THE INSTITUTIONAL AND EMPIRICAL BASIS OF THE RIGHTS THESIS

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I. INTRODUCTION

In recent years a new challenge to positivism has been issued in the form of several articles by Professor Ronald Dworkin which both raise objections to positivism and attempt to provide an alternative.[1] Professor Dworkin's new theory, the "rights thesis," is distinctive because of three attributes—institutional autonomy, absence of judicial discretion, and lack of judicial originality—which he evidently believes answer his objections to positivism. This Article is not so much a defense of positivism as an attempt to show that the rights thesis does not possess, by virtue of these three characteristics, greater normative or descriptive appeal.

For the sake of convenience, I will work from Dworkin's own description of positivism. The important element, for this purpose, is the positivists' idea of "discretion." "That doctrine," writes Dworkin, "argues that if a case is not controlled by an established rule, the judge must decide it by exercising discretion."[2] He also seems to be referring to positivism when he says, "One popular solution [to the problem of describing how judges make decisions] relies on a spatial image; it says that the traditions of the common law contract the area of a judge's discretion to rely upon his personal moral-

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[1] Dworkin's writings include *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 14 (1977); *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972), *reprinted as The Model of Rules II in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 46 (1977); *The Jurisprudence of Richard Nixon*, 18 N.Y. REV. BOOKS, May 4, 1972, at 27, *reprinted as Constitutional Cases in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131 (1977); *Hard Cases*, 88 HARV. L. REV. 1057 (1975), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977). The editors' introduction to *Hard Cases* describes Professor Dworkin's position thus:

> Philosophers and legal scholars have long debated the means by which decisions of an independent judiciary can be reconciled with democratic ideals. The problem of justifying judicial decisions is particularly acute in "hard cases," those cases in which the result is not clearly dictated by statute or precedent. The positivist theory of adjudication—that judges use their discretion to decide hard cases—fails to resolve this dilemma of judicial decisionmaking. Professor Dworkin has been an effective critic of the positivist position and in this essay he provides an alternative theory of adjudication that is more consistent with democratic ideals.

[2] Dworkin, *The Model of Rules*, *supra* note 1, at 34.

ity, but do not entirely eliminate that area."[3] Dworkin is alluding to the positivists' notion of "open texture": not all legal questions can be definitively settled by recourse to existing legal materials because of the necessary indeterminacy of language.[4]

The first characteristic that distinguishes Dworkin's theory from positivism is "institutional autonomy." By institutional autonomy, Dworkin means that judges should confine their attention to material embodied in the law (namely, legal rules and principles) and not take into consideration what he refers to as "background rights." By way of explaining the difference between "institutional" and "background" rights, Dworkin draws an analogy between judicial decisionmaking and decisionmaking in chess and contrasts both to the activities of the legislature. He points out that in chess, officials are not supposed to let their decisions turn on extraneous moral considerations such as individuals' rights to equal welfare without regard to intellectual ability: "Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality."[5] But this is not true in the legislature, he argues:

> [L]egislation is only partly autonomous in that sense. There are special constitutive and regulative rules that define what a legislature is, and who belongs to it, and how it votes, and that it may not establish a religion. But these rules belonging distinctly to legislation are rarely sufficient to determine whether a citizen has an institutional right to have a certain statute enacted; they do not decide, for example, whether he has a right to minimum wage legislation. Citizens are expected to repair to general considerations of political morality when they argue for such rights.[6]

When Dworkin says that judicial decisionmaking is autonomous, he means, therefore, that courts should not consider political morality, sociology, economics, and the like, for these involve policies and

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[3] Dworkin, *Hard Cases*, *supra* note 1, at 1063.

[4] This Article will treat positivism as though it can be accommodated to Dworkin's notion of "legal principles." As he points out, the wealth of legal materials judges have at their disposal is not exhausted by so called "black letter law," or rules.

[5] Dworkin, *Hard Cases*, *supra* note 1, at 1078.

[6] *Id.*

background rights rather than principles about existing institutional rights.

The second axiom of the rights thesis—that judges do not have discretion in any non-trivial sense of the word—is closely related to Dworkin's assertions of institutional autonomy. If judges were free to look outside the law for material on which to base decisions, they might have to use discretion in some strong sense because there would be so much from which to choose. Judges would also exercise discretion in their decision whether to turn to extra-legal sources. Conversely, if, as Dworkin asserts, the legal materials contain a unique right answer for every problem, then it would be desirable for courts to limit their consideration to these legal materials, since consideration of other factors would jeopardize pre-existing legal rights.

The third axiom—that judicial decisionmaking should be unoriginal—is related to both institutional autonomy and lack of discretion, for judges, in confining their attention to institutionalized materials, are limiting themselves to enforcement of pre-existing legal rights and obligations. These three characteristics may not be logically equivalent, but they are interdependent for their appeal, and a successful attack on one undermines the plausibility of the others.

By focusing on these differences between positivism and the rights thesis, I will assess whether the rights thesis has greater success than positivism, first as a normative theory, second as a descriptive theory, and third in assuring consistency between the normative and descriptive aspects.

II. The Rights Thesis as a Normative Theory

My first argument against the rights thesis will be that the two justifications which Dworkin offers for it in *Hard Cases* are not sufficient to establish that the thesis is normatively superior to positivism. The first of these justifications is that judicial lawmaking is unacceptable in a democracy and that the judiciary should limit itself to enforcement of pre-existing rights which have been institutionalized by governmental bodies responsible to the majority, namely, the legislature and executive. Dworkin argues that charges that the judiciary interferes with the democratic process are unfounded as long as judges are unoriginal and confine their role to implementation of legislative policies.[7]

[7] *Id.* at 1059-60.

A. *Defects of the Democracy Argument*

The democracy argument does not, however, favor the rights thesis over positivism. A positivist would agree that judges have an obligation to conform to the products of the democratic process but would argue that it is not always possible to do so, since statutes, due to their "open texture," often fail to provide answers. Without some demonstration that there is in fact an answer in the materials for every problem, there is no reason to believe that the rights thesis infringes less on democratic decisionmaking than positivism. And even if there is such an answer, the rights thesis does not make it more probable that the court will find it, since it is only with respect to particularly hard cases that the rights thesis and positivism disagree.[8] Dworkin's claim that judges should use the rights thesis because it is more consistent with democracy is therefore dependent on the validity of his descriptive claims that a right answer exists and that judges will, by using his methods, be able to find it. These claims I will discuss later in the Article.[9]

Another reason that the rights thesis is no more consistent with democracy than positivism is that it also calls for the continued application of rules and principles of *judicial* origin. It is clearly impossible to derive all existing law from statutory and constitutional sources. The common law existed before the federal or state constitutions were written; state legislation was enacted against a body of existing state judicial law, and federal legislation relied in turn upon existing state law.[10] In the period before there were legislative bodies, judges must have had discretion and been innovative; the democracy argument would seem to prohibit application of this judicially created law as much as it would prohibit formulation of new judicial law. In fact, if one prefers democracy because it effectuates majority will, it would be more sensible to grant present judges *more* power than past judges, for even a federal judge with

[8] In addition, Dworkin's theory of statutory interpretation does not call for adoption of the meaning that the legislature intended if the judiciary determined that a different interpretation would be more in line with the legislature's responsibilities; a positivist theory that applied the law in the manner most consistent with what the legislature had in mind would therefore be more consistent with democratic principles. For Professor Dworkin's general theory of statutory interpretation, see Dworkin, *Hard Cases*, *supra* note 1, at 1083-87.

[9] *See* Part III *infra*.

[10] *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

life tenure is more responsive to popular opinion than a judge that has been dead for several hundred years.

Dworkin might respond that the majority has in some sense "acquiesced" in this body of law; perhaps he would say that when the legislature enacts statutes against a body of judicial law it is, in effect, approving it. But if this is the case, continuing judicial innovation could be approved in the same way. Alternately, he might argue that at some point in the development of the law, judge-made innovation was brought to an end—perhaps this point was marked by the adoption of the federal Constitution—so that prior innovation was adopted but further innovation disapproved.[11] Clearly the rights thesis must offer some explanation of legal evolution to take the place of positivism's theory of institutionalization of legal rules through social custom, judicial use, and legislative approval. But while a notion of adoption might conceivably save Dworkin's thesis from the inconsistency of accepting judicially formulated law from one period while prohibiting judicial reformulation later, the cost of rescue would be the admission of an historical and theoretical limitation on his optimistic efforts to provide a democratic natural rights theory.

Finally, as Dworkin himself admits, there is at least one important area—constitutional law—in which the democracy argument is beside the point. In *The Jurisprudence of Richard Nixon,* he spells out in detail the reasons decisions about constitutional rights should not be left to the majority.[12] Of course, it is precisely in the area of constitutional litigation that the argument from democracy has been made,[13] because that area is the only one in which legislative revision is impossible.

Dworkin uses the "democracy" argument when it serves his pur-

[11] In fact, a more plausible interpretation of the "case or controversy" wording is that it approved not a body of law but a method of adjudication. If the wording in fact adopts a particular approach to the judicial function, it would seem to authorize judicial creativity, since judicial decision method before the American Revolution—a practice to which the wording apparently refers—was necessarily innovative. In addition, any theory which justifies the rights thesis by reference to the Constitution must meet the objections set out in Section B, *infra.*

[12] *See* Dworkin, *The Jurisprudence of Richard Nixon, supra* note 1. In general, Dworkin undercuts his arguments that judges do not have discretion when he posits far-reaching powers of review, for the justification that Chief Justice Marshall offered for the institution of review was that constitutional adjudication was no different from ordinary common law decisionmaking. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[13] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962); L. HAND, THE BILL OF RIGHTS 73 (1960).

poses but denies it its main thrust.[14] Thus the democracy argument does not provide a compelling reason for preferring the rights thesis to positivism, for both theories fit the democracy argument equally well, and, by Dworkin's own admission, the democracy argument is irrelevant in large numbers of interesting cases.

B. *The "Ex Post Facto" Justification*

Dworkin's second argument on behalf of the rights thesis is that if judicial lawmaking is innovative, it is improperly ex post facto. This argument suffers from the same defect as the democracy argument: absent a demonstration that there is in fact an answer in the materials for every problem and that judges using the rights thesis are more likely to find it, there is no reason to believe that it is possible, even using the rights thesis, to avoid ex post facto results.

In addition, even if it could be shown that the ex post facto argument lends support to the rights thesis, it is not clear what lends support to the ex post facto argument. Why should we avoid judicial formulation of ex post facto law? The Constitution does not direct this limitation. In *Frank v. Mangum*,[15] the Supreme Court held that innovation in *judicial* decisionmaking does not violate the ex post facto clause, since that clause applied only to the *legislature*:

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[14] Constitutional law is only one area where development has been left explicitly to the courts. "[T]here are areas of federal preemption, created by force of the Constitution, in which the federal courts formulate rules of decision without guidance from statutory or constitutional standards . . . ." Hill, *The Law-Making Power of the Federal Courts: Constitutional Pre-emption*, 67 COLUM. L. REV. 1024, 1025 (1967). Maritime law is the most obvious example. *See* Hart, *The Relations Between State and Federal Law, supra* note 10, at 496. Legislative power in this area is in fact or derivative of judicial power; it is based solely on the article III grant of jurisdiction to the judiciary and the necessary and proper clause of article I. *See* Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 446 (1958). Another example is formulation of law governing controversies between states. Certainly the democracy argument does not prohibit judicial lawmaking in these areas.

In general, a jurisdictional grant need not carry with it enough substantive material for decision. Where jurisdiction is proper because a case "arises under" a federal law, that law is usually one which provides the substantive rule for decision. However, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), upheld the validity of a statute that did not specify the substantive law but merely granted the federal courts jurisdiction to adjudicate certain kinds of disputes. The Court held that this statute evidenced an intent that federal law should govern and that courts should formulate it. If prior federal law had contained enough material to decide these cases, there would of course have been no need for a jurisdictional grant; a simple lowering of the $10,000 amount in controversy would have resulted in federal question jurisdiction. It hardly seems inconsistent with the democratic process for courts to formulate law when requested by the legislature to do so. *See generally*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

[15] 237 U.S. 309 (1915).

> The insistence that [the state court's decision] was inconsistent with the previous practice . . . and therefore amounted in effect to an ex post facto law in contravention of section 10 of Article I of the Federal Constitution, needs but a word. Assuming the inconsistency, it is sufficient to say that the constitutional prohibition . . . as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.[16]

Neither does it violate the due process or contracts clauses.[17]

Although the Court based these results on the constitutional wording, a second line of reasoning is equally compelling. If an erroneous or novel application or overruling of prior case law were to constitute constitutional error, an inconsistency with prior state case law would provide grounds for Supreme Court review. This would be both highly impractical and contrary to principles of federalism. *Murdock v. City of Memphis*[18] held that even given a sufficient alternate basis for Supreme Court review, the Court would not review alleged errors in state law.[19] It would be much more intrusive if error in state law, by itself, sufficed for appellate jurisdiction.[20]

By the same "federal question" argument, the ex post facto objection cannot be grounded in federal statutory authority. On the other hand, state law obviously cannot provide the uniform acceptance which Dworkin wants his theory to have: in our system there is simply no law which is binding on both state and federal courts but which does not provide grounds for Supreme Court review. But

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[16] *Id.* at 343-44.

[17] *See* Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924). In criminal trials, however, there may be related problems of notice to offenders by reversal of a policy that has been followed for a long period. *See* James v. U.S., 366 U.S. 213 (1961). *See also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

[18] 87 U.S. (20 Wall.) 590 (1875).

[19] In exceptional instances, however, there may be Supreme Court review on the basis of arbitrariness, where the claim is that the decision is ad hoc rather than merely a change in law. *See* Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960). In addition, review may be appropriate where a suspicious and unexpected change in state procedural law is used to foreclose assertions of federal constitutional rights. *See* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[20] Other possible constitutional bases for the rights thesis, namely, the separation of powers and the Guaranty Clause, must be rejected for the same reason. Of course, they are also vulnerable for the reasons set out in the previous section dealing with the "democracy" argument; it is not at all clear that the rights thesis is more consistent with a representative form of government than positivism. Compare U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

Dworkin would probably not be upset by these objections, since he is not looking to statutory or constitutional sources for support of the ex post facto argument; he relies, instead, on its moral appeal. His arguments revolve around the fact that "[i]t is a matter of injustice when judges make mistakes about legal rights."[21] But this reasoning, by the very terms of his thesis, is not compelling because it is a blatant appeal to background rights. According to Dworkin, it is only with regard to enactment of legislation that citizens are allowed to "repair to considerations of political morality."[22] Dworkin should not be allowed to invoke a double standard which exempts his theory from the requirements it imposes on other legal materials.[23]

III. The Descriptive Validity of the Rights Thesis

For all of these reasons, Dworkin cannot argue either that the rights thesis is compelled by force of constitutional or statutory materials or that it is a consequence of a judge's ethical obligation to decide cases in a just fashion. The rights thesis is likewise not obligatory by virtue of explicit judicially formulated principles; only the Supreme Court would have the power to adopt a uniform methodology, and, as already pointed out with respect to potential constitutional bases, such a source of support would compel appellate review of state law decisions.[24] To what arguments, then, can Dworkin turn for support? He would probably argue that the rights thesis is valid because in some sense it best describes our ideas of what the judicial function consists of. He might admit that, because of the peculiarities of our federal system, it would be impossible to pinpoint any source of law which would bind all state courts without presenting questions of federal law but nevertheless argue that the

[21] Dworkin, *Hard Cases*, *supra* note 1, at 1108.

[22] *Id.* at 1078. Parenthetically, one might ask whether the rights thesis is a rule or a principle. Since by its own terms it should have no exceptions, it apparently must be a rule.

[23] One line of response might be that while substantive rules must be institutionalized, methodological assumptions need not be. However, this exclusion would be a serious blow to the rights thesis since so very many important legal principles are by their nature methodological. Conflict-of-laws rules and rules of evidence appear similar to the rights thesis in that they specify appropriate sources of materials for fashioning legal answers. *Stare decisis* is of course methodological; so are rules of procedure and jurisdiction. While it may be overly harsh to require *all* principles and rules to be institutionalized, this bespeaks the implausibility of a theory of complete institutional autonomy, not the implausibility of applying to the rights thesis the requirements it imposes on other legal materials.

[24] If such an approach is adopted, it will of course undercut even further the "democracy" argument.

rights thesis is somehow implicit in our jurisprudence. The rights thesis might be jurisprudentially compelling, not for any moral reasons dependent on "background" rights, but because it is a valid description of accepted judicial practice. I will examine two different claims which Dworkin might make about the descriptive validity of his model: the first is that judicial decisionmaking in fact conforms to the rights thesis because judges reach the results which that thesis prescribes; the second is that judges do in fact *feel* compelled to decide according to that thesis to the extent that such decision is within their power.

Does the rights thesis describe more accurately than positivism the actual results in cases? Because of the way the two theories are set up, it is very difficult to assess their relative accuracy. Positivism holds that when it is not humanly possible to show that one result is better than its opposite, a judge has discretion to decide either way, and may take extra-legal "policy" considerations into account. Dworkin's theory holds that a right answer exists regardless of human inability to discern it; and by postulating the existence of entities which are by his own admission not empirically observable, he makes his theory empirically untestable. One's preference for one theory over the other seems, therefore, dependent upon one's metaphysical outlook, and in this respect the debate between Dworkin and Hart is reminiscent of the debate between determinism and "free will." Dworkin can show a legal justification for vast numbers of decided cases, just as the determinist can demonstrate a "cause" for many human actions. This does not show, however, that every case has a right answer, or every action a "cause," for the most interesting problems are the most difficult ones, and in these the existence of a right answer or cause must be taken on faith.

Regarding the axiom that judges do not take policy or "background rights" into account, Professor Greenawalt has shown in this volume[25] that most arguments judges use can be characterized as either principle or policy; thus this argument is not subject to rigorous empirical test either. The third axiom—that judges are not original—is difficult to test for a different reason; typically it is hard to discount obvious legislative changes to estimate the extent of judicial influence on the changing law. An ideal empirical test for this hypothesis would compare two court systems, both applying the same body of statutory and constitutional law, so that legislative

[25] *See* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

changes would have identical influence in both courts. If the resulting bodies of law were nevertheless to diverge, one would know that at least one of the court systems was "changing" the law. If they did not diverge, we would have good evidence, absent some plausible demonstration that the two were "changing" the law simultaneously, that neither court was being original.

Exactly this situation existed before the landmark case of *Erie Railroad v. Tompkins.*[26] *Erie* overruled an interpretation of the Rules of Decisions Act which had been rendered in *Swift v. Tyson.*[27] The relevant portion of the Act provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[28] According to *Swift,* the word "laws" did not include state court decisions but did of course include state statutory and constitutional materials. Where the federal court deciding a diversity case was called upon to resolve an issue which was not covered by state statute, it deemed itself to be applying state law. Prior state court determinations on the same issue were not binding because they were not themselves law but only evidence of what state law was, which the federal court was free to disregard in its search for the right result.[29] In short, both state and federal courts were bound by the state statutes and constitution, according to the Rules of Decisions Act; both were bound by federal statutory law and the federal Constitution (by virtue of the Supremacy Clause), yet they arrived at different ideas of what "state law" dictated.[30]

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[26] 304 U.S. 64 (1938).

[27] 41 U.S. (16 Pet.) 1 (1842).

[28] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1970)).

[29] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 101-02 (1945) (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J. dissenting)); Hart, *The Relations Between State and Federal Law, supra* note 10, at 505. Professor Hill has stated that

> a federal court deemed itself as competent as a state court to "find" and "declare" the legal principle applicable to the case, and in fact believed itself under a duty to do so independently of the state courts. The law thus being "found" and "declared," however, was recognized to be the law of the state, which the state courts remained free to interpret in their own way without regard to federal decisions . . . .

Hill, *The Erie Doctrine and the Constitution, supra* note 14, at 443.

[30] Of course Dworkin might argue that the federal courts were "wrong" in interpreting state law the way they did for, both as a matter of statutory construction and for constitutional reasons, they did not really have the authority to decide differently on matters of state law than the courts of the states in which they sat. But this is beside the point for purposes of

This difference would probably not disconcert Dworkin, who has embedded within his thesis a "theory of mistakes" which partially accommodates such results. Dworkin would likely respond that the reason federal courts diverged from state courts was that under such a demanding theory of decisionmaking human judges are inevitably prone to error in application of the methodology. According to the rights thesis, such errors are sometimes tolerated or perpetuated because it would be too disruptive to attempt to root them out.[31] In this way Dworkin could explain how two independent sets of courts might develop mutually contradictory sets of results.

But the price of obtaining consistency with the data is high, for Dworkin's dependence on a "theory of mistakes" presents other problems. While use of this strategem makes Dworkin's theory invulnerable to criticism about whether the theory conforms to the results courts reach, it deprives him of any support those results might provide. He cannot simultaneously discard as "error" all evidence which contradicts the rights thesis and rely on evidence which argues in his favor. This objection would not apply if Dworkin were merely saying that judges *should* decide according to the rights thesis, for it is quite consistent to hold to a normative theory while admitting that it does not describe present practice. But a descriptive theory which characterizes as "error" all counter-examples confronting it is empirically suspect, to say the least; one is led to

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our "experiment": whereas a federal court did not have the right to refuse to apply state decisional law, clearly the state might have adopted either the rule it actually chose or the one arrived at by the federal court.

[31] Dworkin describes his "theory of errors" in *Hard Cases, supra* note 1, at 1096-101 (1975). One problem with it is that it does not explain why judicial "mistakes" that are followed should be viewed as error when a legislative decision not ideally consistent with institutional responsibilities is not. Assume for example that the legislature has passed a statute, *S*, which is ambiguous and might mean either *S*1 or *S*2. Under Dworkin's theory, a court faced with this ambiguity resolves it by deciding which one is more consistent with the legislature's responsibilities. Assume the court selects *S*2. The legislature, which had not noticed the ambiguity, reflects and amends the statute to indicate that *S*1 is to govern. The courts now enforce *S*1, of course, and do so without pointing out that some other course of action would be more consistent with the legislature's institutional responsibilities. If the legislature had originally enacted *S*1, the court would never have inquired into the the "best" way to solve the problem at hand, although theoretically standards exist for making that determination. The "best" solution is irrelevant, since courts "defer" to the legislature.

A federal court deciding a diversity case treats state decisional law the same way, applying it without any reevaluation or comment on the merits of the decision. Dworkin offers no reason why the legislature has *discretion* to choose between *S*1 and *S*2 but a court does not have discretion to make an analogous decision as between some *D*1 and *D*2. A less-than-optimal legislative choice involves discretion; a less-than-optimal judicial choice involves error.

wonder whether the error is not in the theory rather than the data.[32]

Dworkin therefore cannot claim that his theory is valid because it is descriptive of the way judges actually decide. He would probably prefer to argue that the rights thesis is superior to positivism because it better describes *attitudes* towards the judging function, that it describes what judges are *trying* to do. In this regard Dworkin claims that judges' traditional concern for both precedent and hypothetical examples demonstrates they are attempting to apply the rights thesis.[33] In fact, this argument could support positivism equally well. Hart would not argue that judges do not concern themselves with examination of precedent; most cases are easy ones, he would say, and can be decided through *stare decisis.* And even in a hard case—one within the "open texture"—it would be necessary to demonstrate that the desired result was consistent with past decisions, and to do so one must of course consider those decisions. Such examination does not, however, show that the result is completely determined by those precedents; the opposite result might be consistent also, and often the dissenting opinion appears to prove as much. Similarly, a concern with hypothetical situations is appropriate where decisionmaking conforms to positivism; as in decisionmaking according to the rights thesis, the present case will become a precedent and should not compel undesirable results.[34]

Since concern for precedent and hypotheticals supports both theories equally well, comparison of the descriptive accuracy of the two theories must be made by other means. One test might be the extent to which positivism and the rights thesis are reflected in the opinions judges write, particularly the opinions in cases which have obvious jurisprudential overtones. I will examine three recent developments in the law which have been recognized as jurisprudentially

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[32] An objective test for the presence of "error" would solve this problem, for if we had such a test, one that was not biased in favor of one of the competing theories of jurisprudence, we could eliminate the "incorrect" decisions and test different theories against the remaining body of "correct" decisions. It should be Dworkin's responsibility to provide such a test, since he is the one who would eliminate part of the data as "error." But of course Dworkin cannot offer such a test; according to his theory it is often beyond human capabilities to decide whether a given decision is correct.

[33] *See* Dworkin, *Hard Cases, supra* note 1, at 1065.

[34] Note also that judges sometimes appear to demonstrate a consciousness of discretionary power by referring to the case before them as "a matter of first impression." In addition, an issue that is denied jurisdiction "for want of a substantial federal question" one year, a holding on the merits, may be reversed shortly thereafter on plenary consideration. *See generally* BATOR, MISHKIN, SHAPIRO, & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 649-50 (1973).

important and attempt to evaluate whether positivism or the rights thesis comes closer to describing the way judges feel about what their proper role should be. These areas are the *Erie* decision (discussed from a different point of view above), the growth of federal common law, and retroactivity.

A. *Jurisprudential Implications of* Erie

Courts and commentators have uniformly read *Erie Railroad v. Tompkins*[35] as rejecting the sort of jurisprudence which Dworkin has in mind. According to Dworkin, there is a right answer to every case, independent of the decision that a judge actually comes to. This was the position the federal courts took during the reign of *Swift v. Tyson*; since the law existed independently of what judges said that it was, federal court judges were as competent to ascertain it as state court judges. In an important early case interpreting *Erie*, the Court wrote:

> In overruling *Swift v. Tyson*, . . . *Erie* . . . did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law . . . . State court decisions were not "the law" but merely someone's opinion—to be sure an opinion to be respected—concerning the content of this all-pervading law. Not unnaturally, the federal courts assumed power to find for themselves the content of such a body of law.[36]

The majority also quoted Justice Holmes' dissent in *Kuhn v. Fairmont Coal Co.*: "The law of a State does not become something outside of the state court and independent of it by being called the common law. Whatever it is called, *it is the law as declared by the state judges, and nothing else.*"[37] *Erie* recognized that courts, as well as legislatures, were involved in making law and that it was proper

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[35] 304 U.S. 64 (1938).

[36] Guaranty Trust Co. v. York, 326 U.S. 99, 101-03 (1945).

[37] 215 U.S. 349, 373 (1910) (emphasis added).

for state court judges to do so when the underlying issues involved state issues only:

> The federal courts in the era of *Swift v. Tyson* had put themselves in the position of denying the authority of state courts as coordinate organs of the state governments . . . . [*Erie*] put a period, with an exclamation point, to the notion that the decisional rules of the state courts had a status inferior to state statutes in the spheres, whatever they were, in which state law governed.[38]

In the words of still another author,

> [t]he Supreme Court now recognized that law was embodied in decisions no less than in statutes; that state law was what the courts of the particular state said it was; and that the federal courts, despite strained protestations to the contrary, had been making substantive federal law in areas where even Congress could not venture.
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> . . . .
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> In *Erie* proper, the Court was concerned with a problem of substantive law, in the sense that basic tort or contract law is substantive law. In this context the Court's statement that the federal courts could not constitutionally "make" law on matters reserved to the states was far from new constitutional doctrine. In an important sense the essential difference between *Swift v. Tyson* and *Erie* . . . was not whether the federal courts *could* make substantive law in nonfederal matters but whether they had in fact been doing so in their "declarations" regarding the "general law." Once it was decided in *Erie* that this practice did constitute the making of substantive law, the practice had to cease by virtue of constitutional assumptions long antedating *Erie*.[39]

At least in the eyes of scholars and commentators writing about *Erie,* the decision definitively discarded the prior description of the judicial function whereby courts merely searched for pre-existing "right answers."

A second reason the *Erie* decision contradicts Dworkin's theory is

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[38] Hart, *The Relations between State and Federal Law, supra* note 10, at 506.

[39] Hill, *The Erie Doctrine in Bankruptcy,* 66 HARV. L. REV. 1013, 1031-32 (1953). *See also* Mishkin, *The Variousness of "Federal Law," supra* note 10, at 798.

the ramifications which it had for federal judges' methods of interpreting state law. After it was settled that state decisional law was binding, a problem arose concerning whether federal courts were obliged to follow state decisional law which could be overruled by other state courts—for example, precedents from state courts of the lowest rank, or unreported decisions of courts of limited jurisdiction.[33] The answer was yes,[40] in almost all instances, and this requirement seemed, to some, inimical to the judicial process:

> [A court should] use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practice; it is history and economics, and sociology, and logic, both inductive and deductive.[41]

The doctrine is not, today, so stringently applied;[42] nevertheless, judges still chafe under the requirement. Judge Friendly recently objected on the ground that "federal courts cannot discharge the important objective of making law" when jurisdiction is based upon diversity of citizenship.[43] Likewise, Professor Wechsler opposed continuation of federal jurisdiction based on diversity, saying that "[i]n many ways the worst part of diversity jurisdiction is that it debases the judicial process, reducing federal judges to what Judge Frank has called 'ventriloquist's dummy to the courts of some particular state'—because they lack the requisite authority to speak themselves."[44] These objections suggest that federal judges envision their role as normally encompassing some creative participation. Their role in interpreting state law is different from their role in interpreting federal law and also different from the state court's role in interpreting state law. Dworkin's theory does not provide for differing amounts of discretion depending on whether the case involves a state judge deciding state law, a federal judge deciding

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[40] *See* Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940); West American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies v. Joint Highway Dist. No. 13, 311 U.S. 180 (1940); Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

[41] Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 775 (1941).

[42] *See* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

[43] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 142 (1973).

[44] Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 238-39 (1948) (footnote omitted).

state law, or a federal judge deciding federal law; the right result would always be uniquely determined by the institutionalized materials, and there would be no discretion at all.

B. *Federal Common Law*

A second area in which the judicial function has been recognized as involving creativity is the so-called "federal common law," exemplified by *Textile Workers v. Lincoln Mills,*[45] in which the Supreme Court held that Congress had authorized it to formulate federal labor law.[46] In its justification of this assumption of broad creative powers, the Court in that case wrote, "It is not uncommon for federal courts to fashion federal law where federal rights are concerned,"[47] and cited in support of this proposition the related case of *Clearfield Trust Co. v. United States.*[48] *Clearfield Trust* involved the rights and duties of the United States government on commercial paper which it had issued, and the Court held that such questions should be governed by federal rather than state law, in order to ensure uniformity. Since no statute provided an answer to the problem, the Court created a rule to govern the situation: "In [the] absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[49] *Clearfield Trust* is just one example of federal courts formulating law to deal with problems that implicate federal interests. Judge Friendly has described this "federal common law" as

> a new centripetal tool incalculably useful to our federal system. [The Supreme Court] has employed a variety of techniques—spontaneous generation as in the cases of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of interstices.[50]

Unlike the *Lincoln Mills* case, jurisdiction in *Clearfield Trust* was predicated upon a federal statute involving congressional creation

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[45] 353 U.S. 448 (1957).

[46] *See* discussion at note 14 *supra.*

[47] 353 U.S. at 457.

[48] 318 U.S. 363 (1943).

[49] *Id.* at 367.

[50] Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 421 (1964). *See generally* BATOR, MISHKIN, SHAPIRO, & WECHSLER, *supra* note 34, at 762-70, 830-32.

of a substantive right. Dworkin might respond that the case did not involve judicial creativity because the statutory grant contained enough directives to decide the case. This is probably wrong; according to the opinion, while congressional directive unambiguously required application of federal law, it was up to the Court to supply it. One author commented that

> in virtually all governmental litigation of the kind here under discussion, it is possible to find some sort of legislation, direct or delegated, somewhere in the background: in the organization of the particular department or agency, in the "authorization" to make contracts or deal in property. It is productive of confusion to seize upon such remote legislation as the basis for a general law-making competence in the federal judiciary.[51]

Moreover, even if the answers the Court found were dictated by the federal statutory involvement which made assumption of jurisdiction appropriate, this would speak only to whether the judges were *in fact* creative in their *results.* As I have shown above,[52] even Dworkin would have to admit that judges do at times alter the law and that the rights thesis cannot be descriptive of whether judges are actually creative. The claim I am now considering is that judges *think* they are obliged to decide according to the rights thesis; and federal common law is an instance in which judges seem explicitly to recognize creativity as part of the judicial function.

A second case, dealing with the "federal common law" of remedies, shows that *Clearfield Trust* is not unique. *Bivens v. Six Unknown Named Agents*[53] dealt with the availability of damages for a violation of the fourth amendment by a federal agent acting under color of his authority. In holding such a remedy available, the Court cited *J.I. Case Co. v. Borak*,[54] which had implied a private cause of action for violation of section 14(a) of the Securities and Exchange Act of 1934.[55] In his concurring opinion in *Bivens*, Justice Harlan wrote,

> The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization

[51] Hill, *The Law-making Power of the Federal Courts, supra* note 14, at 1037 (footnotes omitted).

[52] *See* text at notes 21-29 *supra.*

[53] 403 U.S. 388 (1971).

[54] 377 U.S. 426 (1964).

[55] 15 U.S.C. § 78n(a) (1970).

> of a federal cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision"— . . . a private cause of action for damages. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction . . . nor did the *Borak* court purport to do so.[56]

And at a later point in the opinion, he wrote,

> In resolving [the issue of whether to give compensatory relief] it seems to me that the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express-statutory authorization of a traditional remedy.[57]

C. *Retroactivity*

A third and final development which we will examine in making a choice between positivism and the rights thesis is the law of retroactivity of constitutional decisions. If judges do in fact adhere to the rights thesis, their attitude towards retroactivity should be clear: all decisions should be given full retroactive effect because they reflect the rights that litigants have always had and because there can be no reason for distinguishing between the litigant presenting the case in which the decision is made and the person whose conviction is final but is seeking collateral relief.

Up to a certain time, the courts took essentially this position. The primary impetus for its abandonment arose from developments in the law of habeas corpus which made post conviction collateral relief more readily available.[58] As long as there was no effective procedural device for assertion of "new" rights, "changes" in the law did not have to be recognized as such; judges clung to the fiction that the constitutional decisions which they were making were merely better statements of what the law had been all along. However, philosophy of law which required retroactive application of

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[56] 403 U.S. at 402 n.4. (Harlan, J., concurring).

[57] *Id.* at 407. For another example of judicial recognition of creative participation, see Illinois v. Milwaukee, 406 U.S. 91 (1972), where plaintiff alleged a cause of action for interstate pollution. Noting a congressional interest in the field of water pollution, the Court wrote, "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available." *Id.* at 103.

[58] *See* Mishkin, *The High Court, The Great Writ, and The Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

constitutional decisions began to present enormous practical problems once such application became procedurally possible. Retroactive application would require new trials in cases where witnesses would have forgotten testimony or died in the interim; in many cases it would mean, in effect, the prisoner's release. The case which precipitated the retroactivity issue was *Mapp v. Ohio*,[59] which applied to a state court conviction an exclusionary rule preventing admission of illegally seized evidence. In *Linkletter v. Walker*,[60] *Mapp* was declared to have no retroactive effect.

Linkletter is an unusual case in that it actually deals with competing theories of jurisprudence. One of these theories is positivism, which the Court attributed to Austin;[61] the other is Blackstone's version of natural law. Although Blackstone's and Dworkin's theories are different in many respects, they are alike with regard to the characteristic which interested the Court, namely, the tenet that judges do not "make" law but merely "declare" it:

> Blackstone stated the rule that the duty of the court was not to "pronounce a new rule, but to maintain and expound the old one." . . . The judge rather than being the creator of the law was but its discoverer. . . . In the case of the overruled decision, *Wolf v. Colorado*, . . . here, it was thought to be only a failure at true discovery and was consequently never the law; while the overruling one, *Mapp*, was not "new law but an application of what is, and theretofore had been, the true law." . . .
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> On the other hand, Austin maintained that judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision it is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed.[62]

The Court did not in so many words "adopt" positivism as the official view of jurisprudence. However, it did accept the resolution

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[59] 367 U.S. 643 (1961).

[60] 381 U.S. 618 (1965).

[61] *Id.* at 623-24.

[62] *Id.*

of the retroactivity issue which they had labeled as the positivist one: "We believe that the existence of the *Wolf* doctrine prior to *Mapp* is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial decision.' "[63] In addition, it approvingly described an earlier case as having applied the "Austinian approach."[64]

Other aspects of the emerging retroactivity doctrine, in addition to the explicit discussion of jurisprudential theories, suggest that judges do not feel compelled to be as unoriginal as possible. As several commentators have noted,[65] the retroactivity issue is an extremely sensitive one because it highlights the fact that courts are indeed "making" substantive law.[66] In fact, it later became a requirement for prospective application of a holding that it be "original." Thus, for example, in deciding whether to apply *Katz v. United States*[67] retroactively, the Court prefaced its discussion by saying,

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[63] *Id.* at 636 (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

[64] Concerning Great N.R. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), the *Linkletter* Court wrote, "Mr. Justice Cardozo . . . applied the Austinian approach in denying a federal constitutional due process attack on the prospective application of a decision of the Montana Supreme Court. He said that a State 'may make a choice for itself between the principle of forward operation and that of relation backward.' " 381 U.S. at 625.

[65] *See* Mishkin, *The High Court*, *supra* note 58, at 66; Note, *supra* note 17, at 932.

[66] In addition to highlighting the newness of the *Mapp* result, *Linkletter* was itself quite original in its holding that federal constitutional decisions might be denied retroactive application.

> Mr. Justice Clark's opinion for the Court expressly recognizes the novelty of the decision: "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." Any implication that such previous action was taken without advertence is, however, misleading. Though no "opinion of the Court" had ever discussed the question, individual Justices had at different times advanced the suggestion that particular new holdings of the Court should be given only prospective (or limited retroactive) effect. The fact that those speaking for the Court never addressed themselves to this possibility even by way of refutation is thus not without significance. Most likely the failure to respond in terms, particularly when the issue was specifically raised, rested on the belief that no answer was really necessary, that it is so "obvious" as to be taken for granted that whatever the Court now holds to be the law of the Constitution becomes "what has always been the law"—even if the new holding overrules an earlier decision of the Court.

Mishkin, *supra* note 58, at 56-57 (footnotes omitted). *See also* Justice Black's dissenting opinion in *Linkletter:* "As the Court concedes, this is the first instance on record where this Court, having jurisdiction, has ever refused to give a previously convicted defendant the benefit of a new and more expansive Bill of Rights interpretation." 381 U.S. at 646 (Black, J., dissenting).

[67] 389 U.S. 347 (1967).

> We are met at the outset with the petitioners' contention that *Katz* does not actually present a choice between prospective or retroactive application of new constitutional doctrine. The Court in that decision, it is said, did not depart from any existing interpretation of the Constitution, but merely confirmed the previous demise of obsolete decisions. . . . But this contention misconstrues our opinion in *Katz*. Our holding there that *Goldman* and *Olmstead* "can no longer be regarded as controlling," recognized that those decisions had not been overruled until that day. . . . However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future.[68]

A final reason why the retroactivity cases demonstrate judicial rejection of the rights thesis is that the determination of whether a holding should be given retroactive effect turns on what seem, in Dworkin's terminology, to be "policy" considerations. Three criteria were quoted in *Stovall v. Denno:* "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[69] The second and third of these, the ones which seem most often determinative[70] appear to be policy considerations, although, as noted above, the line Dworkin draws between "principle" and "policy" is so vague that most arguments can be characterized as either. The first one Dworkin himself admits to be inconsistent with the rights thesis,[71] for the purpose of the *Mapp* decision is said to be not reparation but deterrence.[72] Dworkin deals with this problem by qualify-

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[68] Desist v. U.S., 394 U.S. 244, 247-48 (1968). *See also,* Tehan v. Shott, 382 U.S. 406 (1966), deciding against the retroactive application of Griffin v. California, 380 U.S. 609 (1965).

[69] 388 U.S. 293, 297 (1966).

[70] *See* Linkletter v. Walker, 381 U.S. 618, 636-40 (1965); James v. U.S., 366 U.S. 213, 225 (1961) (Black, J., dissenting). *See also* Mishkin, *supra* note 58, at 70; Note, *supra* note 17, at 910.

[71] *See* text accompanying notes 24-25 *supra.*

[72] *See* Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U. PA. L. REV. 650, 659 (1962). As Professor Amsterdam has noted,

> [t]he [exclusionary] rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in "exert(ing) general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers." As it serves this function,

ing the rights thesis somewhat as it applies to criminal cases:

> [The thesis] holds in standard civil cases, when the ruling assumption is that one of the parties has a right to win; but it holds only asymmetrically when that assumption cannot be made. The accused in a criminal case has a right to a decision in his favor if he is innocent, but the state has no parallel right to a conviction if he is guilty. The court may therefore find in favor of the accused, in some hard case testing rules of evidence, for example, on an argument of policy that does not suppose that the accused has any right to be acquitted. The Supreme Court in *Linkletter v. Walker* said that its earlier decision in *Mapp v. Ohio* was such a decision. The Court said it had changed the rules permitting the introduction of illegally obtained evidence, not because Miss Mapp had any right that such evidence not be used if otherwise admissible, but in order to deter policemen from collecting such evidence in the future. I do not mean that a constitutional decision on such grounds is proper, or even that the Court's later description of its earlier decision was accurate. I mean only to point out how the geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds symmetrically.[73]

How satisfactory is this explanation? In the first place, it certainly cannot explain why prospective overruling should be used in civil cases, and yet that technique was used by states in civil cases prior to *Linkletter*.[74] There, the technique is justified on the ground that some judicial lawmaking is desirable but that it should be done in a way which does not disappoint expectations. Dworkin is caught in a bind; for the only way to justify the overruling is on the basis of hitherto unrecognized "rights"; but if there are such "rights," it seems wrong to deny them in the present case. On the other hand, if reliance on erroneous precedent supports non-

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> the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease.

Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388 (1964) (footnotes omitted).

[73] Dworkin, *Hard Cases*, *supra* note 1, at 1077-78 (footnotes omitted).

[74] *See generally* Great N.R. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (permissible practice in state court; federal Constitution "has no voice on the subject"); Note, *supra* note 17.

application of the new holding in some instances—an argument Dworkin seems at one point to reject[75]—, it seems that overruling should *always* be done prospectively.

The explanation does not work very well in criminal cases either. For one thing, it is not clear why one would want to say that the majority has no rights against a criminal. It cannot be because only single individuals have rights, since Dworkin recognizes that corporations and organizations can have rights.[76] Moreover, if the majority never has any rights against criminals, it seems that every conviction allowed to stand must be based on policy. This leads to the odd result that "policy" arguments cannot suffice for a five-hundred-dollar judgment in an automobile negligence case but would support a term of life imprisonment for murder. Finally, if the rights thesis does not grant the majority a "right" to convict a criminal, it cannot claim to be consistent with the principle that the majority should rule in a democracy.[77]

Dworkin does seem to suggest that the *Linkletter* ruling might be just plain wrong: "I do not mean," he writes, "that a constitutional decision on such grounds is proper, or even that the Court's later description of its earlier decision was accurate."[77] But his feelings of the rightness or wrongness of the decision are irrelevant to the question now under consideration—whether judges seem to feel that they may permissibly rely on policy arguments in making decisions. And an argument that judges are mistaken in their characteriza-

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[75] If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award againt him. Even if the duty has not been imposed upon him by explicit prior legislation, there is, but for one difference, no more injustice in enforcing the duty than if it had been.

The difference is, of course, that if the duty had been created by statute the defendant would have been put on much more explicit notice of that duty, and might more reasonably have been expected to arrange his affairs so as to provide for its consequences. But an argument of principle makes us look upon the defendant's claim, that it is unjust to take him by surprise, in a new light. If the plaintiff does indeed have a right to a judicial decision in his favor, then he is entitled to rely upon that right. If it is obvious and uncontroversial that he has the right, the defendant is in no position to claim unfair surprise just because the right arose in some way other than by publication in a statute. If, on the other hand, the plaintiff's claim is doubtful, then the court must, to some extent, surprise one or another of the parties; *and if the court decides that on balance the plaintiff's argument is stronger, then it will also decide that the plaintiff was, on balance, more justified in his expectations.*

Dworkin, *Hard Cases*, *supra* note 1, at 1062 (emphasis added).

[76] *Id.* at 1068.

[77] *Id.* at 1078.

tions of their own decisions leads Dworkin into the same difficulties which we saw with respect to the "theory of errors": if Dworkin is allowed to disregard at will evidence that his theory does not conform to the data, the theory cannot be empirically tested and may not properly be called descriptive. For the same reason, he cannot claim that "the majority of good judges" follow his theories unless he can provide some objective test for what is a good judge, a test which does not depend on conformity to the rights thesis. It seems unlikely that he would be able to find such a test that would exclude all of the judges I have quoted above. The inescapable conclusion is that the rights thesis is not an accurate description of what judges feel their proper function to be.

IV. The Relationship Between the Normative and Descriptive Aspects of the Rights Thesis

Apparently, Dworkin cannot claim that judges should decide according to the rights thesis because of some explicit—statutory or constitutional—institutional basis. Neither can he find any support in the implicit practices of judges, either in the results which they reach or in their attitudes towards the judging function. It seems that judges believe, at least at times (and that is all that positivism requires), that they have discretion and may be innovative by taking into account noninstitutional sources. But if the rights thesis has not been institutionalized—if, indeed, some other practice describes the present judging function better—then Dworkin is in no position to argue that the thesis should be adopted, since to adopt a new theory of jurisprudence would be innovative, and the decision to do so would have to be based on background rights.[78] Thus, if Dworkin's descriptive claims are not correct, his normative arguments cannot be persuasive either.

A final question is whether, if the theory *is* descriptively correct, the rights theory could be shown to be sufficiently institutionalized

[78] Note that an individual judge might voluntarily adopt the rights thesis, because under another theory he might take background rights into account in deciding to make the change. To do so would of course be a "policy" decision, in Dworkin's terminology; it would be in fact the last policy decision that judge would make (assuming that Dworkin's hypothesis that there is enough material for a unique answer is true, so that it is even *possible* to decide according to the rights thesis). But there seems to be no way to make this decision binding on all other judges, since it would be inappropriate in a federal system for such a system to be imposed on state courts by either Congress or the Supreme Court because such action would require Supreme Court review of too many state decisions.

to compel acceptance. I believe that, according to the arguments which Dworkin has offered against positivism, it would not. Assume for the moment that cases were regularly decided according to the rights thesis, that judges regularly justified this practice by appeal to the rights thesis, and that those judges who did not decide cases this way were criticized by other judges for not doing so. Unbelievably, if Dworkin is to remain consistent with the arguments he used in criticizing positivism, he would still have to deny that judges are "under a duty" to decide according to his theory! It was exactly these "practice conditions" which Dworkin found insufficient in Hart's theory to establish criteria to decide when a "custom" became law and thus implied a "duty."

To demonstrate this point, one must examine the arguments which Dworkin makes against Hart's theory of positivism. Dworkin takes issue with Hart's conclusion that conforming behavior of the bulk of the population can constitute a rule:

> When a sociologist says that a particular community "has" or "follows" a particular rule, like the no-hat-in-church rule, he means only to describe the behavior of that community in a certain respect. He means only to say that members of that community suppose that they have a particular duty, and not that he agrees. But when a member of the community himself appeals to a rule, for the purpose of criticizing his own or someone else's behavior, then he means not simply to describe the behavior of other people but to evaluate it. He means not simply that others believe that they have a certain duty, but that they *do* have that duty. . . . We might say that the sociologist's assertion of a social rule is true (or warranted) if a certain factual state of affairs occurs, that is, if the community behaves in the way that Hart describes in his example. But we should want to say that the churchgoer's assertion of a normative rule is true (or warranted) only if a certain normative state of affairs exists, that is, only if individuals in fact do have the duty that they suppose they have in Hart's example.[79]

Dworkin's arguments appear related to the familiar notion of ethical theory that "you can't derive an 'ought' from an 'is.'" Whether or not this objection is correct, if Dworkin is to apply it to Hart, he must be willing to apply it in his own theory as well. Thus, if there

[79] *See* Dworkin, *Social Rules and Legal Theory*, *supra* note 1, at 859-60.

is some additional element of obligation which must be added to a social custom or business practice in order to transform it into a legal duty—that is, to "institutionalize" it—then Dworkin must show that his theory meets that criterion, and has more to offer than the cold fact of judicial acceptance. It is not clear exactly what this additional element would be, but that is Dworkin's problem—he is the one who finds evidence of conformity insufficient. If he finds that judges are under a duty to decide according to the rights thesis because the majority of judges in fact believe that they are, then individual citizens should likewise be seen as incurring legal obligations through social custom.[80] This result, which would destroy the theory of "institutional autonomy," is one which Dworkin is of course unwilling to accept.

V. Conclusion

The problem with the rights thesis as a normative theory is that it cannot be justified by reference to existing institutional materials, and that by its own terms no other sort of normative justification is possible. Viewed as an attempt to describe results already reached, it is empirically indistinguishable from positivism and has the unattractive feature of characterizing all possible counter-examples as "mistakes." Viewed as a description of judges' current attitudes, it seems to be flatly false. Even if the descriptive claims are true, the normative theory still falls prey to Dworkin's own criticisms of Hart; and if they are false, it falls prey to its own axiom that judges should not alter present institutional practices.

The axioms which Dworkin has chosen are too strong and involve his theory in logical contradiction and paradox. And what does his theory offer? Under positivism the judge is also obliged to honor existing legal rights. When it is impossible to ascertain any claim of right which decides the case, when the equities stemming from past decisions seem to be evenly balanced, the judge decides according to common sense, social practice, or policy arguments that would have influenced a legislature deciding the question. Is this attempt to mimic the legislature less justifiable in a democracy than

[80] Dworkin might argue that the legal obligations of judges are different from the legal obligations of individuals, so that different criteria of institutionalization must apply. But the reasoning that Dworkin applies to the individual citizen seems to apply equally well to the judge, so that this response would seem to mean that his reasoning in the case of the individual is faulty in some respect. The reader is left to his own devices to tread through the somewhat opaque arguments that Dworkin offers. *See id.* at 857-68.

judicial wheel-spinning, followed by a stab in the dark which (even under Dworkin's theory) stands only a fifty-fifty chance of being "right"? And is it really undesirable for judges to have the ability to respond to unforeseen cases within the "open texture," and to take the responsibility for having done so?