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NOTES

Dworkin's "Rights Thesis"

For the past fifteen years, a debate over the nature of judicial decision-making has figured prominently in the literature of jurisprudence. The central figures in the debate have been H.L.A. Hart¹ and his defenders,² on one side, and Ronald Dworkin³ on the other. Recently, in an article entitled *Hard Cases*,⁴ Dworkin published the most comprehensive and systematic statement of his theory of how judges should decide cases. This Note provides a textual exegesis and critique of *Hard Cases* within the context of the larger Hart-Dworkin debate.⁵

In his most important work, *The Concept of Law*, H.L.A. Hart suggests that the legal rules judges employ to decide cases typically possess a certain indeterminacy or vagueness in certain areas:

> All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or "open texture"...⁶

Hart argues that when a case arises within the "open texture" of a legal rule, a judge exercises "discretion"⁷ to make "a choice between

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⁴ Supra note 3.
⁵ For other discussions concerning the nature of judicial adjudication within the parameters of the Hart-Dworkin debate, see Greenswardt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975), and Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHILO. Q. 151 (1971). Additional references are cited throughout these discussions.
⁷ Id. at 124.
open alternatives," and thus engages in a "creative or legislative activity." Because open alternatives exist in uncertain cases, "there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests." This "creative" function of courts, Hart asserts, is similar to "the exercise of delegated rule-making powers by an administrative body." Dworkin has interpreted the positivists, with whom he identifies Hart, as contending that a judge who runs out of rules exercises "strong discretion" in the sense that "he is not bound by any standards from the authority of law .... " Accordingly, the judge is free to reach "beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one."

Dworkin disagrees with several of the major tenets of Hart's theory. He contends, first, that judges are never free to exercise "strong discretion" in deciding issues of law, even in cases in which no legal rule dictates a clear result. When a judge runs out of

8. Id.
9. Id. at 131.
10. Id. at 128.
11. Id. at 132.
12. Dworkin states the tenets of positivism as follows:
   (a) The law of a community is a set of special rules .... These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules .... and also from other sorts of social rules (generally lumped together as "moral rules") that the community follows but does not enforce through public power.
   (b) The set of these valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule .... then that case cannot be decided by "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.
   (c) To say that someone has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something .... In the absence of such a valid legal rule there is no legal obligation; it follows that when the judge decides an issue by exercising his discretion, he is not enforcing a legal obligation as to that issue.

The Model of Rules, supra note 3, at 17-18.

13. Id. at 55. But see Greenawalt, supra note 5, at 368-99 (questioning whether it is feasible to draw a hard and fast line between Dworkin's strong discretion in the sense of "freedom to choose" and his weak discretion in the sense of "judgment"). Contra, Reynolds, Dworkin as Quixote, 123 U. Pa. L. Rev. 574 (1975) (arguing that by "discretion" Hart simply means that a judge must use his best judgment by appealing to public standards in resolving borderline cases).

15. Dworkin has not denied that judges are sometimes granted discretion as, for example, in fixing criminal sentences. See Judicial Discretion, supra note 3, at 634 n.6; Social Rules and Legal Theory, supra note 3, at 881.
"textbook rules," Dworkin asserts, he must base his decision not on nonlegal standards or norms, but rather on what may be called legal principles. Legal principles, in Dworkin's view, are as much a part of the law as are the black-letter rules, and are equally binding on judges. Moreover, while no single principle is dispositive of a given case, a fair consideration of all relevant principles points to a uniquely correct answer in even the hardest of cases. Because of this, Dworkin concludes, the Anglo-American legal system is gapless, and judges are never free to engage in creative judicial legislation. Accordingly, the law remains "an arrangement of entitlements" even within the area that Hart has termed the "open texture" of the legal system's rules. As Rolf Sartorius, who shares Dworkin's rejection of judicial discretion, explains, "[A]litigant before a court of law is not in the position of one begging a favor from a potential benefactor, but rather in that of one demanding a particular decision as a matter of right, as something to which the law entitles him."

A second area of debate finds Hart and Sartorius aligned against Dworkin. The controversy concerns Hart's thesis that fully developed legal systems have a social "rule of recognition" that identifies authoritatively all the rules of the system and that thus can be used by judges to isolate the standards they must consider in deciding hard cases. Although Sartorius agrees with Dworkin that judges are bound to ascertain the uniquely correct legal solution in each case, he accepts Hart's contention that a social rule of recognition may serve to distinguish legal principles from nonlegal norms. But for Sartorius, such a rule actually provides a powerful argument against Hart's view that judges have discretion to choose among extralegal principles and norms. If judges can identify which principles are legal and which are not, then even in borderline cases in which the textbook rules do not clearly dictate a result, a judge can nonetheless be certain to stay within the bounds of legal standards.

Dworkin denies that there can be any social criterion or set of social criteria that can effectively identify all of the standards a judge

17. See Judicial Discretion, supra note 3, at 634-35. See also The Model of Rules, supra note 3, at 22-23; Social Rules and Legal Theory, supra note 3, at 855. Some writers have questioned whether Dworkin's notion of "rule" is unduly narrow. For example, one has suggested that Hart's use of this term is broader than Dworkin's: "By 'rules' [Hart] means what Professor Dworkin seems to mean by 'standards,' namely rules, principles or any other type of norm (whether legal or social)." Raz, supra note 2, at 845.
18. Judicial Discretion, supra note 3, at 634 n.7.
20. See H.L.A. HART, supra note 1, at 92.
21. See Sartorius, supra note 5, at 155.
must consider. In a reply to Sartorius, he explains that any such
rule of recognition cannot be a social rule, as Hart supposes, but must
itself be a normative rule inextricably bound to moral and political
theory. Dworkin agrees that, in one sense, the institutional support
for a principle can serve as a kind of complex rule of recognition—a
rule to the effect that “a principle is a principle of law if it figures in
the soundest theory of law that can be provided as a justification for
the explicit substantive and institutional rules of the jurisdiction in
question.” But the judicial development of a soundest theory of law
necessarily involves an appeal to moral and political principles, which
cannot be identified by using a social rule.

In Hard Cases Dworkin attempts to explore more fully the notion
of the “soundest theory of law” (though not in these words), and to
demonstrate with greater precision the role played by moral and
political theory in its construction and application. He aims to
prove that the Anglo-American system of law is indeed gapless (“a
seamless web”) and hence is a system of entitlements in which there
is never room for judges to play the role of “deputy legislators.” It
is not altogether clear whether Dworkin also means to contend that
all legal systems are gapless, but this is unlikely since it is not difficult
to imagine a legal system in which the judiciary is vested, at least at
times, with legislative-like powers. If so, Dworkin’s argument is best
understood as describing a counter-example to Hart’s concept of law,
and not as defining an essential feature of a legal system.

Dworkin’s principal contention in Hard Cases, entitled “the rights
thesis,” is that “judicial decisions in civil cases, even in hard cases
characteristically are and should be generated by principle not

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22. See The Model of Rules, supra note 3, at 40-45; Social Rules and Legal
Theory, supra note 3, at 869-70.

23. The distinction between “social” rules and “normative” rules is one that
Dworkin draws, see Social Rules and Legal Theory, supra note 3, at 857-68. For
example, when a sociologist describes a behavioral practice, such as the wont of male
churchgoers to remove their hats before entering church, Dworkin defines the
behavioral practice as a social rule. However, if the churchgoer himself were to
appeal to this rule, or were to criticize another for its infringement, then the
churchgoer, by Dworkin’s definition, would be appealing to a normative rule. Id. at
859-60. Dworkin criticizes Hart for conflating this distinction between social and
normative rules. Thus, in explicating Hart’s theory, he writes: “If, in a particular
community, [judges] (a) regularly apply the rules laid down by the legislature in
reaching their decisions, (b) justify this practice by appeal to ‘the rule’ that judges
must follow the legislature, and (c) censure any official who does not follow that
rule, then, on Hart’s theory, this community can be said to have a social rule that
judges must follow the legislature.” Id. at 859.


25. Id. at 876 (emphasis added). See text at notes 89-92 infra.

26. See text at note 103 infra.

27. See text at notes 100-01 & note 103 infra.


29. Id. at 1058.
The rights thesis provides that judges decide hard cases "by confirming or denying concrete rights" after considering all relevant principles. Since there is only one correct adjudication of rights in every case, one litigant always has the right to win, a right that Dworkin views as a "genuine political right." Even in a "hard case"—"when no settled rule dictates a decision either way"—it is a judge's legal obligation to determine which party has an institutional right to win. As a consequence, a judge is never free to strike out on his own and weigh conflicting social policies. Rather, his decisions must be determined by legal principles applied consistently in like cases.

This Note argues that the rights thesis is untenable. It shows that Dworkin's distinction between arguments of principle and arguments of policy, upon which the rights thesis is based, cannot withstand close scrutiny. The Note questions whether it is sensible to speak of an objectively soundest theory of law, and argues that, even if such a theory is feasible, Dworkin has failed to prove that it will always dictate a unique result (or, put in different words, that the rights thesis is part of the putative soundest theory). If Dworkin's idea of a soundest theory is oppugned, or if the rights thesis is not part of that theory, then the rights thesis must be renounced. The criticisms presented in this Note do not, however, undermine a fundamental insight underlying Dworkin's rights thesis—that judges face certain

30. Hard Cases, supra note 3, at 1060. The rights thesis, as stated, has both a descriptive and a normative component. This Note, however, restricts its discussion to the latter. For a view of judicial adjudication consistent with Dworkin's position that judges should not base their decisions on social policies, see Sartorius, supra note 5, at 158.

31. Hard Cases, supra note 3, at 1078. See text at note 89 infra.

32. Hard Cases, supra note 3, at 1082. See text at notes 89-90 infra.

33. Hard Cases, supra note 3, at 1066 (emphasis added).

34. Id. at 1060. Dworkin has provided a more complete catalogue of the various kinds of "hard cases":
(i) In many cases a court is pressed to, and in some cases does, overrule a textbook rule, and substitute a new one. (ii) Even when, as is more often the case, a court is determined to follow a particular textbook rule if it applies, that rule may be so ambiguous that it is not clear whether it applies, and the court cannot decide simply by studying the language in which the rule has been expressed. (iii) Sometimes two textbook rules by their terms apply, and the judges must choose between them. In some such cases the need for choice may be disguised, in that only one rule is mentioned, but research (or imagination) would disclose another rule that the court could have adopted as easily. (iv) Sometimes a court itself will state that no textbook rule applies to the facts. Often the gap may be cured by what is called "expansion" of an existing rule, but sometimes a wholly new rule must be invented. (v) A large, and increasing, number of cases are decided by citing rules so vague that it is often unhelpful even to call them ambiguous: the critical words in such rules are "reasonable", "ordinary and necessary", "material", "significant", and the like.

Judicial Discretion, supra note 3, at 627.

35. Hard Cases, supra note 3, at 1078, 1108.

36. For Hart's opposing view, see text at notes 7-11 supra.
institutional constraints not placed upon legislators. The final section of the Note explores the nature of these constraints by examining the "universalizability" of judgments of moral and legal obligation. The thesis presented here is that the central role played by the doctrine of precedent in judicial adjudication, and the requirement that like cases be treated alike, can best be explained as a product of normative reasoning. This thesis steers a middle course between Hart's position that judges exercise a legislative-like discretion in cases within the open texture of legal rules, and Dworkin's contrary view that there is a uniquely correct legal solution in every civil case.

I. PRINCIPLES AND POLICIES
   A. Distinctions Under the Rights Thesis

   The rights thesis relies heavily upon Dworkin's distinction between principles, upon which judges must ground their reasoning, and policies, the weighing of which they must eschew. By introducing this distinction Dworkin hopes to avoid certain difficulties that attach to positivist jurisprudence, according to which a judge is free to "exercise an independent discretion to legislate on issues which the law does not reach." One such difficulty is to reconcile an activist judiciary with the democratic ideal that a community should be governed by elected officials who remain responsible to the electorate. Because appointed judges are largely insulated from the political majority, they should not be vested with the power to determine which goals best serve the general welfare and to find compromises among the various conflicting interests and goals in particular situations.

   Dworkin believes that these two objections have no force when judicial decisions are grounded only on "principles." It is submitted, however, that Dworkin's model is no more successful in avoiding this danger of judicial activism than is the jurisprudential camp he attacks. To demonstrate this, it is necessary first to consider Dworkin's suggested distinction between principles and policies.

   As Dworkin explains, "[a]rguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole," while "[a]rguments of principle justify a political decision by showing that the decision

37. Hard Cases, supra note, 3 at 1103.
38. Id. at 1061-62.
39. Id. Dworkin briefly alludes to these two objections in Judicial Discretion, supra note 3, at 638. He also discusses the second objection in The Model of Rules, supra note 3, at 31, 45. For a general discussion of ex post facto law, see Note, Ex Post Facto Limitations on Legislative Power, 73 Mich. L. Rev. 1491 (1975).
respects or secures some individual or group right." 40 In short, "[p]rinciples are propositions that describe rights; policies are propositions that describe goals." 41 To comprehend the significance of this distinction, we must in turn examine what Dworkin means by a "collective goal" and a "right." Both, he argues, are species of "political aims":

A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated 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. A goal is a nonindividuated 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. 42

Three characteristics that distinguish rights and goals, and hence principles from policies, can be discerned from this passage and from Dworkin's subsequent elaboration. First, rights are "individuated" in the sense that they bestow certain entitlements on particular individuals. 43 Goals are "nonindividuated" in that they do not attach to

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40. Hard Cases, supra note 3, at 1059. The importance of the distinction between principles and policies has developed in Dworkin's thinking over a period of time. In an early paper, Judicial Discretion, supra note 3, Dworkin attached little weight to this distinction. At one point in his argument against discretion, he considered the hypothetical baseball-like game of "Policies" in which "[a]ll the rules of baseball are initially in force, but the umpires . . . are required in each case to consider whether alteration of the pertinent rule would bring the game closer to the realization of certain fixed policies, or make it more consistent with certain fixed principles, and, if so, to make the necessary alteration before deciding the play." Id. at 629. He contended that "[o]n every play the participants are entitled to the 'correct' result; on no play is the [umpire] entitled to decide as he wishes." Id. at 631. Dworkin's position was clearly that "Policies" is a system of entitlements. In The Model of Rules, supra note 3, although generally using "principle" generically to designate "the whole set of . . . standards other than rules," id. at 22-23, Dworkin distinguished between a "policy" as "that kind of standard that sets out a goal to be reached" and a "principle" as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." Id. at 23. In Hard Cases, Dworkin, as indicated, sharply articulated his perceived distinction between policies and principles since, by this time, he had come to the view that law can be a system of entitlements only if judicial decisions are generated by principles.

41. Hard Cases, supra note 3, at 1067.

42. Id. at 1067-68 (emphasis added).

43. Dworkin does not mean to say that rights cannot attach to all citizens. On the contrary, he assumes that all political rights attach to all members in the community. Id. at 1070-71 n.6.
individuals. In order to determine whether a particular right has been infringed, therefore, it is sufficient to examine the facts pertaining to a single individual; but to determine whether or not a particular goal has been abandoned, it is necessary to do more than examine the facts pertaining to any single individual.

Second, goals are political aims that are typically balanced and weighed against one another in a utilitarian calculus, with the result that "offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall." Rights, however, while they may also be weighed against one another, have as a matter of definition a certain "threshold weight" against "ordinary, routine goals" and can be outweighed only by "a goal of special urgency." Thus, whether a political aim is a right or a goal depends on its relative weight within the underlying theory as a ground for justifying judicial decisions.

Third, fairness, in Dworkin's view, requires the consistent enforcement of individual rights, but not the consistent promotion of collective goals. Thus, "it need not be a part of a responsible strategy for reaching a collective goal that individuals be treated alike." Moreover, a government that serves a collective goal on one occasion need not serve that same goal when a similar occasion arises, or serve it in the same way. "[A] responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret [sic], but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well." If the government recognizes a certain right of its citizens, on the other hand, it has an obligation to effect an equal distribution of the benefit of that right.

With these differences between principles and policies in mind, it is possible to consider Dworkin's suggestion that his theory, unlike Hart's, accords with the democratic ideal that collective goals be established by elected officials. The ideal is violated by Hart's theory, Dworkin states, because judges are ill-fitted to engage in the juggling of competing interests that arguments of policy require. Yet, is a judge really in a better, or even different, position if he must

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44. Id. at 1068.
45. Id. at 1069. By the "weight" of a right, Dworkin means "its power to withstand . . . competition" from other goals and rights. Id.
46. Id.
47. Id. at 1064.
48. Id. at 1092. Nevertheless, Dworkin suggests that even in the pursuit of collective goals there are at least some "weak requirements" of fairness that prohibit "grossly unfair distributions." But such minimal requirements are consistent with the government's granting certain benefits to one group to promote a chosen goal while denying similar benefits to other groups. Id.
49. Id. at 1064, 1094.
determine what weight to accord to the various political aims in his theory of law? Given Dworkin's distinction between rights and goals, it is doubtful that he would be.

Rights and goals, for Dworkin, arguably are types of political aims that differ in degree but not in kind. A political aim, as noted above, counts as a "right" within a political theory only if it has sufficient threshold weight to override less than "urgent" collective goals of the community. Thus, whether a political aim functions as a right or goal in some political theory depends on its relative weight in that theory. Yet, the procedure by which a judge arrives at the relative weight of a particular political aim is not apt to be significantly less violative of the democratic ideal than a judically determined balancing of competing policy considerations. Moreover, a judge must also determine whether a collective goal is "urgent," in which case it may be able to override competing rights.

Rarely would a judge be able to conclude that a political aim is a right without engaging in some type of weighing of competing interests. A judge at times might be able to identify a right simply by looking to, for example, the language of the Constitution. The very fact that something appears as an unmistakable constitutional entitlement ordinarily would ensure it the status of a right in any sound theory of law. In such clear-cut cases, a judge would not be required to weigh the aim in question against all other aims to determine whether it stands as a right or a goal. But in the hard cases that are Dworkin's concern, the differentiation will not always be obvious to a judge simply from examining a particular passage in the Constitution and relevant interpretative cases. It is only by referring to a political theory, which in some manner construes the Constitution, that a judge can conclude that certain language gives rise to a right. And, it is only the standing of a political aim vis-à-vis other political aims within the judge's political theory that enables him to determine whether it is a right. Dworkin himself underscores this difficulty by

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50. The argument that follows is limited to Dworkin's definition of rights and goals.

51. See text at note 45 supra.

52. Dworkin wants to say that this is not only a definition of a right, but is equally a means of recognizing a right in a theory of law. It is irrelevant that a theoretician might call a certain political aim a "right" if it does not in fact occupy the requisite function in his theory: "Suppose, for example, some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of . . . liberty of speech . . . . His political position is exhausted by the collective goal; the putative right adds nothing and there is no point to recognizing it as a right at all." Hard Cases, supra note 3, at 1069.

53. "If a public official has anything like a coherent political theory that he uses, even intuitively, to justify the particular decisions he reaches, then this theory will recognize a wide variety of different types of rights, arranged in some way that assigns rough relative weight to each." Id. (emphasis added).
admitting that a political aim may be a goal in one political theory, but function as a right in a different theory. 54

The other differences between rights and goals discerned from Dworkin's account also provide no grounds for concluding that the two are different in kind, and hence that decisions based on principles are essentially different from decisions based on policies. In Dworkin's view, rights are individuated while goals are not. Yet, a political aim stated in an individuated form can always be readily recast into an aim in nonindividuated form, and vice versa. 55 Thus, freedom of speech, an example suggested by Dworkin, can be viewed either as a right or as a collective goal. 56 This difference, therefore, is of little assistance in deciding whether a particular political aim should stand as a right or a goal. That determination still depends on the weight accorded the political aim in a given theory of law. This is not to say, of course, that a particular theory of law will remain unchanged if a right is transmuted into a goal, nor that an argument of policy will be as powerful as the parallel argument of principle; indeed, neither is true since rights ex hypothesi have greater weight than collective goals. 57

Likewise, the third difference between rights and goals—Dworkin's contention that fairness requires that rights be consistently enforced—provides no independent basis for determining whether a political aim is a right or a goal. When political aims come into conflict, it is relatively more difficult to outweigh a right than it is to outweigh a goal; therefore, it is more difficult within any given political theory to justify a refusal to respect a right than to justify a refusal to respect a goal. This distinction is itself a consequence of the greater weight and importance that rights are accorded in a political theory. It might also derive from the greater importance that rights have to individuals. But the special requirement of fairness in the enforcement of rights, though understandable, does not itself provide judges with a factor to be used in separating rights from goals.

Dworkin's rights thesis depends on the establishment of a firm line between arguments of principle and arguments of policy. But as just seen, there can be no such hard and fast line even using Dworkin's own analysis. If the difference between rights and goals is simply a matter of their relative weight in a political theory, then, at least in hard cases, judges must still juggle competing political aims.

54. Id.
55. Id. at 1069, 1073; The Model of Rules, supra note 3, at 23 ("The distinction between principles and policies can be collapsed by construing a principle as stating a goal... or by construing a policy as stating a principle ... ").
56. See note 52 supra.
57. Hard Cases, supra note 3, at 1073, 1077.
and weigh their strength. Indeed, simply to determine in a hard case that a particular political aim is to count as a right and not as a goal, a judge must often look to the "soundest" theory and weigh the aim against other competing aims to determine whether it has the requisite threshold weight to override routine goals. Of course, if it is evident from the history of governing legal institutions that a certain political aim has been traditionally accorded the status of a right, then the "soundest" theory will ordinarily be required to assign the aim the same status. That is, a judge may be able to conclude that a political aim is a right simply by discerning from prior opinions that courts have traditionally treated the aim as individuated, as worthy of consistent enforcement in competition with social goals, and as possessing the requisite threshold weight. Yet the legal history of a political aim will not always be so clear that weighing can be avoided. Furthermore, even if it is manifest that some political aim has been traditionally recognized as a right, a judge may sometimes still have to balance this right against social goals. For, as we have seen, a right under Dworkin's theory can withstand competition from "ordinary, routine" goals, but it may be overcome by a goal of "special urgency." To this extent, at least, even rights and goals must be balanced against one another.

The rights thesis suggests that judges, when making decisions, should only consider what might be called "important" political aims. But to require judges in hard cases to decide which aims are important and which are unimportant (that is, to determine which aims have standing as rights, and which goals are "urgent") is to require them to balance and "compromise competing interests in their chambers" in a way that Dworkin finds objectionable. Whether judges make arguments of principle or arguments of policy (per Dworkin's definitions), they are really doing essentially the same kind of thing, and not, as the rights thesis necessarily supposes, qualitatively different kinds of things. If so, the rights thesis is fatally subverted.

58. See text at notes 50-53 & notes 52, 53 supra.
59. This will not hold true if there has been a "mistake."
60. See text at note 45 supra.
61. For a critique of Dworkin's "no discretion" thesis in which it is argued that the process of fixing the relative importance of principles is itself an important area of judicial discretion, see Raz, supra note 2, at 846.
62. Hard Cases, supra note 3, at 1061. One criticism Dworkin makes of a judge's compromise of competing interests is that "it is far from clear that interpersonal comparisons of utility or preference, through which such compromises might be made objectively, make sense even in theory; but in any case no proper calculus is available in practice." Id. But see Brandt, The Interpersonal Comparison of Utility, forthcoming as a chapter in R. Brandt, A THEORY OF THE GOOD AND THE RIGHT (originally read as a paper at the Western Division Meeting of the American Philosophical Association, May 1971) (arguing that some interpersonal comparisons of wanting are justified).
63. To reach this conclusion, however, is not to concede that judges are free to
The second objection to positivist jurisprudence is that judges who “make” law by exercising their discretion create and impose legal duties *ex post facto*. Dworkin’s model of adjudication attempts to avoid this difficulty by stating that the winning plaintiff had a right to recover and that, accordingly, the defendant had a duty all along to avoid the wrongful conduct for which he is now held liable. But in a hard case, surely, no safe predictions concerning the outcome can be made when the matter is first raised in litigation. In such circumstances, the rights model of adjudication can provide little solace to the defendant who receives notice that his conduct is wrongful only in retrospect. Dworkin admits that new principles may be discovered that “best explain” existing legal history, though they have never before been articulated. From the viewpoint of the unwitting defendant, whose loss is based on such a new explanation, these cases merely serve to frustrate the reliance he reasonably placed on the rules and principles of law that were previously articulated.

Perhaps Dworkin’s point, however, is merely that his model is theoretically superior to the positivists’ model in meeting the objection of retroactive adjudication. Since, according to the rights thesis, there is only one proper judgment possible in civil cases, then it might be said that unvoiced and perhaps previously unknown legal duties do exist prior to their expression as new principles in the opinions of hard cases. But if one important *rationale* behind the established principle *nulla poena sine lege* is to provide an individual with fair warning that the acts he intends are unlawful, then this theoretical victory is Pyrrhic. For it is certainly a novel and troublesome interpretation of this principle that a defendant could have perceived his legal duty only if he had been an omniscient legal genius. In short, Dworkin’s model possesses no clear advantage over that of the positivists in avoiding the retroactive creation of legal duties.

The Note thus far has considered two objections that Dworkin voices against positivist jurisprudence, but which are not surmounted by his own legal theory. It has suggested, first, that even Dworkin’s analysis of rights and goals leads to the result that judges must weigh and compromise political aims in hard cases. This conclusion under-

weigh and compromise political aims *ab initio* as legislators properly might. Clearly, judges are limited in an important sense by the rules and principles inherent in the institutional history of the Anglo-American system of law. Dworkin is right that judges even in hard cases are not free to “strike out on their own” in the adjudication of issues of law to the same extent as legislators. But Dworkin is mistaken in supposing that the limitations and constraints placed upon judicial adjudication can be aptly captured by the rights thesis. *See section III infra.*

64. *See text at note 39 supra.*
65. *Hard Cases, supra note 3, at 1062.*
66. *Id. at 1096-97.* As an example, Dworkin cites Warren & Brandeis, *The Right of Privacy, 4 Harv. L. Rev. 193* (1890).
67. *See Note, supra note 39, at 1496.*
cuts the value, if not the feasibility, of Dworkin's very distinction between principles and policies upon which the rights thesis stands or falls. Thus Dworkin's model comes no closer to the democratic ideal than do the models of his opponents. Second, the Note has demonstrated that Dworkin fares no better than the positivists in meeting the objection that judging in hard cases imposes duties on litigants ex post facto.

B. Policy Considerations in Adjudication

A further difficulty with the rights thesis, aside from its inability to resolve jurisprudential dilemmas that Dworkin himself considers crucial, is that it conflicts with the common-sense intuition that it is sometimes appropriate for judges to consider social policies in adjudicating. It seems reasonable to suppose that most people would be surprised by the suggestion that judges characteristically are and ought to be oblivious to social policies. For, indeed, there are a variety of circumstances in which judges typically are thought to include policy considerations in their adjudications. Consider, for example, the following kinds of cases suggested by Kent Greenawalt: (1) "[S]ome legal standards such as 'unreasonable search' and 'nuisance' appear to build in notions of competing costs and benefits. . . . [I]n these instances [a judge] is properly weighing competing social interests in deciding cases"; 68 (2) Judges should also take account of social consequences "in the sense of administrability and likely effectiveness of proposed rules"; 69 and (3) "[w]hen the court knows that the legislature will not soon address a small problem within a large area covered by legislation, again it is harder to argue that it should refuse to take into account considerations that would be important for a legislative body." 70 The remainder of this section explores these three kinds of cases in which judicial consideration of policy seems particularly appropriate. The conclusion reached is that Dworkin is able to accommodate these apparent counterexamples to his rights thesis only by engaging in a conceptual "gerrymandering" that abandons his original formulations of the principle-policy distinction.

Dworkin explicitly considers the first of these possible counterexamples in discussing the implications of Learned Hand's formula for negligence:

[Hand] said, roughly, that the test of whether the defendant's act was unreasonable, and therefore actionable, is the economic test which asks whether the defendant could have avoided the accident

68. Greenawalt, supra note 5, at 391.
69. Id. at 392.
70. Id. at 393-94.
at less cost to himself than the plaintiff was likely to suffer if the accident occurred, discounted by the improbability of the accident. It may be said that this economic test provides an argument of policy rather than principle, because it makes the decision turn on whether the collective welfare would have been advanced more by allowing the accident to take place or by spending what was necessary to avoid it. If so, then cases in which some test like Hand's is explicitly used, however few they might be, would stand as counterexamples to the rights thesis.\footnote{71 Hard Cases, supra note 3, at 1075.}

Dworkin's rejoinder is that Hand's test is really not an argument of policy at all, but rather a method of "compromising competing rights."\footnote{72 Id. at 1076.} This can be understood, he says, once the distinction between "abstract" and "concrete rights" is drawn. "Abstract rights . . . take no account of competing rights; concrete rights, on the other hand, reflect the impact of such competition."\footnote{73 Id. at 1075.} Hand's test, he urges, is not a simple cost-benefit formula but rather "a mechanism for compromising competing claims of abstract right."\footnote{74 Id. at 1077.}

Dworkin applies his distinction between abstract and concrete rights to a broad range of cases: Negligence cases are not the only cases in which judges compromise abstract rights in defining concrete ones. If a judge appeals to public safety or the scarcity of some vital resource, for example, as a ground for limiting some abstract right, then his appeal might be understood as an appeal to the competing rights of those whose security will be sacrificed, or whose just share of that resource will be threatened if the abstract right is made concrete. His argument is an argument of principle if it respects the distributional requirements of such arguments, and if it observes the restriction . . . that the weight of a competing principle may be less than the weight of the appropriate parallel policy.\footnote{75 Id. (emphasis added).}

Thus, Dworkin's view is much more sophisticated than it first appears to be. On one hand, he wishes to maintain the position that judges should not adjudicate on the basis of policy arguments. Yet on the other hand, he is forced to concede that much of what looks like adjudication by policy arguments is quite appropriate after all. Dworkin seeks to reconcile these two views by suggesting that ostensible policy considerations are actually appeals to competing abstract rights. In the quoted passage, for example, appeals to public safety—what most people would consider a paradigm instance of a collective goal—are viewed by Dworkin as appeals to a right. Unfortunately, Dworkin can only manipulate his original definitions of rights and goals in this manner by conceding much ground to his
opponents. If policy considerations can be "understood as an appeal to competing rights," what force remains behind his original distinction between principles and policies? When is an ostensible policy consideration to count as a "hard core" policy consideration and when not? Dworkin's response, apparently, is that an argument is one of principle if it respects the distributional requirement of principles—that rights be consistently enforced—and if it has greater weight than the parallel or cognate argument of policy. This response is unconvincing, however, when something like public safety, which seems so plainly a goal, can be so readily understood as a right. Indeed, Dworkin seems to have committed himself in his examples to the somewhat elusive position that a judge can be attentive to what is commonly called a "policy" just in case the "policy" has sufficient importance in his political theory—in which case it is really a principle rather than a policy.

To be sure, Dworkin attempts to bolster his principle-policy distinction by providing an example of what he considers a true argument of policy. He suggests the situation in which one man is drowning, and another man, with little personal risk, can save him:

Suppose someone argued that the principle requiring rescue at minimal risk should be amended so as to make the decision turn, not on some function of the collective utilities of the victim and rescuer, but on marginal utility to the community as a whole so that the rescuer must take into account not only the relative risks to himself and the victim, but the relative social importance of the two. It might follow that an insignificant man must risk his life to save a bank president but that a bank president need not even tire himself to save a nobody. The argument is no longer an argument of principle, because it supposes the victim to have a right to nothing but his expectations under general utility.

But is it so clear that this must count as a true argument of policy under Dworkin's model? Cannot this example too be accommodated as an appeal to competing abstract rights? Arguably, the bank's employees as well as members of the community at large have an abstract right to economic security. These rights might be jeopardized should the bank president drown in an attempted rescue. They would be jeopardized much less if the "insignificant man" happened to drown. The decision to risk only the life of the "insignificant man" can thus be reached by appealing to competing abstract rights. Indeed, as this example and Dworkin's treatment of Hand's formula demonstrate, it should ordinarily be a simple matter to transform what appears to be an argument of policy into an argument of principle. If the transformation can always be so easily accomplished, as seems to be the case, then nothing counts conceptually as an argument of policy, and the concept is, hence, logically vacuous.

76. See text at notes 47-49 & note 48 supra.

77. Hard Cases, supra note 3, at 1077.
Greenawalt's second situation in which a judge is deemed justified in considering social consequences occurs when a judge considers the administrability or workability of a proposed rule. Dworkin has not discussed this possibility, but as Greenawalt projects, Dworkin probably would not deny that judges properly take such considerations into account.  

78 Perhaps Dworkin would feel that judicial consideration of administrability is permissible in light of the fairness requirement that rights be consistently enforced.  

79 Under this view, a judge could properly estimate whether or not a rule could be enforced in a consistent manner. Dworkin might well insist, however, that a judge consider the enforceability of a rule from the viewpoint of fairness, and not from that of utility.  

According to Greenawalt, the third situation in which judges should properly weigh social policies occurs when a legislature leaves some areas in a piece of legislation largely open for subsequent development by the courts. Under such circumstances, he suggests, judges must calculate social consequences in much the same way as do legislators. Dworkin explicitly contradicts such a view: "It would be inaccurate . . . to say that [a judge] supplemented what the legislature did in enacting the statute, or that he tried to determine what it would have done if it had been aware of the problem presented by the case . . . . [Rather, a judge] constructs his political theory as an argument about what the legislature has, on this occasion, done."  

81 Though the foregoing statement is not free of ambiguity, it does at least make clear Dworkin's rejection of the notion that a judge should put himself in the place of the legislature and should try to determine how that body would have responded to the facts of the case before the court; statutory construction, Dworkin states, does not call for "hypotheses about the mental state of particular legislators. . . ."  

82 But then, is a judge to weigh social policies or not?  

In a note appended to his article, Dworkin explains that a judge must consider collective goals in such cases, yet not in the same capacity as would a legislator: "When [a judge] interprets statutes he fixes to some statutory language . . . arguments of principle or policy that provide the best justification of that language in the light of the legislature's responsibilities. His argument remains an argument of . . ."  

78 See Greenawalt, supra note 5, at 392. Alternatively, if Dworkin wishes to maintain steadfastly that judges never choose rules, then, of course, they would have no occasion to consider the administrability of rules.  

79 Hard Cases, supra note 4, at 1094. Cf. id. at 1100 ("If [a judge] believes, quite apart from any argument of consistency, that a particular statute or decision was wrong because unfair . . . then that belief is sufficient to distinguish the decision and make it vulnerable").  

80 Cf. id. at 1074.  

81 Id. at 1087.  

82 Id. at 1086.
principle; he uses policy to determine what rights the legislature has already created."  
83. Id. at 1088-89 n.23.
84. Id. at 1086.
85. Id.
86. Id. at 1085.
87. Id. at 1087.
88. Consider, for example, the broad language of the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1970) and accompanying SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974). It is hard to deny that the huge and complex body of judicial decisions which has developed around these vague provisions has been centrally concerned with policy matters. For a recent example, see Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
to have, the decision in every case that constitutes the best resolution of the stipulated principles and policies." This "best" or uniquely correct decision presumably determines the legal rights of the parties in such a manner that one party is always entitled to judgment in his favor. The correct decision itself is defined analytically in terms of what Dworkin has called "the soundest theory of law." That is, the judge is to decide which party has the right to win the lawsuit by first determining which relevant theory of law is the soundest, and then by ascertaining what this theory requires in the particular case.

The soundest theory of law, according to Dworkin, is that "set of principles that best justifies the precedents" relevant to the case under consideration. Dworkin's first requirement for such a theory is that it provide a coherent justification for the rule or provision at issue. When relevant case law exists, this justification must take into account not only the simple "enactment force" of the prior decisions, but also their "gravitational force." By the former Dworkin means an opinion's precedential authority as limited by the specific words used by the courts. The influence of a judicial decision, of course, is not usually limited to the "canonical form of words" of the opinion; it includes a "gravitational force" that extends beyond the specific language of the opinion. The soundest theory, Dworkin states, must be consistent with both.

Coherence or consistency, however, is at most a logical prerequisite for any plausible theory of law. It cannot in itself always determine which theory is the "best" or "soundest," since several theories may be logically consistent with a given statutory provision or series of decisions. If so, how is a judge to determine which of the available alternative theories is in fact the best? Dworkin answers by

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89. Judicial Discretion, supra note 3, at 633. Dworkin is actually talking here about his imaginary game "Policies," and not about the law. But it is clear that he intends his remarks to apply to the law. Id. at 634 n.7. See text at note 31 supra.

Dworkin, of course, has veered from his earlier position that judges should decide cases by an appeal both to principles and policies. See text at note 30 & note 40 supra.

90. See text at note 32 supra.

91. See text at note 25 supra. Dworkin does not use this phrase in Hard Cases. See note 103 infra. But the political theory of his superhuman judge, Hercules, serves the same function. See text at notes 111-112 infra.

92. Hard Cases, supra note 3, at 1093 (emphasis added).

93. Id. at 1094.

94. Id. at 1088-89. By this distinction Dworkin presumably wishes to make the point that the influence of an opinion can extend well beyond the particular facts of that case. When a decision falls into disfavor in the judicial community, it is much more likely that courts will simply "limit it to its facts," that is, to its enactment force, rather than overrule it. Id. at 1100.

95. Sartorius, who uses the concept of coherence in a manner similar to Dworkin, admits the "theoretical possibility" of equal coherence. Sartorius, supra note 5, at 159.
posing the example of a judge who must apply the establishment clause of the first amendment to a particular case, and who admits that two distinct theories might be equally consistent with this provision. In such a circumstance, Dworkin explains, the judge "must turn to the remaining constitutional rules and settled practices under these rules to see which of these two theories provides a smoother fit with the constitutional scheme as a whole." That theory which fits best not only with the constitutional provision at issue, but with the entire Constitution, is the superior theory. In short, the soundest theory of law is the theory that is able to justify the largest body of law.

But, again, if the test is how smoothly a theory fits, then the criterion remains one of logical coherence. It is possible, of course, that there will be but one theory that is consistent with a particular body of law, in which case the coherence test alone will determine the soundest theory. But in many cases there may be several contenders for the best theory, each of which is able to justify a good deal, if not all, of a body of law. Ascertaining which of these theories is most consistent, a difficult task in itself, is complicated by the fact that the requirement of coherence is not absolute, for, as Dworkin properly admits, some part of the legal history may be mistaken. If a given theory establishes that a certain group of decisions has been mistaken, it must explain how it provides a better justification for legal history than any alternative theory. But the basic problem remains. Once it is shown that the consistency of two or more theories with legal history is roughly the same, how is a judge to decide which is superior?

Dworkin's reply is that a judge should consider this matter "not just as an issue of fit between a theory and the rules of the institution, but as an issue of political philosophy as well." Dworkin believes, therefore, that the soundest theory depends in some sense on moral and political principles, a view he also expresses in his essay *Social Rules and Legal Theory*:

If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to justify the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and well past the point

97. Dworkin admits the possibility of the equal coherence of divergent theories. *Id.* at 1084, 1104.
98. *Id.* at 1097.
99. *Id.* at 1097-1101.
100. *Id.* at 1100.
101. *Id.* at 1084.
where it would be accurate to say that any "test" of "pedigree" exists for deciding which of two different justifications of our political institutions is superior . . . 102

It is plain, moreover, that Dworkin views the notion of the soundest theory as thoroughly normative:

I assume that persuasive arguments can be made to distinguish one theory as superior to another. But these arguments must include arguments on issues of normative political theory, like the nature of society's duty of equality, that go beyond the positivist's conception of the limits of the considerations relevant to deciding what the law is. The test of institutional support provides no mechanical or historical or morally neutral basis for establishing one theory of law as the soundest. Indeed, it does not allow even a single lawyer to distinguish a set of legal principles from his broader moral or political principles. His theory of law will usually include almost the full set of political and moral principles to which he subscribes; indeed it is hard to think of a single principle of social or political morality that has currency in his community and that he personally accepts, except those excluded by constitutional considerations, that would not find some place and have some weight in the elaborate scheme of justification required to justify the body of laws.103

But just how a judge should appeal to "the political or moral concerns and traditions of the community" is not made clear by these passages alone, and requires further exploration.

Dworkin's rights thesis concerns a litigant's "institutional rights," not his "background rights."104 If a judge's theory of law includes background rights, at minimum they must not be seriously at odds with the language of the Constitution.105 The choice between the several theories that might meet this minimal requirement, according to Dworkin, depends in some manner on what may be described as "accepted" moral and political principles.

At this point it is possible to examine two distinct assumptions.

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103. Id. at 878. (sentence emphasis added; word emphasis original). Dworkin reveals his increasing emphasis on the "issue of political philosophy," text at note 101 supra, by largely omitting from Hard Cases the locution "theory of law" in favor of "political theory."
104. Hard Cases, supra note 3, at 1078. According to Dworkin, background rights "provide a justification for political decisions by society in the abstract," while institutional rights "provide a justification for a decision by some particular and specified political institution." Id. at 1069-70.

As an illustration of this distinction, Dworkin considers a political theory which postulates that every person has a right to property commensurate with his need. Since this right is not recognized in our Constitution and would not be recognized by any court, it cannot be an institutional right. Nevertheless, an adherent of this socialist theory can claim that "people as a whole would be justified in amending the Constitution to abolish property, or perhaps in rebelling and overthrowing the present form of government entirely." Id. at 1070. As such, however, the adherent would be claiming for the people what must be described as a background right only.
105. Id. at 1084.
upon which Dworkin bases the rights thesis, that law is a system of entitlements. The rights thesis assumes, first, that “community morality,” in a sense explored below, permits the development of an objectively soundest political theory. Second, it supposes that this political theory, once constructed, will always dictate a uniquely correct result in hard cases. In other words, Dworkin assumes that a soundest theory of law is theoretically feasible and that the rights thesis would be part of that theory. It is important to keep these two contentions distinct, for Dworkin must prove the truth of both in order to secure his rights thesis. It is submitted, however, that he provides no persuasive argument for either contention.

Dworkin's first proposition, that a judge ought to construct the soundest theory by referring in some manner to “community morality,” raises the question of how a judge is to appeal to moral principles in hard cases. It is clear that Dworkin rejects the view that a judge is free to decide simply on the basis of personally held moral principles. For example, a judge ought not to base a decision that capital punishment offends the eighth amendment on a personal abhorrence of capital punishment. Rather, according to Dworkin's theory, a judge ought to appeal to principles of “community morality” in justifying his decisions. Since this phrase may be seriously misleading, it is important to clarify what Dworkin has in mind. Dworkin stresses that it is not “a consensus of belief about a particular issue, as might be elicited by a Gallup poll,” but rather “the principles that underlie the community's institutions and laws, in the sense that these principles would figure in a sound theory of law.”

Elsewhere, Dworkin defines it as “the political morality presupposed by the laws and institutions of the community”; that is, the principles that are necessary to provide an adequate justification or rationalization of the laws of the particular jurisdiction. Most frequently, perhaps, the community morality in this sense will coincide with the beliefs held by a majority of persons in a Gallup-type survey. Nevertheless, Dworkin is prepared to grant that community morality, in his sense, may at times diverge from popularly held moral and political views. On such an occasion, a judge must appeal only to the community morality as presupposed by the laws, and not to what is popularly believed or to what he independently may believe is morally required.

106. See Hard Cases, supra note 3, at 1078, 1090.
107. One writer has been misled, perhaps justifiably, by Dworkin's loose use of this kind of language in Judicial Discretion, supra note 3, at 635, n.9. See Raz, supra note 2, at 848-51.
109. Id.
110. Id.
111. Id. at 1104-05. Dworkin makes this point somewhat cryptically: “The
The soundest theory of law, then, appeals to moral and political philosophy in the sense that it relies on those principles that underlie the laws and institutions. Just what those principles actually are, of course, is often a matter of debate among judges and other legal scholars. It is no wonder that Dworkin invokes the assistance of his judge “Hercules,” “a lawyer of superhuman skill, learning, patience and acumen,”112 to construct the soundest political theory, for no human judge could ever accomplish the task of constructing a complete theory of law to justify all prior legal history. Yet, it is important to keep in mind that Dworkin poses the soundest political theory as an ideal, not as an accomplished fact of jurisprudence. Accordingly, the inability of human judges to construct such a theory presents no obstacle to the rights thesis if the task is at least theoretically feasible. The question remains, nonetheless, whether it is even theoretically possible to construct a political theory, along the lines Dworkin suggests, that can be applied to decide all hard cases. It is suggested that a certain difficulty attaches to such a task in so far as Dworkin’s conception of the soundest theory is inextricably tied to the justification of legal history.

One type of hard case arises when a court decides that it must discard a rule.113 The soundest theory is that which “best justifies the precedents,”114 and which “provides a coherent justification for all common law precedents and . . . constitutional and statutory provisions as well.”115 But because Dworkin allows for a theory of institutional mistakes,116 a judge is given some freedom to determine that a part of the legal history is mistaken. Hence, Dworkin’s model can encompass the hard case in which a court must overrule, for instance, a single decision with no major consequences to the great body of law. However, a theory of mistakes, although it can be used to overturn a decision clearly at odds with the gravitational force of other precedents, cannot be freewheeling; “it must limit the number and character of the events than [sic] can be disposed of in that way.”117 Yet a court may on occasion adjudge unconstitutional or otherwise abandon a substantial portion or even the vast majority of decisions and practices in a given area of the law.118 Dworkin’s notion

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112. *Id.* at 1083.
113. See note 34 supra.
115. *Id.* at 1094.
116. See text at notes 99, 100 supra.
118. See Greenawalt, *supra* note 5, at 390 (citing Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court disapproved of many police practices). Consider also...
of the soundest theory of law runs into some conceptual difficulty in this situation since the soundest theory, to reiterate, is simply that which best reflects the great body of existing precedents. Likewise, Dworkin's conception of the community morality, as explained above, mirrors "the laws and institutions of the community," or in other words, the legal status quo.

Dworkin might wish to justify a major constitutionally grounded overturning of prior lower court precedent on the theory that, since the Constitution occupies the highest level in the "vertical ordering" of authority, the soundest political theory actually includes those constitutional principles, not yet included in any judicial decision, that would justify the overruling of an existing body of lower court decisions and practices. But with this rejoinder, what becomes of the initial coherence test for the soundest theory? It might be argued, of course, that coherence is to be taken less literally, that the soundest theory need not be consistent with existing express decisions so much as with unarticulated principles that could be inferred from the gravitational force of existing Supreme Court decisions.

This position, obviously, makes short shrift of the coherence test as originally conceived, for the test is then no longer a purely logical one (even aside from the allowance for a theory of mistakes), but has been made normative in part. A judge applying a coherence test of this sort would have to engage in what Dworkin probably would


119. See text at notes 92, 114 supra. Compare Dworkin's formulation of the rights thesis as the proposition that "judicial decisions enforce existing political rights . . . " Hard Cases, supra note 3, at 1063 (emphasis added).

120. See text at note 110 supra.

121. In Social Rules and Legal Theory, supra note 3, Dworkin's view of what is included in a theory of law, text at note 103 supra, seems somewhat broader than his description of Hercules' political theory in Hard Cases as the theory that "best justifies the precedents." Text at notes 92, 114 supra. Thus, Dworkin's earlier description of the soundest theory is perhaps less open to this criticism.

122. Hard Cases, supra note 3, at 1095.

123. An even bolder proposal is suggested by Thomas C. Grey: An essential element of American constitutionalism was the reduction to written form—and hence to positive law—of some of the principles of natural rights. But at the same time, it was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law. The ninth amendment is the textual expression of this idea in the federal Constitution.

Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 715-16 (1975). If this is correct, it might be argued that the coherence test applies not simply to the principles of natural rights which have been explicitly codified in our Constitution, but also to the yet unwritten principles of "higher law." See note 124 infra.
admit is a political, and doubtless much controverted, process of deciding how far to extend the gravitational implications of existing decisions.124

In any case, Dworkin would probably disavow this response, and retain the definition of the soundest theory as simply that which is congruent with the great body of existing decisions. But this notion of the soundest theory can be criticized for its inability to accommodate the situation in which a significant and numerically substantial portion of existing decisions and practices in a particular area must be overturned. Indeed, it is nonsensical for a court in such a position to claim that its decision is mandated by the theory that best fits the precedents.

The notion of the soundest theory might be defended on different grounds by arguing that the theory comprises the set of "true" moral and political principles, apart from the values inherent in the laws and institutions of the jurisdiction. But even if the idea of true moral principles makes any sense (as it very well might), Dworkin would not hesitate to reject this suggestion. Throughout Hard Cases he emphasizes that a judge is bound by the values that inhere in the institutional history of the law (i.e., the "community morality"), and so is not free simply to base his decisions on a direct appeal to morality.125

Because Dworkin cannot account for the occasion on which a court overturns a major body of precedent, he has failed to prove that the soundest theory, in his sense, can accommodate all hard cases.126

124. Applying the coherence test to unwritten principles of higher law, see note 123 supra, would further attribute normative qualities to the coherence test and would thus force judges to engage in the even more clearly political process of determining the nature of such unwritten principles.

125. See Hard Cases, supra note 3, at 1078 ("[N]o one may claim an institutional right by direct appeal to general morality"). Cf. text at note 137 infra.

126. At times Dworkin even seems to suggest that there is no one soundest theory at all. See Hard Cases, supra note 3, at 1105, 1107. For example, he observes that Hercules' constitutional theory will not always be the same as those developed by other judges "because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make." Id. at 1095.

If Dworkin means to say that Hercules' theory will be different from those of other judges because Hercules, unlike other judges, has a comprehensive knowledge of all legal history and makes no mistakes in reasoning, then his concession does not undercut the rights thesis, for if another judge of similar perspicacity, for example, Minerva, were to direct her attention to the task of working out a constitutional theory, then Minerva's theory would be more or less identical to Hercules' and would always dictate the same results in hard cases. However, it is more likely that what Dworkin means in the above quotation is that judges develop different theories because they have fundamental ethical and political disagreements. If this is what is meant, then Dworkin has pinned his rights thesis on the highly controversial proposition that ethical disagreements are objectively justifiable. Compare Stevenson, The Emotive Meaning of Ethical Terms, 46 Mind 14 (1937), reprinted in C.L. Stevenson, Facts and Values 10 (1963) (not objectively justifi-
But suppose, arguendo, that Dworkin is correct in contending that there is some superior theory of law. As indicated above, the model of law as a system of rights further requires for its success that the soundest theory always dictate a uniquely correct decision.\footnote{127} Dworkin does not suggest, of course, that judges will always know which putative political theory is the best and what that theory requires in each particular case. On the contrary, Dworkin readily concedes that only someone with the wisdom and perspicacity of Hercules could have such knowledge.\footnote{128} A judge's duty, therefore, is not necessarily to achieve this theoretical ideal, but only to do his best to discover that uniquely correct solution. Consequently, it is no objection to Dworkin's thesis that human judges, unlike Hercules, sometimes make errors in their adjudication of rights.\footnote{129}

Nevertheless, even after Dworkin's position is properly understood, it is far from clear that it is correct. It is not at all obvious how even Hercules, armed with his soundest and most comprehensive political theory, could always discern but one correct decision in the hard case. Dworkin expends a good deal of effort in \textit{Hard Cases} discussing how Hercules is to construct his theory of law in various areas of adjudication, but nowhere does he explain clearly how the model of law as an arrangement of entitlements follows from Hercules' theory.\footnote{130} There is no reason to suppose that, in a complex case, only one decision comports with Hercules' theory of law, and that all other decisions are wrong,\footnote{131} unless, of course, the rights thesis itself, that a litigant has a right to the uniquely correct decision, is a principle included in Hercules' theory of law. Surely the bald assertion that each case has a uniquely correct resolution is insufficient to support this controversial contention.\footnote{132}

\footnote{127. \textit{See} text at notes 89-91 \textit{supra}.}
\footnote{128. \textit{Hard Cases, supra} note 3, at 1108-09.}
\footnote{129. \textit{Contra}, Greenawalt, \textit{supra} note 5, at 377-78.}
\footnote{130. Dworkin cites pages 1091-93 of \textit{Hard Cases} for the argument that Hercules accepts the rights thesis. \textit{Id.} at 1088-89 n.23. Dworkin argues in this passage that the only complete justification for the judicial practice of precedent is the "doctrine of fairness," which requires treating like cases the same. Dworkin wants to conclude from this that Hercules can justify the practice of precedent only by accepting the rights thesis. At most, however, Dworkin has proved that Hercules should treat like cases alike. He has proved neither that Hercules should use only arguments of principle nor that one litigant always has the legal right to win a civil lawsuit.}
\footnote{131. \textit{See} MacCallum, \textit{Dworkin on Judicial Discretion}, 60 J. Phil. 638, 641 (1963) ("entitlement to the correct decision in every case" may be unreasonable if no such decision exists in certain complex cases).}
\footnote{132. \textit{See} note 130 \textit{supra}.}
Moreover, if we consider the analogy from common moral experience, it seems clear that there are often several morally permissible alternative courses of action open to an individual. Take, for example, the utilitarian moral theory that an act is right if and only if there is no alternative act open to the individual that would bring into the world a greater balance of good over evil. Surely the situation can be envisioned in which several acts would generate the same amount of good. In this situation an individual would not be required by this utilitarian standard to choose any one over the others. Dworkin wishes to say that the moral principles reflected in the community morality are included in Hercules' theory of law. But if this is true, how can he be so certain that Hercules' theory will always dictate one correct decision when common moral experience sometimes suggests the opposite?

This is not to say, of course, that it never makes sense to talk of a party's entitlement to the correct decision. Plainly it does in some cases. For example, if someone comes upon another's land and removes timber, it is not disputed that the owner has the legal right to recover damages for the trespass, even though the intruder may have believed in good faith that the land was his own (assuming, of course, that the statute of limitations has not run, and that procedural and jurisdictional requirements are properly met). But suppose a tenant comes before a court seeking recognition of an implied warranty of habitability. Suppose further that the courts in his state, as in most states, have consistently applied the common-law *caveat emptor* rule that denies the existence of any such implied warranty. Does it make sense to say that the tenant has the *legal right* to have the court recognize the implied warranty when no decision in the jurisdiction has yet done so? The tenant can be expected to argue that the "better view" adopted by the more "enlightened" jurisdictions calls for the abandonment of the common-law rule, and he may present a "Brandeis brief" in support of his contention. But it would hardly avail him to contend that the *present* law entitles him to a favorable decision. His claim, rather, is that the court *ought* to recognize the implied warranty of habitability doctrine—not that the court has the *duty* to do so. Surprisingly, this is a distinction that Dworkin himself has urged:

Sometimes we say that on the whole, all things considered, one "ought" or "ought not" to do something. On other occasions we say that someone has an "obligation" or a "duty" to do something, or "no right" to do it. These are different sorts of judgments: it is one

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134. For a general discussion of this area of landlord and tenant law, see Annot., 40 A.L.R.3d 646 (1971).
thing, for example, simply to say that someone ought to give to a particular charity and quite another to say that he has a duty to do so. . . . It is easy to think of cases in which we should be prepared to make the first . . . [claim], but not the second.135 Yet it is this very distinction that Dworkin has failed to respect in his thesis that a litigant always has a right to the uniquely correct decision. For to contend that judges always have a duty to decide a lawsuit in one particular manner seems to ignore the way in which lawyers ordinarily argue and talk about hard cases. Even assuming, arguendo, that there is some soundest theory of law, it does not follow that the soundest theory will always establish “duties” for a judge in lieu of “oughts.” In short, common parlance, though admittedly not dispositive, belies the assumption that the soundest theory will only dictate duties to a judge.

Finally, it is appropriate to consider one last argument, proffered by Sartorius, in defense of the thesis that a judge should always consider himself under a duty to arrive upon the correct decision:

Even if a correct philosophical account of the judicial decision process implied that a case might arise in which the issues were so finely balanced that there would be no one uniquely correct decision, it would not follow that in any particular case a judge would be entitled to act as if there was no uniquely correct decision . . . . Since there is a uniquely correct decision in the vast majority of cases, the lack of a judicial criterion for identifying those in which there is not implies that a judge would never be entitled to treat a case before him as one in which there was no uniquely correct result, for in all probability it will not be.136

This argument implicitly admits the substance of the criticisms above, but attempts to deny that they have any practical effect. The fallacy of this argument is not difficult to detect. It is easy to concede that there are clear legal rights on the part of the litigants in most cases and correlative duties on the part of judges. Hence, Sartorius is correct in asserting that there will probably be one correct decision in any randomly selected case. He has not proved or even unequivocally asserted, however, that there is a uniquely correct decision in the vast majority of hard cases. And this is precisely what must be shown to justify the inference that a judge should always treat a hard case as if there were, in fact, a uniquely correct decision.

135. Social Rules and Legal Theory, supra note 3, at 857. Another writer has also referred to a distinction between “ought” and “obligation” and has suggested that in hard cases it only makes sense to speak of “the correct decision which the judge ought to reach.” Sartorius, supra note 5, at 172-73 (emphasis original).

136. Sartorius, supra note 5, at 158-59. See Sartorius, supra note 19, at 185. At one point Dworkin remarks, “[t]he law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.” Hard Cases, supra note 3, at 1094 (emphasis added). Might Dworkin have this same kind of argument in mind?
To rebut the rights thesis, however, is not to dismiss Dworkin's central insight that judging is different from legislating in some very important respects. As Dworkin explains,

The legislator may very often concern himself only with issues of background morality or policy in deciding how to cast his vote on some issue. He need not show that his vote is consistent with the votes of his colleagues in the legislature, or with those of past legislatures. But the judge very rarely assumes that character of independence. He will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past. A judge is bound by the history of Anglo-American institutions and laws in a way in which a legislator is not. This limitation is contained in the doctrine of precedent, which, as Dworkin suggests, is justified most completely by the "fairness" requirement that like cases be treated alike. A court must consider "whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second." That is, the courts can only be "fair" by respecting in some sense the principles and justifications offered in prior opinions.

It is proposed in this final section that judgments of legal obligation in judicial decision-making are universalizable, and that the constraint placed upon judges can best be viewed as an institutional requirement that judges respect the universalizability of prior decisions. In its basic form, the universalizability of legal judgments is a relatively simple thesis. If one person has a legal obligation to perform (or forbear from performing) a certain act, then any other person has a legal obligation to perform (or forbear from performing) the same act in relevantly similar circumstances; if a rationale or justification is effective in one case, then it must be effective in other cases that are relevantly similar. In the literature of moral philosophy, the universalizability of moral judgments is a view most closely associated today with R. M. Hare, and one widely shared by contemporary moral philosophers.

137. Hard Cases, supra note 3, at 1090.
138. Id. at 1090-93. See note 130 supra.
139. Id. at 1091.
140. Cf. Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics, and Fundamental Law 3, 27 (1961) (a "principled decision" is one "that rests on reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result that is involved").
For purposes of this Note, it is necessary only to consider the basic elements of Hare’s position. He argues that “the meaning of the word ‘ought’ and other moral words is such that a person who uses them commits himself thereby to a universal rule.” Hare’s thesis is thus a logical one, in that it concerns the meaning of words; it is not a substantive moral position. Hare explains that “[i]f a person says ‘I ought to act in a certain way, but nobody else ought to act in that way in relevantly similar circumstances,’ then, on my thesis, he is abusing the word ‘ought’; he is implicitly contradicting himself.” The moral neutrality of the universalizability thesis can perhaps be better understood by noting that malevolent “moral” judgments are just as universalizable as benevolent moral judgments. For example, if X says that Y should be imprisoned because Y renders assistance to the needy, then X has committed himself to the universal rule that anyone who renders assistance to the needy should be imprisoned. And, if X were himself to help the needy, he could not, without logical inconsistency, deny that he too should be imprisoned.

Hare, however, takes the position that judgments of legal obligation are not universalizable because “a statement of law always contains an implicit reference to a particular jurisdiction; ‘It is illegal to marry one’s own sister means, implicitly, ‘It is illegal in (e.g.) England to marry one’s own sister.’” Nevertheless, one can grant this point and still maintain that legal judgments are universalizable within a given jurisdiction or legal system. Hare, in fact, seems willing to accept this at one point in his book when he says that “a judge cannot say, without self-contradiction, ‘I ought to treat cases X and Y in different ways, though the facts of the cases are identical.’”

Since universalizability is a logical thesis, it supplies no substantive content for a jurisdiction’s legal rules and principles. Nor does the thesis explain when circumstances are “relevantly similar.” Nonetheless, universalizability is a significant thesis as applied to the legal reasoning of judges, for it helps to explain why judges ordinarily feel compelled to respect a prior decision and, if possible, to distinguish that decision on relevant grounds from the case to be decided. In short, the thesis of universalizability elucidates the institutional con-

143. R. HARE, supra note 141, at 30 (emphasis added). By a “universal rule” Hare means one that contains no reference to a particular individual. See Hare, supra note 141, at 295.


145. R. HARE, supra note 141, at 32.

146. Id. at 36.

147. Id. at 124.
straint placed upon judges in the form of the doctrine of precedent, and hence accounts for the degree of flexibility judges have in deciding hard cases. Moreover, because universalizability is a logical and purely formal thesis, it justifies the practice of treating like cases alike, without relying upon the vague and undefined moral requirements of "fairness" (as does Dworkin).

The practice of universalizing legal judgments is not entirely similar to an analogous practice in moral reasoning. When a judge decides a case, he must consider his prior opinions, particularly when they have the force of "holdings." As Hare has said, a judge cannot admit that the facts of two cases are identical and then proceed to decide them differently. Up to this point, a judge's universalization is very much like an individual's universalization of his particular moral judgments. A judge, of course, is not bound simply by his own prior decisions, but by the prior decisions of other judges in his jurisdiction. In a sense, then, it might be said that a judge must consider these other judges as his alter-egos. Speaking on behalf of the court, he must universalize the prior decisions of these other judges as well as his own.

This conception of adjudication in terms of universalization does not require a slavish and mechanical adherence to prior cases, for it does not compel a judge to make his decision congruent with the greatest number of prior holdings and other provisions of law, as Dworkin and Sartorius at times appear to suggest. Universalizing a decision does not necessarily mean that if rule r has been applied in case A, then r must be applied again in case B, where A and B bear some similar factual circumstances. For while A and B may share certain similarities, they may also possess certain dissimilarities that justify a refusal to apply r in B. In such a situation it could be said that r is "applicable" to B, but that "its application is not warranted." But if the reasons r was applied in A are equally effective in B, then universalizability requires a judge to apply r in B as a matter of logic. Obviously whether the reasons are effective in B requires a good deal of perspicacity on the part of the judge. Accordingly, the process of universalization can in no sense be thought of as purely mechanical.

148. See text at notes 137-139 supra.
149. See text at notes 161-165 infra.
150. See text at note 147 supra.
151. Cf. Sartorius, supra note 19, at 178-79 (speaking of existing decisions and rules as "initial commitments," the departure from which a judge must attempt to minimize).
152. See generally section II supra.
153. See Winston, supra note 144, at 17-23.
The doctrine of universalizability does not preclude a court from occasionally overruling prior decisions. The judicial duty to respect universalizability derives in large measure from the societal need to have laws upon which citizens can rely with reasonable certainty. Because this need is satisfied if courts follow prior precedent in the vast majority of cases, the duty to respect universalizability need not be so rigidly applied as to prohibit courts from retracing their steps on rare occasions and discarding prior decisions that no longer seem correct. On the other hand, it should be pointed out that the overrulings of a prior case need not always involve a violation of universalizability. In fact, the doctrine of universalizability may in some situations mandate that an earlier holding be invalidated. A court might decide one case by weighing certain goals and rights. Over time, the relative weights of these goals and rights might be altered by changed conditions. A later court faced with a relevantly similar factual situation might therefore be in accord with the dictates of universalizability by weighing the same goals and rights and yet, because of the changed conditions, may arrive at a decision so contrary to the prior one that an overruling is required.

This brief discussion of the universalizability thesis may explain what prompted Dworkin to contend that judges should ground their decisions on principles rather than policies. He may have been attempting to show that judges must reason only from universalizable judgments (although he does not use this expression). There is some evidence in *Hard Cases* that supports this view. Dworkin says, for example, that there is a requirement of "distributional consistency" in the case of arguments of principle, not present when policy arguments are at issue.\(^{154}\) By this he seems to mean that a principle, but not a policy, must be consistently applied in like cases.\(^{155}\) In another place, Dworkin states a view that seems to coincide with the universalizability thesis:

> If it is acknowledged that a particular precedent is justified for a particular reason; if that reason would also recommend a particular result in the case at bar; if the earlier decision has not been recanted or in some other way taken as a matter of institutional regret; then that decision must be reached in the later case.\(^ {156}\)

Several criticisms of Dworkin's distinction between principles and policies were considered in section I. At this point it is possible to recast one criticism in somewhat different terms. Dworkin believes that judges ignore the dictates of universalizability when they take social goals into account. He reasoned accordingly, that judges must

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156. *Id.* at 1093.
consider only principles, which he takes to be exclusively universalizable. But legal judgments based on policy considerations are equally universalizable. If it is right to decide a certain case by balancing certain goals, then it is right to decide on the basis of the same goals when a similar case arises. For example, in *Boomer v. Atlantic Cement Co.*,\(^\text{157}\) the New York Court of Appeals found that a pollution nuisance created by defendant cement plant resulted in substantial damage to plaintiffs' nearby properties. Yet the court discarded the prior New York rule and refused to issue an injunction in view of its concern for the serious economic dislocations that the community might suffer if the plant were closed down. Surely, the *Boomer* court's decision is grounded on what can only be called policy considerations. Yet there is no difficulty in universalizing the court's judgment. After *Boomer* a New York Court should not enjoin a nuisance without first weighing the possibility of serious economic detriment to the community.

The objection to Dworkin's distinction between principles and policies can now be more clearly stated. Dworkin mistakenly believes that universalizability can only be respected if the content of what judges can properly consider is limited to rights. Thus, he states that "[t]here can be . . . no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises."\(^\text{158}\) Yet judgments based on both rights and goals are universalizable and can be considered by judges in their adjudications as long as subsequent courts appeal to the same kinds of rights and goals in similar cases.\(^\text{159}\)

Universalizability also places in better perspective Dworkin's claim, with which this Note agrees, that there are constraints placed on judging that are not placed on legislating.\(^\text{160}\) Legislators, qua lawmakers, have little or no institutional duty\(^\text{161}\) to judge (that is, vote) the same way in relevantly similar circumstances.\(^\text{162}\) Thus, for

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\(^\text{158}\) *Hard Cases*, supra note 3, at 1092.

\(^\text{159}\) Cf. Sartorius, supra note 19, at 180 ("[I]t is not any social policy but only those policies and principles which are established in prior judicial obligations, or which may be derived from those which are so established, which provide good reasons for judicial decisions").

\(^\text{160}\) See text at note 137 supra.


\(^\text{162}\) Constitutional restraints, of course, serve to limit legislative arbitrariness, and to this extent impose institutional duties upon legislators.
example, Congress one day may choose to “bail out” Lockheed from its financial difficulties and the next day refuse to “bail out” New York City from threatened default even though it believes that the two situations are relevantly similar. Of course, when a legislator ignores the requirements of universalizability in this manner, he in effect makes logically contradictory judgments (assuming, \textit{ex hypothesi}, that the two cases are relevantly similar). A judge, on the other hand, has a relatively powerful institutional duty to respect universalizability in adjudicating, a duty that perhaps springs in part from the fact that the law can serve as an action-guide only if there is an over-all consistency in the rationales that judges assert in their opinions. The principle of stare decisis is simply a label for this institutional duty.

Yet, there is nothing inherent in the requirement of universalizability that always entitles one party in a civil lawsuit to judgment in his favor. It is true that judges are bound by an institutional duty to respect the reasons given for decisions in prior cases, and, to this extent, cannot assume the role of “deputy legislators.” But Dworkin claims too much in supposing that the requirements of universalizability engender a gapless system of entitlements on behalf of litigants. The thesis of universalizability does not suggest that there is some soundest theory of law, nor that there is always a uniquely correct decision. From time to time judges will inevitably differ on what \textit{counts} as a relevant similarity or difference between cases. Furthermore, just which reasons and justifications are the actual grounds for prior decisions will often be a matter of interpretation, about which there may be disagreement. Therefore, different judges can, on occasion, be expected to universalize prior cases in different ways. In such cases it makes little sense to speak of a court as being under an institutional duty to decide in one particular way, or, correlative, to say that a party has a right to a particular decision. Universalizability simply requires a judge, when he is reasoning his way to a decision in a hard case, to reconcile his decision with whatever he considers to be similar cases in precedent, and to determine whether the reasons given in the prior cases apply to the case he is judging. But unless the authorities are very clear and persuasive (in which circumstance he is presented with an easy rather than a hard case), there will not always be one correct decision that is objectively justified to the exclusion of all other possible decisions.

Dworkin’s fallacy has been to suppose that the law must be conceived as a seamless web of entitlements if judges are not to be taken as quasi-legislators. In proposing the thesis of universalizability of legal judgments, this Note has attempted to describe a middle ground.