A THEORY OF RIGHTS: SOME REFLECTIONS ON THE DEVELOPMENT OF RONALD DWORKIN'S PHILOSOPHY OF LAW

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ABSTRACT

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The perennial debate between the partisans of judicial "restraint" and judicial "activism" has become increasingly poignant and public. Since the articulated majority opinions of the Supreme Court have the force of "the law of the land," the explicit or implicit philosophies of law promulgated therein, dramatize an important way in which philosophy affects our daily lives.

This thesis attempts to elucidate some of the salient elements of Dworkin's jurisprudence. The first section is an introduction, which conveys the importance and timeliness of the topic. The second part is expository inasmuch as it attempts to extrapolate a theory of rights from Taking Rights Seriously, A Matter of Principle, and Law's Empire. The third part defends this theory of rights as a particularly illuminating account of constitutional adjudication. The concluding section provides an account of how Dworkin's theory of rights can be seen to affect future development in the philosophy of law.

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SECTION I

INTRODUCTION

The inherent weaknesses of a particular conception of "liberalism" were recognized and articulated long before conservatives proclaimed the end of dominance by that political tradition at the dawn of the current decade. I hope to demonstrate in this thesis why that proclamation may yet prove premature.

The liberal political tradition reflects the history of a remarkably resilient political philosophy. The central concepts it employs like "liberty," "equality," and "democracy" admit of many conceptions. Moreover, the proper relationship between and among these concepts is a matter of interpretation that determines the particular conception of liberalism espoused. It should not be surprising, therefore, to find competing conceptions that all claim to fall within the liberal political tradition. It also follows, however, that if the justificatory force of a particular conception is found lacking, it is not necessarily the case that the political tradition itself is imperiled. The explanatory power of a rival conception within the same tradition may be found to be superior to

any conception found in other traditions. In other words, recognition of the inherent weaknesses of justificatory force of a particular conception of liberal political philosophy may signal the need for a profound reordering of conceptual relationships within that tradition. If successful, this reordering may result in a more vital and encompassing explanatory and justificatory model.

Philosophers have noticed that there is an intimate connection between political philosophy and the philosophy of law. Both have a conceptual component and both have a normative component. In addition, the domain of discourse for each is inextricably intertwined with the other. It has also been observed that they are mutually supportive interpretive enterprises. If this latter claim can be demonstrated, it will become evident how a philosophy of law can offer a powerful critique of conceptions within political philosophy.

The development of Ronald Dworkin's philosophy of law purports to provide this demonstration and therefore claims to show why a particular conception of liberal political philosophy, utilitarianism, viewed as a goal-based political theory, is inferior in its justificatory force to a rights-based political theory. If Dworkin is successful, "liberalism" may emerge as an even more powerful political tradition. Rumors of its demise will not simply be premature, they will be groundless.

Several additional observations are in order by way of introduction. The first of these is that Dworkin's legal and political philosophy is exceptionally difficult to characterize. Since he is engaged in the process of reordering and redefining conceptual relationships within a political tradition already rich in established distinctions, those very distinctions, based as they are on more conventional conceptual relationships, fail to place his philosophy within one of the more traditionally recognized schools of thought such as natural law, positivism, or legal realism. His enterprise is much more ambitious: It attempts to reconstruct the frame of reference itself. In this regard it is not unlike the process described by Thomas Kuhn for the interpretation of data within the enterprise of science. More specifically, Kuhn makes use of the notion of a theoretical construct. Simply stated, the theoretical construct functions as a frame of reference for conceptual relationships. Since science attempts an ever more encompassing explanation of natural phenomena, it is always possible that new empirical data will be anomalous within the established theoretical construct. If only minor adjustments among the established conceptual relationships are needed to accommodate the anomalies, the explanatory value of the construct is preserved. If the anomalies prove to be

intransigent, however, this may sometimes signal the need for a new theoretical construct that accommodates the anomalies without transforming previously explainable phenomena into anomalies within the new construct.

Dworkin's approach is also not unlike the position adopted by Kant when the latter hoped to rescue metaphysics from pure empiricism. Dworkin thinks that many of the conceptual difficulties encountered in the philosophy of law are due to an inordinate attention to linguistic analysis. In answer to the perennial philosophical puzzle, "What is law?," Dworkin responds that it is an interpretive concept. With this seemingly simple response he hopes to rescue jurisprudence from the "semantic sting."

As might be expected from the foregoing, Dworkin's legal and political philosophy is exceptionally complex and holistic, in addition to being difficult to characterize. This makes it virtually impossible to isolate a single conceptual relationship for analysis without also taking due notice of a plethora of distinctions found in his philosophy taken as a whole.

Nevertheless, the theory of rights that Dworkin develops is central to both his legal philosophy and his political philosophy. He develops it somewhat differently in each of his three major works. In <u>Taking Rights</u>

Seriously (hereafter referred to as TRS), Dworkin points out the defects of "the ruling theory of law," which he sees as consisting of legal positivism in its conceptual component and utilitarianism in its normative component, and provides the structural framework for his own alternative theory. This work is foundational in more than just the chronological sense. In it Dworkin provides us with an account of rights that purports to rescue that valuable notion of the liberal political tradition from its supposed connection to a questionable ontology of ethereal entities. Indeed, he claims that the idea of individual rights is "of no different metaphysical character from the main ideas of the ruling theory itself" (TRS, p. xi).

In A Matter of Principle (hereafter referred to as AMP), there is a shift in emphasis to the domain of political philosophy. Dworkin argues that law and politics do not occupy independent domains, but he also rejects the view that they are the same. In constructing his argument Dworkin develops the notions of "intention" and "principle," which will prove central to his theory of adjudication.

Another major theme of this second work is a critique of liberalism. Dworkin argues that the liberal political tradition has not taken sufficient pains to elucidate the

form of egalitarianism that it espouses. He thinks that this failure is responsible for some of the muddled criticisms now being leveled against that tradition by more extreme partisans of both the "left" and "right" positions of the political spectrum.

Building on these seminal works, the idea of "law as integrity" comes to fruition in Law's Empire (hereafter referred to as LE). In TRS Dworkin utilized issues in legal philosophy to illuminate broader issues in political philosophy. In AMP his extensive discussion of issues within political philosophy served to deepen our understanding of the process of adjudication, an issue central to legal philosophy. In LE he explicitly states the intimate connection between political philosophy and the philosophy of law implied in the earlier works: "Political philosophers consider problems about the force of law, and academic lawyers and specialists in jurisprudence study issues about its grounds" (LE, p. 111). This substantive distinction, in turn, throws light on the rationale behind his methodology:

> We must hold constant certain parts of our attitudes and convictions about law, as not under present study, in order to evaluate and refine the rest. We use the distinction between grounds and force to that end. (LE, p. 111)

In some ways LE is the most unified and unifying of the three. In the first place, the earlier works are primarily collections of essays bound together by a common

theme: the idea of "rights" in TRS and the idea of "principle" in AMP. The subject matter of each essay often overlaps with others, and the general tone is analytic. In LE the tone is more synoptic. The relationship between and among the central concepts employed is more clearly developed and seen as part of a broader and more coherent general philosophy of law. In addition, as was noticed before, the earlier works took grounds (TRS) or force (AMP) as different primary perspectives of reference. The frame of reference of the latter work is more encompassing inasmuch as it tries to elaborate on both the grounds and force of law.

In LE we more clearly see the ambitious nature of Dworkin's enterprise. He is not content with engaging in the traditional debate among advocates of natural law, positivist, and "realistic" schools of thought about the primacy of justice, legal certitude, or social utility in a well-developed philosophy of law. He wants, rather, nothing short of a complete reexamination of the context of the debate itself. Dworkin sees jurisprudence as "interpretation" rather than linguistic analysis. For this reason he rejects some of the classical characterizations of arguments within that debate, like the argument about the relationship between law and morals, as profoundly misleading:

> In jurisprudence texts that debate is pictured as a contest between two semantic theories: positivism, which insists that law and morals are made wholly distinct by semantic rules everyone accepts for using "law," and natural law, which insists, on the contrary, that they are united by these semantic rules. In fact the old debate makes sense only if it is understood as a contest between different political theories. . . . The argument is not conceptual in our sense at all, but part of the interpretive debate among rival conceptions of law. (LE, p. 98)

As might be expected as a result of this account, Dworkin discards some of the classic distinctions found in the philosophy of law as obfuscating terminology left over from the "semantic sting." He proposes, instead, a new classification of schools of thought based on their "interpretive" positions: conventionalism, pragmatism, and law as integrity. The value of an interpretive judgment is how well it "fits" and "justifies" what has gone before. Although the extended discussion of these two main dimensions of interpretation is long and complex, suffice it to say for now by way of summary that he finds law as integrity as a superior interpretation of our legal practices and applies that interpretation to issues in common law, statutory construction, and constitutional adjudication.

It should be evident from the foregoing summary of Dworkin's labors that any attempt to do full justice to the development of his philosophy of law would require a work much more substantial in scope than that suggested

by the title of this thesis. He himself provides an outline of the requirements for a general theory of law. It should have a normative as well as a conceptual component. The normative component should provide a theory of legislation, adjudication, and compliance. The theory of legislation should include a theory of legitimacy and legislative justice. The theory of adjudication should provide a theory of controversy and a theory of jurisdiction. The theory of compliance should contain a theory of deference and a theory of enforcement.

To say the least, this is quite a comprehensive agenda, and this thesis makes no attempt to assess how completely or successfully Dworkin has met the requirements he himself has set for a general theory of law. Although it might be argued that the three main works under consideration do, taken as a whole, provide the requisite rudimentary elements from which a general theory of law might be extrapolated, this thesis has a narrower focus. It concentrates attention on one type of one element of one branch of Dworkin's schema, constitutional adjudication, and tries to show how his theory of rights provides a superior interpretation of that practice. Dworkin observes that:

> Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its agenda. That argues for a fusion of constitutional law and

> moral theory, a connection that, incredibly, has yet to take place. (TRS, p. 149)

This thesis is offered in hopes of stimulating additional interest in the connections advocated by these observations.

The remainder of this paper is divided into roughly three sections. The first attempts to extrapolate a theory of rights from the three major works heretofore outlined. The following section concentrates on issues pertaining to constitutional adjudication and tries to show how Dworkin's theory of rights provides a superior account of that practice. The final section attempts to show how the development of that theory of rights affects future inquiry in the philosophy of law.

SECTION II

ELEMENTS OF A THEORY OF RIGHTS

Taking Rights Seriously: A Taxonomy of Rights

Early in his introduction to TRS, Dworkin provides an operational definition of the central concept he plans to examine:

> Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them. That characterization of a right is, of course, formal in the sense that it does not indicate what rights people have or guarantee, indeed, that they have any. (TRS, p. xi)

His cautious and formal tone here is understandable once we remember that he is trying to remove what he believes to be a major obstacle to taking rights seriously, namely, that rights have some "special metaphysical character." Indeed, he wants to insist that his forthcoming argument about the idea of rights is of no different metaphysical character than the ideas promulgated by the "ruling theory of law." To say simply that rights are "political trumps held by individuals" is vacuous at this stage of the argument, without additional explanation. The complex account he begins in TRS will culminate in LE with the

notion that the idea of rights provides a superior "interpretation" of our legal practices in terms of "fit" and "justification." But this evolution must await the development of law as integrity. For now he is concerned with differentiating his account of rights from accounts that do depend on ideas of a special metaphysical character.

In Chapter 4 of TRS we are provided with a more elaborate and detailed taxonomy and vocabulary of rights. A fundamental distinction, however, provides the context for this elaboration. This is the distinction between arguments of policy and arguments of principle. Dworkin believes that policy and principle are the two major grounds for political justification. He admits that they are not the only grounds but contends that other grounds are utilized in an "ad hoc" manner (like an extra income exemption for the blind defended on the grounds of public generosity). He also admits that these grounds are not mutually exclusive. Indeed, he believes that any legislative program of sufficient complexity will probably require both forms of argument. In this case it will prove helpful to think sometimes that a policy generates a right qualified by a principle and sometimes that a principle generates a right qualified by policy. They are sufficiently different, however, to make the following crucial distinction:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. . . . Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. (TRS, p. 82)

This distinction is crucial because the rights thesis that Dworkin advances, "that judicial decisions in civil cases, even in hard cases . . . , characteristically are and should be generated by principle not policy" (TRS, p. 84), needs greater specificity of distinction between rights and goals if it is to provide an adequate account of adjudication. "If the rights thesis is to succeed, it must demonstrate how the general distinction between arguments of principle and policy can be maintained between arguments of the character and detail that do figure in legal argument" (TRS, p. 89). The crucial distinction cited above provides the structural framework for the bridge linking principle to right and policy to goal: "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals" (TRS, p. 90).

The additional specificity called for in the foregoing is now possible. Dworkin now focuses on the "distributional character" of claims about rights. He begins by stipulating that a political aim is a generic

political justification. If arguments of policy and arguments of principle are the major sources of political justification, then both express political aims. But the aims they express differ in their distributional claims.

> A political right is an <u>individuated</u> [emphasis mine] political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served. (TRS, p. 91)

It is important to note that the individual is in the foreground in this description. Other political aims are seen as relative to the individual's state of affairs. There is no question of the proper distribution of some resource at issue. The macrocosmic perspective is in the background.

This is not the case when the discussion turns to goals. "A goal is a <u>nonindividuated</u> [emphasis mine] political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals" (TRS, p. 91). Here the community is in the foreground. Other political aims are seen as relative to the community's state of affairs. There is certainly a question of distribution here. The microcosmic

perspective is in the background. Trade-offs in terms of benefits and burdens on particular individuals or groups are justified as long as the overall aggregate good of the community is maintained or enhanced.

In short, distributional claims do not of themselves provide sufficient justificatory force for an individuated political aim, whereas they are of paramount importance in determining the justificatory force for a nonindividuated political aim.

It follows that the character of a political aim is dependent on its place and function within a broader political theory. In some theories the aim advanced will be seen as a goal, whereas in other theories the same statement of the political aim will be seen as a right. The simple proposition that individuals are entitled to freedom of speech offers an example. If the background political theory espoused holds that "democracy" is best served when individuals can freely articulate their political positions, the proposition functions as a policy statement because it describes a goal. If, on the other hand, the background political theory espoused holds that "democracy" best serves the capacity of each individual to participate in community decisions, then the proposition functions as a principle because it describes a right. In the first case the proposition is more easily qualified by other propositions that purport to serve the broader

aggregate goal of serving "democracy." Trade-offs of benefits and burdens among individuals within the community are encouraged as long as it can be shown that the aggregate welfare is enhanced. Dworkin makes the same point about collective goals: "In each case distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall" (TRS, p. 91). In the second case, the proposition is not as easily qualified by other propositions because it expresses an individuated political aim. The notion of "distributional principles" is inappropriate here. The background political theory espoused is not parasitic on any particular conception of an aggregate good. Offering less or more of freedom of speech to some individuals is incomprehensible in the second account. Each possesses it in an equal though abstract way.

The next set of distinctions that Dworkin elaborates brings us closer to the degree of specificity required for a more detailed account of adjudication. The first of these is the distinction between background and institutional rights:

> An adequate theory will distinguish, for example, between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights,

> that provide a justification for a decision by some particular and specified political institution. (TRS, p. 93)

Both are species of political rights, and for that reason both express individuated political aims. But it is important to note that the political aims expressed by institutional rights are seen as being justified by the political aims expressed by background rights and not the other way around. Dworkin provides a particularly illuminating example in this regard. An individual may believe that X has a background right to the property of Y if X needs it more and yet concede that X does not have an institutional right to a decision by a court which would condone theft. X may argue that the legislature ought to be empowered or that the constitution ought to be amended to recognize his background right, but he cannot appeal to an institutional right that presumes the existence of institutions created by society acting as a whole.

The second distinction differentiates between abstract and concrete rights:

> An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. . . . Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. (TRS, p. 93)

Dworkin points out that the grand rights of political rhetoric are good examples of abstract rights. The rights

of free speech, liberty, equality, and so on, do not specify what rights a particular person has on a particular occasion, especially when there is a question about the force of a competing claim of right. The proposition utilized earlier in the discussion about the character of political aims, that individuals are entitled to freedom of speech, is a principle expressing an abstract right. The proposition that individuals are entitled to freedom of speech except when their exercise of that right causes others to lose their lives (yelling "Fire!" in a crowded theater when there is no such treat), expresses a more concrete right. It is more concrete because the weighting of conflicting claims is taken into account in the expression. The force of the abstract right is not denied; it is mitigated in a context-dependent way. "Abstract rights in this way provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it" (TRS, pp. 93-94).

The stage has now been set for a more detailed account of the role of the rights thesis in adjudication. Before commencing that account, however, it might prove helpful to review the course of Dworkin's development thus far. He first asserted that the two primary grounds for political justification were arguments based on policy and arguments based on principle. He argued that arguments of

policy tried to advance or protect a collective goal, while arguments of principle attempted to respect or secure some right. But the rights thesis maintained that judicial decisions in civil cases, even in hard cases, are and should be generated by principle rather than policy. At the level of adjudication, however, legal arguments have a greater degree of specificity than that provided by his first distinction. The second distinction, by linking principle to right and policy to goal, provided for a more precise formulation: Principles are propositions that describe rights, and policies are propositions that describe goals. This move allowed for a more enlightening discussion of rights and goals as political aims. If political aims are generic political justifications and if a political right is an individuated political aim, then principles could also be seen as individuated political aims. In the same way, if goals are nonindividuated political aims, then policies can also be seen as nonindividuated political aims. In this manner he demonstrates that the justificatory force of both policy and principle derives from political theory and must be argued on that same territory. Different political theories give rise to different political justifications. These justifications are expressed as political aims which may be either individuated or nonindividuated. If they

are individuated, they will be classified as either background or institutional political rights. If they are background rights, they are "residual" in the sense that they do not presuppose the existence or creation of particular political institutions. If they are institutional rights, they do presume these political institutions as somehow expressing the consent of society taken as a whole. Since the former are more "proximate" to the domain of political theory, they cannot be justified in terms of the latter, which are less "proximate" in terms of logical priority, whereas the latter can be justified in terms of the former. Similarly, an abstract right cannot be justified in terms of a concrete right, but an abstract right may provide a powerful rationale for the force of a concrete right.

Given the aforesaid distinctions that summarize the progress of Dworkin's development thus far, we can now more adequately assess the role of the rights thesis in adjudication. If adjudication is seen as a process of decision making that purports to determine the relative strength of competing political aims within a political community, then several features of that process become apparent. In the first place, if rights are claimed, the "competing aims" feature of the process mandates a judgment that <u>concrete</u> rights be either affirmed or denied. Since abstract rights do not prescribe what

rights a person has on a particular occasion and since litigation is predicated on controversy inherent in competing claims between particular parties in particular circumstances, adjudication must be context-dependent.

But more is needed to assess the role of the rights thesis in adjudication than simply noticing that concrete rights are at issue.

> The rights thesis provides that judges decide hard cases by confirming or denying concrete rights. But the concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights. (TRS, p. 101)

Legal rights are thus placed in conceptual relationship to other rights within Dworkin's schema: "Legal rights may then be identified as a distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function" (TRS, p. xii). At first glance it may seem that this move, which subsumes legal rights as a species of institutional rather than background political rights, supports the positivist assertion that law and morality are made wholly distinct by semantic rules that define the territory encompassed by "legal." But this is only a brief illusion made possible by the "semantic sting." Although the move does deny the assertion of natural-law theorists that law and morals are united by shared semantic rules, it also denies the

positivist assertion that they are "wholly distinct." To see why this is so, we must remember that although a background right cannot appeal to an institutional right for additional justificatory force, an institutional right may appeal to a background right for precisely that support. Dworkin makes the point that institutional rights are fixed by "constitutive and regulative rules" that are recognized as belonging distinctly to the enterprise in question. Some institutions are completely autonomous inasmuch as they define their own parameters and procedures in such a way that appeal to extra-institutional norms is ruled out by stipulation. He offers the game of chess as an example. But other institutions are only partly autonomous in this sense. This is especially true of political institutions. The constitutive and regulative rules that belong to this enterprise are rarely sufficient to determine what institutional rights an individual has in controversial situations. A citizen is expected to repair to political morality when he wishes to argue for such rights. "The fact that some institutions are fully and others partly autonomous has the consequence mentioned earlier, that the institutional rights a political theory acknowledges may diverge from the background rights it provides" (TRS, p. 101). In this way we see that Dworkin permits an appeal to extra-institutional norms in adjudication and thus

denies the positivist assertion that such appeals are only disguised acts of judicial legislation.

He hastens to add, however, that institutional rights are nevertheless genuine rights. If a background right is asserted that X has a right to the property of Y if X needs it more and that assertion is not recognized as an institutional right, it would be wrong under the constitutive and regulative rules in force to appropriate the property of Y and give it to X. Participants in the enterprise have a genuine right that the rules adopted by the political society will be honored.

It might be objected, however, that if legal rights must be institutional rights rather than background rights and if judges can appeal to extra-institutional norms to determine what those rights are, then the foregoing account of adjudication seems hopelessly subjective. But this apparent confusion is a result of our thinking in terms of traditional conceptual relationships left over, once again, from the "semantic sting." Although a more detailed elaboration of "interpretation" must await our analysis of Dworkin's development in AMP and LE, suffice it to say for now that law seen as an interpretive concept is best illustrated by the process of adjudication in hard cases:

> The hard case puts, we might say, a question of political theory. . . . The concept of a game's

> character is a conceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. (TRS, pp. 104-105)

Dworkin observes that legal arguments in hard cases turn on such contested concepts. The critical point to be observed is that although a legal right must be an institutional right to be enforced by a judge in adjudication, it is often unclear exactly what legal right has been established by the institutional right in dispute. In easy cases the institutional right is seen clearly to establish a legal right with nothing more. In hard cases, however, one cannot simply repair to the institutional right for guidance because what legal right has been established by the constitution or the statute or the precedent is precisely what is in dispute. The judge has no choice but to repair to extra-institutional norms. The fact that judges do sometimes behave in this way is generally agreed. The characterization of that behavior is the crux of the controversy. Some would characterize such behavior as "legislating interstitially between the rules"; others might hold that judges behave "as if" they are applying established "principles" of the law.

Dworkin's account is much different. He sees no reason to accept the aforesaid explanations of what judges do in hard cases. He asks us to examine what it means to

say that the conventions associated with an institutional enterprise have run out:

> It is important to see, however, that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of many conceptions; that is, in a contested concept. (TRS, p. 103)

In this account the judge is seen as deciding what particular conception he or she must adopt to enforce the convention. It is not a matter of supplementing the convention or pretending that its force has not run out.

Since legal arguments turn on such contested concepts, it will be profitable to examine some of these in greater detail. Dworkin proposes that two will be particularly illuminating. The first is the concept of "intention" or "purpose": "This concept provides a bridge between the political justification of the general idea that statutes create rights and those hard cases that ask what rights a particular statute has created" (TRS, p. 105). The second concept he wants to scrutinize is the idea of "principles" that underlie the rules of positive law: "This concept provides a bridge between the political justification of the doctrine that like cases should be decided alike and those hard cases in which it is unclear what that general doctrine requires" (TRS, p. 105).

These concepts, although treated in TRS, are more elaborately formulated in AMP. In this latter work "intention" and "principle" are treated more generically. Since we are primarily concerned with adjudication rather than legislation and since LE draws upon AMP fairly extensively, it is now time to turn our attention to the second of Dworkin's major works.

A Matter of Principle

Intention

It was observed earlier that judges often appear to be repairing to extra-institutional norms when deciding hard cases. This is especially true in constitutional adjudication, or at least it seems to be the case that constitutional issues dramatize the controversial nature of this phenomenon. Dworkin maintains that judges cannot do otherwise in such cases; the nature of the activity in question entails such a repair. Others, however, deplore such a state of affairs. They may agree that this is an accurate account of what the judges are doing but may insist that it is simply wrong to engage in such an activity.

What is at stake here, and why are the debates surrounding the "interpretation" of the Constitution so intense? One possible explanation is that critics of extra-institutional appeal see a fundamental tension

between "judicial review" and "democracy." If judges appeal to extra-institutional norms, which norms are they appealing to--their own or those held by the community in establishing a constitution in the first place? Since there is always a possibility of conflating the former with the latter, it is safer for "democracy" to deny, or at least severely limit, such a potentially subjective practice. Judicial review, in the account of these critics, should concentrate attention on trying to ascertain framers' "intention" when hard cases arise. Although this may sometimes prove to be a difficult task, it may be the only way that we can ensure some degree of objectivity in constitutional adjudication. The presumed tension between "judicial review" and "democracy" is thus seen to be resolved in favor of the latter.

Upon closer examination, however, it is not at all clear that reliance on "framers' intention" ensures such objectivity. Indeed, insistence on the primacy of "framers' intention" within a constitutional theory is itself parasitic on a particular conception of "democracy" that finds its justificatory force in the realm of political theory. This, too, is an appeal to an extra-institutional norm of the same type that is condemned by critics of Dworkin's account.

> Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers.

> Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular. . . . It would be like the theory that majority will is the appropriate technique for social decision because that is what the majority wants. (AMP, p. 54)

As was pointed out earlier, the set of critics under discussion do not deny the fact that judges sometimes appeal to extra-institutional norms; they only claim that such appeals are wrong. But if these critics must themselves appeal to extra-institutional norms to justify their condemnation of the practice, it would seem that their value judgments are misplaced at this level of discourse. If, as Kant has suggested, "ought" implies "can," then the inability to extricate constitutional adjudication from reliance on extra-institutional norms, as Dworkin maintains, precludes the possibility of ascribing "rightness" or "wrongness" to the practice. The real issue is not what the framers intended the Constitution to mean, but what conception, if any, of framers' intention the Constitution requires. This issue can only be argued within the realm of political morality, and the "rightness" or "wrongness" of a particular conception is the real value judgment in question.

Even if the concerns articulated by the opponents of appeal to extra-institutional norms were granted, however (and as we have seen, there is no compelling reason to do this), what sort of "objectivity" would be gained by an

appeal to "framers' intention" viewed as an alternative theory of judicial review? The presumption is that we can accurately determine or approximate the "meaning" intended by the framers by a close examination of historical records, committee reports, and the like. There may be something reassuring about examining something tangible and external to the interpreter that beguiles that person into believing that the resulting interpretation is more "objective" simply because of the labor involved.

But there are serious problems with this account. The "framers' intention" advocates of judicial review presume a definitive answer to a series of questions that can only be agreed upon by those already holding a particular conception of constitutionalism. In the first place, who are we to count as "framers"? Are the mental states of just the drafters of the document to be considered, or should we try to ascertain the mental states of those who ratified the document as well? Moreover, how are we to count? Should those who express their opinions more vociferously or more frequently in debates count more than those who simply have their vote recorded? Anyone approaching the interpretation of the Constitution from a "framers' intention" orientation presumably has formed some judgments in answer to these questions if he or she hopes to convince others of the "objectivity" of the methodology employed. But these

judgments are precisely the sort that reasonable people will disagree on. Agreement is likely only among those who, as was mentioned before, share a particular conception of constitutionalism.

But let us assume for the sake of argument that the complex calculation required in the foregoing account is agreed on by those charged with the responsibility of constitutional adjudication. Even so, there are additional complications.

Dworkin maintains that we must be clear to distinguish between hopes and expectations when trying to determine the psychological state of an individual framer. That person may vote, for example, in the affirmative on a particular provision, hoping that it will be construed in a particular way but expecting that it will not be. The decision to vote in the affirmative may have been an exceptionally complex deliberation which ultimately turned on the feasibility of getting a better worded provision, from the point of view of the framer in question, passed. Are we then to say that our framer's intention is the same as the intention of the framer whose wording is finally adopted? This certainly complicates the calculation that we have assumed earlier.

In addition, is it reasonable to assume that there is a single intention in the mind of a particular framer? If

there is more than one, which certainly seems likely, how are we to determine the dominant intention? How are we to weight, if at all, a multiplicity of intentions?

It is also important to distinguish between a framer's abstract and concrete intentions. A framer may intend to vote for a particular provision because he or she believes in its statement as a matter of general principle and yet express concrete convictions that may seem to others at variance with the abstract principle that is formally espoused. That person may believe, for example, that Congress should make no law respecting the establishment of any religion as a matter of general principle. He may believe, that is, that state support of religion would violate a certain spirit of toleration for different religious beliefs. He may also express the belief, however, that Congress should encourage religious observances among the citizenry, perhaps by making it unlawful to conduct interstate commerce on Sundays, as long as it does not specify <u>which</u> religion must be observed. He votes for the provision because he understands it to prohibit the establishment of any particular religion. His understanding is that prohibiting interstate commerce on Sundays does not violate the spirit of toleration for different religious beliefs. It does not occur to him that the provision might be construed to prohibit Congressional action with

regard to religion generically. Which "intention," the concrete or the more abstract, should our "framers' intention" advocates count in making their determination of what the Constitution requires? The framer's abstract intention is that government should not violate the spirit of religious toleration by formally adopting a state religion. But he does not believe that Congressional action to prohibit interstate commerce on Sunday establishes a state religion. His abstract intention is consistent with the wording of the provision, but his concrete intention is a particular conception of what the abstract wording does or does not require.

Thus far, attention has been given to the attendant difficulties of establishing a definitive "intention" for an individual framer. As might be expected, the problems are compounded when one tries to ascertain a collective intention. One approach that Dworkin labels a "majority intention" approach assumes that there is a set of intentions held by each member of a subclass defined numerically as the majority of the pertinent population under consideration. Setting aside for a moment the complexities noticed before in trying to determine the membership of this "pertinent population," there is a deeper difficulty illuminated by the aforesaid discussion about concrete and abstract intentions. Even if there is

sufficient agreement at the level of abstract intention among the majority of the members in the given population, the expression of any one member's concrete intentions as to what is being allowed or prohibited by the provision under discussion is unlikely to command the same degree of majority assent enjoyed by the more abstract statement of intention. The recitation of a series of hopes held by any particular member of the majority may encounter opposition from other members as the degree of specificity is increased. This is because rival conceptions of a contested concept are now brought into the forum of public debate.

Another approach that Dworkin considers is that of "representative intention." According to this account, a sort of composite intention is formulated that is not too far from any one framer's intention but is identical to no single framer's intention. Obviously, the major drawback of this approach is that it requires a judgment call that is not too far removed from the sort of "subjectivity" that advocates of the "framers' intention" school of judicial review hope to overcome by their theory.

It seems, therefore, that the "framers' intention" theory of judicial review faces serious impediments in its search for "objectivity." Dworkin provides a succinct summary of such attempts:

> There is no stubborn fact of the matter--no "real" intention fixed in history independent of our opinions about proper legal or constitutional practice--against which the conceptions we construct can be tested for accuracy. The idea of an original constitutional understanding therefore cannot be the start or ground of a theory of judicial review. At best it can be the middle of such a theory, and the part that has gone before is not philosophical analysis of the idea of intention, and still less detailed historical research. It is substantive--and controversial--political morality. (AMP, pp. 39-40)

It is important to emphasize, however, that Dworkin sees a role for "intention" in constitutional adjudication. He merely wants to place that concept in proper perspective:

> I do not mean that we can sensibly state any political conclusion we choose in the language of intention, so that if we think the delegates to the original constitutional convention should have outlawed slavery, for example, we can say that they intended to do so, whatever they said or thought. The concept of constitutional intention is bounded by those aspects of the concept of intention that are not contested. . . . (AMP, p. 40)

Later, in his development of law as integrity, the concept of "intention" functions as a parameter for coherence in judicial interpretation. It is not the only one, to be sure, nor is it necessarily the most important parameter, but it is a valuable guide to determining what legal rights the Constitution, as an institution, provides.

If we cannot repair to the original "intention" of the framers as a starting point for constitutional adjudication in hard cases and if we accept the notion

that ultimately we must engage issues of political morality in constitutional discourse, then we should be prepared to articulate at least the broad outlines of a political theory that justifies our approach as to what the Constitution requires in judicial decision making. As Dworkin observes:

> If we want judicial review at all . . . then we must accept that the Supreme Court must make important political decisions. The issue is rather what reasons are, in its hands, good reasons. My own view is that the Court should make decisions of principle rather than policy--decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted. . . . (AMP, p. 69)

Principle

In Part Three of AMP, Dworkin attempts to provide the outlines of the political theory described above. It is a liberal political theory, to be sure, but it is fundamentally different from the liberal political theories associated with utilitarianism.

In introducing the topic of this thesis, it was observed that the liberal political tradition was seen by many to be losing its justificatory force. Indeed, Dworkin himself attacks the brand of liberalism associated with what he calls the "ruling theory of law." In AMP he more fully develops an alternative account of liberalism. If we take seriously his claim that political philosophy is an integral part of any philosophy of law (a claim made

most forcefully in LE), then it will be important to examine the main features of Dworkin's political philosophy to more adequately assess the development of his jurisprudence.

He begins, characteristically, with a fundamental distinction between constitutive political positions and derivative political positions. The former are valued for their own sake, while the latter are valued only insofar as they can be seen as viable strategies for achieving what is required by the constitutive positions. Dworkin argues, contrary to the modern, popular, and conventional wisdom, that the disarray within the "liberal" camp is not due to any loss in justificatory force of constitutive positions but is a result of failure to recognize the inadequacies of some of the derivative positions in light of changing social values. Moreover, and more seriously, many who claim a liberal allegiance confuse derivative positions with constitutive positions and thus undermine the tradition they claim to espouse.

Dworkin offers a particularly illuminating example in this regard. Many "New Deal" liberals seemed to advocate a greater role for government in stimulating economic growth. The tenets of Keynesian economics and the visions of a "Great Society," "New Deal," "Fair Deal," "New Frontier," and so on, all seemed to focus on the notion that greater material prosperity for more and more

citizens was a proper political aim. As social circumstances changed, however, and as people began to question the intrinsic value of economic growth per se, new values began to emerge. Environmental quality, consumer protection, and other issues related to the "limits of growth" ethic began to demand attention. Insofar as rampant economic growth was seen to be inimical to these emerging values and insofar as it was seen to be associated with the liberal political agenda, some began to question the justificatory force of the tradition itself and either abandoned it altogether or sought, sometimes in vain, to reconcile it with other conceptions of the tradition which were, themselves, not without features that could be accepted wholesale within the new rhetoric. For these reasons it became fashionable to denigrate liberalism and to search elsewhere for a coherent political theory.

Dworkin, however, is not so willing to abandon this venerable and resilient tradition:

> But is this emphasis on growth a matter of constitutive principle because liberalism is tied to some form of utilitarianism that makes overall prosperity a good in itself? . . . Or is it a matter of derivative strategy within liberal theory--a debatable strategy for reducing economic inequality, for example--and therefore a matter on which liberals might disagree without deep schism or crisis? (AMP, p. 184)

It will come as no surprise that Dworkin affirms the second possibility given above. He then proceeds to give his own account of what is constitutive of the liberal tradition and begins by asking whether there is a common thread or principle that unites the core liberal positions. He thinks that there is and calls this principle the "liberal conception of equality."

Elaboration of this principle requires another distinction:

> We must distinguish between two different principles that take equality to be a political ideal. The first requires that the government treat all those in its charge <u>as equals</u>, that is, as entitled to its equal concern and respect. . . . The second principle requires that the government treat all those in its charge <u>equally</u> in the distribution of some resource [or] opportunity, or at least work to secure the state of affairs in which they all are equal or more nearly equal in that respect. (AMP, p. 190)

Although Dworkin maintains that the first principle is constitutive and the second is derivative, he takes pains to point out that, as stated, even those of a conservative orientation might be persuaded to accept this distinction and characterization. More is needed to specify the "liberal conception of equality" that he has in mind.

Toward that end he asks us to consider what it means for a government to treat its citizens as equals. There are two basic answers to this question:

> The first supposes that government must be neutral on what might be called the question of the good life.

> The second supposes that government cannot be neutral on that question, because it cannot treat its citizens as equal human beings without a theory of what human beings ought to be. (AMP, p. 191)

Advocates of the second answer insist on a substantive answer to the question of what constitutes the good life. It is not unusual to hear arguments, even from those who profess a liberal persuasion, which extol the virtues of community, "aesthetic appreciation," and so on, as constitutive of the good life. Positions which do not specifically include these values are viewed as hopelessly individualistic or atomistic, or, worse still, expressive of anarchic tendencies. But proponents of this point of view, although they generally express noble and altruistic ideals, seem to ignore the fact that it is one thing for an individual to pursue what seems to him the path of greatest virtue and quite another for a government to pursue what seems to it the path of greatest virtue. The latter is an abstract concept expressing a relationship <u>among individuals</u> in all societies. As such, the notion of "agency," properly construed as the active force resulting from volition, cannot be predicated of government. In short and in a deep sense, there is no such thing as a "government" pursuing what seems to it the path of greatest virtue, but only individuals temporarily entrusted to secure the conditions of agency for their fellow citizens as members of a society. For these

individuals so entrusted, no matter how enlightened they may seem to themselves and to others, to make substantive determinations of "the good life" for others is tantamount to subverting the sense of community assumed by a particular conception of democracy.

Advocates of what might be called the "neutral" position on the good life, on the other hand, accept the fallibilities and frailties of the human condition as a given and offer the following account:

> The first theory of equality supposes that political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group. (AMP, p. 191)

There is a specific recognition in this account that particular conceptions of the good life are always held by individuals "qua" individuals, even when they are acting in a governmental capacity. Since all individuals are subject to fallibilities and frailties, it would be wrong to institutionalize individual preferences for what is constitutive of "the good life."

There is also recognition in this account of the truth that is somewhat obscured by the familiar rhetorical slogan that democracy is a government of laws and not men. The particular conception of democracy envisioned by

proponents of the "neutral" position heretofore outlined see community in a special way. It is not synonymous with society but a way of ordering society. As a way of ordering society it is an interpretation of the proper relationship between and among individuals who constitute the society. That relationship, in turn, is characterized by a respect for the active agency which is seen to be the most fundamentally human aspect of human society. The role of government in this account is to secure and maintain this relationship. Law functions as the means by which a government seeks to accomplish the ends entrusted to it by society.

Viewed in this way, the "liberal conception of equality" that Dworkin maintains is a constitutive position of liberalism does not lead to atomistic individualism. Agency is not confused with autonomy. The latter connotes the notion of functioning freely and independently without the control of others, whereas the former insists only that constraints on the individual are justified when that individual impairs the capacity of other individuals to function as agents. There is an "other-directed" quality about agency that is not expressed by the notion of autonomy. Conflating the terms misrepresents the former in a serious way that does not do justice to the sense of community espoused by the "liberal conception of equality." Indeed, both the explanatory

power and justificatory force of this conception are dependent on a sense of community that is far more consistent with democratic principles than conceptions of equality that see community as an outgrowth of government. The liberal conception of equality assumes community from the outset as a necessary condition for "the good life" (however that is interpreted by each member of the society). In this view, governments are fashioned to secure and maintain that necessary condition through law. Those who posit substantive notions of "the good life" as a starting point for their political theories impose their own versions of this problematic concept on the other members of a society through government. This is tantamount to allowing a subset of society's members, no matter how enlightened and benevolent, to determine the aspirations for all the other members. But when we speak of "democracy" the sense of community we seem to value is one that recognizes the inherent dignity and capacity for agency of each individual. Community is seen as enabling the fruition of individual aspirations rather than the end-point of all aspirations. In short, the liberal conception of equality views community as logically antecedent to government, whereas many rival conceptions see community as a much-hoped-for consequence of government.

Dworkin's political philosophy is therefore a powerful conception of liberalism: "In this respect, liberalism is decidedly not some compromise or halfway house between more forceful positions, but stands on one side of an important line that distinguishes it from all competitors taken as a group" (AMP, p. 192).

Law's Empire

Interpretation

After providing an elaborate and complex account of the taxonomy of rights in TRS, Dworkin more closely scrutinized the notions of "intention" and "principle" in AMP. These latter were viewed as "contested concepts" which illuminated the connection between the theoretical and the normative components of his political and legal philosophy. As was noticed before, TRS focused attention on the grounds of law, whereas AMP was primarily concerned with the notion of the force of law.

In LE a more unifying and holistic account of Dworkin's position is proffered. The unifying concept of this major work is that of "interpretation":

> But if law is an interpretive concept, any jurisprudence worth having must be built on some view of what interpretation is, and the analysis of interpretation I construct and defend in this chapter is the foundation of the rest of the book. (LE, p. 50)

But even here, in keeping with the spirit of his substantive account, Dworkin recognizes the inherent limitation of the project he proposes to pursue:

> Unfortunately, even a preliminary account will be controversial, for if a community uses interpretive concepts at all, the concept of interpretation will be one of them: a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts. (So any adequate account of interpretation must hold true of itself.) (LE, p. 49)

Nevertheless, although it is important to keep this qualification in mind, Dworkin has constructed an impressive case for his notion that law is an interpretive concept. If we accept his argument, then the traditional debates within the enterprise of jurisprudence will be recast as rival interpretations of the force of law.

Indeed, Dworkin begins his discussion of interpretive concepts by noticing the "semantic sting" implicit in the traditional debates: "The logic that wreaks this havoc is the logic just described, the argument that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is" (LE, p. 44).

Dworkin believes that the aforesaid account of when genuine disagreement is possible is not exhaustive and failure to recognize this fact is responsible for a great deal of muddled thinking in the philosophy of law: "But much disagreement in law is theoretical rather than empirical. Legal philosophers who think there must be

common rules try to explain away the theoretical disagreement" (LE, p. 46). In particular, he notices that the "semantic sting" does not account for a whole set of disagreements about social practice. Members of a particular community share certain practices and traditions and sometimes disagree about the best interpretation of these practices and traditions. They might disagree, that is, about what those practices and traditions require in particular circumstances:

> These claims are often controversial, and the disagreement is genuine even though people use different criteria in forming or framing these interpretations; it is genuine because the competing interpretations are directed toward the same objects or events of interpretation. (LE, p. 46)

In short, at least when speaking of social practices in general, it is not necessary for the disputants to share factual criteria before disagreement of a genuine kind is possible and the "semantic sting," insomuch as it purports to set the ground rules for disagreement, is clearly an inadequate account. Dworkin suggests that attending to the way that disagreements occur within our social practices will illuminate an important way in which they occur within our legal practices as well. This requires a closer look at the process of interpretation.

Initially, an overview will prove helpful. Dworkin asks us to attend to the two components of any interpretive attitude. First of all, when we are

interpreting a particular practice, we are assuming not only that it exists but that it also has value. We assume, that is, that there is some point to the practice. The fact that it is a social practice assumes that, to varying degrees, it is accepted by the members of a community as having some value for the community. Second, the behavior or judgments that the practice calls for are seen to be sensitive to its point. These behaviors and judgments are not necessarily or exclusively associated with the practice in question but have become connected to the practice by convention. In other words, it is always appropriate to evaluate these behaviors and judgments in relationship to their point. The "point" thus modifies or qualifies the behaviors and judgments.

Once the members of a society adopt this interpretive attitude toward their social practices, the institution in question no longer represents "unstudied deference to a runic order" (LE, p. 47). The members of the society attempt to impose <u>meaning</u> on the institution.

Dworkin is quick to notice, however, that the generic features of the interpretive attitude can be applied to a number of different contexts of interpretation, and his aim is to elucidate a distinct species of interpretation:

> The form of interpretation we are studying--the interpretation of a social practice--is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct

> from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation. (LE, p. 50)

He calls this form of interpretation "creative interpretation" because he sees the interpretation of social practices and works of art as essentially concerned with purposes as opposed to causal explanations.

Having made these distinctions, however, he recognizes that it will not be enough simply to notice that the interpretive attitude will be applicable to a wide variety of interpretive contexts. He needs an interpretation of interpretation that will accommodate the various contexts in such a way that creative interpretation will be seen to be a subset of a more encompassing enterprise. The conception of interpretation that performs this role he calls "constructive": "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong" (LE, p. 52).

Once again, he is quick to point out that this account does not allow for unrestrained subjectivity. That which is being interpreted exists apart from the observer, and that concept, or entity, or practice being interpreted brings a history, a contour, or some other set of restraints on possible interpretations. Still:

> The constructive account of creative interpretation, therefore, could perhaps provide a more general account of interpretation in all its forms. We would then say that all interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success. (LE, p. 53)

To summarize, the interpretation of social practices is similar to the interpretation of art inasmuch as both are concerned essentially with purposes as opposed to causal explanations. For this reason Dworkin wants to call them forms of "creative interpretation." Creative interpretation can then, in turn, be seen as a subset of a particular conception of interpretation that he calls "constructive," which embraces other contexts of interpretation.

Since he is ultimately concerned with law as an interpretative concept, however, more is needed by way of examining the similarity between interpretation as it functions in social practices and interpretation as it functions in art. Keeping in mind the components of the interpretive attitude outlined before, Dworkin asks us to consider what can be meant by the concept of author's "intent" when interpreting a literary work. If interpretation as a generic enterprise is seen as an attempt "to make an object the best it can be, as an instance of some assumed enterprise," it is clear that no historical, conscious-mental-state conception of

"intention" will suffice. The societal context, for example, may have changed sufficiently since the literary work was created that many of the original author's concrete intentions no longer have meaning for the interpreter. The interpreter must bring to the work of art the entire cultural milieu in which he is immersed and try to do justice to an author's abstract intention in constructing an interpretation.

Another difficulty with the conscious-mental-state account is the problem of "not unintended" intentions. If an author is confronted by a critic with an account of the former's work that that person had not even considered when creating his work but now, on reflection, sees as even further illuminating his original intention, he is apt to say that this account is what he "intended," although, strictly speaking, he might say that he did not unintend that account. Which account, the author's original or the one informed by the critic, shall we take as the author's "intention"? Dworkin sees no reason why we cannot accept the latter.

Moreover, he sees interpreting social practice in much the same light. Utilizing, by way of example, the social practice of courtesy, he observes:

> Each citizen, we might say, is trying to discover his own intention in maintaining and participating in that practice--not in the sense of retrieving his mental state when last he took off his cap to a lady

> but in the sense of finding some purposeful account of his behavior he is comfortable in ascribing to himself. (LE, p. 58)

We should now recall Dworkin's discussion of "intention" in AMP. In that work he denied the possibility of ascertaining some "framers' intention" in interpreting the Constitution. He did not deny any role whatsoever for intention but only rejected a particular conception of that concept that held for a discoverable, historical, conscious-mental-state on the part of the framers. The role that intention plays in Dworkin's philosophy of law is now more evident:

> For even if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the <u>formal</u> structure for all interpretive claims. I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted--a social practice or tradition as much as a text or painting--as if this were the product of a decision to pursue one set of themes or visions or purposes, one "point," rather than another. (LE, pp. 58-59)

Discussion of law as an interpretive concept of social practice must await further elaboration of what is involved in constructive interpretation. Toward this end Dworkin makes an analytical distinction among three stages of any interpretation. The stages are distinguished by the degree of consensus required for each if the interpretive attitude is to flourish there. The first of these is the "preinterpretive" state where the tentative content of the practice to be interpreted is given. It is

important to note that a fairly high degree of consensus within a community is required at this stage. There must be some minimally controversial account here of what counts as the practice in question. The second stage is the interpretive stage at which the interpreter determines a general justification for the practices enumerated at the preinterpretive stage. Finally, there is a post-interpretive stage at which he reevaluates what the practices require in light of the justification he provides at the interpretive stage. Dworkin employs the helpful example of courtesy as a social practice designed to show respect. There are certain practices that will be viewed as unmistakable instances of courtesy in a society. Identification of these occurs at the "preinterpretive" stage of interpretation. Our interpreter might see these practices as justified by the desirability of showing respect to fellow members of the society. This occurs at the interpretive stage. Finally, in the postinterpretive stage, the interpreter may want to reexamine the social practice of courtesy and what it requires in light of what he has accepted as its justification in the interpretive stage.

The distinction between concept and conception is also helpful here in discussing the nature of constructive interpretation. Debate within a community about courtesy,

Dworkin maintains, will have a tree-like structure. Generally accepted abstract propositions about courtesy will form the trunk of the tree. At a certain stage in a community's development almost everyone will agree that courtesy is employed as a sign of respect, for example. But the community may divide on the correct interpretation of respect. Some members of the community may feel that people of a certain rank or social status are deserving of respect, whereas other members may feel that respect is something that is earned. This is the first branching of the trunk of the tree in the proposed analogy. The first group may further divide as to which ranks are deserving of respect, while the latter group may divide over the issue of what acts are deserving of respect, and so on.

> In these circumstances the initial trunk of the tree --the presently uncontroversial tie between courtesy and respect--would act, in public argument as well as private rumination, as a kind of plateau on which further thought and argument are built. (LE, p. 70)

There is thus a conceptual relationship between respect and courtesy. Respect can be seen as providing the concept for courtesy, and different accounts of what respect requires are conceptions of the basic concept:

> The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. (LE, p. 71)

Law as Integrity

The somewhat detailed foregoing account of Dworkin's notion of interpretation is a necessary prelude to his development of law as integrity. If, as he maintains, law is an interpretive concept, we must be clear about his particular conception of interpretation before we can reexamine the field of jurisprudence from a fresh perspective:

> Just as we understood the practice of courtesy better at one stage in its career by finding general agreement about the abstract proposition that courtesy is a matter of respect, we might understand law better if we could find a similar abstract description of the point of law most legal theorists accept so that their arguments take place on the plateau it furnishes. (LE, pp. 92-93)

As might be expected, Dworkin believes he has such an abstract description: "Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government" (LE, p. 93). In short, law determines when government is justified in using or withholding coercive force. Collective coercive force, in turn, is seen as justified only when it can be shown to flow from past political decisions establishing individual rights and responsibilities.

This abstract account of the concept of law admits of several conceptions. These conceptions are distinguished by their answer to three fundamental questions. The first

question asks whether the link between law and coercion is justifiable. In other words, is there a "point" to the linkage? If there is a "point," the second question asks what that point is. The third question asks what notion of consistency with past political decisions best serves the justification of the linkage referred to in the first question.

Dworkin maintains that the various schools of jurisprudence have been distinguished in the past by discriminations made by linguistic analysis. But these classifications are misleading because law is an interpretive concept. Using the model of law as constructive interpretation, Dworkin thinks that new classifications of schools of thought can be based on the answers given to the questions cited earlier. These new classifications are "conventionalism," "legal pragmatism," and "law as integrity." Although there are parallels between these classifications and some of the traditional schools of thought, it would be a mistake to assume that the change in nomenclature disguises an identity relationship. Traditional schools of thought were distinguished by semantic claims, while Dworkin's classifications discriminate on the basis of interpretive claims. It is likely, therefore, that no single self-proclaimed positivist would cast himself as a

"conventionalist" in Dworkin's account, nor would a legal realist necessarily consent to all that is implied by "legal pragmatism." Nevertheless, aspects of the old debates are illuminated by the new account.

But the more immediate concern of this paper is the development of law as integrity and the account of constitutional adjudication that this conception provides. It is appropriate, therefore, to take a closer look at the special way in which this third conception answers the questions posed by Dworkin in the foregoing. Unlike legal pragmatism but in common with conventionalism, law as integrity provides an affirmative response to the first question. But whereas conventionalism sees the point of law's constraint in the predictability and procedural fairness that this constraint provides, law as integrity provides a much different response to the second question:

> It supposes that law's constraints benefit society not just by providing predictability and procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising political power as it does. (LE, pp. 95-96)

It will be recalled here that in AMP a more precise formulation of "the kind of equality" required was developed as "the liberal conception of equality." It was argued in that second work that the justificatory force of that conception was superior as an account of liberalism. In contrast to the more restricted response of

conventionalism to the third question regarding the requirements of consistency, law as integrity provides a more flexible account:

> It argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification. (LE, p. 96)

In this connection it is helpful to remember that Dworkin has previously argued that it is impossible for a judge not to repair to extra-institutional norms when concrete right claims are controversial. The answer a conception gives to this third question about the requirements of consistency will therefore determine the concrete legal rights it recognizes.

At the level of adjudication, the acceptance of the conception of law as integrity provides the following guidance for judges:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author--the community personified--expressing a coherent conception of justice and fairness. (LE, p. 225)

This guidance is a statement of Dworkin's position about the grounds of law:

> We form our third conception of law, our third view of what rights and duties flow from past political decisions, by restating this instruction as a thesis about the grounds of law. According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice,

> fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice. (LE, p. 225)

With this latter move Dworkin satisfies the two minimal conditions he has established for a political theory of law:

> A full political theory of law, then, includes at least two main parts: it speaks to both the grounds of law--circumstances in which particular propositions of law should be taken to be sound or true--and to the force of law--the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstance. (LE, p. 110)

Answers to the first and second questions speak to the force of law in any political theory of law, while the answer a particular conception of law provides for the third question determines what it takes to be the grounds of law.

Dworkin maintains that in the past philosophies of law have been unbalanced insofar as they paid inordinate attention to the grounds of law at the expense of discussing rival conceptions of the force of law. In reconceptualizing and reordering the distinguishing features of the various interpretations of legal practice via the three questions posed by the concept of law, some hidden assumptions in these jurisprudential traditions are exposed. Conventionalism, legal pragmatism, and law as integrity all qualify as political theories of law under Dworkin's schema; that is, they all provide answers to the three questions posed by the concept of law.

But how are we to decide among these conceptions of law? The answer to this question is found in the conception of interpretation that has been defended. The value of an interpretation, in this account, is how well it fits and justifies what has gone before.

Before turning to the issue of how successful the conception of law as integrity is an account of constitutional adjudication, it may prove helpful to summarize our progress thus far. The foundation of Dworkin's theory of rights was examined in TRS, and the taxonomy of rights explained there showed how legal rights could be seen as a distinct species of institutional rights, thus adumbrating his fuller treatment of the grounds of law in LE. The distinction drawn in that early work between arguments of policy and arguments of principle as the two primary modes of political justification shifted focus to the realm of political theory in AMP. Cruder conceptions of the concept of "intention" were rejected in that later work and thus paved the way for the notion, developed in LE, that the concept of intention provides the formal structure for all interpretive claims. AMP also elaborated on the liberal conception of equality as providing the justificatory force for an especially powerful form of liberalism. This conception of equality provided law as integrity with an answer to the first two

questions posed by the concept of law in LE. This latter work united many of the themes found in TRS and AMP and offered an account of interpretation that was foundational to the development of law as integrity.

SECTION III

CONSTITUTIONAL ADJUDICATION

By way of introduction, it was observed that constitutional adjudication provides the most public forum for the great debates within the philosophy of law. This is true because the articulated opinions of the Court explain the rationale behind the decisions that are made. Since the Court characteristically must decide "hard cases," the interaction between conceptions of grounds and force of law is illuminated. Academic lawyers and political philosophers scrutinize the opinions of the justices in order to ascertain the broad outlines of the constitutional theories contained therein.

Having extrapolated the salient elements of a theory of rights from the development of Dworkin's jurisprudence, the remaining task is to assess the relative value of that theory for constitutional adjudication. Law as integrity is the fruition of that theory of rights and is, therefore, the conception of a political theory of law that will be defended and advanced.

Perhaps a good place to begin our inquiry is with the institution of judicial review itself. After all, constitutional adjudication would have a very different character and status today had it not been for the monumental decision of Marbury v. Madison at the dawn of our political history. Surely no conception of a political theory of law can count as an eligible interpretation for constitutional adjudication unless it is coherent with judicial review.

The Constitution limits the various branches of government in different ways. This much is explicit. But at the time of the landmark case under discussion, it was unclear whether the Constitution required any particular procedure for determining when those limits were transgressed. One possible interpretation would have given the power to make this determination to the branch of government against which the transgression was claimed. Officials within that branch, to be sure, would have had a legal and moral obligation to obey the Constitution, but such an interpretation would have made them their own judges.

Justice Marshall, however, utilized the "supremacy clause" of Article VI as well as the judicial structure provisions of Article III to establish the precedent of judicial review. The decision was controversial then, and it is not impossible to find critics even today. Indeed,

if one accepts the view that there is a firm analytical distinction between questions about what the law is and questions about whether courts are justified in enforcing the law, it is possible to make a case that the original decision establishing judicial review was mistaken. But law as integrity rejects the analytical distinction upon which critics of judicial review build their case:

> Law as integrity, on the contrary, supports Marshall's argument. He was right to think that the most plausible interpretation of the developing legal practices of the young country . . . supposed that an important part of the point of law was to supply standards for the decision of the courts. (LE, p. 356)

So law as integrity provides a coherent account of judicial review and remains an eligible conception that can be utilized for constitutional adjudication.

Although law as integrity survives the first test, there are several other prominent conceptions that pass this initial threshold that we have established. All accept the institution of judicial review (although in more modern times the degree of this acceptance is perhaps less wholehearted within some conceptions) but differ in the degree of flexibility they will allow the Court in exercising that review.

One such conception is "historicism." As a constitutional theory it shares much with the conventionalist theory of law outlined in Dworkin's

account. For that reason, as might be expected, it is not unlike the positivist theories within traditional jurisprudence. A distinguishing feature of historicism is the following: "It identifies, for each clause, a canonical moment of creation, and insists that what the framers thought then, no matter how peculiar this might seem now, exhausts the Constitution we have" (LE, p. 361).

But we have already noticed the serious limitations of any conception of a political theory of law that depends on a simple conscious-mental-state idea of "intention." Historicism, insofar as it reflects the conventionalist position, can be dismissed as a viable interpretation on the basis of its weakness in terms of justificatory force; that is, it cannot adequately justify what has gone before. Moreover, it does not even fit current constitutional practice. The Court has extended the protections against government outlined by the Bill of Rights to the individual states via the "equal protection" and "due process" clauses of the Fourteenth Amendment. Given this fact, constitutional adjudication has outrun historicism's basic claim. That claim can no longer fit what has gone before.

Another popular theory of constitutional adjudication is "passivism": "We must understand passivism to declare that as a matter of law the abstract clauses of the Constitution grant citizens <u>no</u> rights except concrete

rights that flow uncontroversially from the language of these clauses alone" (LE, p. 371).

In essence, this theory is also not unlike the conventionalist position in its insistence on a strict account of when it is proper to say that rights "flow from" past political decision. Passivism and its more generic counterpart, conventionalism, both maintain that rights must be "explicit" in past political decisions, or at least made to be explicit by means of conventional methods or techniques of legal practice.

Once again, however, we notice a serious limitation in the passivist account. If rights must be explicit in past political decisions, or at least made to be so through conventional techniques, how should we adjudicate a "hard case" in which conventions that we normally rely upon have run out? After all, this is a not uncommon feature of constitutional cases. The passivist maintains that the judge in this kind of case is free to make new law or, perhaps, "legislate interstitially between the rules." But this is an inadequate account because it undermines some of the values passivists usually espouse. Only Congress and the legislatures are expressly granted the power to legislate. There is no "explicit" right to legislate reserved for the Court. The passivist is placed in the position of denying the grounds of law he

initially asserts, unless he is prepared to say that his "new law" opinion is not "really" law.

At first glance it might seem that judicial "activism," or some form of it, may provide a better interpretation of constitutional adjudication than either historicism or passivism inasmuch as these latter positions are generally associated with the position known as judicial "restraint." But this is not the case. On closer examination judicial activism can be seen as a "virulent form" of legal pragmatism. As such it answers the first question posed by the concept of law in the negative; that is, it denies that the supposed link between law and coercion is justified. It denies that there is any point to requiring that force be used only in ways conforming to rights and responsibilities that can be seen to flow from past political decisions. It is almost completely forward looking in that it allows judges to make decisions which seem to them best for the future of the community, although for practical political reasons it may be prudent for them to act "as if" they were seeking consistency with what has gone before:

> An activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture. He would ignore all these in order to impose his own view of what justice demands. (LE, p. 378)

Basically, legal pragmatism, and the constitutional theory of activism that it informs, are skeptical conceptions of law. But the skeptic's position is not unassailable because his practice undermines his own position. If there is no point to the connection between law and coercive force so that a judge may decide what justice requires by repairing only to his own opinion of the matter, then the skeptic denies that there is a right answer that the litigants are entitled to in adjudication. He may hold, in general, that all political matters are matters of opinion and have no right answer. He does, however, assume that there is a right answer to the question of whose opinion should govern when the issue at stake is only a matter of opinion.

As Dworkin observes:

> The alternative to passivism is not a crude activism harnessed only to a judge's sense of justice, but a more fine-grained and discriminating judgment, case by case, that gives place to many political virtues but, unlike either activism or passivism, gives tyranny to none. (LE, p. 378)

Although the foregoing constitutional positions are not exhaustive nor would any one of them be likely to be accepted in total by any jurist, their broad outlines do serve to illuminate the deficiencies that a superior interpretation of constitutional adjudication would have to eliminate.

Law as integrity provides such an account. Unlike conventionalism, law as integrity is not primarily backward looking, and, unlike legal pragmatism, it is not exclusively forward looking. It seeks to offer an account of adjudication in the constitutional sphere that shows our past legal practice in the best light while trying to capture the "aspirational" nature of a constitutional community:

> . . . As in the Constitution's history and text, an aspirational dimension is present in the Constitution's logic. The remaining chapters of this book show that by viewing constitutional problems in light of a commitment to a constitutionally ideal state of affairs, constitutional theory acquires a coherence it cannot otherwise achieve. (Barber, 1984, p. 34)

This "coherence," viewed as consistency in principle, is an essential component of law as integrity: "But conventionalism differs from law as integrity precisely because the former rejects consistency in principle as a source of legal rights. The latter accepts it" (LE, p. 134). Law as integrity seeks consistency in principle because it wants to express a single and comprehensive vision of justice. It wants to reduce the number of anomalies present in our legal practices, anomalies defined against the vision of justice that is constantly being interpreted in constitutional adjudication.

Law as integrity informs a theory of rights for constitutional adjudication and insists on the primacy of

right-claims in qualifying the coercive use of power by the government. Moreover, unlike other rival conceptions of a political theory of law, law as integrity holds that rights flow from past political decisions not just when they are explicit in those decisions but when they can be shown to follow from principles of political morality which justify the decisions in the first place. This is a far more encompassing notion of the role of rights in constitutional adjudication than that provided by other accounts. It is also consistent with another position in constitutional analysis:

> It is not analytically sound to consider the organization of the federal government and its relationship to the state governments before considering the constitutional aspects of individual liberty because constitutional questions concerning the protection of individual liberty arise in all constitutional cases. . . . So any analysis of the cases involving the distribution of powers between the states and federal government postpones the fundamental inquiry contained in all such cases as to whether either government has the power to engage in the regulatory activity involved, or whether, on the other hand, neither the state governments nor the national government can regulate because such regulation would interfere with individual liberty. (Williams, 1979, pp. 35-36)

It would seem that the Constitution also takes rights very seriously. They are logically prior to considerations involving the structure of government because law as integrity sees the existence of community as a necessary condition for government. Governments exist to secure and maintain the relationships that

characterize the community. The sense of community espoused by the liberal conception of equality is one characterized by the respect due each member of the society as an active agent. This precludes coercion except in circumstances where an agent's activity threatens the ability of another member of society to act as an agent. Those entrusted with the function of "government" must therefore respect the ordering principles of community that the society adopts.

The theory of rights being advocated for constitutional adjudication also assumes that there are right answers in hard cases. If this is true, then, at least in principle, there should be a "correct" constitutional theory, correct in the sense of providing a process by which right answers can be arrived at. Law as integrity presents itself as a program <u>of</u> interpretation, whereas conventionalism and legal pragmatism present themselves <u>as</u> interpretations. In this respect the former is more dynamic and flexible than the other two. It recognizes that an interpretation is not a static report of an uncontroversial proposition of law. It notices the symbiotic relationship between the interpretive and postinterpretive stages of interpretation. When a judge makes a determination about the proper way to construe a statute or constitutional provision, he is operating at the postinterpretive stage of interpretation; that is, he

provides a rationale for what the statute or provision "really" requires in light of the justification he has provided at the interpretive stage of interpretation. This in turn becomes his new interpretive sense on which other postinterpretive judgments will be made. If, for example, a judge must decide whether the equal protection clause of the Fourteenth Amendment prohibits racially segregated schools, he will examine the interpretive claim that treating people as equals requires not depriving them of an equal opportunity to better themselves. At the postinterpretive stage of his interpretation, he may determine that equality of opportunity "really" requires that different educational opportunities should be minimized. If this becomes the result of his interpretation, it will henceforth act as the new interpretive claim upon which a future postinterpretive judgment will be based (perhaps he will be asked to determine if quota systems in higher education are fair).

In any case, it is important to recognize:

> The very decision to debate an interpretive judgment presupposes the possibility of, and justifies the quest for, the correct constitutional theory. Those who make a thorough attempt to deny the possibility of getting the meaning of the Constitution right will eventually have to explain their own reliance on the possibility of others correctly interpreting what they want to say. (Barber, 1984, p. 37)

Given the limitations noticed in other constitutional theories, it would seem that Dworkin's theory of rights

provides a superior interpretation of constitutional adjudication. This is true not simply because it remains after others have been discarded but for the positive reasons just outlined. It offers a program of constant interpretation rather than a static interpretation that does not take into account the phenomenon of social growth and understanding. Moreover, it recognizes the primacy of rights in constitutional discourse because its conception of democracy is one that assumes a sense of community that respects the agent capacity of each member of society. Finally, the broader conception of a political theory of law by which it is informed, law as integrity, is profoundly aspirational and therefore constantly challenges us as a people to refine our sense of justice. In short, it succeeds along both dimensions of interpretation. It both fits and justifies what has gone before.

SECTION IV

POST-DWORKIN JURISPRUDENCE: FUTURE INQUIRY IN THE PHILOSOPHY OF LAW

The development of Ronald Dworkin's philosophy of law is not just a singularly important contribution to the dialogue within that discipline. As suggested in the introduction, it can be viewed as nothing short of a complete rethinking of the frame of reference for that dialogue.

This is especially the case when one examines the issues raised in more traditional accounts of the problems facing the philosophy of law. In this regard it will prove helpful to review H. L. A. Hart's analysis, which is treated in the Encyclopedia of Philosophy (hereafter referred to as EP). Here Hart identifies three fundamental difficulties: problems of definition and analysis, problems of legal reasoning, and problems of the criticism of law.

Remnants of "the semantic sting" are evident in Hart's treatment of the problems associated with the definition of the law. After dismissing early attempts at definition which involved identifying and/or describing

the "essence" of law and attempts which purported to identify and describe the "standards" actually accepted for various terms and expressions to count as instances of legal discourse as hopelessly unrealistic, Hart observes,

> Thus it is often asserted that in the case of law, the area of indeterminacy of actual usage is too great and relates to too many important and disputed issues, and that what is needed is not a characterization or elucidation of usage but a reasoned case for the inclusion in or exclusion from the scope of the expressions "law" and "legal system" of various deviations from routine and undisputed examples. (EP, p. 265)

Hart is correct in rejecting the possibility of lexical definitions, but, relative to Dworkin's account, he has not gone far enough. Noticing that theorists from the "natural law" and "positivist" traditions utilize semantic rules differently in their approaches to defining "law" and simply concluding that this kind of definition poses insurmountable difficulties misses the point. Any definition which fails to account for the "indeterminacy" of actual usage that Hart observes, including the more limited types of "pragmatic" definitions he seems to favor, will fail in its explanatory power because it is precisely this "indeterminacy" that provides the clue for the proper direction of the definitional endeavor.

Hart vaguely anticipates but does not fully articulate the ramifications of this latter view when he recognizes that "pragmatic" definitions, despite their legitimacy and utility for dealing with practical issues

such as the delineation of areas of study, avoid rather than resolve the fundamental theoretical complexities:

> But reflection on what is thus identified by the common usage of such terms shows that the area they cover is one of great complexity; laws differ radically both in content and in the ways in which they are created, yet despite this heterogeneity they are interrelated in various complex ways so as to constitute a characteristic structure or system. Many requests for the definition of law have been stimulated by the desire to obtain a coherent view of this structure and an understanding of the ways in which elements apparently so diverse are unified. (EP, p. 265)

Dworkin's stark assertion that law is an interpretive concept provides for such a coherent view of this structure. It recognizes that the "indeterminacy" of legal concepts is intrinsic to the very process of interpretation whereby purpose or meaning is imposed on a practice in order to see it as the best example of an assumed enterprise. The various legal concepts in question operate as plateaus of generality or abstraction defined by relatively uncontroversial instances of the enterprise. This makes discourse about legal matters possible. Beyond these levels of generality and abstraction, however, there is a realm of indeterminacy which can only be resolved at the level of political morality. Thus the "area of indeterminacy of actual usage" that Hart refers to is not to be characterized as an unfortunate and lamentable fact in the philosophy of law but as an inescapable requisite for understanding the

nature of jurisprudential disputes. Parties to these disputes should be seen as advancing and defending rival interpretations or conceptions of a legal concept. Insofar as this process is characterized by bounded choice, that is, since it must fit and justify what has gone before, "defining" the law is essentially an active, creative, and dynamic endeavor, ever sensitive to the experiences of the society doing the defining. This contrasts with the more static characterization of the definitional endeavor encouraged by the "semantic sting" which seeks a relatively uncontroversial account of "what counts" as law or what elements exhaust what can be subsumed under that heading. In short, Hart's account of the problems associated with the definition of the law fails to recognize how the intractability of the "indeterminacy" issue illuminates a more enlightening account of the definitional process itself when applied to interpretive enterprises.

A second though related inadequacy of Hart's treatment of the problems associated with the philosophy of law is his failure to recognize the central role of political morality in providing an intelligible context for core disputes in legal discourse. Beyond a nodding, occasional reference to the fact that it is at least sometimes the case that such disputes reflect divergent

conceptions of law in general, nowhere in Hart's account do we find a full and satisfying explanation of the implications of this phenomenon. It always seems to be at the periphery of his discussion, whereas it is at the center of Dworkin's account. The net result is that Hart provides a listing of difficulties without an adequate discussion of the context in which further inquiry can be pursued. This is at least not very helpful and perhaps a little distorting, for if Dworkin is correct, failure to recognize or adequately discuss the role of political morality in the philosophy of law is tantamount to a tacit espousal of a particular political morality.

A good example of Hart's failure in this regard is his discussion of the problems associated with the analysis of legal concepts. After acknowledging that legal rules can be classified in a number of different ways, Hart maintains, correctly, that there are still a number of identifiable common elements; moreover, situations and relationships created by these rules are constantly recurrent in social life. The existence of these common elements, situations, and relationships makes it possible for us to refer to them by utilizing a vocabulary that expresses the organizing concepts. But Hart notices that there are problems with this vocabulary:

> These problems arise in part because this vocabulary has a more or less established use apart from law, and the points of convergence and divergence between

> legal and nonlegal usage is not always immediately obvious or easily explicable. It is also the case that the ways in which common elements in law or legal situations are classified by different theorists in part reflect and derive from divergent conceptions of law in general. (EP, p. 266)

It is important to notice here that Hart, once again, fails to go far enough. He fails to provide us with an account of why our vocabulary for these organizing concepts is troublesome. It is not the case that our choice of vocabulary was simply an unfortunate development. The choice of vocabulary was dictated by the linkages to morality and political philosophy inherent in our organizing concepts of legal discourse. The vocabulary proves troublesome at times because it attempts to accommodate a variety of competing interpretations at a less abstract level than that of the "organizing concept." It will be helpful to recall Dworkin's tree analogy in his account of interpretation (LE, pp. 70, 71) in this regard. The "organizing concept" provides the uncontroversial plateau on which future argument is based. It can be seen as the trunk of the tree and represents the "common elements" of various social practices that Hart alludes to. Beyond this level, however, it will be controversial and a matter of interpretation of what to subsume under the rubric expressed by the "organizing concept." In Dworkin's example there will be sufficient community agreement at some stage of its development that courtesy

is utilized as a sign of respect. The uncontroversially common elements of instances of courtesy provide us with an "organizing concept," i.e., respect. But what is to count as an instance of respect is at a lower level of abstraction and will, therefore, be more controversial. Interpretations will "branch" away from the uncontroversial "trunk." Similarly, our organizing legal concepts derive from uncontroversial instances of certain common and recurrent features that characterize our social practices. There will be general agreement, that is, on certain abstract propositions in legal discourse, but when the consensus breaks down or when the conventions run out, we are confronted with a problem of interpretation that must, of necessity, repair to political morality for resolution.

It is interesting to note Hart's choice of words in describing the problems associated with conceptual analysis in the philosophy of law inasmuch as his choice reflects an unwillingness to confront the basic issue. He contrasts "legal" with "nonlegal" usage of the pertinent vocabulary. Surely "nonlegal" is too broad and obfuscates the intimate connection between legal and moral discourse. In this he betrays a reluctance to concede the point that although law and morality are not identical, neither are they totally distinct. "Scientific" is arguably a species of "nonlegal" vocabulary usage as much as "moral," yet it

seems unreasonable to say that the practices associated with the former term are as proximate to "legal" usage as are the practices associated with the latter term. But Hart's intention seems to be the isolation of "strictly" legal usage, and so the choice of "nonlegal" rather than "moral" in his treatment of usage serves to create an artificial dichotomy that allows him to evade an explanation of the central importance of political morality to the conceptual analysis of legal discourse.

Moreover, when Hart says that the choice of classifications for the observed "common" elements reflects and derives, at least in part, from different general conceptions of law, he provides no guidance as to how these concepts are formulated. He is unwilling to concede that they are formulated in the broader realm of political morality and therefore, once again, rests content with a purely descriptive account of the phenomenon.

As might be expected, this failure to recognize the central role of political morality in the conceptual analysis of legal terms results in some confusing examples. In analyzing the concept of "duty," Hart relies on the distinction between viewing this concept from its "predictive" and "normative" standpoints and observes that this yields "apparently conflicting analyses."

Nevertheless, he seems content to retain the distinction in the interest of separating the realms of law and morality rather than rethink the terms of the distinction to emphasize the common ground. In discussing the advantages of the "predictive" standpoint, Hart says: "On the one hand it has seemed to free the idea of legal duty from metaphysical obscurities and irrelevant associations with morals, and on the other to provide a realistic guide to life under law" (EP, p. 266). But, as Dworkin argues in TRS, repair to political morality in legal discourse need not depend on "metaphysical obscurities." Indeed, he showed in this early work how the central tenets of the positivist position were inescapable, if not always consciously articulated, results of a substantive position in political morality.

Hart's account of the "normative" standpoint is also flawed:

> By contrast, the normative point of view, without identifying moral and legal duty or insisting on any common content, stresses certain common formal features that both moral and legal duty possess in virtue of their both being aspects of rule-guided conduct. (EP, p. 266)

Although it is true that those who advocate what Hart chooses to call the "normative" standpoint do not wish to <u>identify</u> moral and legal duty, it is not the case that they would not insist on <u>any</u> common content.

Although Hart suggests that these two standpoints must be "illuminatingly combined," he fails to see that the distinction itself is a remnant of the "semantic sting." It might prove more profitable to abandon it altogether in favor of a more holistic political theory of law with two interdependent parts--one speaking to the ground of law (circumstances in which particular propositions of law should be taken to be sound or true) and one speaking to the force of law (the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstances) (see LE, pp. 110, 225). In this manner Dworkin reconciles what is valuable in the standpoints given by Hart. The grounds of law will provide a "realistic guide to life under law," and the force of law will affirm the justification for the use of coercion in "rule-guided conduct" by appeal to political morality.

Hart's account of the problems of legal reasoning does not reach the level of sophistication achieved by Dworkin. The former expends a considerable amount of energy in characterizing the salient issues here as an ongoing debate about the role of logic in legal reasoning. An exhaustive (and somewhat exhausting) account is given of the place of deductive and inductive reasoning in legal discourse. Not surprisingly, the

positions of those who criticize the role of logic in adjudication are charitably explicated.

Only toward the end of his analysis does Hart fasten on the issue that, for Dworkin, is the starting point of substantive inquiry--the "no-right-answer" theory of adjudication when the rules are indeterminate:

> Yet however it may be in moral argument, in the law it seems difficult to substantiate the claim that a judge confronted with a set of conflicting considerations must always assume that there is a single uniquely correct resolution of the conflict and attempt to demonstrate that he has discovered it. (EP, p. 27)

Once again the futile attempt to disassociate the realm of law from the realm of political morality is evident in Hart's account.

Dworkin adopts a different approach that asks us to engage ourselves within the activity of legal discourse so as to better characterize the nature of legal disagreement in adjudication:

> Certain legal concepts, like the concept of a valid contract, of civil liability, and of a crime, have the following characteristic: If the concept holds in a particular situation, then judges have a duty, at least <u>prima facie</u>, to decide some legal claim one way; but if the concept does not hold, then judges have a duty, at least <u>prima facie</u>, to decide the same claim in the opposite way. I shall call such concepts "dispositive" concepts. (AMP, p. 119)

The question now becomes a matter of how such dispositive concepts figure in legal discourse. Dworkin goes on to observe:

> Lawyers seem to assume, in the way they talk and argue, [w]hat we might call the "bivalent thesis" about dispositive concepts: that is, that in every case either the positive claim, that the case falls under a dispositive concept, or the opposite claim, that it does not, must be true even when it is controversial which is true. (AMP, pp. 119-20)

Having appealed to the language of disagreement as it is commonly described in legal discourse, we are now in a better position to state more precisely the "no-right-answer" thesis: that the bivalence thesis does not hold for important dispositive concepts. But there are two versions of the "no-right-answer" thesis which must be considered in turn because each holds that the bivalence thesis fails in a different way.

The first version asks us to discount the linguistic behavior of lawyers and others within the context of legal discourse because their pronouncements fail to take into account that both propositions about the dispositive concepts may be false. On this version, the bivalent thesis makes no provision for a logical space between the alternatives; in short, it ignores the possibility of a third answer. Dworkin provides a helpful illustration here to explain what is meant by this first version of the "no-right-answer" thesis:

> On this first version of the thesis, the question "Is Tom's contract valid or invalid?" makes a mistake like the one the question "Is Tom a young man or an old man?" makes. The latter question may have no right answer because it ignores a third possibility, which is that Tom is a middle-aged man. (AMP, p. 121)

At first glance, it might seem that the bivalent thesis is flawed, but on closer examination the first version of the "no-right-answer" thesis has a more serious problem:

> It is a semantic claim, about the meaning of legal concepts, and it would therefore be natural to support the claim by some appeal to a linguistic practice that is decisive. But since lawyers do seem to treat "not valid" as the negation of "valid," "not liable" as the negation of "liable," and "is not a crime" as the negation of "is a crime," the argument cannot take that natural course. (AMP, p. 123)

In short, the similarity of questions in the example is denied.

The second version of the "no-right-answer" thesis, though also rejecting the bivalent thesis, is more complex. Essentially, it holds that the bivalent thesis must fail because it ignores the possibility that either proposition may not hold up. This account suggests that there is a similarity in the questions "Is Tom's contract valid or not valid?" and "Is Tom middle-aged or not?" There may be no right answer to the latter question if Tom is a "border" case; that is, it would be a mistake to classify him as either middle-aged or not when the parameters for inclusion in one of the classifications are not clear and distinct.

Dworkin maintains that this version is also mistaken but in a different way. Although he responds to various formulations of the second version with long and complex

arguments, suffice it to say for the purposes of our discussion regarding the problems facing the philosophy of law, that he ultimately depends on an elaborate distinction between "borderline" and "pivotal" cases. This distinction argues that what is at stake in the latter are the larger questions of constructive interpretation. Since this is the case, even the way we look at legal reasoning is affected by the political morality we espouse.

When he turns to the problems associated with the criticism of law, Hart remains adamant in his contention that law, properly understood, can be considered in isolation from the demands of political morality: "A division between inquiries concerned with the analysis of law and legal concepts and those concerned with the criticism or evaluation of law seems not only possible but necessary" (EP, p. 272). Yet after listing potential objections to pure analysis, his replies to those same objections fall wide of the mark:

> None of the above seem to constitute serious objections. The difficulties of decision in particular cases arising from the relative indeterminacy of legal rules are of great importance, but they are distinct from analytical questions such as those illustrated earlier, which remain to be answered even when legal rules are clear. (EP, p. 272)

In this account he neglects to notice that, in the absence of the possibility of repair to political morality, he

has provided us with no guidance as to how we can proceed with conceptual analysis. Moreover, and more importantly, he has provided no convincing argument why we must separate the questions he sees as distinct other than stark assertion!

In summary, Hart's account of the problems of the philosophy of law is seriously lacking. His treatment of the problems surrounding the definition of law and the analysis of legal concepts fails to explain adequately the indeterminacy of legal discourse and is a remnant of what Dworkin calls the semantic sting. His exposition of the problems involved with legal reasoning is overly concerned with the proper role of logic in adjudication and does not address the more substantive issue of analyzing the character of legal disagreement. Finally, he fails to provide a standard of criticism for the law that does not ultimately depend on a substantive political morality and thus undermines his own assertion that questions of analysis and questions of criticism can be properly answered in isolation from each other.

We must conclude that the problems facing the philosophy of law are more profitably discussed in the schema provided by Dworkin.

To be sure, the account that Dworkin provides is not without its difficulties, and it may prove profitable to

notice some of these in order to stimulate further development of his position.

In the first place, more is needed to explain the adequacy of his account relative to legal practice outside of the Anglo-American tradition. More specifically, it would be interesting to see how the liberal conception of equality he advances as providing the best justificatory force for the liberal political tradition might be accommodated within socialist states. "Rights-talk" is certainly not peculiar to capitalist societies.

A related area of inquiry might be the applicability of the notion of law as integrity to the field of international law. How would community be defined among nation-states, and how would interpretation function among different traditions?

Although it is conceded that Dworkin's project has been sufficiently ambitious in its present form, the claim that law is an interpretive concept is a generic claim. From the philosophical point of view, we are not unjustified in examining any anomalies that may arise in attempting to predicate his claim over a wider universe of discourse.

Perhaps the most severe criticism of Dworkin's philosophy of law is its excessive formalism. Although he spends a great deal of time in TRS showing why his account of rights does not exclusively depend on notions derived

from the natural-law tradition, it is interesting that his new classification of jurisprudential traditions roughly parallels the older classifications, with the exception of natural law. We find a great deal of the positivist tradition in the conventionalist interpretation and a great deal of legal realism in the legal pragmatist interpretation. Yet natural law as a traditional school of thought has no counterpart in his new schema. There are elements within law as integrity that resemble some natural law positions, but Dworkin seems to hesitate to acknowledge them.

There has been a great deal of new work in the area of ethical rationalism that does not depend on mysterious metaphysical entities. Concentrating on the generic features of action, this tradition purports to demonstrate the viability of a modified "naturalism" that could provide some substance to Dworkin's formal claims.

Notwithstanding the aforesaid, Dworkin's political and legal philosophy is an impressive intellectual endeavor that will demand serious reflection on the part of anyone who takes rights seriously.

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