmes, for example, urged that the maxim be eliminated from American jurisprudence,[17] and numerous state legislatures have in fact enacted statutes specifically purporting to abrogate it.[18] For the most part, however,

these attacks appear to have been leveled at misuse of the canon—at judicial decisions that found the canon to be more than simply the abstract principle of interpretation described above. Such decisions implicitly viewed the canon as reflecting a substantive principle of power allocation between legislature and judiciary that gave the latter institution control over development of the common law in the face of superior, countervailing indicia of intended legislative change. But if one restricts the role of the maxim to the minimum function described by the abstract principle of interpretation, it then becomes difficult to reconcile legislative abrogation with a continued expectation that the court perform an exclusively judicial role in cases where the maxim would otherwise apply. One might even have difficulty knowing how to comply with an instruction that no presumption, however weak, should henceforth be made in favor of interpretations that more nearly accord with prior, accepted practice.[19] If the instruction is viewed as tantamount to a direction not to use common sense in interpreting communications—"do not assume the legislator in communicating directives acts as experience indicates most rational people do"—it becomes doubtful whether the "interpreting" official remains a "judge" any more than he would when acting on an instruction to resolve doubtful cases by flipping a coin.[20]

Contrast the second maxim mentioned above—that "criminal statutes should be strictly construed." Here it is difficult to see how our suggested identifying feature—immunity from deliberate change—would justify assigning the maxim binding but translegal status. If the abstract principle represented is thought to reflect solely a policy of providing fair notice concerning acts that will result in criminal sanctions, then it can be discovered only by inspecting community or legal norms concerning fairness, not judicial norms concerning techniques of rule interpretation and application. If a particular community decided no longer to value fair warning in issuing and enforcing criminal statutes, the maxim could be intelligibly and deliberately countermanded. One could establish a translegal status for such a maxim only to the extent one views it as reflecting an abstract principle of interpretation rather than substantive community goals—for example, "communicators who intend serious consequences to attach to actions will avoid ambiguity; where they did not avoid, they probably did not intend."

B. Whether All That Binds Is Law

Does a refusal to include among a society's "legal standards" those principles that are immune from deliberate change in the sense described amount simply to a verbal dispute, a definition of law "by fiat"?[21] Dworkin rejects out-of-hand any attempt to explain the obligation to take principles into account

> as a matter of judicial "craft," or something of that sort. The question will still remain why this type of obligation (whatever we call it) is different from the obligation that rules impose upon judges, and why it entitles us to say that principles and policies are not part of the law but are merely extra-legal standards "courts characteristically use."[22]

The above discussion essays an answer to this question based on differences in the source and character of judicial technique principles corresponding to the

difference between standards that bind a judge *qua* judge and those that bind *qua* judge of a particular legal system.[23]

In one sense, of course, Dworkin is correct. Because the role of judge is itself assigned by the law, principles implicit in the concept of judging become incorporated in the legal system by reference. Furthermore, if judicial technique principles are too numerous to list and too unrelated to be generated from a formula, as we have assumed for purposes of argument,[24] then it must be false to claim that "some *social* rule or set of social rules exists within the community of [a nation's] judges and legal officials, which rules settle the limits of the judge's duty to recognize any other rules or principle as law."[25]

If all of this is conceded, in what sense could one continue to defend a model of law that ignored judicial technique principles in the account it gave of legal validity? The answer lies in part in the characteristics implied by the shared identifying feature of immunity from deliberate change. It is the peculiar characteristic of principles identified by this feature that they can be constructed in advance by an external observer, bent on determining "the laws" of a particular legal system, without regard for empirical questions concerning the existence or content of any legal standard in the society, including the rule of recognition. It is this claimed universality and independence of judicial technique principles that justifies excluding such standards in a model designed primarily to isolate a society's particular legal norms. Exclusion is justified for much the same reasons that one would not include the rules of grammar or language of the society in a model of "law," even though these too would be "binding" on a judge responsive to his obligation to understand and apply the signs used to convey legal standards.

Another way of making the point is to note that we are doing no more than separating a judge's obligation "to apply the law" into its constituent parts: the obligation (1) "to apply" (2) "the law." The second half is what the positivist's model is designed to reflect. The first half—the realm of standards that determine acceptable methods of interpreting and applying other standards and of deciding particular cases under such standards—is not the peculiar concern of the legal theorist. It is the concern as well of the theorist in any discipline, from philosophy to science, who must deal with the perplexing problems involved in the characterization and classification of fact situations and the justification of decisions under standards.[26] One need not deny that real differences may exist in the concept of rationality as it applies to these various disciplines in order to affirm that there is a common core that conscientious judges must heed for reasons quite different from those that explain why judges must also heed the standards identified by a contingently accepted rule of recognition.

The plea, in short, is for a distinction, also urged by others,[27] between the concept of legal reasoning and the concept of legal validity. Dworkin suggests that the question "What, in general is a good reason for decision by a court of law?" is in every respect simply another way of asking "What is Law?"[28] The view presented here declines as misleading this invitation to collapse all questions concerning how courts ought to decide cases into questions of what the law is. This viewpoint also explains why Hart might write an entire book on the concept of law and explicitly set aside, as a matter "that cannot be at-

tempted here," the characterization of "the varied types of reasoning which courts characteristically use . . . ."[29] It may be that of these two, the inquiry into legal reasoning is the more urgent and of more immediate, practical effect than the conceptual study of legal validity. It may even be that the perceived barrenness of conceptual theories of law in general justifies a view that finds more fertile possibilities in the American realist movement,[30] whatever the conceptual flaws of the legal theory produced by that movement.[31] But these normative evaluations are beside the point when the question concerns potential defects in the conceptual enterprise upon which Hart, after all, chose to embark.

The importance of distinguishing what are here called judicial technique principles does not, however, lie solely in the implications of the distinction for an adequate conceptual model of law. The distinction has implications as well for questions concerning the responsibility of individual judges to develop and correct such principles within an existing legal system. In the case of legal standards, individual judges who disagree with the justice or wisdom of the accepted rule of recognition do not breach—and indeed can only acquit—their duty *qua* judge by applying such standards. On the positivist's model, compliance with accepted standards *is* compliance with official duty. In contrast, official acceptance of particular judicial technique principles has no necessary connection to questions concerning the correctness of such standards and the obligation of a judge to employ them. An individual judge demonstrates compliance with official duty as respects these principles, not by pointing to the fact of convergent peer behavior, but only by pointing to the correctness in fact of the judicial technique principles he employs. And in establishing such correctness, the search for guidance must ultimately be directed well beyond the community of legal officials to the wider community of rational rule-appliers.

That much needs to be done in further characterizing and identifying such principles may be conceded.[32] The point of the present discussion is only to stress that, to the extent the judge's role is that of a rational rule-applier, the resulting implications for role theory should not be subsumed under legal theory in a way that obscures real differences in the nature and source of judicial obligation.[33] Llewellyn's elaborate exploration of "rule, tool and technique"[34] in the process of judicial decision should not, under the rights thesis, be converted into an exploration of exclusively legal standards: rule and tool perhaps, but not technique.

C. *The Limits of the Argument*

Even if the above distinction is accepted, it will constitute a complete response to Dworkin's argument only if it can be applied to all of the principles Dworkin has in mind. Consider the principle that "no man should profit from his own wrong." On its face, this at least appears to be a standard unrelated to any independently developed methodology of rule-discovery that might be thought to transcend the realm of the peculiarly legal. Dworkin suggests that we can imagine the standard being changed or eroded "[i]f it no longer seemed unfair to allow people to profit by their wrongs."[35] Can one justify a refusal to

count this standard as law by a process similar to that applied to judicial technique principles?

The attempt to do so might take the following form. First, one might question whether in fact the "no-profit" principle could be disavowed as Dworkin suggests. If the principle is a concrete illustration of some more abstract principle, linking notions of right and wrong with notions of just desert ("good should be rewarded, evil punished"), the suggestion that the principle could have no weight at all in community judgments about "fairness" borders on a redefinition of the underlying normative concepts of "desert," "right," "wrong," and "profit." It will always be prima facie unfair to profit from one's own wrong, even though the prima facie case can sometimes, as in Dworkin's example of adverse possession, be overcome. Second, even if complete disavowal of the no-profit maxim is logically possible, it might be argued that the maxim (or the abstract principle it reflects) operates on such a level of generality that one could assume implicit acceptance of the principle as an empirical fact in any relevant social context. In this respect, such principles would resemble judicial technique principles: They are found not in the confines of a particular legal institution but in the essential preconditions of social intercourse in general.

If this hypothesis is correct, one should be able to discover the "no-profit" maxim and similar principles operating in nonlegal, rule-governed situations—in games, for example. Consider a referee at a basketball game played under rules that predate the introduction of specific provisions for intentional fouls. The generally applicable rule is that all bodily contact fouls "shall be called." A member of team *A*, which is losing in the closing minutes of the game, intentionally fouls the poorest shooter on team *B* with the hope that team *A* will get the rebound if the foul shot is missed. Team *B* urges that the rule be construed to allow the referee not to call the foul, thereby leaving team *B* with possession of the ball. No other relevant rules govern the situation, which has not previously arisen. One can imagine the referee deciding that, although the rules committee had not envisioned this particular situation, surely it had not intended for a team to "profit from its own wrong."[36] Whether or not that is the conclusion the referee reaches, the claim that he has a duty at least to consider the "no-profit" principle rests on assumptions about how critics and players would respond to a failure "to take the measure of these principles" that are similar to the assumptions Dworkin makes in arguing for the binding nature of the principle in *Riggs*.[37] In both cases a decisionmaker is urged to construe a rule, in the absence of express contrary indications, not to do violence to implicitly accepted general social principles. Although in that sense "binding," the context-neutral nature of such principles might be thought sufficient to explain why one does not include them specifically among the "rules of basketball" or the "laws" of society.[38]

I do not intend to explore this suggestion further because it seems clear that, however far one might push this process of distinguishing translegal from legal principles, one cannot in this manner account for all, or even most, of the principles that Dworkin has in mind. Some principles are surely not context-neutral. A principle that places "special burdens upon oligopolies that

manufacture potentially dangerous machines"[39] derives its authority from standards accepted within the particular legal institution in much the same manner as other legal standards. A referee urged to apply the foul rule only to intentional fouls must consider the purpose and "spirit" of the particular game of basketball (it is not a kind of football or rugby) in order to reject the proposed interpretation. The fact that one would not include in the "rules of basketball" all the purposes and aims of the game that might become relevant to an interpretation of the rules provides no answer to Dworkin's argument that at least these principles operate functionally like other legal standards to determine results, and thus in that sense are institution-specific standards that must be included in an accurate theoretical account of the "laws" of the game or institution.

THE RIGHTS THESIS

What, then, should a judge do when the shared conventions of language and purpose alone do not point to a single result? Dworkin's answer is that the judge must expand his search beyond the legal standards implicit in any particular rule to those implicit in the entire legal system itself: "A principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question."[40] Professor Sartorius provides a similar but not identical account: "The correct decision in a given case is that which achieves 'the best resolution' of existing standards in terms of systematic coherence . . . ."[41]

In his most recent article, Dworkin expands at length on this thesis by positing an ideal judge called Hercules.[42] Faced with a hard constitutional case, Hercules must first develop a "full political theory that justifies the constitution as a whole." If several political theories satisfy this test, he must refer to other constitutional rules and settled practices under the rules to select the theory that "provides a smoother fit with the constitutional scheme as a whole." By this process, he develops a theory of the Constitution "in the shape of a complex set of principles and policies that justify that scheme of government," and by reference to which he is now able to decide the hard constitutional issue in the case before him.[43] The same process is applicable to cases involving statutes and the common law. Hercules must "construct a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well."[44]

Dworkin's dual claim that this search for the "soundest" solution to a hard case not only accurately describes the Anglo-American judicial function but will also yield a single correct decision in every case faces theoretical, empirical, and practical objections. In the remainder of this article, I briefly discuss these difficulties without attempting to resolve them, and then consider whether the rights thesis, even if valid, can be accommodated to the positivist's basic model.

A. Assessing the Thesis

1. THEORETICAL PROBLEMS

Any attempt to assess the above claims confronts at the outset the problem of understanding just what is meant, in the present context, by "coherence" or by "a soundest theory of law." Dworkin and Sartorius, however, have done much to try to clarify these notions, and I shall not expand on their efforts here.[45] Even if one understands what is required of a judge trying to apply the rights thesis, the plausibility of the thesis would still be difficult to test because of the clear separation of the claim that there is always a single right answer from the claim that any mere mortal could be expected to know that he had found it. Only Hercules can do that, as Dworkin illustrates.[46] Indeed, Sartorius goes so far as to admit "that it is unreasonable to expect that it would be possible, even in principle, to develop some form of judicial proof procedure which would permit one to demonstrate the correctness, let alone the unique correctness, of a putatively correct decision in all cases."[47]

These merely practical problems, however, prove the claim theoretically untenable only if one holds a theory of truth that makes the testability of a claim a precondition of its meaningfulness. Let us assume that claims can be true though they are unprovable "even in principle."[48] We can then also agree with Sartorius that uniquely correct decisions for legal cases exist if the following conditions are met: (1) there is a unique set of exclusively relevant legal standards that bear on the issue; (2) these standards have relative weights for use in cases of conflict; and (3) some method exists for resolving ties when conflicting standards are evenly balanced.[49]

Of these three conditions, Sartorius acknowledges a theoretical problem only in connection with the third: One has no guarantee that cases will not arise in which conflicting principles are evenly balanced. Sartorius' response is that this possibility is so unlikely that the theoretical model remains a viable hypothetical model for the judge and justifies his search for *the* correct answer in all cases.[50] The second condition—that unique, pre-established weights attach to the pluralistic and undoubtedly conflicting institutional standards one is likely to discover in any hard case—is more troublesome. Several commentators have argued that this aspect of the claim is unproved and implausible.[51] Sartorius, for example, simply asserts at this point in the argument that the same test of institutional support that isolates the relevant standards will also reveal their relative weights.[52] Again, the problem does not seem to lie with the theoretical claim that all institutional standards relevant to a decision *will* have fixed, relative weights at any point in time, but only with the likelihood that any procedure can be developed to reveal those weights. In this respect, the thesis is perhaps best viewed, as far as its theoretical validity is concerned, as a sketch of the hypothetical framework implied by judicial opinions that are written *as if* the decision in a hard case were uniquely required, much as Kelsen's theory may be viewed as an attempt to describe what must be hypothesized if one is to explain the normative aspect of law.

There remains, however, one problem that has been largely overlooked. In fact, the problem arises in connection with what has apparently been assumed

to be the most plausible aspect of the thesis: the assumption that a unique set of pre-existing, decision-relevant legal standards exists in every case. Elaboration of the problem requires brief reference once again to Fuller's writings on the nature of adjudication, referred to earlier in this article, in a different context.[53] Fuller's view is that some kinds of disputes are inherently inappropriate for resolution through adjudicative methods. The explanation for and description of what constitutes these "limits of adjudication" is varied and sometimes obscure, with the "polycentric" nature of the issue usually serving as the predominant sign that the limits have been reached.[54] On one interpretation of this model, what makes some problems nonjusticiable is the absence of the pre-existing standards upon which rational, judicial decisionmaking depends.[55]

Now Sartorius explicitly draws on Fuller's theory of adjudication in developing the rights thesis as an apparent explication of the concept of adjudication.[56] Dworkin explicitly characterizes the thesis in its descriptive aspect as explaining "the present structure of the institution of adjudication."[57] If the rights thesis indeed amounts to an explication of the concept of judging, and if it is true that some problems can arise that are inherently nonjusticiable for lack of pre-existing decisional standards, then the validity of the claim that there is a single right answer in every case depends, even in theory, on a further empirical investigation into the kind and range of jobs we have, in fact, given to courts.[58] One may, of course, hope that courts have themselves properly applied doctrines of justiciability to limit the cases they accept to those with pre-existing decisional standards. But neither Dworkin nor Sartorius undertakes any such investigation. Courts may, after all, have made mistakes in applying justiciability doctrines. And although mistakes made by judges about the legally required result in normal cases leave untouched the claim that there *was* a right answer, mistakes in deciding what is justiciable leave the courts dealing with "polycentric" cases as to which the claim of single right answer is, by definition, false.[59] Furthermore, apart from the question of mistakes, not all state courts, let alone English courts, adhere to doctrines of justiciability similar to those that have been applied in federal courts. To the extent that the single-right-answer thesis is meant to apply to all cases heard by Anglo-American courts, its validity will again depend upon empirical investigations yet to be undertaken by proponents of the thesis.

The rights thesis advocate might, of course, reply that the single right answer claim applies only to those cases in which the deciding official *is* acting *qua* judge. But this response makes the thesis considerably less interesting. One may accept the rights thesis as an explication of the ideal embraced by the concept of adjudication and still be left with the problem of determining which of the cases that come before courts are compatible with that ideal. One cannot draw the line between these two kinds of cases on the basis of "those that do and those that do not have pre-existing standards and right answers," for that is precisely what is in question.

Clearly, much depends on how broad a claim is being made for the single-right-answer ("no discretion") thesis. Dworkin at one point appeared to exclude constitutional cases from the reach of the thesis[60] and at other times seems to have limited the common-law claim to the standard kinds of civil

cases that courts customarily handle.[61] Depending on what counts as a "typical civil case," one might support the proposition that these at least fall into the class of the justiciable. But if legislative instructions to courts to decide matters that are not justiciable (or the voluntary acceptance by courts of such matters) are automatically disqualified as counterexamples to the thesis on the ground that they are not the sort of cases to which the claim applies, then the thesis again threatens to become as interesting as a tautology.

One can, perhaps, avoid these problems by looking for the limits of the thesis in the context of the dispute out of which it arose in the first place. Dworkin, after all, is talking about "hard cases"—those for which the positivist admits there are standards that can lead to only one result in some cases, but not in all. Dworkin's claim might be that if there are any admitted standards, then the solution to the case is always determined: once justiciable, then always and thoroughly justiciable. Whether this fully restores the theoretical base of the claim depends, perhaps, on whether one agrees that justiciability can only be an all-or-nothing matter, and that moving beyond what can be traced to a common or general consensus in applying standards entails a problem that is significantly different, as respects "justiciability," from problems raised by cases that are standardless from the beginning.[62]

2. EMPIRICAL PROBLEMS

Empirical problems arise when one looks for evidence that the rights thesis does, in fact, accurately describe the Anglo-American system of adjudication even in cases that are theoretically justiciable. Given the difficulty of the task demanded by the thesis and the present scarcity of Herculeses, it is, after all, entirely conceivable that a society would deliberately opt, in designing its legal system, for less than the ideal. A legal system might, that is, authorize judges (through the rule of recognition) to abandon the search for the right answer in hard cases despite its theoretical existence, and to exchange the role of "judge" in such cases for that of an informed, conscientious legislator.

In this respect, Dworkin's most recent article is puzzling, for it appears designed less to argue that the thesis holds than to provide an account, in the hypothetical sense described above, of how judges could in theory operate under such a thesis *assuming* that it holds. Consider the illustration from the game of chess that Dworkin employs.[63] We are to assume that the rules of chess include a rule directing the referee to forfeit a game if one of the players "unreasonably" annoys the other in the course of play. The referee must decide whether Tal's smile is sufficiently annoying to justify a forfeit by virtue of the rule. Like Hercules, the referee must construct from the institution of chess a sufficiently precise theory of the game to yield a single correct answer in every case of annoying conduct. But we know that this is what the referee must do only because Dworkin assumes that he has been instructed to treat the rule in this fashion, despite its vagueness. If chess really did include such a rule, a referee's proper response could normally be determined only after marshalling other evidence beyond the rule and the game of chess alone. If, for example, referees decided that they should first issue warnings before declaring forfeits (in reality, the most likely possibility) one would probably conclude

that the referee believes he is authorized to exercise quasi-legislative power to declare rules prospectively. One would not have a "right" to a forfeit until conduct, now specifically described, occurred for a second time. The point is that whether a system of standards is to be viewed as a system of entitlements, like the question whether any particular standard is a rule or a principle, cannot be determined solely from a priori inspection of the standard or set of standards without considering the empirically determined attitudes toward such standards of those who must administer and live under them.

The evidence on which both Dworkin and Sartorius rest their empirical claim consists almost exclusively of what they discover in the attitudes of judges and ordinary litigants. They claim that this attitude, as reflected in judicial opinions and the arguments litigants make, reveals that the relevant judicial community believes it has been instructed to treat the legal system as a system of entitlements, however vague the standard that is being applied. But surely this is rather selective evidence. If one takes into account the views of the entire legal profession, as Dworkin seems prepared to do in deciding which principles are legal principles,[64] one would have to balance the cited empirical evidence against the contrary views of numerous scholars and judges who have claimed that judges are authorized to make fresh choices in hard cases.[65] One would also have to account for the increasing practice of prospective overruling in both common-law and constitutional cases.[66] Finally, even the cited evidence would normally have to be weighed against arguments designed to explain why judges and litigants might act as if their decisions were uniquely required, even though they knew in fact that they were not.[67]

3. PRACTICAL PROBLEMS

The practical objection to the rights thesis, ably presented in a recent article by Professor Greenawalt,[68] is a synthesis of both the theoretical and empirical problems. If one can transform vague standards into standards that embody entitlements simply by adding a directive to view them as such, it is not clear what practical difference the thesis makes to judges, litigants, or other participants in the system. Thus, Dworkin is prepared to accept sentencing decisions by judges as cases involving strong (legislative) discretion. Yet nothing in Dworkin's account explains why the standards to which a judge refers in determining a sentence could not, in theory, yield a single correct sentence via the Herculean route; these decisions should also become matters of right once the judges are instructed to include sentencing decisions within the ambit of the thesis.[69] Administrative agencies determining "fair rates" or "unfair trade practices" differ from judges determining "unreasonable restraints of trade" or standards of "due care" only because the latter are instructed to treat the standards as yielding institutionally correct answers, whereas the former are not. If we give the administrative agency's standard to the court, or, conversely, instruct the administrative agency to view the standard as incorporating institutionally correct solutions, then the distinction disappears—but only in theory. Even the legislator—the paradigmatic case of a decisionmaker with "legal discretion" to pass laws whether or not they conform to results thought to be required by moral or political theory—may lose his discretion if one in-

corporates in the constitution a directive to pass only legislation "in the public interest." Such a directive will presumably transform criticisms directed at the wisdom of the law into criticisms that the law is an incorrect measure of the public interest and thus a violation of pre-existing, system-incorporated rights.

Whenever the standard is vague, as in these cases, it is difficult to see what practical difference will result from these alternative methods of describing the system. By hypothesis, reasonable men will differ about what the standard requires, and more than one solution will fall within the range of reasonable difference. In the absence of a real Hercules to resolve the dispute, one is hard pressed to explain how behavior is affected by the fact that one is instructed to seek a system-determined "right" answer instead of being told that more than one solution (within the reasonable range) is system-acceptable, even though there may be in some theoretical sense an extra-systemic "right" answer.[70]

B. Accommodating the Thesis to the Positivist's Model

Despite the seriousness of the preceding objections, the rights thesis can at least be viewed as a plausible theoretical explication of the ideal embraced in the concept of adjudication. As such, Dworkin's writings provide a valuable check to the temptation to view controversial judicial decisions—simply because they are controversial—as nothing more than rationalizations of a judge's personal views. Even though the ideal has not been shown to be practically or empirically compatible with all the controversies that judges decide, Dworkin and Sartorius help draw attention to the unresolved questions that should be investigated before the thesis is rejected in any particular case as the model that should guide a conscientious judge. Let us assume that these questions can be resolved and that the rights thesis is correct. How might the positivist respond to the claim that the thesis provides a counterexample to his theory?

One possibility is simply to extend an argument that is often made in accommodating purpose to the positivist's model in the easy case. In such cases, the positivist can plausibly claim that the same master test that identifies the rule also identifies the commonly agreed purpose used to interpret the rule. The rights thesis asserts that legal standards beyond those implicit in language and purpose contribute to the resolution of the hard case. But the identification of these additional standards is not made through a process different in kind from that involved in the easy case. The only difference is that instead of confining one's attention to a particular rule and its purposes, the investigation now broadens to include the entire institution and all relevant rules and practices, together with their underlying purposes. In this manner, one extracts a complex set of standards for use in finding the soundest solution to the case in question. The ultimate test for whether a standard has the necessary "institutional support"[71] and hence counts as "law" will be exceedingly complex, but simplicity was never claimed as a feature of the positivist's theoretical model.

Professor Sartorius, who otherwise agrees with the essence of the rights thesis, argues along these lines that the thesis remains consistent with positivism:

> Although the actual filling out of such an ultimate criterion would be a complex and demanding task for any mature legal system, if it is indeed a practical possibility at all, the only claim that need be made is that it is in principle possible, and that it is just this possibility which in principle underlies the identification of something as an authoritative *legal* standard. Although perhaps it is a good way from Hart's version of positivism, it is in accord with the fundamental positivistic tenet as described by Dworkin: "The law of a community . . . can be identified and distinguished by specific criteria, by tests having to do not with . . . content but with . . . pedigree."[72]

Dworkin's response to this attempt to rescue positivism is found in the second article in his trilogy.[73] "Institutional support" cannot serve as an ultimate test for law in the positivist's sense, because the rights thesis does not require a judge, in attempting to construct the soundest theory of law, to accept as dispositive the fact that other judges accept any particular theory as the soundest. Each judge's task is to find the unique soundest theory, the content of which, however, is largely independent of what other judges think it to be. The distinction is between what Dworkin calls a "normative rule," which ascribes duties to individuals whether or not they accept or acknowledge them, and a "social rule," which only describes duties that are, in fact, accepted.[74] The positivist's test is a social rule. The rights thesis, in contrast, imports a test that makes relevant to the determination of legal validity normative arguments about what "ought" to be recognized as accepted practice, whether or not it is so recognized.

There are two paths one might take in evaluating this response, each corresponding to a different interpretation of what it means to say that "normative arguments" must occur in applying a test of "institutional support." The first interpretation views "normative arguments" as referring only to what is entailed by the need to provide a "consistent rationale" for accepted practices, with the latter still serving, in the positivist's sense, as the basic mark of a community's legal standards. This is the path Sartorius takes.[75] People can, after all, disagree about what consistency requires with respect to unanticipated or controversial issues, and in that sense disagree about what "ought" to be done, while still agreeing that maximum consistency with existing practices determines the correct answer. Normative arguments in this sense, although they may take into account the reasons for or the underlying purposes of existing practices, make no attempt to justify those underlying purposes or baseline practices. But Dworkin also uses "normative argument" in a sense that explicitly denies the conclusive relevance of any baseline reference to concordant practices. It is in this sense that a vegetarian might argue that it is a present duty of society to refrain from killing animals for food, even though existing practice does not conform to such a rule.[76]

Let us assume that normative arguments in this second sense are properly made whenever judges decide "hard cases." One might still be able to view the resulting legal system as compatible with positivism by distinguishing between two levels at which such normative arguments about the law may be advanced: At the basic level, determined by the rule of recognition, one may find a social rule setting forth instructions phrased in normative terms for the identification

of legal standards; at a secondary level, one may discover normative arguments about whether those instructions have been followed. If normative arguments are limited to the secondary level, the master rule model remains theoretically intact and basically a social rule test for law, even though all of the crucial arguments about the legally required result in particular cases occur at this secondary, normative level.

The point can be illustrated by reference to an assumed Kingdom of Rex, with the social rule of recognition that "whatever Rex enacts is law" and a single enactment by Rex: "All disputes are to be settled as justice requires." In this simplified equity system, normative disputes (in the second sense) will arise over what is required by the system's explicit incorporation of moral standards. But what makes these disputes at all relevant as a means of determining the law is the fact that the appropriate officials accept, in Hart's sense, the basic rule of recognition. Hart is the first to concede that in this respect law and morality may well overlap, as evidenced in the United States, for example, by a variety of constitutional concepts that "explicitly incorporate principles of justice or substantive moral values."[77] Far from providing a counterexample to the positivist's conceptual model, such systems reenforce the theoretical validity of that model by making the legal relevance of the normative debate dependent on the instructions contained in the master test.[78]

Dworkin's description of the Anglo-American legal system differs from Rex's equity system only because the instruction given to judges is of the more complex form described by the rights thesis. Normative debates about the "soundest theory of law" occur and are legally relevant (assuming the empirical claims are established) only because the underlying social rule directs judges to engage in this method of resolving hard cases. That this is the case is revealed by the fact that at critical points throughout Dworkin's argument—in deciding whether standards are rules or principles and whether the legal system is a system of entitlements—resolution of the issue, as we have seen, turns on an inspection of the actual attitudes and practices of the relevant community. Indeed, the only empirical evidence for the rights thesis itself is based on claims about what is accepted in fact by judges and litigants as the proper way to decide cases. This inevitable recourse to empirically measured attitudes to resolve critical issues in Dworkin's account supports, rather than contradicts, the thesis that the ultimate test for law is a basic rule of recognition, determined by reference to the accepted practice of the officials of the system.

Viewed in this light, the dispute between Hart and Dworkin concerning judicial discretion in hard cases emerges as a dispute over the empirical question discussed in a preceding section: It is a disagreement over what are in fact the accepted "closure instructions"[79] for the system. Hart suggests that judges have accepted closure instructions directing them to decide the hard case through the exercise of quasi-legislative discretion.[80] Dworkin claims that the closure instructions in such cases require judges to perform the Herculean task described in *Hard Cases.* In either case, it remains true that how and whether a particular system is closed is an empirical question, to be determined by inspection of the directions that the judge finds in the positivist's master test—the accepted social rule of recognition.[81]

A determined nonpositivist might respond to this final attempt at reconcilia-

tion between positivism and the rights thesis in three ways. First, he may question whether it remains meaningful to talk of a "test" of "pedigree" in systems such as Rex's where the positivist's theoretical model is preserved, but only at the cost of rendering it of little practical use in resolving critical arguments about what "the law" requires. This objection highlights the ambiguity of the term "positivism" itself. It may be that we have moved some distance from the view that a "master test," capable of actually identifying with some precision all standards relevant to legal decision, forms the core of a positivist's theory. It may also be that those who believe there is a conceptual link between "legal standards" and some minimum degree of authoritative definiteness and clarity in such standards[82] will refuse to categorize the standards used to decide cases in Rex's system as "legal." But if the "core" of a positivist's theory is, instead, "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality,"[83] then Rex's equity system and the rights thesis are both consistent with a positivist's perspective. Moral standards become relevant to legal decisions in both cases only because they are contingently, not necessarily, made relevant by social rules. Content is crucial in deciding which standards to use, but only because pedigree makes it so. The fact that one cannot provide a proof procedure either for checking the accuracy of decisions employing such legally adopted moral standards or for demonstrating which such standards are the correct ones, does not affect the core claim that legal and moral standards are conceptually distinct.[84]

A second response to the claim that the rights thesis represents a disagreement over closure instructions might try to capitalize on the very fact that such a claim concedes the existence of disagreement concerning this particular aspect of the rule of recognition. Even though the empirical evidence for the rights thesis may be inconclusive, it is, we have suggested, at least strong enough to indicate that a genuine and unresolved dispute exists over the question of how to decide hard cases. Thus, Dworkin has indeed provided a counterexample to the thesis that in every legal system there exists a social rule that settles the limits of a judge's duty *qua* judge. But this thesis is largely one of Dworkin's own making, rather than an essential aspect of positivism or a claim that Hart makes, "at least in his more careful moments."[85] Hart has never denied that the rule of recognition may itself be uncertain in some respects, and that authoritative resolution of some questions may thus depend on a court's success in getting a particular decision accepted by the rest of the relevant community. "Here all that succeeds is success."[86] One may agree with Dworkin that until such success is achieved, the positivist must admit that there simply is no social rule on the issue.[87] But that admission leaves the theoretical model intact, raising at most a question of the relationship between, on the one hand, the efficacy of a legal system, and, on the other, the degree of uncertainty that can be tolerated in the rule of recognition. When an unresolved question is fundamental, the existence of the legal system may be seriously threatened.[88] But when, as here, the question concerns how judges should decide hard cases, the riots occur in the academic journals, not in the streets, and are thus "system tolerable" in the extreme.[89]

A third possible response at once illustrates both the incompleteness of

Dworkin's argument and the potential threat that the rights thesis could pose for the positivist if the argument could be completed. The analogy to Rex's equity system, it might be suggested, misses the point or assumes what is in issue. The analogy assumes that the normative dispute turns into a sociological question of fact once one reaches the claim that "whatever Rex enacts is law." But it is this basic claim itself that the rights thesis subjects to legally relevant, normative debate. A judge in Rex's system does not acquit himself of his responsibility to apply "the law" by showing only that a particular decision is "just," and that Rex has decreed that cases be decided as justice requires. The judge must also be prepared to entertain, as legally relevant, arguments concerning the ultimate justification, if any, (not merely the stated or implicit reasons for acceptance) of the rule that "whatever Rex enacts is law." It is in this sense that the "process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior."[90]

Under this interpretation, the issue between Dworkin and the positivist is sharply joined in a way that admittedly does not permit reconciliation. But the interpretation raises two new problems. First, it now seems clear that one could no longer draw any distinction between legal standards, on the one hand, and extra-legal—moral or political—standards on the other;[91] as a result, the rights thesis collapses into the most traditional kind of classical natural law theory. Second, one is now left without any argument to support the newly interpreted thesis; for the thesis now appears to have left the confines of descriptive theory for the larger realm of conceptual inquiry into the meaning and nature of "law." Dworkin's analysis of "social" and "normative" rules may be both conceptual and accurate. One may concede, that is, that the language of obligation can be used either to describe acknowledged duties or to assert that duties exist, whether or not they are acknowledged. But what is missing from this account is an argument that demonstrates that "law" necessarily rests on an underlying normative rather than social rule. As an empirical matter, it is difficult to deny that social structures *can* be organized in ways that fit the positivist's model—that is, in such a way as to make the fact of acceptance the final court of appeal in determining the appropriateness of applying organized sanctions to specified conduct. Insistence upon the *necessary* legal relevance of normative appeals beyond what is, in fact, accepted requires one to explain what it is about the nature of "law" that makes this newly interpreted thesis a more accurate account of the concept of a legal system. In the conclusion to this paper, I shall briefly describe the kind of investigation that might be expected to provide such an explanation.

CONCLUSION

It may be helpful to place the preceding discussion into somewhat broader perspective by comparing Dworkin's attack on positivism with other non-positivist theories.

Legal positivism's traditional target was the classical natural law theorist's claim that norms otherwise identifiable as "law" would not, in fact, qualify as

law if they were sufficiently unjust. Dworkin's attack belongs to a more modern version of nonpositivism. The new nonpositivist does not deny that *if* one can determine a norm is law, further reference to content is unnecessary for determining the norm's legal status. Instead, the attack is directed at the antecedent of that hypothetical. In some cases, one cannot determine whether the norm is law at all without first inspecting content; in these cases, at least, the separation of fact and value becomes blurred and the conclusion that the norm is law may entail the conclusion that the norm is not unjust (at least not egregiously so).

The common feature of both the classical and modern approach (in addition to their rejection of the more extreme versions of legal realism) is a refusal to accept the positivist's insistence on the strict separation of the "is" and the "ought"; in this respect both might be thought to represent varieties of a natural law theory. But the obvious difference between the two approaches is important and should not be glossed over by the choice of a label designed to emphasize the common feature. Faced with an unambiguously evil statute, enacted by a supremely competent legislature, the new "natural law" theorist, unlike his classical predecessor, cannot deny the norm its legal status any more than does the positivist.[92] (Both may, of course, urge that its moral worth be considered in deciding whether it should be obeyed.) It is only when we move from the "unambiguous" to the "hard case" that the new theorist discerns an essential blurring of fact and value.

This difference in approach is sufficiently sharp that the classical theorist is not likely to view the modern nonpositivist as much of an ally. The impetus for the classical approach rested in part on the desire to construct a unified theory of obligation: With the bottom line for any actor—what one ought to do—as his ultimate goal, the classical theorist needed only to restrict legal norms to those that also passed moral muster in order to preserve a sense of unqualified fidelity to law while maintaining the primacy of moral reasons among the reasons for acting. In contrast, the new approach appears at times to be making a somewhat quibbling point about the inherent limits of language and human foresight. When language and purpose fail to guide unequivocally, one must fall back on something else, and that something else might just as well be (or "must be," depending on the particular variation of the theory) the judge's sense of what best "coheres" with the aim of the entire legal system. The new approach, in short, capitalizes on the problem of uncertainty to reintroduce value judgments into descriptions of the law, but in so doing gives away most of what the classical debate was about in the first place.

From another perspective, however, the modern approach represents a much more serious challenge to positivism precisely because it never was clear just what the classical debate *was* all about. The claim that "immoral law is not law" apparently assumes that there is a subject to which the predicate "immoral" can attach and thus seems to concede that there are *formal* tests for legal validity; the question whether one should also require substantive tests appears mainly as a problem of choice on pragmatic or theoretical grounds. The positivist's choice for the wider concept, for reasons of both conceptual clarity and practical merit in moral deliberation,[93] has never been easy to challenge. But when the claim that there are formal tests for validity itself is

challenged, the positivist will never reach the question of choice until he re-examines his model of law to determine whether the alleged defects do in fact exist and, if so, whether the model can be repaired.

I have argued that the positivist's model remains intact in the face of Dworkin's argument, primarily because the rights thesis is cloaked in empirical claims and girded by arguments peculiar to a particular legal system. The conceptual theorist can discount the thesis—even if true—as an accidental, not an essential, aspect of law, explaining that the normative debates that the thesis entails occur only because social rules make such debates relevant to determining legal validity. The theory fails, in short, precisely because, and to the extent that, it is presented and viewed as a descriptive theory. If the arguments Dworkin makes for the need to refer beyond purpose and rule to the underlying justification of the entire institution could be connected to the concept of law itself, the blow of positivism would be more serious.

One possible direction that a further inquiry along these lines might take is the following. The fundamental premise of the inquiry would be that an adequate legal theory must preserve the distinction between legal and coercive systems—the basis, after all, for Hart's criticism of Austin. From that basic premise, the inquiry would explore the extent to which a model of law that roots legal validity in the fact of acceptance of a basic social rule by a group of officials accurately preserves this distinction between "obligation" and "being obliged." If one can show that the concept of obligation is accurately reflected only in a model of law that makes legal validity dependent, not on the fact of acceptance alone, but also on a good-faith claim that the system and standards thus described are "acceptable" to those governed by the system, to that extent the positivist's model will require modification. It is in this respect—in Dworkin's insights concerning the persistence with which claims of legal validity are linked with *claims* of normative validity—that one finds in the rights thesis valuable hints for the development of an improved, conceptual theory of law.

NOTES

1. Ronald Dworkin, "Social Rules and Legal Theory," *Yale Law Journal* 81 (1972): 874, note 3.
2. Ibid., pp. 871, 882–90.
3. See Note, "Understanding the Model of Rules," *Yale Law Journal* 81 (1972): 912, 921–34. See also note 36 below.
4. This conclusion receives some support from Dworkin's own description of principles. See Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14, 26.
5. See generally, R. Carnap, *Logical Foundations of Probability,* 2nd ed. (1962); N. Goodman, *Fact, Fiction and Forecast* (1955); G. von Wright, *A Treatise on Induction and Probability* (1951).
6. H. L. A. Hart, *The Concept of Law* (1961), p. 200.
7. Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88 (1975): 1064.
8. Ibid.
9. See L. Fuller, "The Forms and Limits of Adjudication" (unpublished paper prepared for the Roundtable on Jurisprudence, Association of American Law Schools, 1959); L. Fuller, "Collective Bargaining and the Arbitrator," *Wisconsin Law Review* (1963): 3.
10. See H. M. Hart and A. M. Sacks, *The Legal Process,* p. 666, (unpublished, 1958).
11. Ibid., p. 1221.
12. See Dworkin, "Model of Rules," p. 42.
13. *Broom's Legal Maxims,* 10th ed. (1939), p. 453.

14. See H. Read, J. MacDonald, J. Fordham, and W. J. Pierce, *Materials on Legislation* (1973), p. 903.

15. See J. Sutherland, *Statutory Construction,* 3rd ed. (Horack, 1943) § 4916.

16. F. Lieber, *Legal and Political Hermeneutics,* 3rd ed. (1880), pp. 17–18.

17. See O. W. Holmes, "Common Law and Legislation," *Harvard Law Review* 21 (1908): 383, 386–88.

18. For a survey of such states and resulting court reaction, see Jefferson B. Fordham and J. Russell Leach, "Interpretation of Statutes in Derogation of the Common Law," *Vanderbilt Law Review* 3 (1950): 438, 448–53.

19. Presumably, prior practice is maintained, despite the instruction, until it is overturned by statutes. Some statutes will intend "sharp" changes and some will not, with the line between the two, despite the instruction, still marked (in part) by language that avoids ambiguity. Cf. *Niblock* v. *Salt Lake City,* 100 Utah 573, 111 P.2d 800 (1941) (adhering to previous "strict" construction of statute in derogation of common law despite intervening legislative reversal of derogation canon). The only context in which repeal of presumptions of any kind in favor of established practices might be understandable is one in which it appears that the law-making institution thereby intends total disavowal of the relevance of existing practices as "background" against which to understand and interpret future directives, as in the case of a postrevolutionary committee. Even in that case, however, one can probably explain different interpretations of apparently identical pre- and post-revolutionary directives simply by noting, if true, that fundamental changes in societal goals have led to "other indicia" of intent or purpose that outweigh presumptions in favor of continuity. Only if one thinks it is possible "rationally" to declare irrelevant all respects in which background human behavior converges, can one strip the presumption of all weight, leaving judges to interpret on a totally clean slate.

20. Cf. Hart and Sacks, *The Legal Process,* p. 1240 (a "statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably").

21. See Dworkin, "Model of Rules," p. 37.

22. Ibid., p. 36.

23. By suggesting that standards can bind "*qua* judge," I mean to imply that judging occurs in nonlegal contexts and that, in all such contexts, observance of a core of common minimal standards makes it appropriate to speak of the official engaged in the activity as a judge, whether it be of beauty contests, Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges," *Columbia Law Review* 75 (1975): 368–69; of games, compare Hart, *The Concept of Law,* pp. 138–41, with Dworkin, "Judicial Discretion," *Journal of Philosophy* 60 (1963): 629; or of the law. I do not mean to deny that judges in legal systems may also be obliged to heed additional standards of judging technique that are peculiar to their role as legal judges. See Graham Hughes, "Rules, Policy and Decision Making," *Yale Law Journal* 77 (1968): 414–16.

In its broadest sense, "judging" need not be confined to acts of officials resolving disputes but may include any attempt of an individual to reach and justify decisions (make "judgments") under standards. See Dworkin, "Model of Rules," p. 33 (sergeant told to "pick the five most experienced men" for a patrol). In this sense, what the text refers to as standards implicit in the concept of judging might be characterized equally well as standards implicit in the concept of rationality. Compare Perry, "Judicial Method and the Concept of Reasoning," *Ethics* 80 (1969): 1, 3–6, and note 4.

24. If one thinks that judicial technique principles can be easily listed or otherwise captured, the positivist could, of course, save his model without recourse to the argument in this section. I ignore this possibility because Dworkin apparently treats these standards as among the principles that cannot be so captured and because the distinction urged in this section seems to me worth preserving even if other arguments for the positivist might also be made.

25. Dworkin, "Social Rules and Legal Theory," p. 869; see ibid., p. 874. That the social rule thesis quoted in the text may be a stronger claim than the positivist need make is noted below.

26. Cf. Wasserstrom, *Judicial Decision,* (1961), p. 32.

27. See Hughes, "Rules, Policy and Decision Making," p. 433.

28. Dworkin, "Wasserstrom, 'The Judicial Decision,' " *Ethics* 75 (1964): 47.

29. Hart, *The Concept of Law,* p. 144.

30. See Hughes, "Rules, Policy and Decision Making," pp. 437–39.

31. See Hart, *The Concept of Law,* p. 143.

32. See Hughes, "Rules, Policy and Decision Making," p. 439. It may be that there are

characteristics other than those suggested in this section that more appropriately identify the full class of judicially binding standards deserving of exclusion from the class of "legal standards." My primary concern is to describe the general nature of this class of standards and to justify its separation from inquiries into legal validity.

The leading reference point for studies characterizing what is peculiar and essential to the process of adjudication is still largely found in the writings of Professor Fuller. See sources cited at note 9; and Hart and Sacks, *The Legal Process,* pp. 662–69. For a thoughtful application of Fuller's model to questions of legal theory, see Paul Weiler, "Two Models of Judicial Decision-Making," *Canada Bar Review* 46 (1968): 406.

33. Philosophers and sociologists have long explored the extent to which obligations attach to, and define, roles, see, e.g., R. Dahrendorf, *Essays in the Theory of Society* (1968), pp. 19–87, and this literature is to some extent reflected in discussions of legal theory and legal reasoning, see Weiler, "Two Models of Judicial Decision-Making," p. 407, note 3. See also Robert B. Seidman, "The Judicial Process Reconsidered in the Light of Role-Theory," *Modern Law Review* 32 (1969): 516.

34. See K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960), p. 402.

35. Dworkin, "Model of Rules," p. 41.

36. Professor Carrió discusses a similar example involving the "advantage rule" in soccer, which allows officials to avoid penalizing a team's infraction of a rule "if, as a consequence of the penalty, the offending side would gain an advantage and the non-offending side would be adversely affected" (G. Carrió, *Legal Principles and Legal Positivism* [1971], p. 6). Carrió uses the example to distinguish between second-order and first-order principles, the former characterized in part by their "topic neutrality" and in part by the fact that they are addressed to judges and indicate how other rules are to be understood and applied. But Carrió's second-order principles appear to include far more than what I have called judicial technique principles, and both sorts of principles appear for Carrió to be legal standards (see ibid., pp. 7, 16, 24). Thus the distinction is different both in content and purpose from the distinction developed in this article.

37. See Dworkin, "Model of Rules," p. 36.

38. This attempt to extend the argument used in the case of judicial technique principles can be placed in perspective by briefly comparing the thesis of this section with classical theories of natural law and with Hart's own theory concerning the "minimum content of natural law." For Hart, natural facts of human vulnerability, desire for survival, and the like, make minimal rules respecting persons, property, and promises necessary features of all social life. See Hart, *The Concept of Law,* pp. 189–95. Legal systems must include such minimal rules, not so they may count as "legal," but because it is unlikely that such systems could otherwise come into being or survive. The link here is an empirical one between universal but contingent truths about human beings on the one hand, and the *efficacy,* not the *concept,* of a legal system on the other. One would hardly be inclined to exclude these minimally necessary legal standards (which may take various concrete forms in particular legal systems) from a model of law simply because they appeared only in this sense in all legal systems. In this respect, the difference between such standards and judicial technique principles lies in part in the difference in subject matter with which they deal. Minimal rules concerning persons, property, and promises aim directly at the control of human conduct, rather than at control of the process of reasoning from standards to decisions in particular cases. It is the thesis of this section that the former enterprise, but not the latter, is what "law," even in its broadest, preanalytic sense, could possibly be said to be "about." Cf. Fuller, *The Morality of Law* (1964), p. 106. This thesis explains why a model of law that failed to reflect "the minimum content of natural law" *would* seem arbitrary in a way that a model that ignored judicial technique principles would not. For similar reasons, classical natural law theories, which assert conceptual links between "law" and substantive principles of justice or morality, would also require that such principles be included among the "legal standards" identified by legal theory.

The attempt in the text to provide a translegal account of principles such as the "no profit maxim" falls between the Hartian and the classical natural law theories. Like the latter, such principles are not limited to those based on the "natural necessity" reflected in a Hobbesian view of man's predicament, but embrace broader principles of fairness and justice generally in social contexts. Like Hart's theory, the claim that these principles would be universally accepted in any social context is only contingent, not conceptual. (Indeed the plausibility of even the contingent claim probably depends on interpreting the principles at a level so abstract that they threaten to become vacuous.) But like both theories, an attempt to exclude such substantive standards from a model of "legal standards" begins to appear arbitrary.

39. Dworkin, "Model of Rules," p. 41.
40. Dworkin, "Social Rules," p. 876.
41. Rolf Sartorius, *Individual Conduct and Social Norms,* (1975), p. 196; Rolf Sartorius, "Social Policy and Judicial Legislation," *American Philosophical Quarterly* 8 (1971): 158.
42. See Dworkin, "Hard Cases," p. 1083.
43. Ibid., pp. 1084–85.
44. Ibid., p. 1094.
45. For a further examination and critique of the notion of a "soundest theory of law," see Note, "Dworkin's Rights Thesis," *Michigan Law Review* 74 (1976): 1167.
46. See Dworkin, "Hard Cases," pp. 1083–101.
47. Sartorius, *Individual Conduct,* p. 201.
48. See ibid., p. 185: "[I]t is clear that, in mathematics, we have learned that truth cannot be equated with provability."
49. See ibid., pp. 189–99.
50. Compare Sartorius, "Social Policy," pp. 158–59, with Sartorius, *Individual Conduct,* pp. 199–204. This response, of course, concedes that the theoretical validity of the model cannot be established, however "rarely" one might suppose evenly balanced cases will occur. As one commentator notes, what may be "rare" in comparison to the totality of cases—easy and hard—may not be rare at all if "hard cases" alone are considered. See Note, "Dworkin's Rights Thesis," p. 1193.

At this point, the argument over whether judges should accept the model, despite the theoretical imperfections, shifts from the conceptual to the normative level. The proponent of the rights thesis anchors his normative claims primarily in considerations drawn from the role of a judge in a democracy and from the perceived unfairness of "retroactive" resolutions of social disputes. An opponent of the thesis might agree with Llewellyn that the "single right answer" view "tends, along with pressure of work and human avoidance of sweat, to encourage taking the first seemingly workable road which [appears], thus giving the more familiar an edge up on the more wise" Llewellyn, *The Common Law Tradition,* p. 25. Note that this normative dispute results from focusing on the impact of the rights thesis on judges at opposite ends of the spectrum from "easy" to "hard" cases. Judges who strike "new" ground in "hard cases" may find shelter in the thesis from accusations that judges are merely legislating their own personal views, but they do so arguably only at the cost of being too quick to decide in other cases that they are, in fact, dealing with an "easy" case.

51. See Gerald MacCallum, "Dworkin on Judicial Discretion," *Journal of Philosophy* 60 (1963): 638, 640; George Christie, "The Model of Principles," *Duke Law Journal* (1968): 656; Joseph Raz, "Legal Principles and the Limits of Law," *Yale Law Journal* 81 (1972): 846.
52. See Sartorius, *Individual Conduct,* p. 193.
53. See sources cited at note 9.
54. "A polycentric problem is one which has many centres of stress and direction of force, only some of which are likely to be the focus of attention when a decision in the area is made . . . ." Weiler, "Two Models of Judicial Decision-Making," p. 423.
55. Ibid., pp. 420–21. "Polycentricity" does not seem to mean the same thing as "lacking preexisting decisional standards." As Fuller uses the term, polycentricity seems to imply just the opposite—namely, that there are too many interrelated and decision-relevant standards to allow a court to manage them all in the adjudicative setting. Thus, it is not clear that polycentric issues would cause Dworkin's Hercules any problem, or, correspondingly, that Dworkin would concede that *any* issues are inherently nonjusticiable. See text at notes 68–70 and note 69.
56. Sartorius, *Individual Conduct,* p. 168 (emphasis original).
57. See Dworkin, "Hard Cases," p. 1101.
58. See generally MacCallum, "Dworkin on Judicial Discretion," p. 640.
59. By deciding a nonjusticiable case a court may, of course, by that very act (and the accompanying articulation of standards) make *future* such cases justiciable, although one is still left with an unavoidable instance of judicial legislation in the first decision.
60. See Dworkin, "Judicial Discretion," p. 634, note 6. But see Dworkin, "Hard Cases," pp. 1083–85; Greenawalt, "Discretion and Judicial Decision," p. 375, note 46.
61. See Dworkin, "Hard Cases," p. 1060.
62. Cf. ibid., p. 1080.
63. Dworkin, "Hard Cases," pp. 1078–82.
64. See Dworkin, "Model of Rules," p. 41.

65. Sartorius acknowledges that this is the "nearly universal view of academic lawyers and legal philosophers . . . [f]ound in journal articles too numerous to mention." Sartorius, *Individual Conduct,* p. 182, note 2. In addition to H. L. A. Hart, others whom either Sartorius or Dworkin have identified as holding views that, in varying degrees, are inconsistent with the rights thesis include Gerald MacCallum, Benjamin Cardozo, Felix Cohen, John Dickinson, William O. Douglas, Felix Frankfurter, Paul Freund, Gidon Gottleib, Henry M. Hart, Jr., Karl Llewellyn, Roscoe Pound, Albert M. Sacks, and A. W. B. Simpson. See Rolf Sartorius, "The Justification of the Judicial Decision," *Ethics* 78 (1968): 171, 172, 177, 178; Sartorius, *Individual Conduct,* p. 182, and pp. 190, 194, notes 2, 3, and 6; Dworkin, "Judicial Discretion," pp. 624–25, note 1. It must be admitted that attempts to characterize writers as belonging clearly to one side or the other of this dispute can be a risky business when one considers variations in context and in the way the issue is posed. Thus, it has been argued that none of Dworkin's representative antagonists, properly interpreted, can be said to support a view of strong judicial discretion—a claim that, if true, only lends weight to the empirical evidence for the rights thesis. See Noel B. Reynolds, "Dworkin as Quixote," *University of Pennsylvania Law Review* 123 (1975): 574.

66. See Greenawalt, "Discretion and Judicial Decision," p. 385, note 64.

67. See Llewellyn, *Common Law Tradition,* p. 24; cf. Voltaire, *Epitre a l'Auteur du Livre des Trois Imposteurs,* Nov. 10, 1770 ("If God did not exist, it would be necessary to invent him").

68. See Greenawalt, "Discretion and Judicial Decision," note 23.

69. Cf. ibid., pp. 372–74. One might resist this conclusion by suggesting that sentencing decisions are inherently nonjusticiable and thus not among the range of cases to which the rights thesis could apply. This response reintroduces the theoretical problem of explaining the scope of the thesis in a way that does not beg the question and that yields an independent test of justiciability. See text at notes 55–62.

70. On the basis of similar considerations, Sartorius now acknowledges that "[t]he issue about the existence of uniquely correct decisions is to some extent a red herring." Sartorius, *Individual Conduct,* pp. 201–2 (footnote omitted).

71. The term was employed by Dworkin in his original article and became the focus for his subsequent debate with Sartorius over the compatibility of positivism and the rights thesis. See Dworkin, "Model of Rules," p. 41; Sartorius, "Social Policy," p. 156; Dworkin, "Social Rules," pp. 874–78; Sartorius, *Individual Conduct,* pp. 204–10.

72. Sartorius, "Social Policy," p. 156.

73. Dworkin, "Social Rules," pp. 876–78.

74. See ibid., p. 860.

75. See Sartorius, *Individual Conduct,* p. 209.

76. See Dworkin, "Social Rules," pp. 861–62.

77. Hart, *Concept of Law,* p. 199.

78. The simplified equity system described in the text may strike many as too indeterminate to yield the kind of guidance normally associated with the existence of a "legal system." See Joseph Raz, *Practical Reason and Norms* (1975), pp. 137–39; L. Fuller, *The Morality of Law* (1963), pp. 34, 39. The force of this objection should diminish as courts begin to accumulate a body of case law and to recognize that "doing justice" includes taking account of settled expectations under such cases, even if it is thought that some of them had initially been decided erroneously. See Sartorius, "Social Policy," p. 152. Compare Sartorius, *Individual Conduct,* pp. 176–79, with Wasserstrom, *The Judicial Decision,* pp. 150–52. Indeed, it has never been clear that the common law, which includes judicial power to overrule past decisions, operates differently in any essential respect from a system that might have emerged from Rex's equity system. See Simpson, "The Common Law and Legal Theory" in *Oxford Essays in Jurisprudence* (2d series, edited by A. W. B. Simpson, 1973), pp. 77, 79, 85–88. But see Raz, *Practical Reason and Norms,* p. 140.

In any event, objections to counting such systems as "legal" do not affect the point made in the text: One who insists that such systems *are* "legal" will find that Hart's model can accommodate the system. Hart's version of positivism, in short, need not be seen as conceptually linking "law" with a requirement that legal standards be ascertainable with any specified degree of certainty. (Raz, in contrast, does insist on just such a conceptual link. See ibid., p. 146 [systems of "absolute discretion are not legal systems"]). Hart, it is true, claims that in cases of sufficient uncertainty the judge's decision is not determined by legal norms, but that claim can be explained as based not on what is logically entailed by Hart's definition of law or his account of social rules, but on empirical assumptions concerning what most legal systems could realistically expect and have, in fact, demanded of judges in hard cases. If Dworkin's Herculean instructions can intelligibly be given to

judges and can be defended as yielding (in theory) externally determined solutions, as the rights thesis assumes, Hart's account of law can adjust to the different empirical assumption without altering the basic theoretical model. See text at notes 81–84.

79. Municipal legal systems are generally thought to have "closed" themselves by including "some kind of residual principle the effect of which is to occupy the space which would otherwise be devoid of law" (J. Stone, *Legal Systems and Lawyers' Reasonings* [1964], p. 189). The most common such principle, dubbed the "residual negative principle" by Professor Stone, provides "that everything which is not legally prohibited is deemed to be legally permitted" (ibid.).

80. See C.C. art. 1 (Swiss Civil Code 1972) (judge is to decide cases in which a rule is unclear as if he were a legislator); Stone, *Legal Systems,* p. 29, note 21, and p. 189, note 124.

81. See Stone, *Legal Systems,* pp. 188–89.

82. See note 78; John Dickinson, "The Problem of the Unprovided Case," *University of Pennsylvania Law Review* 81 (1932): 115, 126.

83. Hart, *Concept of Law,* p. 181.

84. Cf. Sartorius, *Individual Conduct,* pp. 208–9. See also note 78.

85. Sartorius, *Individual Conduct,* p. 210.

86. Hart, *Concept of Law,* p. 149.

87. See Dworkin, "Social Rules," pp. 871–72.

88. See Hart, *Concept of Law,* p. 149.

89. Thus, it is hard to agree with Dworkin that uncertainty in this respect is somehow more fatal to positivism than uncertainty concerning a rare issue such as Parliament's power to bind future parliaments. See Dworkin, "Social Rules," p. 872. It is true that "hard cases" arise more frequently than cases involving Parliament's power to pass entrenching clauses; in that sense the disagreement over closure instructions is an issue judges must continually face. But unlike the case of judges in disagreement about what to do if Parliament *did* pass an entrenching clause, disputes about how one is to decide "hard cases" will largely escape detection in the actual outcome of cases given the practical difficulty of distinguishing between the exercise of weak discretion on the one hand and strong, but wise, discretion on the other. See text at notes 69–71.

For similar reasons the fact that judicial decisions are written as if there is a "right answer" does not prove the judges have accepted the rights thesis. Because of the practical problems of distinguishing strong from weak discretion, decisions are not likely to distinguish explicitly between the claim that a decision is "correct" as measured by pre-existing legal standards (a judicial opinion) and the claim that the decision is "correct" as measured by political or moral philosophy (a legislative opinion). Of course, in applying closure instructions applicable only to "hard cases," judges can make mistakes in deciding when they are dealing with such a case.

90. See Dworkin, "Social Rules," p. 877.

91. Raz and Sartorius both conclude that Dworkin is driven to this position when he attempts to maintain his thesis as a counterexample to positivism. See Raz, "Legal Principles," p. 844; Sartorius, *Individual Conduct,* p. 208. Dworkin, on the other hand, appears steadfastly to resist the suggestion that his thesis entails the inability to distinguish legal from nonlegal standards. Compare ibid., p. 206, with Dworkin, "Hard Cases," pp. 1105–6.

92. The accuracy of this description of Dworkin's position in comparison to classical natural law theory depends on how one resolves the confusion concerning whether Dworkin thinks legal and nonlegal standards can ever be separated. See note 91.

93. See Hart, *Concept of Law,* pp. 205–7.