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The legal philosophy of Ronald Dworkin.

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THE LEGAL PHILOSOPHY OF RONALD DWORKIN

A Thesis Presented

by

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TABLE OF CONTENTS

C H A P T E R I

In Taking Rights Seriously, Ronald Dworkin proposes his rights thesis as an alternative to legal positivism which he takes to be the ruling concept of law. Briefly, his rights thesis maintains that judicial decisions characteristically do, and should, enforce the existing rights of the parties involved, even in hard cases where those rights do not seem to be clearly defined by explicit legal rules. In such cases judges have a duty to discover the legal rights and duties of the parties before them, although their decisions may be controversial and other responsible judges might well decide differently.

Dworkin's proposal does not appear to be, nor is it intended to be, a novel and radical thesis. Rather it is intended to fit the familiar facts about what judges actually do better than other models of judicial behavior currently popular in theories of jurisprudence. The ordinary citizen believes that it is the duty of a judge merely to apply the law and to decide cases on the basis of established legal standards which pre-determine his legal rights and obligations. It seems unfair, and unconstitutional, for judges to create new legal rights and impose sanctions on the basis of an appeal to arbitrarily chosen extra-legal standards or to considerations of political expediency. Yet

the doctrine of judicial discretion widely accepted by legal theorists allows for just this sort of ex post facto legislation of legal rights.

Dworkin argues that any legal theory which takes seriously the notion of individual human rights cannot justify judicial decisions based either on arguments of social policy or on purely subjective moral convictions, even in admittedly difficult cases. Moreover, a theory which does not take rights seriously cannot accurately describe the role and functions of judges in the American legal system. But Dworkin's rights thesis is not merely descriptive. It is also a normative theory, suggesting how judges should correctly go about determining what the legal rights of citizens are. It considers what duties and responsibilities judges should recognize and what questions they should ask themselves in those cases where the nature of the legal rights involved is a controversial issue.

In his collection of essays, Dworkin intends to define and defend what he views as a liberal theory of law. The objective of any general theory of law must be to propose an answer to the broad question "what is the law." Everyone can cite examples of specific laws. The difficulty in answering this general question does not rest on an inability to recognize those things which the term 'law' is commonly

used to refer to. Yet a list of examples does not constitute a definition which will serve to explain why some things fall under this general term and others do not. Dworkin, like others who have offered differing answers to this question, is not concerned merely with illuminating our vague understanding of the correct use of the term 'law'. The problem is not simply a linguistic one. Dworkin is concerned with the social and political consequences of accepting a particular answer as authoritative. His belief that the prevailing theory of law is wrong is based not only on his contention that it provides an inaccurate account of what judges in fact do, but also on his conviction that this theory has dangerous consequences which run counter to the principles on which our legal system was founded.

Legal positivism, which is derived from the legal theory of Jeremy Bentham, attempts to answer the question "what is law" by defining the criteria one may use to distinguish legal rules from other standards of conduct and social rules of behavior. Bentham developed his own theory of jurisprudence in opposition to natural law theorists because of what he saw as the dangers involved in the view that the law has some transcendent metaphysical status and is therefore not subject to human criticism and change. If the specific laws of a community are viewed as somehow reflective of divine will or derived from eternal truths of

reason, then citizens will take a different view of their obligation to obey such laws than if they are recognized as commands of a particular sovereign backed by threats and punishments. What is at issue here is the justification of particular laws and the legitimacy of the use of force in requiring certain standards of conduct.

Bentham declared that the idea of any natural human rights is nonsense, that the only rights citizens enjoy are those explicitly granted by the laws of the state. Against those who defended the existence of self-evident natural rights, Bentham maintained that "all this talk about nature, natural rights, natural justice and injustice, proves two things and two things only, the heat of the passions and the darkness of the understanding."[1]

The existence of natural rights seems to require special metaphysical assumptions which cannot be empirically validated, even in principle. If there can be no objective verification of the moral claims underlying theories of natural rightsthen these claims seem to be a matter of individual subjective opinion, which is irrelevant to the empirical facts about the establishment and maintenance of an effective legal system. Bentham emphasized the distinction between morality and the law because of the important political implications of separating questions of legal and moral obligation.

According to positivist theory, Aquinas' identification of law and morality, which gives rise to the famous pronouncement that "unjust law is not law", obscures the distinction between what law is and what it ought to be. What the law is in a particular society is a matter of fact about the political institutions governing that society. Those institutions may be criticized according to moral standards concerning the requirements of justice. But the simple denial that certain regulations are part of the law because they are viewed as unjust merely leads to an oversimplification and confusion of complex issues.

Such apparently unjust rules may in all other important respects fit the criteria for valid laws in a community and may in fact be enforced by the political authorities. Moreover, if each individual is in a position to decide for himself what societal demands he must regard as legally binding then each person will be a law unto himself. Such a concept of law disregards the fundamental nature of law as governing a group of individuals and preserving order by establishing general standards of behavior which all must follow.

Although critical of existing legal systems, Bentham worried about the anarchical effects of individual citizens deciding what is and what is not valid law on the basis of subjective moral judgements. If legal obligation is distinguished from moral obligation, then if a citizen finds a particular law to be unjust he may refuse to obey it, yet

still recognize the legitimate authority of the state to punish him for his actions, because he also accepts a general obligation to obey the laws of the community.

Traditional natural law theory does assume that there are some objective standards of behavior and some fundamental rules governing the association of individuals which must apply to all societies and which exist prior to the establishment of any organized political system. These general requirements and prohibitions may be supplemented or more specifically determined by rules which are a matter of contract or social convention, so long as these are consistent with the general demands of natural law.

The obligatory quality of natural law rests on the recognized rationality of its requirements. In this sense at least legal obligation is held not to differ from moral obligation. The commands of a sovereign or other official of the state are not viewed as legally binding simply because they can be backed up by the exercise of punitive sanctions. This is merely violence under the guise of legitimate authority, "the gunman writ large." If there is no rational basis for these commands, then no obligation arises from them, even though a person may be forced to do things against his will and against his conscience.

The positivist theory of Bentham and Austin does not capture this aspect of law as representing rules of behavior

accepted and endorsed by members of the community as being appropriate and reasonable standards according to which they believe they should pattern their behavior. However, natural law theory does not seem appropriate to complex legal systems in which large portions of the enacted law are obviously contingent products of human creation designed to effect various social purposes, but bearing little relation to the demands of natural justice and in no way derived from some objective requirements for human association. Both these answers to the general question "what is law" point to important aspects of an organized legal system, yet both seem inadequate in fundamental ways.

H. L. A. Hart's conception of law as a union of primary and secondary rules explores the essential continuity between socially accepted moral standards and specifically legal rules of conduct. At the same time he emphasizes the fundamental differences between the two forms of obligation and preserves the notion of the law as something consciously created and accepted as valid by a particular group, in order to promote differing social and political goals. His theory recognizes the fact that there is and has been a strong connection between the moral attitudes and convictions of members of a community and the requirements of its legal system, but denies that there is any necessary connection between the two.

Hart criticizes the definition of law as a command of a recognized sovereign backed by threats because of its failure to distinguish between being obliged to do something and having an obligation. Some level of justification and acceptibility of rules by those who follow them is part of the ordinary conception of legal obligation, beyond mere obedience through fear. According to Hart's theory, the primary rules of obligation within a society establish rights and impose duties on individuals, and furthermore justify the exercise of sanctions against those who violate these socially accepted rules. Such social rules governing the behavior of members of the community are designed to ensure or promote the survival of the society. The majority must for the most part willingly abide by these rules of conduct; they must be commonly accepted in order to impose a general obligation to obey them.

"Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to is great."[2] If these social rules are backed by physical sanctions they may be viewed as a primitive form of law, though not yet as a legal system. But primary rules may also be enforced through other sorts of sanctions, verbal expressions of disapproval, or other means of reproach intended to elicit shame and remorse. In this case, the

primary social rules of the community may be equivalent to the customary morality commonly accepted by the group.

Although on Hart's theory the moral standards of the community may form the basis for the acceptance of legal rules and obligations, something more is necessary for the establishment of an actual legal system. His theory of law requires the existence of secondary rules which do not directly govern the actions of individuals, but rather are concerned with defining which social rules are to be recognized as legallyvalid, and with conferring powers on certain officials to establish new laws and change old ones.

The distinguishing feature of a (municipal) legal system is the existence of a rule of recognition which constitutes the criterion by which primary rules are defined as valid law in a particular society. Any social or moral standards which do not fall under the established rule of recognition are no part of the law. The rule of recognition may be very simple, or quite complex, depending on the particular society. But in any case the rule of recognition cannot itself be validated since it is the ultimate test of what is law. It is established by its general acceptance by those judges and officials who are in a position to apply the laws.

Hart's model of rules is intended to be a general theory of what law is, applicable to all different societies

and social groups, including clubs and associations, not only to political systems. All cases where the term 'law' is applicable should show the general features of Hart's conception of law, that is, some accepted rules and some test for which ones of these are to be considered valid as law. However, the content of these rules will change in different societies, and the general rule of recognition may be very complicated to state in a modern complex legal system like our own.

Dworkin views Hart's theory as the most sophisticated version of legal positivism, yet still finds its model fundamentally inadequate as an account of the workings of the American legal system, especially in its theory of adjudication. Although he is intent on demonstrating that the United States provides at least one counter-example to Hart's general theory, it is not entirely clear whether Dworkin would maintain that Hart's theory is inapplicable to other sorts of legal systems, and if so what sort of general theory of law he would offer to replace Hart's. The liberal theory of law Dworkin proposes seems at most to be intended to describe the British and American systems of law.

His major contention against Hart is that in the American legal system it is not possible to distinguish specifically legal standards from moral ones by any simple

socially accepted rule of recognition. He maintains that the law consists of more than explicit rules and social practices: it includes at least some moral principles which are embedded in explicit statutes, common law precedents and constitutional provisions. These principles cannot be explicitly and uncontroversially verified as legally valid, yet judges and lawyers in fact do appeal to them in deciding difficult cases where explicit rules do not seem clearly applicable.

If these moral principles are treated as extra-legal standards, which judges may appeal to but which they are not legally obligated to recognize, then in at least some cases judges will be basing their decisions not on established law but on subjectively chosen moral principles or judgements about desirable social policies. When explicit rules do not cover particular cases, Hart's theory allows for judicial discretion in making new laws, creating new rights and duties, without any accepted legal standards to set limits on their decisions.

The dangers inherent in defining law as Hart does appear to Dworkin to have to do with the way in which judges view their official responsibilities. The model of rules encourages judges to regard the exercise of discretion (in the sense that Hart describes) as a necessary and desirable thing. According to Dworkin, however, if judges feel free to legislate on matters of social policy and make politically expedient decisions, because of the "open texture" of the law,

then the status of individual rights of citizens will be undermined. Certain fundamental rights of citizens which should be protected may be ignored or abridged without the judges responsible believing that any injustice has been done.

Dworkin contends that we have many legal rights which are not created by any explicit political decisions or social practices. The positivist distinction between morality and law reduces all rights which are not explicitly made legally valid to the status of purely moral rights which may be of importance for our judgements concerning the justice of our legal system, but not for our understanding of what our legal rights are. Dworkin maintains that people have legal rights which are "natural" in that they are not the product of any legislation, social conventions or political contract. These rights constitute "independent grounds for judging legislation and custom;"[3] they are legal rights because they are defined by the political principles stated or embedded in the American Constitution.

Dworkin embraces a general political theory which assumes that individuals have moral rights against the state prior to the rights created by explicit legislation. Such rights must be taken seriously in American law because the political theory behind the Constitution takes as a fundamental doctrine the position that there are some moral rights of individuals which may not be violated in the service of

purely utilitarian goals favored by the majority of citizens. The Bill of Rights is designed to protect individual citizens against the enactment of certain policies, regardless of their appeal to majority interests. In order to apply such abstract moral provisions as law in concrete cases, Dworkin argues that judges must and should develop a legal theory which consistently and coherently explains and justifies the moral framework of our legal system. If Dworkin is right in this, then one cannot define and determine what the law is or what the legal rights of citizens are without being prepared to answer at least some basic questions concerning political morality, and to present moral arguments in support of one's general theory.

According to Dworkin, his rights thesis makes no special ontological assumptions about the nature of moral rights. He invokes no ghostly entities or eternal laws of reason. Nor does he treat natural rights as "spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny."[4] Rather, he maintains that his theory of rights involves no more controversial assumptions than the prevailing political theory of economic utilitarianism, which takes as fundamental the notion of a collective goal of a community.

For Dworkin, Claims about moral rights represent merely a special form of judgement about what it is right

and wrong for a government to do. "A man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so."[5] This formal definition of a right does not specify what rights, if any, citizens have, nor does it identify what reasons would support particular rights that are affirmed. It does, however, characterize a right, not as some sort of odd ontological entity, but as a moral judgement, the validity of which can only be established through convincing moral arguments.

It is puzzling to consider what relation Dworkin's use of the term 'natural' bears to the concept of law traditionally regarded as natural law theory. Dworkin's political theory assumes that individuals have some moral rights against the state which a legal system <u>should</u> recognize, but he would probably not wish to maintain that every legal system must recognize such rights in order for its laws to be valid and impose legal obligations. His definition of legal rights as a particular kind of moral political rights may be a conception of law applicable to the American legal system, but it may not be acceptable as an answer to the general question "what is law."

Dworkin does not defend a particular moral theory which he holds to be objectively correct and from which one could derive the specific moral and political rights which

individuals must be regarded in general as possessing. He does propose a theory which he believes best captures the sense of justice underlying the political institutions and practices in the United States. But his formal definition of rights does not elaborate the specific nature of these rights. Rather, he believes that it is essentially controversial what concrete rights individuals have, even in the United States.

It seems that on one interpretation, Dworkin's talk about natural rights is entirely compatible with the general positivist view that law is essentially a matter of human creation, consisting of certain facts about the organization of particular human groups and political associations, rather than an objective standard transcending and applying to all such groups. Dworkin does not seem to be defending a necessary connection between law and morality, but rather a specific and contingent connection which exists in American law.

If moral standards and principles form part of the legal system of this country, it is because of the particular political philosophy which shaped our Constitution. That political philosophy, as embodied in the Constitution, conditioned the creation of the legal institutions and social practices we as citizens accept. The principles stated in the Constitution explicitly establish some moral rights as

legal rights to be protected and promoted by the government. These principles are taken as fundamental and are used to judge the legality of legislative enactments and social practices, but it is difficult to see why for that reason they should be regarded as "natural".

The Constitution, and the moral standards for government it expresses, were in fact formally accepted and agreed upon as an appropriate articulation of the political desires and purposes of the newly-formed United States. The Constitution derives its authority as a criterion for legality from the continued acceptance of its general principles by the community it governs. If this were not so, it could be changed in order to reflect the changing moral and political convictions of the majority of citizens.

If individuals are recognized as having fundamental legal rights against the state, or minority groups have rights which cannot legally be interfered with despite majority interests, this is not because there is some objective necessity for the legal recognition of such rights, but because the majority of those governed have accepted, at least tacitly, the correctness and justice of those provisions. The majority of citizens may agree, on consideration, that there do exist certain natural rights of human beings and for that reason approve of the legal validation of those rights, but that concensus would not in itself make such

rights exist as legal rights. Other moral judgements may be accepted in general by the community, yet form no part of the legal system. Some further formal enactment would be required to establish such moral standards as legal rules.

One may interpret Dworkin's position as maintaining that there are some principles which are implicit, or embedded in, the actual rules and provisions accepted as law by the society, and that these may define certain legal rights not explicitly stated or articulated. Dworkin's rights thesis does seem to express a customary conception about the responsibility of judges in our legal system which is not adequately characterized by Hart's model of law as explicit rules. But it is not clear that Dworkin has shown that the general approach taken by positivist theorists to the question "what is law" is wholly misguided.

The fact that some Constitutional provisions and other rules of law do state requirements concerning such things as the right to liberty and due process of law may make moral argumentation about rights part of the process of determining the legal validity of specific rules and practices, so that there is no simple test for what the law is in concrete cases. But this does not mean that there is in principle no distinction between moral and legal standards.

It seems possible to revise Hart's general theory

somewhat in order to take into account the major thrust of Dworkin's rights thesis, that is, in order to avoid the dangerous doctrine of unlimited judicial discretion. One would have to extend Hart's rule of recognition for what is valid law in the United States to include those standards which are neither explicit rules of law nor accepted social practices but which nevertheless judges commonly do recognize as legally binding on them. Such a revision would preserve the fundamental characteristics of law under Hart's conception, while taking into account the particular nature of the American legal system, which in general does not view consideration of the question "what is justice in this case" as irrelevant to determination of what the law is in concrete cases.

REFERENCES FOR CHAPTER I

1. Jeremy Bentham, "The Limits of Jurisprudence Defined", in The Great Legal Philosophers, p. 277.

2. H. L. A. Hart, The Concept of Law, Oxford University Press, (New York:1961), p. 84.

3. Ronald Dworkin, Taking Rights Seriously, Harvard University Press, (Cambridge:1977), p. 177.

4. Ibid., p. 176.

5. Ibid., p. 139.

C H A P T E R I I

In The Concept of Law Hart proposes to examine and elucidate the general framework of legal thought. His primary purpose is not to defend a strict definition of law, in the sense of providing a clear rule by which one can test the correctness of ones use of the term 'law'. Rather, his intention is to "advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena."[1] Although his model of law as a set of rules may be too narrow to include all the standards and principles which should be regarded as binding law in our system, it has nevertheless, as Dworkin recognizes, contributed a great deal to the philosophical clarification of the issues involved in contemporary jurisprudence.

The 19th century philosopher John Austin, in his Province of Jurisprudence Determined, followed Bentham in defining the law of a community as consisting of the general commands of its sovereign. The sovereign in any given political society is defined as that individual or determinate group receiving habitual obedience from the majority of the people, and not in turn in the habit of obeying anyone else. A citizen is under a legal obligation if he is

among those addressed by a command of the sovereign and if he is liable to be punished if he does not comply. A command specifies a wish expressed by an intelligent being that another person perform or forbear from some act, with the added feature that the person expressing the wish has the power to inflict some evil on the other if the wish is disregarded. Commands from the sovereign define legal duties: "wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed."[2]

The commands of the sovereign may be signified through conduct as well as through articulated orders. The sovereign cannot forsee all future contingencies or enumerate all the implications and details of the application of general commands to specific circumstances. The law as stated may have "furry edges" which must be clarified and determined by judges as new situations arise. But judges do not issue commands or create laws on their own authority. Whatever authority they have is derived from the sovereign and the force of the state which will back up their decisions with sanctions and punishments. Since the sovereign may overturn any decisions not approved of, the orders issued by judges impose legal obligations because they are tacitly, though not necessarily explicitly, commanded by the sovereign.

Austin's definition of law dominated legal thinking for many years. However, there are two main problems with

this conception of law, which Hart discusses. In the first place, in modern democratic political systems there is no recognizable sovereign of the sort Austin describes. There is no individual or determinate group with unlimited power to issue commands and impose sanctions, and not in the habit of obeying anyone else. The locus of power is more diffuse than the simplicity of Austin's model allows. Secondly, the notion of a law as a command, although it points to the aspect of law as something potentially in conflict with the desires of individual citizens which must be enforced through penalties, does not adequately account for the authority involved in the rule of law. Such a conception of law ignores the normative function of legal rules, the fact that citizens recognize legal obligations because they generally believe in the rationality and desirability of the standards of conduct governing their behavior. The sovereign, or the institutions of government, derive their legal authority, in distinction from their power to exact obedience, from the acceptance by the majority of those governed of the fact that they have a legitimate right to rule.

A social rule involves more than a habit of obedience or conformity in ones behavior. From an external point of view one may observe that there exists a social rule in a particular society if there is a general conformity in the behavior of individuals and if deviation from the common standard of behavior is met with strong disapproval or the

exercise of puntive sanctions. But the reasons for this conformity of behavior are important for an understanding of the binding character of social rules. From an internal point of view held by those who endorse a particular set of rules, a rule involves more than mere coincidence of habitual behavior, or predictions of punishment for deviation. The rule is regarded as a necessary or desirable standard of behavior and is taken as a justification for the punishment or coercion of those who threaten to deviate.

Hart also emphasizes the logical distinction between different kinds of rules. Some social rules are viewed as binding on individuals and imposing obligations simply because they are willingly accepted by the majority of citizens as appropriate standards of behavior. Other rules are recognized as binding because they are formulated in accordance with another rule which establishes a criterion for validity. If a certain procedure is recognized as the proper method for the enactment of binding regulations, then any rules created in that manner will be accepted as imposing an obligation, regardless of whether the content of that rule was previously part of the accepted practices of the community.

A legal system, on Hart's conception, is distinguished from customary morality by the existence of these secondary rules which establish the validity of primary rules of behavior on the basis of their means of enactment and accep-

tance and which confer powers on certain officials to create or amend specifically legal rules. The rule of recognition for what is valid law in a particular society is the only rule which is binding for the sole reason that it is accepted by the community. All other laws fall under the tests for validity stipulated by this overarching rule which is the ultimate test of law.

The rule of recognition for law may be quite complicated and is often never explicitly articulated. "For the most part, the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors."[3] The existence of such a supreme rule cannot be validated in the same way as the other rules it authorizes. Its existence can be asserted only as an external statement of fact, but it can be recognized by the generally concordant practices of officials and private citizens in identifying the law according to specific criteria.

The ordinary citizen may not concern himself with the established criteria of legal validity. He may simply obey laws because others do, or out of fear of punishment, without necessarily regarding these standards as imposing obligations. The judges, however, who in their official capacity must apply primary legal rules, must take a more responsible and critical attitude toward the rules which

govern their operations. Any rule of recognition must exist as a public and internally endorsed standard for official behavior and judicial decision. Judges must view deviations from a common standard for official conduct as serious lapses. If judges and other officials simply obey rules for their own part, without concerning themselves with the nature of their legal obligations or demanding conformity from other officials in recognizing standards for legal validity, then the unity and continuity of the legal system will be threatened, since the rule of recognition is constituted (at least) as a matter of social practice among officials.

One objection to positivist theory has been the charge that it presents an oversimplified and mechanistic model of the judicial function as merely applying clearly established rules of law. In response to such charges of formalism, Hart emphasizes the necessity and desirability of judicial discretion in interpreting and applying legal rules. He introduces the notion of an "open texture" to the law by pointing out the inherent limitations of the general language in which rules are formulated. Because laws must be broadly applicable, they must involve general classifications of persons, acts and situations. But the application of these necessarily general rules to particular persons and circumstances cannot, even in principle, be a mechanical or simple procedure. Questions will inevitably arise con-

cerning the extension of general terms and at some point the general rule will prove to be indeterminate in its application. Some degree of subjective interpretation of the specific situation and the aplicability of rules relating to it must be involved when a judge decides difficult cases, where his choice is not plainly ordained by the existing rules.

Hart argues that although it might be possible to enumerate and pre-determine through legislation the acceptable applications of a general term, this formalization would be undesirable. Freezing the meaning of a rule, in ignorance of possible future situations, would involve blindly pre-judging future cases. Such rigidity in defining the intent of legal rules might necessitate judicial decisions which run counter to the social goals originally presumed to be furthered by the particular law. Hart maintains that in every legal system some compromise must be made between the need to formulate definite rules of behavior which individual citizens can apply for themselves without appeal to official interpretation and the need to leave open for future determination some uncertain or unenvisioned issues.

In every legal system, according to Hart, there are large areas left open for the exercise of judicial discretion: the clarification and concrete determination of vague or abstract legal standards, the resolution of uncertainties concerning legislative enactments, and the development and

qualification of rules not precisely articulated in authoritative precedents of the common law. This open texture of the law makes it necessary for the courts actually to create new laws and reformulate old ones, despite their disclaimers that they are only interpreting already existing laws established by precedent or legislation. "At the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards."[4]

Hart does not believe that judges are totally free from constraint in exercising their power to create law: "at any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the center to supply standards of correct judicial decision."[5] Judges are not free to disregard these standards concerning the correct use of their authority, but on Hart's theory such standards cannot be part of the law. They are no explicit rules validated by the rule of recognition; therefore, although judges perhaps ought to follow these standards, they cannot have a legally binding obligation to do so. Moreover, such standards cannot themselves dictate any particular decision or course of action in deciding a difficult case. In certain areas of open texture where there is no common agreement among judges, no position can be definitely proved to be right or wrong. Hart con-

cludes that "here at any moment a question may arise to which there is no answer -- only answers."[6]

If there is no right answer to some particular legal question which falls outside the explicit authority of established rules, then the judge must simply choose one answer and thereby determine what the law is. Since explicit law does not impose any specific legal rights or duties in this difficult case, on Hart's theory neither party in the dispute can have a legal right to a particular decision. The rights and duties of the parties involved do not exist prior to the judicial decision. Once the decision is made, legal obligations are determined and imposed ex post facto.

This legislative function of the courts certainly goes beyond the ordinary citizen's conception of the appropriate role of judges as simply applying the law. Moreover, judges themselves deliver their decisions as if they were simply interpreting existing law or at most discovering new implications and applications of determinate rules. Yet according to Hart, judges are often called upon to do more than interpret the meaning of statutory language. When no formally recognized rules of law determine the decision of a particular case, the judge may look to historical legal texts and writings for arguments with which to justify his decision, but it is no requirement of the legal system that he should use these sources. "Perhaps we might speak of

such sources as 'permissive' legal sources to distinguish them both from 'mandatory' legal or formal sources such as statute and from historical or material sources."[7]

Hart's theory allows for "varied types of reasoning which courts characteristically use"[8] in justifying their creative function. The choices of judges are not arbitrary and may involve the impartial weighing of various moral values, as well as a balancing of the competing interests of those affected by these decisions. Judges will often take into account the general requirements of justice and the particular social aims intended to be furthered by specific rules and attempt to justify their decisions on the basis of some acceptable general principle. The reasoning process of judges then does not differ substantially from the sort of argumentation which takes place in the legislative body.

The creation of law by judges may be viewed as an unfortunate but unavoidable aspect of the legal system. Private citizens need to know and understand the general rules which their conduct must conform to, but there are inevitably some standards whose application cannot be determined in advance (e.g. due care in negligence cases) and others whose fringe areas remain questionable. Hart does not view some amount of ex post facto legislation of legal obligations as a serious problem for a legal system, as long as this takes place within a general context in which

citizens most of the time know what is legally required of them and the judges most of the time have clear legal rules on which to base their decisions.

Although every rule may be doubtful at some points, in order for a legal system to exist as a coherent and unified system of rules there must be a general framework of established standards which can be recognized and followed without subjective or extra-legal determinations by the courts. Nevertheless, "at the point where the texture is open, individuals can only predict how courts will decide and adjust their behavior accordingly."[9]

REFERENCES FOR CHAPTER II

1. Hart, p. 17

2. John Austin, "Law as the Sovereign's Command", in The Nature of Law, Random House, (New York:1966), p. 81.

3. Hart, p. 98.

4. Ibid., p. 132.

5. Ibid., p. 141.

6. Ibid., p. 147.

7. Ibid., p. 247.

8. Ibid., p. 144.

9. Ibid., p. 135.

C H A P T E R I I I

Dworkin's rights thesis, which asserts that judicial decisions always enforce the existing rights of citizens, even where these rights are controversial because they are not clearly defined by existing law, seems clearly incompatible with Hart's description of the open texture of law which requires the exercise of judicial law-making powers. Dworkin's claim that there is always a right answer to difficult legal questions represents a quite different conception of the function and responsibilities of judges. He maintains that ex post facto legislation of legal rights and duties cannot be justified on any reasonable theory of American Constitutional law. Hart's model of rules naturally leads one to affirm the necessity of judicial discretion when the area of applicability of rules runs out. But Dworkin argues that this conception of the role of judges is neither necessary nor accurate as a description of the actual role of judges in American law.

In his discussion of "Hard Cases", Dworkin contends, in opposition to Hart, that it is never the role of judges to invent new rights retrospectively. Moreover, "judges neither should be nor are deputy legislators, and the familiar assumption, that where they go beyond political decisions made by someone else they are legislating, is misleading"[1] Dworkin goes on to propose his own theory of

what judges do, and should do, in deciding hard cases not capable of being settled on the basis of explicit valid law, or explicit social custom. He maintains that it is always the duty of judges to discover what the rights of citizens are, not to make them up and impose obligations after the fact. In order to support his theory he must first of all demonstrate that there are legitimate rights and duties established by something other than explicit law which are, nevertheless, legally binding. If he is successful in this he will have considerably undermined the positivist distinction between legal standards and other social standards, especially those of general political morality. Further, Dworkin must propose a means by which judges can be said to "discover" rights of citizens not explicitly enumerated in the law, taking into account the fact that there is much controversy among responsible judges and lawyers over the existence of particular rights.

Central to Dworkin's criticisms of Hart, and to the elaboration of his own theory, is his affirmation of the existence of legal principles which are not, and do not function in the same way as, legal rules. He does not argue that such principles must exist, or otherwise support this claim, except by calling attention to the sorts of justifications judges in fact often appeal to in defense of their decisions. Examples Dworkin presents of the principles

invoked by judges include such propositions as "no one shall be permitted to profit from his own wrong"[2] and "the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars."[3]

Dworkin explains that there is a logical distinction between such legal principles and explicit legal rules. Therefore these principles cannot be subsumed under a general theory of rules. First of all, rules are intended to apply in an all-or-nothing fashion. If the circumstances of a particular case can be shown to fall under the provisions of a valid rule, then there can be no question that the rule applies. A definite answer is given and the rule enforced. There may be exceptions to the rule, but these can be (at least in theory) enumerated and taken into account. A principle, however, may apply only sometimes; there are no specified conditions under which it must necessarily be applied. Instances in which the principle does not apply are not exceptions similar to exceptions to a rule, because they could not, even in theory, be enumerated and included in a more complete statement of the principle. Instead, a principle "states a reason that argues in one direction, but does not necessitate a particular decision."[4]

If a legal principle is relevant to a particular case the judge must take it into account, but it need not be the determining consideration in the case. It may in some instances be outweighed by another principle of the law.

Such counter-instances may demonstrate the relative weight or importance of a principle in the system of law, but they do not invalidate it. Rules do not have this dimension of weight. If one apparently valid rule conflicts with another then one or the other must not be valid, and will be over-ruled. Moreover, rules have pedigrees which certify them as valid legal standards, whereas principles do not.

Legal principles are not enacted as law by the legislature or the courts. They originate in a "sense of appropriateness developed in the profession and the public over time; their continued power depends upon this sense of appropriateness being sustained."[5] In order to defend some principle as a legal standard one must produce some evidence of institutional support for it, in statutes and precedents, but there is no simple test for its validity. "We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards...about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all of these to contemporary moral practices, and hosts of other such standards."[6]

If judges in fact do appeal to legal principles in making decisions, then a theory of law which does not take these into account must be inadequate. If the positivist does not treat such principles which are not explicit rules as valid law, then judges have no duty to take them into

consideration. They must be viewed as extra-legal standards which judges are free to call upon in support of their decisions, but which have no legally binding status. If, however, some principles are actually accepted by judges as part of the law, then there will be no clear test or rule of recognition for determining what the law in fact is, because of the controversial nature of principles.

Dworkin asserts that at least some principles are generally accepted by judges and lawyers as legal, not simply moral standards. If he is right, then some rights and duties of citizens may be established by legal standards other than the explicit rules of law. "Legal obligation might be imposed by a constellation of principles as well as by an established rule."[7] Consideration of these principles and the arguments in support of them would enable the judge to discover the rights of individuals in hard cases by examining legal standards instead of creating new rights, even though his conclusions might remain controversial.

In order to clarify and defend his contention that courts do not and should not act as deputy legislatures, Dworkin introduces what he considers to be a fundamental distinction between arguments of principle and arguments of policy. Arguments of principle are intended to justify a specific political decision by demonstrating that the decision respects or secures an individual or group right which is

recognized by that society or political system. Arguments of policy justify a political decision in a utilitarian way, on the grounds that it advances or protects some collective social aim which is in the interest of the community as a whole. Arguments of policy will be concerned with determining the nature and relative intensity of the demands and interests of various groups within the community, and with compromising between these competing interests in pursuit of the general welfare of the community. Political decisions of the legislature will generally be based on a consideration of both types of argument, although in varying degrees of relative importance.

According to Dworkin, judicial decisions should be supported only by arguments of principle, not policy. In clear cases, where the rights of the individuals are defined by explicit law and judges merely enforce existing statutes, there is no room for policy considerations. A judge may not overrule the precise statements of legislative decisions simply because he thinks a different policy would be better for the community. Even in hard cases, where statutes are vague or uncertain, if the judges have a duty to uphold the rights of citizens then they should not be concerned with other issues of general social policy. This is true because of the nature of individual rights.

Dworkin characterizes individual rights as political

trumps over majority interests. Individuals are said to have political rights when "for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do."[8] A denial of these rights for purely utilitarian reasons would constitute an injustice. On Hart's theory there would be no injustice done if courts weigh issues of social policy in deciding hard cases because there are no existing rights to be violated. But if (at least in disputes between individuals or groups) one side always has a right to a favorable decision, judges must be concerned with arguments defining and supporting the rights involved. Other sorts of arguments will be irrelevant and inappropriate.

The right to a particular legal decision is a special kind of political right. Dworkin must clarify the general nature of political rights, and distinguish between differing types. He identifies a political aim as a state of affairs which should be advanced by political decisions according to a given political theory. A political right is an individuated political aim. An individual has a right to something if it counts in favor of a political decision that it promotes that state of affairs, even if some other political aim is thereby disserved. A political goal is a non-individuated political aim. It requires no particular liberties or opportunities for particular individuals. Which political aims will be

viewed as rights and which as goals will depend on the particular political theory. Moreover, rights need not be absolute. They may have differing weights against other rights or against important collective goals, although in order to be considered as rights they may not be outweighed by all other social aims.

The benefits and burdens of a social policy serving some collective goal may be unequally distributed among individuals as long as the effect is to promote the overall welfare of the community. Political rights, however, have a different distributional character. If individuals, because of their status as citizens of a particular state, are held to have certain basic rights, then these rights must be shared equally by all citizens. This standard of distributional fairness does not apply so rigidly to other social goods.

Dworkin further distinguishes between what he calls background rights and institutional rights. Background rights are derived from a general theory of political morality; they justify political decisions by society in the abstract. Institutional rights are determined by the nature and processes of institutions in a given society; they provide a justification for the political decisions made by a specified institution. "Political rights are creatures of both history and morality: what an individual is entitled to have in civil

society depends upon both the practice and the justice of its political institutions."[9] Judges are not free to determine the rights of citizens purely on the basis of arguments concerning general political morality. They must examine the specific character of our legal system, its history, its functions and its traditions, in order to discover what rights it should be expected to protect. There is no point at which the requirements of legal traditions run out and judges can rely on their own moral intuitions in deciding cases. Determination of rights involves careful consideration of the history of legal systems, in light of the moral principles underlying their formulation, rather than a simple examination of explicit rules.

Dworkin also makes a distinction between abstract and concrete rights. An abstract right is a general political aim, like the right to free speech, which has not been clarified in terms of its weight in relation to other political aims. A right is made more concrete when its weight in various circumstances has been more precisely defined. The abstract right to free speech is not absolute; its limitations in particular contexts must be defined in order for courts to uphold the concrete rights of individuals derived from it. The rights which judges must "discover" in order to settle difficult cases correctly are concrete institutional rights -- particular legal rights.

Legislators may make <u>ad hoc</u> decisions about social

policy, experiment with various methods of achieving collective goals and make different sorts of compromises between competing interest groups at different times. They are under no obligation to treat all individuals alike, or to follow an entirely consistent set of stragegies in promoting the general welfare. However, the doctrine of political responsibility, which states that officials must make only those decisions which they can justify within the political theory they use to justify their other decisions, applies somewhat differently to judges than to legislators.

The determinations of legal rights that judges arrive atcannot be isolated judgements based on special intuitions about specific cases. They must be formulated within a coherent and systematic legal theory, and applied in a consistent way to all individuals. "An argument of principle can supply a justification for a particular decision, under the doctrine of political responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in hypothetical circumstances."[10] This difference between the responsibilities of judges and legislators underlines the difference between the functions of these officials, and helps to account for the particular attention that judges must direct towards precedents and hypothetical examples.

The general legal theory which a judge develops to account for the purpose and function of the various aspects of the legal system will enable him to interpret statutes and evaluate precedents and principles in a coherent and consistent way. In the process of applying his general theory of the nature of the legal system to questions concerning the legislative purpose behind particular statutes and legal principles which are embedded in positive law, he will develop a theory of legal rights which he can use to settle controversial issues. Such general theories will vary somewhat among responsible judges and lawyers. Yet an individual judge will always have a theory and a legal framework within which to decide hard cases, without having to legislate new rights or make decisions based on extra-legal standards.

In order to develop such a legal theory a judge must ask himself certain sorts of questions. He must consider various political philosophies which can be used to justify the legal system as a whole, or some of its aspects, and see which of these is most satisfactory as an account of the specific details of legal institutions. He must interpret the general legal statutes and common law precedents in constructing a theory of jurisprudence which is consistent with established legal principles.

Controversies arise, however, because different judges will formulate different sorts of answers to these general

questions, and therefore will not agree about the concrete legal rights of individuals in particular cases. If different conclusions are arrived at, depending on the personal political convictions of particular judges, how can one claim that there is a right answer to a controversial legal question, and not simply answers as Hart suggests? Dworkin insists that the proposition that there is a right answer to a difficult question does not mean that there is some unambiguous and ultimately authoritative method of validating decisions. Rather, it is a "complex statement about the responsibilities of its officials and participants."[11]

One might object that it seems offensive to democratic principles foe judges' decisions about the legal rights of citizens to depend on the subjective judgements about political morality which underlie their general theories. Dworkin would reply, however, that if legal rights are not exhaustively fixed by explicit legal rules, then one lacks a strictly objective standard for determining them. Any definition of these rights will involve personal judgements at some level, and the issue cannot be separated from general questions of political morality. The judge will not defend his decision on the basis of his personal preferences, but rather because he believes that the answer derived from that theory is the right one.

REFERENCES FOR CHAPTER III

1. Dworkin, p. 82.

2. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

3. Henningsen v. Bloomfield, 32 N.J. 358, 161 A.2d 69 (1960).

4. Dworkin, p. 26.

5. Ibid., p. 40.

6. Ibid., p. 40.

7. Ibid., p. 44.

8. Ibid., p. xi introduction.

9. Ibid., p. 87.

10. Ibid., p. 88.

11. Ibid., p. 104.

C H A P T E R I V

Although Dworkin insists that acceptance of his rights thesis leads one necessarily to the conclusion that legal positivism is inadequate as a general theory of what law is, I suggested in the first chapter of this essay that Dworkin's analysis of the duties of judges in the United States could be accomodated within a general positivist theory. It is not clear that the positivist assertion that law is fundamentally distinct from other moral or social standards is incompatible with Dworkin's contention that the concrete rights of American citizens cannot be correctly determined except through a complicated process of moral reasoning. Hart, for instance, does not deny that some moral principles may form part of the law in particular societies. He does not insist on a strict division between these two sorts of standards as actual social phenomena; he only maintains that there is no necessary connection between them.

The positivist character of Hart's theory consists in his description of law and legal systems as socially relative institutions created in accordance with differing social interests, customs and purposes. Dworkin's rights thesis conflicts with one aspect of Hart's description of how legal systems operate, but not necessarily with the

general positivist point of view about what law is.

As Dworkin emphasizes in his defense of individual rights, the American Constitution establishes some moral rights of citizens as legal rights. The language of these Constitutional clauses is necessarily vague and abstract, mentioning such concepts as 'liberty','due process' and 'equal protection under the law'. The precise meaning of these provisions and their specific application to concrete situations is not clearly defined or elaborated, and this vagueness has led to considerable legal controversy over what concrete rights are in fact protected. Nevertheless, these general moral concepts are included in what has been formally accepted as part of the established law in this country.

To apply such abstract rules to concrete issues concerning legal rights and obligations, judges must interpret the meaning and intention of these general provisions. This will involve them in a complicated process of examining the principles of legal philosophy underlying these concepts and of explaining their direct moral implications. Perhaps those principles which are implicit in Constitutional law, or directly derived from fundamental requirements of accepted law, should be regarded as legally-binding standards for judicial interpretation of legal rules and determination of concrete legal rights.

The rule of recognition for valid law in the United

States might thus be extended to include those principles of political morality which are directly required for a coherent determination and justification of accepted legal rules. Consideration of these principles in a consistent theory of law might allow judges to define or "discover" the existing legal rights of citizens in difficult cases where the applicability of explicit rules is questionable. In this way Hart's troublesome doctrine of the open texture of the law could be avoided in an analysis of American law and judicial discretion limited to the weak sense of interpreting legal rules according to authoritative standards. Dworkin's insistence that judges should, and characteristically do, decide cases on the basis of existing legal standards need not invalidate Hart's general theory if the rule of recognition as defined by judicial practice includes the principles Dworkin claims judges do appeal to.

Dworkin, however, argues against the possibility of extending Hart's rule of recognition to include principles. He admits that Hart does not define rules in the same way Dworkin does in his discussion of the distinction between rules and principles; Hart's use of the term 'rule' is not restricted to those legal standards which can be applied in an absolute way, or which are explicitly articulated. Yet Dworkin maintains that there can be no clear test of pedigree for principles that is concerned not with content but with the manner in which they were adopted. They are

not enacted like legislative statutes, or established as precedents like judicial decisions. They must possess some amount of "institutional support" to justify the claim that they should be recognized as part of the law. But they are not formally established in an authoritative way. They originate as legal principles in the "sense of appropriateness" they develop over time in the legal profession and the general public.

One might attempt to formulate the pedigree for principles in terms of their relation to explicit law: only those principles which have the feature of being implicit or embedded in existing law should be recognized as legally binding. The problem with this definition is that judges in fact disagree about which principles should be counted as binding on them, as well as about the relative importance of such principles. It would seem that since judicial practices and opinions concerning the status of principles are not concurrent, these cannot constitute a commonly-accepted criterion for the legal validity of principles. The rule of recognition for law is supposed to be a social rule on Hart's theory. Some other normative stipulation of the duty of judges to recognize certain standards as law could be viewed as a correct criterion for valid law, but this would not be the sort of socially-accepted rule Hart's theory requires.

Moreover, the complexity of the development of a coherent legal theory identifying all the principles appropriately related to established law would not fit Hart's notion of a clear test for pedigree. "The test of institutional support provides no mechanical or historical or morally natural basis for establishing one theory of law as the soundest."[1] This process of developing a legal theory would involve substantial controversial assumptions and conclusions about moral and political theory which could not themselves be tested for validity or acceptance by any social rule. They could only be supported by convincing moral arguments. "But these arguments must include arguments on issues of normative political theory, like the nature of society's duty of equality that go beyond the positivists' conception of the limits of the considerations relevant to deciding what the law is."[2]

Despite Dworkin's objections it still seems theoretically possible to distinguish those principles which should be regarded as relevant to judicial decisions from other moral standards. A formal definition of legal principles as those which are implicit or embedded in established law would not identify any specific principles which should be recognized, nor even elaborate exactly how one would determine that some principle fits this definition. Yet this criterion for validity could well in fact be a

commonly-accepted social rule among judges and lawyers.

Judges might disagree to some extent in their articulation of the political theory underlying the framework of our legal system and thus be led to differing conclusions about what is implicit in a set of legal rules. But they might still agree on the general standard that only those principles inherent in the political framework of our system can be considered part of the law. Any claim that a particular principle is in fact part of the law would have to be argued for on the basis of that general standard. No other sort of justification could be given for appealing to some principle in deciding a legal question.

This formal definition of specifically legal principles would preserve in an abstract way the positivist distinction between law and other standards of political morality. The concrete determination of what the law actually requires in particular cases would, as Dworkin observes, involve a great deal of subjective moral argumentation. But this moral reasoning would be specific to illuminating the nature of established legal institutions. Judges would not be free to endorse or appeal to any principles which they could not reasonably argue to be somehow implicit in the existing law of the United States.

The social rule of recognition could be stated from an external point of view as including all explicit and implicit requirements of political decisions and enactments

by authorized officials, in accordance with fundamental Constitutional provisions and restrictions. But to the judges and officials viewing the legal system from an internal perspective, the agreement on the inclusion of implicit principles would involve more than a verbal and abstract concurrence. The conformity of officials in accepting this rule of recognition would be evidenced by their actual practice of proceeding in the attempt to determine what is implicit in the law. Although their conclusions might differ, their procedure would reflect the existence of a social rule. Private citizens could equally well engage in the same process if they had sufficient knowledge of established law.

The formal defintion of legal principles does not really provide a simple test for what is generally accepted as valid law. The legal rights of citizens cannot always be determined in any clear-cut and demonstrably certain way. However, the positivist might simply view this a peculiar fact about our legal institutions, resulting from the inclusion of vague moral requirements in explicit Constitutional law. The abstract moral concepts which appear in the Constitution are endorsed and accepted as authoritative legal standards even though there may be various and conflicting conceptions of the meaning and implications of those provisions.

There exist accepted social rules establishing the

moral limitations on what is valid law; what is controversial is the interpretation of those restrictions and provisions. The duty of the judge to use his best judgment in determining the legal rights and obligations of citizens may be imposed by a social rule governing judicial practice, even though there may be no objective method for deciding whether or not his conclusions are correct.

Dworkin might object that the positivist claim that there is always a social rule which settles what rules or principles judges must recognize as law is not supported by this reformulation of the rule of recognition. If legal rights and obligations are essentially controversial at a concrete level, and require substantial subjective assumptions and judgments for their specific determination, then there is not an objective or commonly accepted rule of recognition of what is law. Where there is no such rule, the distinction between legal and moral standards cannot be defined according to positivist criteria.

However, Dworkin cannot be claiming that there is no general social rule for recognizing valid law. If he were, then judges would have no way of figuring out their legal duties even in simple cases. Judges would not then be bound by any standards of social acceptance in their determination of legal rights and obligations. Some rules of law and judicial practice must be viewed as settled by social

acceptance for Dworkin's theory of judicial responsibility. Dworkin's judge, "accepts the main uncontroversial and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights and that judges have the general duty to follow the earlier decisions of the courts."[3]

Dworkin's judge does not question the fact that the Constitution creates legal rights and duties and validates the legality of statutes. He only questions what principles are assumed by this fact and what specific rights are thereby created. His legal theory is concerned with discovering the principles justifying those constitutional provisions, legislative statutes and judicial precedents in order to determine the non-explicit extension of these laws to concrete cases. He does not begin by questioning the fact of the validity of those uncontroversial elements of the law.

It seems that Dworkin must accept the accuracy of something like Hart's rule of recognition in order to show that there is an established legal system with a complex set of authoritative enactments and precedents whose general character judges must interpret and justify. The problem for Dworkin is just that Hart's test does not include enough: the test for explicit rules may be commonly accepted but not the test for other legal standards and principles. A social rule of recognition will settle some, but not all, legal questions, according to Dworkin's theory.

Although Dworkin might not accept the existence of this proposed revised social rule of recognition as a genuine social rule because of its lack of specificity in concrete determinations, nevertheless I think it is a legitimate and defensible interpretation of the main thrust of his rights thesis. It seems to allow for the existing controversy over difficult legal issues and protect Dworkin's claim that there is always a right answer to such questions despite the lack of social agreement. At the same time it seems to clarify the relationship between Dworkin's concerns and the general approach of positivist theory. Since Dworkin relies on some sort of postivist theory similar to Hart's as a basis for determining what the law is in relatively simple cases and does not propose any other general theory to replace Hart's, it seems plausible to maintain that the differences between the two conceptions of what law is are not so fundamental as Dworkin supposes.

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1. Dworkin, p, 68.

2. Ibid., p. 105.

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