Distribution Agreement

In presenting this thesis as a partial fulfillment of the requirements for a degree from Emory University, I hereby grant to Emory University and its agents the non-exclusive license to archive, make accessible, and display my thesis in whole or in part in all forms of media, now or hereafter now, including display on the World Wide Web. I understand that I may select some access restrictions as part of the online submission of this thesis. I retain all ownership rights to the copyright of the thesis. I also retain the right to use in future works (such as articles or books) all or part of this thesis.

Jaden Lessnick March 30, 2020

Principled Formalism: The Hart/Dworkin Debate's Lessons for Judicial Adjudication

by

Jaden Lessnick

Dr. Judd Owen
Adviser

Department of Political Science

Dr. Judd Owen

Adviser

Dr. Danielle Jung

Committee Member

Dr. Andrew Kazama

Committee Member

2020

Principled Formalism: The Hart/Dworkin Debate's Lessons for Judicial Adjudication

By

Jaden Lessnick

Dr. Judd Owen

Adviser

An abstract of
a thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of Political Science

2020

Abstract

Principled Formalism: The Hart/Dworkin Debate's Lessons for Judicial Adjudication

By Jaden Lessnick

In the coming months and years, courts will be tasked with resolving increasingly controversial and consequential cases that affect, in some way or other, every citizen. Accordingly, the process by which judges make decisions is paramount and deserves heightened scrutiny. One of the most seminal and enduring debates to consider not only the legal adjudicatory process but also the nature of law more broadly is the debate between HLA Hart and Ronald Dworkin. While this debate has been contemplated by many legal scholars, few have considered the debate on its normative merits.

This paper utilizes the Hart/Dworkin debate to normatively deliberate regarding how judges ought to make decisions. By examining Hart's discretion and Dworkin's interpretivism, I develop a set of requirements to inaugurate a new theory of judicial decision-making. In short, I conclude that judges should be bound by moral principles even if not explicitly codified in the text of the law. I adopt a constructivist approach to explain the origin of these moral principles, which recognizes morality as socially constituted. I ultimately develop a theory of "principled formalism" that explains a mechanical process by which judges ought to incorporate morality into their decision-making processes. Principled formalism is the product of lessons gleaned from a normative analysis of the Hart/Dworkin debate, and will hopefully galvanize future consideration into the methods with which judges adjudicate their controversial cases.

Principled Formalism: The Hart/Dworkin Debate's Lessons for Judicial Adjudication

By

Jaden Lessnick

Dr. Judd Owen

Adviser

A thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of Political Science

2020

Acknowledgements

I would like to acknowledge those who have dedicated their time, expertise, and support in assisting with this project. I would first and foremost like to thank Dr. Judd Owen, who provided invaluable advice and support from the very earliest stages. Despite this research being outside of his specific area of focus, Dr. Owen generously devoted additional time and effort to guide me through this process. I would similarly like to thank Dr. Danielle Jung and Dr. Andrew Kazama, who both have limited exposure to legal philosophy, yet readily agreed to serve as committee members. Both have been academic role models, and I am grateful for their willingness to participate. I am incredibly appreciative of Dr. Michael Berger, who has been a mentor in every sense of the word, both in the classroom and beyond. Thank you to Dr. Jeffrey Morrison, who instilled in me my original interest in pursuing an honors thesis. His intellect, humor, and friendship have been instrumental to my growth as a student. I would like to express my gratitude to all my friends, but especially Caroline Saba, who read numerous drafts, listened to my many ramblings, and provided emotional stability. Finally, I would like to thank my parents, who are undoubtedly the most loving and supportive people I know. I am grateful for everything they have done and sacrificed to get me to this point.

Contents

Introduction

0.1 Preamble and Target of Research

Legal philosophy has been a foundational sub-field of political theory for decades. The legal system constitutes a considerable portion of American politics, and its emphasis on procedural and substantive fairness, justice, and basic morality is metonymic of the crucial ideals upon which the political system operates more broadly. Legal philosophy today is more relevant than it has ever previously been. At a time when political polarization is intensifying and legislative gridlock is inexorable, the judicial branch is thought to be the institution least affected by partisanship because of its purported independence and reliance on democratic values such as justice rather than ideology.

The substantive issues in which the courts have jurisdiction are increasingly controversial and consequential as well. The courts have recently ruled upon, and will have to rule upon, copious contentious issues, including abortion, healthcare, immigration, education, gerrymandering, gun control, and surveillance (to name but a few). The composition of judges and justices on the courts, especially the Supreme Court, will determine the outcome of many of these cases, with far-reaching and extra-legal consequences for the vast majority of citizens. The role of judges has become more significant than at any other point in history.

Subsequent research into judicial decision-making processes has proliferated. Given the increasing relevance of the courts, many scholars have examined empirically how judges make decisions in these controversial cases (Reyes and Reyes 2019; Rachlinksi and Wistrich

2017; Capurso 1998). While a great deal of social science has sought to examine the empirical trends of the voting behavior of judges, legal philosophers have developed more theoretical conceptions of legal adjudication (Pocza 2015; Ho 2017; Bellamy 2013).

In the midst of this increased attention to jurisprudential theories of legal adjudication, there has been a debate regarding the methodological purpose and approach of legal theory, and whether it should be primarily empirical or primarily normative. The question of methodology is at its core a question regarding the epistemological purpose of legal theory (Dagan et al. 2018). Considering the purpose of legal theory is critically important. The goal of jurisprudence invokes the very question of why legal theory *matters* and how the discipline itself is worthy of study and engagement (McIntosh 1983). Failure to answer the question "why perform legal theory in the first place?" renders jurisprudence meaningless (Culver 2011). Some scholars contend that jurisprudence should be primarily conceptual in nature and defend the value in developing notions of what the law *is* (Guest 2016; Himma 2015). For these scholars, the most valuable scholarship produces a clear conceptual understanding of empirical phenomena. In contrast, other scholars suppose that the purpose of legal theory is normative. These intellectuals are concerned with what the law *ought to be* rather than what the law conceptually *is* (Leiter 2003; Dagan et al. 2018). They primarily insist that purely conceptual jurisprudence lacks utility if it is unable to make normative recommendations for improvement.

Normatively driven jurisprudence is increasingly appropriate in the contemporary context. Given the incredibly controversial and consequential cases judges will be faced with, simply describing judicial decision-making is insufficient. Empirical theory is useless if it is unable to inform specific interventions or recommendations. As such, developing a normative theory of judicial adjudication is not only appropriate, but necessary.

Accordingly, this paper will construct a normatively desirable process for judicial decision-making that can be applied to all legal cases. Answering the question "how should judges make decisions?" is a necessary first step in ensuring that the legal cases of our time

are judiciously adjudicated in accordance with democratic principles of fairness, justice, and equality. It is essential to note that this new theory of law, which I term "principled formalism," will necessarily be preliminary. The goal of this research is not to set forth a final, complete theory of judicial adjudication, but is instead to lay the groundwork for future research around this question. Further, this research will demonstrate one (of many) potential process to construct a normative theory of judicial decision-making. Its process is instructive in informing future interventions into this area of scholarship, regardless of the specific theory of law developed in this thesis.

0.2 The Hart/Dworkin Debate

Of those who have constructed theories of either law or judicial adjudication, HLA Hart and Ronald Dworkin are perhaps the two most influential and well-regarded. The debate between Hart and Dworkin is astounding in both its longevity and depth. Ever since Hart's *Concept of Law* in 1961 and Dworkin's *Taking Rights Seriously* in 1977, the jurisprudential community has been infatuated, provoked, and divided by the debate. This debate's centrality to legal philosophy cannot be overstated. The primary point of contention between the two thinkers is whether morality is an essential feature of law or whether moral considerations are conceptually distinct from legal systems. Hart is considered a legal positivist because he believes the law is posited by social construction (Starr 1984; Adler 2006). Because law for Hart is primarily a matter of procedure, "law and morality occupy two entirely distinct intellectual domains" (Friedlander 2011, 1390). In contrast, Dworkin believes that morality is an intrinsic component of law (Adler 2006, 725).

The disagreement between Hart and Dworkin is most clearly demonstrated in their competing explanations of judicial decision-making (Soper 1977; Mandel 1979). For Hart, when the law is ambiguous, judges possess broad discretion to adjudicate cases according to methods they believe are most appropriate (Hart 1979, 462). In contrast, Dworkin be-

lieves judges are bound by moral principles even when the text of the law is indeterminate (Dworkin 1977, 23). Dworkin explains that judges do and should weigh the competing moral considerations that may be present to resolve textual uncertainty. Accordingly, Dworkin's theory of judicial decision-making has been termed "interpretivism" (Stavropoulos 2017, 2085; Winter 2015, 463). Despite the debate's age, it remains a foremost controversy in legal theory and represents an opportune starting point for considering how judges should engage in decision-making.

In fact, the literature remains split regarding the "winner" of the debate. A number of scholars believe Hart's conceptual theory of law is superior to that of Dworkin's given the empirical record of judicial decisions that often eschew morality (David 2004; Gamwell 2015; Gur 2018; Winter 2015; Yanal 1985). Nonetheless, the number of theorists who believe Dworkin emerges victorious is equally as impressive. Many believe that Hart misinterprets the judicial record (Stavropolous 2017), while others level critiques of moral nihilism against Hart's separation of law and ethical principles (McIntosh 1983; Zipursky 2008).

Yet, the majority of literature on the debate considers which conception of law is most descriptively accurate rather than normatively desirable. In fact, some experts have noted that "the field has been preoccupied by a question that is poorly formed" because it formed around a debate that is no longer relevant for contemporary jurisprudence, and accordingly the "time has come to set it aside and take up a better one" (Hershovitz 2015, 1163). Many believe that the "the debate between Hart and Dworkin has grown stale as a matter of descriptive analysis. This may be partially due to the lack of a fully realized theory of normativity. Future inquiries into jurisprudence, therefore, should focus on the sources of normativity, legal principles, and moral obligations - a type of metajurisprudence that will enhance our knowledge of the law as a whole" (Friedlander 2011, 1416).

A normative approach to the Hart/Dworkin debate imbues the contestation with new purpose not previously considered. Rather than trying to simply obtain an empirically valid conception of the law, this novel approach to a decades-old debate emphasizes the

external utility of jurisprudence. This innovative approach yields crucial insights for real-world application and makes the dispute relevant once more. Those who have accused the debate of being increasingly irrelevant do so based on a conception of legal philosophy that limits its real-world utility (Hershovitz 2015). In other words, those who disparage the debate do so from within the descriptive methodological frame, which possesses limited utility for informing real-world interventions. The staleness and irrelevance critiques both dissipate once the debate is finally approached on normative terms.

The debate between Hart and Dworkin is the most appropriate starting point for considering how judges ought to make decisions. Political and judicial utility aside, scholars recognize the theoretical and academic value of the debate. Michael Mandel is worthy of quoting at length when he writes,

> The [debate] between Dworkin and Hart, as I hope to demonstrate, is actually about nothing less than what is important in the study of law as a branch of social theory. To ask the nature of legal rights in this context is in fact to ask what about legal rights *matters*—what is worthy of attention and inquiry, whether empirical, moral, political, or historical. It is even to ask *who counts* out of all the possible social actors and to whose concerns attention should be given in the understanding of legal rights (Mandel 1979, 58).

This realization not only emphasizes the contemporary relevance of the debate, but also reveals the importance of a normative methodology. If the debate between Hart and Dworkin is so far-reaching that it invokes questions such as "who counts," normative considerations must be at least *part* of the criteria to help resolve the debate. As such, the debate is far from stale, but reveals new methodological and substantive insights that are imperatively relevant today. The Hart/Dworkin debate provides a useful starting point for responding to the most consequential and far-reaching questions and problems of our political context, especially including how judges make decisions.

Chapter 1

Hart's New Legal Positivism

To understand Hart's account of judicial decision-making, it is first necessary to comprehend his description of the law (or, more precisely, his analytical tool for identifying whether something *is* law). Hart distinguishes his jurisprudential theory from legal theorist John Austin's conception of positivism. Austin's positivism recognizes law as a system in which a supreme sovereign issues general, threat-backed orders that are habitually obeyed by the population. It is against this "command model" of law that Hart develops his own legal theory.

1.1 Primary and Secondary Rules

Under Austin's command model, law is generally conceived as an imposition of obligation upon the general population (Hart 1961, 80). Like Austin, Hart begins with the concept of legal obligation, but concludes that Austin's model is incomplete insofar as the concept of legal obligation does not capture in its entirety a valid description of the law. In other words, there are components of law that are not commands, but are rather procedural guidelines.

For Hart, the law is composed primary and secondary rules. Hart explains, "Rules of the first type impose duties; rules of the second type confer powers, public or private" (Hart 1961, 81). In this sense, primary rules are similar (but not identical) to Austin's "command"

as they create some obligations for behavior that are not voluntary. Secondary rules are the "power-conferring" procedures that specify the ways in which law can be created or altered, and who possesses the authority to make these changes. Hart does not claim that everything that *is* law is either a primary or secondary rule, but instead notes that the union between primary and secondary rules is a heuristic that helps clarify instances of law that have evaded specific identification or definition. These primary and secondary rules form the foundation of Hart's theory, and the various implications of each will be considered in turn.

1.1.1 Primary Rules

Primary rules create some mandatory requirement for behavior. Hart supposes, however, that the law is more than a simple command. To demonstrate that the law refers to a system beyond threat-backed orders, Hart differentiates between having an obligation and being obliged to do something. According to Hart, being obliged "is often a statement about the beliefs and motives with which an action is done" (Hart 1961, 82). A victim of an armed robbery, for example, is obliged to hand over his or her money because he or she believes that significant harm would accompany a refusal. The harm is significant and credible enough to cause the victim to be obliged to hand over the money. If the threat was harmless or unlikely, the victim would not be obliged to give money to the gunman. Being obliged to do something is largely consequential, as it is a prediction about the sort of consequence that will occur from defection. Austin's command model relies upon this concept of being "obliged" insofar as people adhere to the law for fear of punishment for defection.

In contrast, an obligation confers an intrinsic or internal duty. For example, "the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience" (Hart 1961, 83). While this linguistic distinction may at first appear pedantic, Hart uses it to meaningfully distinguish from Austin his own theory. Here, Hart notes that rules imposing obligations are not solely

related to whether or not one believes he or she will be legally punished for infraction—instead, any number of coercive forces may be operative, such as social pressure or internal respect, remorse, or shame. Hart clarifies that "The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure" (Hart 1961, 88). It is this *internal* aspect of rules that distinguish them from the simple concept of a command reliant solely upon a consequential prediction about the likelihood of punishment for disobedience.

Primary rules may be legal or non-legal. Simply conferring an obligation is insufficient to characterize a rule as law. For example, there is certainly a primary rule in American society against lying. It is largely enforced by social pressures or internal feelings of guilt and shame when one violates this rule. The fact that any number of people may have violated this rule is irrelevant in identifying it as a rule, because it ostensibly carries with it at least some external social pressure for conformity. For example, a parent verbally reprimanding a child for lying is exerting upon that child social pressure to conform to the general principle that one should not lie. However, we surely would not recognize this pressure against lying as a law (except cases in which social pressure lying has specifically been incorporated into law, such as perjury). These specific instances do not confer a general *legal* obligation upon citizens to always tell the truth, demonstrating that primary rules are not themselves sufficient to be considered law. This limit is where Hart turns to secondary rules.

1.1.2 Secondary Rules

While primary rules may be legal or non-legal in nature, Hart uses secondary rules to identify when primary rules can rightly be considered law. Hart recognizes three issues with primary rules alone as constitutive of a legal system. The first problem is uncertainty. The nature of language and primary rules ensures that there will inevitably be some indeterminacy regarding the actual content or scope of the rules. Let us return to the rule against lying. The general societal rule is not uniformly understood (i.e. there is not a singular definition of

"lying" that applies external and internal pressure amongst all individuals in society equally). What exactly constitutes lying? Can intentional omissions of truth be considered lies? This general uncertainty makes primary rules insufficient on their own to comprise a legal system (Hart 1961, 91). Accordingly, secondary rules must provide some metric for identifying when a primary rule crosses into the realm of law.

Second, the "static" character of rules makes necessary the presence of secondary rules (Hart 1961, 92). Under the primary rules model, only slow progress or change will alter people's obligations—the social nature of primary rules therefore stunts transformation. In a society with only primary rules, change in obligations only occurs "whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed" (Hart 1961, 92).

The final defect is the inefficiency of social pressure in maintaining conformity to the rules (Hart 1961, 93). Feuds as to whether a rule has been violated may continue *ad infinitum* without some authoritative actor charged with settling these disputes. Because society is diverse and may interpret various situations in divergent ways, an authoritative process is needed for identifying and sanctioning infractions.

Secondary rules are named as such because they refer to the primary rules themselves. The secondary rules are all, in a way, power-conferring rules, because they "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" (Hart 1961, 94). The intersection of primary and secondary rules creates the basis for a functioning and recognizable legal system. These secondary rules are broken up into three general categories that correspond to the defects of the solely primary rule system explained above.

Rules of Recognition

A "rule of recognition" is a rule that allows people to identify a primary rule as legally binding. Rules of recognition resolve the uncertainty concern by authoritatively establishing that a "suggested rule is...a rule of the group to be supported by the social pressure it exerts" (Hart 1961, 94). There are many potential forms of a rule of recognition depending on the society in which the secondary rule functions. For example, a rule of recognition may simply be an aggregated list of all of the primary rules to which members of that society are beholden, such as the U.S. Constitution. Hart elaborates, "This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions" (Hart 1961, 95). For example, in the American legal context, the passage of primary rules by the federal legislature constitutes a rule of recognition because the federal legislative process provides identification of the validity of a primary rule. In a society in which a leader (such as a monarch or dictator) has sole and unlimited legislative power, the rule of recognition is merely that a primary rule originated from that leader.

This intersection of primary rules and the rule of recognition constitutes the establishment of a legal system. The primary rules are unified by the rule of recognition, thereby creating a sense of legal validity. In other words, primary rules identified by a rule of recognition have a legally valid quality that primary rules of recognition extrinsic from the rule of recognition do not. These external primary rules are therefore extra-legal, while the combination of primary rules and rules of recognition constitutes the essence of a legal system.

Rules of Change

"Rules of change" are a simple way to avoid the staticity concern. Rules of change (self-evidently) provide the procedures for creating, changing, or removing primary rules. These rules can and do specify which body is allowed to change primary rules, such as how the U.S. Constitution grants Congress legislative power. Here, it is possible to see the departure from the command model because these rules of change are *not* commands backed by threats

but are instead power-conferring. The connection between rules of recognition and rules of change is highly pertinent. Rules of change reference (either explicitly or implicitly) rules of recognition insofar as they provide guidelines for enacting rules that are valid under the rules of recognition. For example, a bill debated in the U.S. Congress could not be considered law if passed only by the Senate but not the House. These rules of change allow for the valid establishment, amendment, or removal of primary rules. Rules of change further signal the presence of a legal system by specifying a procedure for legitimate rulemaking.

Rules of Adjudication

"Rules of adjudication" are the secondary rules most responsive to the inefficiency defect. They vest in individuals the authoritative power to make judgments about whether a primary rule has been violated (Hart 1961, 97). This power-conferring rule of adjudication specifies the range of judicial jurisdiction and may set forth procedural requirements, but for Hart, these rules do not impose a *duty* or *obligation* upon judges as a primary rule would. These rules are also, in a sense, rules of recognition. If courts are called upon to discern whether a particular rule has been violated and therefore to reconcile indeterminacy and confusion, the courts are making judgments about *what the rules are*.

1.1.3 The Junction of Primary and Secondary Rules as Law

In total, it is possible to see how a hypothetical society of solely primary rules could not be considered a legal system. In contrast, the junction of primary and secondary rules lays the foundation for a recognizable legal scheme. Primary and secondary rules are heuristics that allow for a clear identification of what exactly constitutes law. Further, it is now apparent why Hart is considered a positivist insofar as his legal theory understands law as a set of socially constructed primary and secondary rules. This social construction will become highly relevant for Dworkin's departure from Hart and remains a central contention in the Hart/Dworkin debate.

1.2 Law vs. Morality

It may initially appear that the concept of an "obligation" is itself a moral statement. For example, it may be possible to recognize the prohibition against lying as a sort of moral requirement because it is based on some determination about appropriate human behavior. Hart acknowledges that moral and legal obligations "are alike in that they are conceived as binding independently of the consent of the individual bound and are supported by serious social pressure for conformity" (Hart 1961, 172). Nevertheless, Hart separates morality from legal obligation in four important ways. The claim that morality and law are related but distinct concepts is the central source of disagreement between Hart and Dworkin, so developing a clear comprehension of the differences between morality and law is essential to understanding the debate itself.

Importance

Law differs from morality in importance. Of course, a great many laws have "importance" insofar as they have significant implications across a range of issues—however, the relative importance of a law is independent from whether or not something *is* law. For example, Hart explains that, in 1944, a woman in England was prosecuted under the 1735 Witchcraft Act for telling fortunes (Hart 1961, 61). This primary rule was passed legitimately in accordance with the relevant secondary rules, securing its status as "law." Nevertheless, the historical lack of enforcement of this act demonstrates that it is contemporarily unimportant, but *technically* retains legal force, and can be appropriately recognized as law.

A perhaps more recognizable example is the enforcement of the speed limit. Law enforcement officers will typically ignore motorists going 5-10 miles per hour over the speed limit, even though doing so violates the law. In these instances, the law is of relatively low importance except in the instance of an egregious infraction. In contrast, however, "It would...be absurd to think of a rule as part of the morality of a society even though no one thought it any longer important or worth maintaining" (Hart 1961, 175). Importance is

therefore an essential and intrinsic element of morality, but not of law.

Immunity from Deliberate Change

The rules of change demonstrate the ways in which rules can be passed, updated, or removed more expediently than by simple social progression. This deliberate lawmaking is distinguishable from morality because moral principles are unable to be artificially and intentionally modified in this way. The lawmaking body of a society does not have the power to determine that a certain behavior is moral. Moral considerations are derived solely through social attitudes and are thereby mutable only through the slow process of social progression rather than legislative enactment (Hart 1961, 175).

Voluntary Character of Moral Offences

While *mens rea* (guilty mind) is a component of the criminal justice system meant to exclude from punishment those without the mental capacity to adhere to law, the intentionality of one's behavior is largely irrelevant to the question of whether or not he or she is culpable for legal transgression. The excuse that "I didn't realize I was speeding," even if genuine, does not excuse the motorist from the conclusion that he or she violated the law. Conversely, if a person proves that he or she was genuinely unable to avoid violating a moral commitment, that person is excused from culpability. In other words, "Moral blame is excluded because he has done all that he could do...It is therefore clear that legal responsibility is not necessarily excluded by the demonstration that an accused person could not have kept the law which he has broken; by contrast, in morals 'I could not help it' is always an excuse" (Hart 1961, 178-179).

The Form of Moral Pressure

Finally, the form of pressure for adherence differs between laws and morals. One possible pressure for conformity to rules is based on internal characteristics, such as feelings of guilt

or shame for violating said rule. However, this internal pressure is not the sole force exerting pressure on an individual to conform to rules. Social pressure and even external threats of sanction can force conformity to a particular rule (such as the threat of being given a ticket for speeding). In contrast, moral pressure is exerted by an appeal to the intrinsically valuable characteristics of the moral principles in and of themselves (Hart 1961, 180). The reasons for adherence to law and moral principles differ, thereby further distinguishing legal rules from moral obligations.

1.3 Discretion

So far, we have established a general conceptual understanding of Hart's law as posited by social construction and acceptance (ergo, positivism). Comprehending law as the union of primary and secondary rules provides a more complete explanation for even auxiliary components of law. It is apparent that, in most recognizable modern legal systems, the intersection of primary and secondary rules is textual in nature. The American system, for example, textually codifies legislation, and even judicial opinions are written. This understanding makes law more recognizable but comes at the cost of instances of indeterminacy. Because law is *linguistic* for Hart insofar as it is written or even spoken, it is "open textured" (Hart 1961, 127). In other words, expressing the totality of one's intent via language is impossible because of ambiguity in terminology, application, grammar, and so on. Communication inherently engenders uncertainty in comprehension.

To elaborate, Hart hypothesizes a legally valid statute prohibits the use of vehicles in a park (Hart 1961, 127). However, its range of application is ambiguous because of linguistic imprecision and limitation. Certainly, the statute prohibits the operation of an automobile or a motorcycle in the park. Less obvious, however, is whether the phrase "vehicle" can be defined to, or was intended to, include bicycles, roller skates, strollers, and so on (Hart 1961, 126). In a hypothetical case pertaining to this law, a judge must answer the question of

whether strollers are vehicles under this statute.

This situation is what many jurisprudential scholars refer to as a "penumbral case" because the law falls under a "penumbra of uncertainty" regarding its substance (Friedlander 2011, 1394; Hart 1961, 12). Assuming no prior precedent has defined what constitutes a "vehicle," the judge must "exercise his discretionary power and create law for the case instead of merely applying pre-existing settled law" (Hart 1979, 462). Here is the crux of Hart's position with regards to judicial decision-making in penumbral cases: judges are vested power with which to create law when the law is ambiguous. In determining whether strollers are vehicles, the judge is, for Hart, creating law by further extending or applying primary rules. The judge's discretionary decision is part of the law-creating process under secondary rules of adjudication, which allow judges to determine whether a primary law has been transgressed.

In these penumbral cases, the judge is able to "[fill] the gaps" of incomplete law by exercising this discretionary but limited law-making power (Hart 1979, 462). Hart describes this process as discretionary because, while judges are bound by judicial procedure, determining the correct answer to the posed legal question is simply a matter of opinion when the law is indeterminate. In other words, the law fails to support as correct one decision over the other. The judge may correctly rule that strollers *are* vehicles, yet he may also correctly rule that strollers are *not* vehicles. Of course, this discretionary process may not be entirely arbitrary. Flipping a coin for example would be inappropriate to determine the outcome of a penumbral case, as the judge "must always have some general reasons justifying his decision...But if he satisfies these conditions, he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with a similar 'hard case'" (Hart 1979, 465). Multiple methods are available to the judge to help answer the question of whether strollers are vehicles. He or she may consider what may have been the intent of the original legislators (perhaps the statute was meant as a noise ordinance). The judge may rely on common understanding of the word

"vehicle" in concluding that vehicles are typically understood to refer to motorized modes of transportation (or perhaps coming to the opposite conclusion through the same textualist method).

Any number of judicial methods could be used to come to one answer or another—no method nor answer would be incorrect so long as the judge adheres to judicial procedure and exercises reasonable judgment. What is important, however, is that the law does not specify one method the judge must use, nor does it clearly favor one answer over another. In this sense, discretion is *extra-legal* since the substance of a decision in penumbral cases operates external from substantive legal constraints (even if *procedural* rules must be followed). For Hart, discretion is the appropriate method of judicial decision-making in penumbral cases. As a matter of law, nothing binds a judge to come to one legal determination over another when the law is indeterminate or incomplete. Judges exercising discretion are relying upon limited law-making power conferred by secondary rules of adjudication. It is against this account of discretion that Dworkin develops his theory of law and interpretivist understanding of judicial decision-making.

Chapter 2

Dworkin's Rights-Based Interpretivism

Dworkin's project does not reject in its entirety Hart's positivism. In fact, some legal scholars have gone as far as explaining that Dworkin takes the existence of primary and secondary rules for granted, and that the specific point of disagreement between the two scholars is regarding the penumbral cases in which Hart contends judges have significant discretion (Mandel 1979, 59-60). It is appropriate to consider Dworkin's thesis as additive to Hart's conception of law rather than a theory meant to usurp entirely positivism.

2.1 Principles and Policies

Before he describes his account of law, Dworkin condenses Hart's positivist thesis into three central components. For positivists, law must:

1. Have a test of pedigree (which is to say some identifiable process so that one can recognize law as valid. For Hart, this test of pedigree is a rule of recognition).

2. Have some way to resolve indeterminacy (such as rules of adjudication and discretion).

3. Be obligatory. In the absence of a legal rule, there is no valid legal obligation, and vice versa (Dworkin 1977, 17).

It is this system of rules that Dworkin contends is, at best, incomplete. According to Dworkin, the combination of these three positivist components fails to encapsulate the notion that one may possess a legal obligation even when not invoked by a specific rule (Dworkin 1977, 22). Rather than viewing the law exclusively as a set of primary and secondary rules, Dworkin understands law as composed of policies and principles. Dworkin explains that a policy is a "kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community," while a principle is 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" (Dworkin 1977, 22). While this distinction is at times weak, principles are primarily expressed in terms of individual moral obligations, while policies are justified by utilitarian considerations.

To illustrate the importance of these often-intangible principles, Dworkin introduces the 1889 New York case *Riggs v. Palmer*. Elmer Palmer was named in his grandfather's will as the heir to a large estate. Fearing that his grandfather would change his mind and write Palmer out of the will, Palmer poisoned his grandfather and sought to collect his inheritance. While this murderous action clearly offends anyone's basic sense of morality, the relevant statutes governing this case, if interpreted literally, would have obligated the court to bestow upon Palmer his inheritance. Nevertheless, the court ruled against Palmer and held contracts should be controlled by "fundamental maxims of the common law...No one shall be permitted to profit by his own fraud" (Dworkin 1977, 23).

The limits of Hart's positivist account become clear when considering adjudicatory cases of moral controversy such as *Riggs*. Recall that for Hart, judicial decisions are made in one of two ways. Either the rules are apparent and applicable, and a judge must simply apply those rules, or the law is indeterminate and a judge must use his or her discretion

to reach a conclusion. The moral implications of Hart's theory can be seen here, as Hart's rules-based account would require the court to award to Riggs his inheritance. However, the descriptive shortcomings of Hart's theory are also apparent, as the case in *Riggs* is governed by a clear and applicable statute, which is ultimately discarded by the court in favor of an argument based on moral principle.

Principles may therefore confer legal obligations despite the fact that they may not be textually codified. In other words, the principle that one should not profit from his or her own fraud is not "law" in the positivist sense because there is no rule of recognition that identifies it as such, but the principle was sufficiently strong for the judges in *Riggs* to abandon the literal meaning of the statute and enter judgment on moral grounds.

Dworkin continues juxtaposing rules and principles. Principles can contradict and therefore have "weight" that can be balanced by decision-makers. A principle, for example, that states taking the life of another is morally reprehensible can contradict with a principle that recognizes the importance of human freedom and autonomy. Freedom in the American legal system is an important value, but that does not give one the moral justification to commit murder. In contrast, rules cannot contradict. If two rules contradict, one (or both) is invalid. This demand for consistency is part of the purpose of the judiciary—reconciling or resolving incompatible rules. The speed limit cannot simultaneously be 25 miles per hour and 65 miles per hour. Rules also lack the quality of weight that principles possess insofar as they cannot be balanced (especially given the demand for consistency amongst rules). If rules are consistent, there is no need to balance them because they can all coexist in a legal schema. It may seem counter-intuitive to conclude that some rules are not more important than others. The prohibition against murder surely seems more important than the speed limit. Yet, the legal obligation imposed by each is equally binding—one's legal obligation to obey the speed limit is equivalent to his or her obligation to not murder another. One appears more important because of the underlying principles. The principle that considers murder immoral is more directly and obviously linked to the rule prohibiting murder than

the speed limit (Dworkin 1977, 27).

It is this distinction between rules, policies, and principles upon which Dworkin builds his theory and critiques Hart. The limits of positivism and the importance of moral principles can be most clearly seen in the context of judicial decision-making and interpretation because courts are the location in which legal obligations are settled and clarified. The extent to which moral principles are legally binding upon judges and citizens alike is therefore the central point of contention between Hart and Dworkin and represents an advantageous starting point for considering how judges ought to make decisions.

2.2 Weak vs. Strong Discretion

Because the greatest point of friction between Hart and Dworkin is regarding judicial decision-making, Dworkin turns next to Hart's theory of discretion. Dworkin wants to return to the ordinary meaning of discretion before discussing Hart's adjudicatory method. He recognizes three central types of discretion. The first is a weak discretion in which one is confined by some rules or higher authority but there are certain elements left up to one's own judgment. For example, if one were asked to choose the ten best men to complete a project, he or she has discretion in choosing the best ten men, but is bound by certain requirements: there must be ten of them, they must be men, and they must be the best by some metric. If one were asked to choose the best ten *people* to complete a project, he or she would have *more* discretion than in the previous scenario but is still confined by the other limitations. In the legal setting, this form of discretion refers to cases where "a determination may prove difficult...[The] judge only has discretion in the sense that the standard does not automatically produce an answer, but rather requires judgment" (David 2004, 1230; Dworkin 1977, 31). A second weak sense of discretion exists when one makes a decision that is not reviewable or alterable by a higher authority. The Supreme Court, for example, possesses discretion in this sense because there is no superior judicial body capable of overturning its decisions

(David 2004, 1230).

The third type of discretion is strong and refers to a case when decision-makers are "not bound by standards set by the authority in question" (Dworkin 1977, 34). One who is asked to select people to complete a task has strong discretion—the gender, number, and other qualities of workers is solely at the discretion of the decision-maker, unlike the weaker cases in which particular standards and limitations were imposed on the decision-maker. It is important to note that "This sense of discretion does not deny that there are rules and principles that purport to bind judges. Rather, it posits that in many cases those rules and principles are so vague and difficult to apply that, in actuality, they fail to bind judges at all" (David 2004, 1230). Dworkin attributes Hart's discretion to this third category. For Hart, when the law is indeterminate and no clear textual or statutory answer to the case at bar exists, judges are not bound to decide the case in favor of one party over another.

Dworkin, in contrast, believes that judges in actuality only possess weak discretion. Even if the text of the law is convoluted or does not legally obligate the judge to rule in one particular direction, there are other forces that still impose upon the judge a legal obligation. Because the law for Dworkin is more than rules alone (and is instead composed of principles and policies), and because principles have weight and can be balanced, judges are still bound by these moral rights. A legal obligation exists to rule in favor of whichever principle is "weightier" even if it is impossible to mechanically or textually demonstrate why one principle may be more important than another.

2.3 Adjudication in Hard Cases

Dworkin also emphasizes normative reasons why the discretion required by the rules-based conception is undesirable. Dworkin notes that in many cases, judges can and should apply the plain rules of law. These cases must satisfy two requirements. First, the rules must be clearly applicable and easy to resolve (i.e., a technically demonstrable way to justify a

decision must exist based on the language of the law of the facts of the case). Second, there must be an absence of a compelling moral principle that contravenes the literal interpretation of the text of law. *Riggs* demonstrates why this second component is necessary: the rules governing the case would have compelled the judges to rule in favor of Riggs, yet a compelling contravening principle guided the decision in the opposite direction.

Dworkin contrasts these easy cases with hard cases, or cases in which the rules are indeterminate and do not compel a particular decision. Hard cases are analogous to penumbral cases for Hart, which capture the "open texture" of the language of law. When judges are faced with a hard case, they have two options: deciding a case based on policy or based on principle. Dworkin recognizes that Hart's discretion would allow judges to make decisions through either lens because, under the discretionary approach, judges are not bound by any substantive constraints on adjudication. Dworkin, to criticize this model of discretion, critiques the fact that the positivist account of adjudication would allow judges to make decisions based on matters of policy. Because, under the discretionary interpretation, judges are literally *creating* law in a hard case, "they will act...as a deputy legislature" (Dworkin 1975, 1058). Dworkin separates his criticisms of this approach into two broad categories. First, because judges are, for the most part, unelected, they should not decide cases on matters of policy. Second, deciding a legal case as a matter of policy is an act of *ex-post* legislation that violates procedural fairness. In contrast, making decisions based on principles resolves the critiques of the policy-making perspective.

2.3.1 Objection I: Law Should be Made by Elected Officials

The critique that policy should be made by elected officials requires returning to the meaning of "policy" for Dworkin. Policies are decisions made based on promoting the general welfare of the community and are in most instances utilitarian calculations. Judges are poorly equipped to make decisions based on policy and making decisions based on principles is a more desirable approach.

Institutional Capacity

Courts are poor venues for judging issues of policy. Individual decision-makers are very rarely, if ever, capable of discerning the best course of action for the community. The institutional design of the legislature accommodates for weak this individual capacity in various ways. The representational nature of the legislature is meant to ensure that the interests of the majority of citizens are accounted for in the policy-making process. Legislators are elected based on the extent to which they are able to accurately represent the interests of their constituents. Voting represents a model of democratic accountability meant to ensure this representation—when the advocacies of a legislator diverge sufficiently from his or her constituency, the legislator is replaced by a candidate who better represents the interests of the majority in that electoral district. Democratic accountability is absent in judicial decision-making in most instances because the majority of judges are unelected.

Another way in which the legislative process compensates for the weak individual capacity to determine the best policy outcome is through the presence of special interest groups and lobbyists. This free-market approach to representational democracy ensures that those groups with the strongest majoritarian interest wield the most legislative influence. Of course, the extent to which this observation is true has become increasingly scrutinized in recent years (for example, the oil lobby's considerable influence is often derided as contravening the common goal to avert climate change). This objection actually emphasizes why matters of policy should be left to elected officials. The channels of input are far more accessible to the public than in the judicial branch. While *amicus* briefs do allow for some input into the judicial decision-making process, the lack of electoral accountability ensures that these briefs hold little power to compel judges to vote in one direction or another (Dworkin 1975, 1061).

Minority Interests

Compelling judges to make decisions based on policy rather than principles eschews one of the most important functions of the judicial system: conferring rights, especially to protect minority interests. Courts are not meant to extend the legislative process but are instead a check on that legislative power when it exceeds institutional limitations. Legislative bodies are an appropriate venue to enact the will of the majority, so courts act as a balance to protect the interests of minority groups. Because judges are isolated from electoral pressures and lobbyists, they are best suited to make decisions focused on moral principles rather than political majoritarian/utilitarian calculations. The protection of minority is valuable because it confers human dignity upon all equally by recognizing the interests of some are not superior to the interests of smaller groups. This approach requires judicial decision-making based on principle.

For example, "If some minority's claim to an antidiscrimination statute were itself based on policy, and could therefore be defeated by an appeal to overall general welfare or utility, then the argument that cites the majority's discomfort or annoyance might well be powerful enough. But if the claim cites a right to equality that must prevail unless matched by a competing argument of principle, the only such argument available may be, as here, simply too weak" (Dworkin 1975, 1074). Once one person is entitled to a right, *everyone* is entitled to that right. The extent to which that equality is enforced in the modern context is contestable, but that does not undermine the argument that judges should seek to protect political rights of all.

Strength of Rights vs. Policies

One could reasonably contend that it is possible to protect minority interests through matters of policy. Perhaps what is good for the majority is similarly good for minority groups. Nevertheless, Dworkin finds that arguments based on rights and principles are better suited for this protection of minority groups than arguments of policy. Hierarchically, rights super-

sede policies when in tension. Legal rights set the boundaries of policies insofar as a policy is unable to usurp that right. For example, a policy meant to ban outright the freedom of press would be ruled invalid by courts pursuant to rights protected under First Amendment liberties. Legal rights are also durable insofar as the passage of new legislation cannot overturn a previously established right.

Consider for a moment *Brown v. Board*. After the Court's decision mandating the desegregation of public schools, local governments refused to implement the Court's judgment. Riots abounded, and many communities remained unsafe for a considerable amount of time. If the Court had made a decision based on policy, the mere threat of riots may have been sufficient to delay, if not overturn entirely, desegregation. However, because the Court's decision was based on the conferral of rights, the temporary threat of riots and chaos did not preclude the implementation of the Court's ruling.

Rights are therefore stronger and more durable than policy-based claims. Because majoritarian decisions can and do undermine minority interests, minorities require a decision-making body not constrained by majoritarian accountability such as elections. The institutional design of American democracy ensures that courts are isolated from these political pressures, which makes the judicial branch most apt to make decisions based on moral principles rather than utilitarian policies.

2.3.2 Objection II: The Pitfalls of Retroactive Legislation

Under the discretionary model, judges *create* law in penumbral cases because of the indeterminacy of extant rules. As such, when a judge makes a decision in a hard case, he or she "makes new law and applies it retroactively" (Dworkin 1975, 1071). This application of new law *after* the fact is objectionable and lends credibility to the rights-based approach.

Function

If the purpose of law is either to discourage or encourage particular behavior, retroactive legislation undermines the ability of law to achieve that social function. Because the law is applied after a particular action, it does not recognize a prior legal obligation to which the parties were bound before the decision. Both parties were justified in their actions, as there was no legal obligation to act in a particular way given the indeterminacy of the rules. Principles, on the other hand, recognize the presence of a legal obligation even when the rules are unclear. Making a decision based on a principle signals that the parties were obligated to act in a certain way even if not explicitly set forth by the textual rules. In this way, decisions made on principle reinvigorate the social function of the law by constraining behavior even when the rules have been exhausted.

Fairness

Retroactive legislation violates procedural fairness in the judicial process. Under the rules-based model, any action is permissible when the rules are indeterminate. *Ex-post* legislation therefore makes the particular action of one party a crime only *after* the fact, despite the fact that at the time of its commission, the action was legally justifiable. This approach undermines the fairness intrinsic to the legal system because it provides no reasonable, predictable, and consistent standard for human behavior. In other words, people do not know if their actions are crimes until after a court has issued a ruling. The system of law that only applies justice retroactively undermines procedural fairness and precludes a predictable, *ex-ante* code for human behavior because no person can know in the moment if his or her actions are legal or illegal.

2.4 Background vs. Institutional Rights

Dworkin, having sufficiently criticized discretion, returns to his discussion of how rights can and should inform the adjudicatory process. He first seeks to further distinguish between principles and policies. He explains that "Principles are propositions that describe rights; policies are propositions that describe goals" (Dworkin 1977, 90). But what exactly is the difference between a right and a goal? A policy goal encourages utilitarian cost/benefit analysis to determine the maximum collective goal, while decisions based upon rights are described in individual terms irrespective of consideration for the collective societal well-being (Dworkin 1977, 94). Principles are thus individualized standards concerned with morality.

To further elucidate upon the difference between principles and policies, Dworkin disaggregates the concept of rights into background and institutional rights. A background right is a right that "provide[s] a justification for political decisions by society in the abstract," and an institutional right "provide[s] justification for a decision by some particular and specified political institution" (Dworkin 1977, 93). Background rights might provide justification for a right, but that does not mean that legal institutions have incorporated that justification into their institutional designs. For example, a judge might suppose that everyone is entitled to an equal share of the world's resources, but that does not mean American law recognizes this right. In contrast, a societal background right that recognizes the right to free speech. This background is also an institutional right because it has been textually incorporated into American jurisprudence. Institutional rights are therefore derived from background rights, and as such, are often more specific than the general societal background rights.

Further, institutional rights constrain the behavior of judges in hard cases, while background rights do not. For example, the judge who supposes there exists a background right to an equal share of the world's resources could not decide a case pertaining to theft in favor of the thief if the legal institution has not recognized this background right. Here it is apparent how Dworkin's theory differs from Hart's discretion. While Hart would allow a judge to make a decision on a background right, Dworkin's interpretivism limits the discretion

of a judge by requiring him or her to repudiate a background right if not incorporated into institutional design. In other words, institutional rights shield participants from the decision-maker's own personal background rights (Dworkin 1977, 101).

2.5 Hercules

2.5.1 Hercules and Adjudication

Now that Dworkin has discarded discretion and described more precisely the nature of rights, he illustrates the process of interpretivist adjudication he believes judges are bound by in hard cases. To demonstrate, he creates a fictional judge Hercules. Unlike his mythological namesake, Dworkin's Hercules possesses superhuman intellectual and analytic powers rather than physical strength. Hercules's power lies in his ability to develop and test different judicial theories. Hercules is a judge who adheres to the main conventions and texts of the American legal system, such as the Constitution or the concept of precedent. Dworkin constructs a dilemma about which Hercules must adjudicate. The case before Hercules concerns a legislative grant for free busing to parochial schools. The Constitution's Establishment Clause invalidates laws that establish religion, so Hercules must determine whether these grants establish a religion in violation of constitutional law (Dworkin 1975, 1084).

Hercules must first develop a political theory that justifies and fits with the Constitution. He must, in other words, identify the background and institutional rights that have supported the Constitution in general and the Establishment Clause in particular. For example, Hercules's theory cannot include a background right to the establishment of a church (Dworkin 1975, 1084). There are multiple potential background rights upon which Hercules can justify the Establishment Clause. For example, he could conclude that individuals have the right to be free from government interference in religion. He could even conclude that individuals have the right to be free from government interference in *general*, a background right that extends beyond religion. Many background rights in a vacuum could accurately

justify the Establishment Clause. In the presence of multiple plausible background rights, Hercules must return to the settled precedent and determine which of these theories fit "the constitutional scheme as a whole" (Dworkin 1975, 1084).

The settled practices of Hercules's jurisdiction lead him to the conclusion that the Establishment Clause is justified by a right to religious freedom rather than any possible alternatives. Deciding that a strong background right to religious liberty justifies the Establishment Clause still begs the question of what exactly constitutes religious liberty. Dworkin asks, "Does a right to religious liberty include the right not to have one's taxes used for any purpose that helps a religion to survive? Or simply not to have one's taxes used to benefit one religion at the expense of another?" (Dworkin 1975, 1084). If there is institutional elaboration upon this concept via precedent or statutory explanation, Hercules may use the settled practices in deciding the case at bar. However, the very quality of a hard case is that the established rules provide insufficient clarity to guide the judge's decision. Accordingly, there comes a point in which one must simply decide "which conception is a more satisfactory elaboration of the general idea of religious liberty" (Dworkin 1975, 1084). In this way, judges must use discretion in the weak sense in deciding the most appropriate conceptual elaboration, but they are still bound by moral principles as a matter of law even when the rules are uncertain.

Separately, there may be cases Hercules must decide in which rights are in direct conflict with each other. Let us consider generally the constitutionality of the freedom of speech. For the sake of demonstration, assume that, in Hercules's jurisdiction, no precedent establishes how the freedom of speech must be balanced relative to other rights. Let us also place Hercules in a fictional legal jurisdiction rather than the American context. The only difference between this new jurisdiction and the U.S. corpus of law, however, is that Hercules's jurisdiction recognizes an explicit right to be free from violence, compelling the government to pass legislation meant to prevent instances where unnecessary violence may occur. Hercules is faced with a case in which he must decide whether an individual has the

right to intentionally incite a deathly altercation with another.

As such, Hercules must decide how to balance free speech and freedom from violence. Because in this hypothetical, little precedent exists about how to balance these two principles, Hercules must turn to other methods for evaluation. First, he must decide the extent to which each right is directly relevant to the present case. In other words, to what extent would the freedom of speech be infringed upon by upholding the restriction? To what extent would the freedom from violence be infringed upon by rejecting the restriction? Hercules might start by deciding whether or not violence is likely to occur if the speech is permissible. If violence is highly unlikely, then the freedom from violence is less directly relevant to the case, while the freedom of speech is more central, and Hercules may decide to reject the restriction. However, if Hercules determines that violence *is* likely as a result of the speech, then both rights are directly relevant to the case in relatively equal proportions.

In a case where the contradicting rights are equally involved, Hercules must then engage in a moral balancing to determine the relative importance of each right. Similar to how, in the other example, Hercules had to decide which iteration of religious freedom was more valid, he now has to determine himself which right is more important. This decision is again a matter of weak discretion because Hercules makes the decision himself but is still constrained by the principles as legally binding entities.

2.5.2 Hercules and Precedent

Part of Hercules's adjudicatory process requires ensuring that his scheme of principles fits within the broader corpus of jurisprudence in his jurisdiction. Judges are in agreement that there is a sort of "gravitational force" to earlier decisions, which removes judges from the ability to be entirely independent in their perspective as they must craft decisions that generally "fit" within the extant body of legal opinions. This consistency is important, as the law is meant to provide to individuals a basis for action. People are able to act freely by knowing which behaviors are legal or illegal, which is why retroactive legislation violates fundamen-

tal principles of fairness. Precedent is important because of the "fundamental fairness of treating like cases alike" (Dworkin 1975, 1090). It is not simply the case that Hercules must make a decision whose outcome is similar to the *outcomes* of other cases. Hercules "does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent" (Dworkin 1975, 1094). In other words, the principles upon which Hercules justifies his decision must be consistent with the principles used to justify earlier cases.

2.5.3 Hercules and Mistakes

The gravitational force of precedent creates consistency that underlies the predictability of the legal system. Nevertheless, that explanation is insufficient to fully account for how judges empirically make decisions and undermines the ability to correct past mistakes or incorporate the evolution of moral principles throughout time. Consider, for example, the cases of *Plessy v. Ferguson* and *Brown v. Board*. *Plessy* established the doctrine of "separate but equal" in upholding the segregation of railway cars. This decision was used to more broadly justify racial segregation for years. Surely within a modern context this decision is recognized as morally reprehensible. Nevertheless, the judges of that era made a decision to uphold segregation by balancing principles. The concepts of equality and racial justice developed by the *Plessy* Court determined that equality could occur even in a segregated society. As societal views of segregation developed and changed, that conception of equality changed, allowing the justices in *Brown* to strike down segregation in public schools.

If precedent is absolutely binding upon judges, there would have been no way to correct the moral error of *Plessy*. Further, the very fact that judges can and do overturn precedent in some instances demonstrates the need for a theory that explains how "a justification of institutional history may display some part of that history as mistaken" (Dworkin 1975, 1099). However, Dworkin cautions that Hercules must use this theory of mistakes with serious restraint. If unreserved, Hercules's use of this theory could usurp the demand for

consistency altogether by allowing judges to overturn decisions.

Dworkin contends that Hercules must undergo a similar interpretivist process to overrule or distinguish a precedent. Hercules must show that his explanation is "a stronger justification than any alternative that does not recognize any mistakes, or that recognizes a different set of mistakes" (Dworkin 1975, 1100). Further, fairness with regards to consistency in judicial decision-making is a moral consideration, which has been previously discussed. If Hercules is to interrupt that consistency by finding a previous ruling was an error, he must believe that a particular decision was so incorrect that it would be *more* unfair to maintain the precedent for the purpose of consistency.

To demonstrate, let us return to the *Brown* example. After *Plessy*, schools had a reasonable expectation that segregated schools were legal if facilities were equal. Nevertheless, the Court in *Brown* unanimously and explicitly overturned the precedent in *Plessy*. According to Dworkin's theory of precedent and mistakes, the Court recognized (if not explicitly) that the unfairness of segregation was so severe that it outweighed the unfairness of overturning precedent upon which schools had informed their decisions to segregate.

There may be cases in which the precedent is clear, but the relevant moral principles and rights complicate the application of that precedent. Dworkin's interpretivist theory is sufficiently flexible to account for these cases while simultaneously ensuring that judges are not given so much leeway that judicial consistency becomes obsolete.

2.6 One Right Answer Thesis

Dworkin argues that, even if it is not mechanically demonstrable, there exists one right answer to hard cases (Friedlander 2011, 1397). Dworkin believes that if there was truly no right answer, hard cases could be described as a tie. In this case, there would be no valid argument determining that one party had a right to win a case over the other party. Nevertheless, empirical observation shows that this perspective is erroneous, as even in hard cases,

judges determine a "winner" and justify that decision (Van Doren 1980, 304). According to Dworkin, "there is always a right answer provided by the correct balance of the values at stake" (Ludena 2016, 2; McIntosh 1983, 718-719). Of course, that does not mean that every judge comes to the correct decision. It is certainly the case that judges may come to the incorrect conclusion if they inaccurately balance the principles. Nevertheless, that does not remove judges from their obligation to make a good faith attempt to find that right answer (David 2004, 1241; Guest 2016, 19).

2.7 Constitutional Cases

Dworkin concludes by emphasizing the importance of morality to judicial decision-making, especially in hard cases. He explains that the constitutional theory of the United States requires this attention to principles when he writes,

> The constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest (Dworkin 1977, 132-133).

The institutional design of the American judicial system demands attention to individual legal rights. Similar to how Hart conceives of the law as open textured, Dworkin recognizes that even reasonable judges will disagree about what is demanded by particular rights. Dworkin responds to the theory of originalism invoked by judges who attempt to settle these disputes by returning to the original meaning or intent of the words at issue. He derides this approach as it "limits such rights to those recognized by a limited group of people at a fixed date in history" (Dworkin 1977, 133).

2.7.1 Concept vs. Conception

Part of the reason Dworkin disavows this approach is that he believes that principles can only ever be defined as concepts rather than conceptions. A concept refers to an abstract idea, while a conception refers to its operationalization and specific definition. For example, the framers of the Eighth Amendment developed the concept of cruel and unusual punishment. At the time, they surely had a conception of cruel and unusual punishment as well, but the conception does not limit the concept. In other words, if the framers had originally adopted a conception of cruel and unusual punishment as including the death penalty, that does not mean that the concept of cruel and unusual punishment is forever inclusive of the death penalty. Conceptions are instead socially and historically contingent.

Because constitutional clauses are references to broad moral concepts, it would have been impossible for the framers to make the concepts more specific. Accordingly, turning to original intent effaces the purpose of the American constitutional design. It inappropriately treats the Constitution and its supporting principles as static, relying on historical conceptions that misrepresent the contemporary understanding of concepts. Because the composition and weight of different principles can change with time, originalism is unworkable as an interpretive theory.

Dworkin's account of rules and principles thus provides a robust account of judicial decision-making and law more broadly. Even when the text of the rules is inapplicable or indeterminate, legal principles are still binding upon judges. Because these principles are relatively abstract, judges need a way to evaluate cases when the rules are insufficient. The sort of interpretivism exhibited by Hercules illustrates the proper way to adjudicate these cases for Dworkin. This theory allows for both consistency and change with regards to the effects of precedent. This interpretivist approach provides an opportune starting point for this paper's intervention into the debate about how judges ought to make decisions.

Chapter 3

Evaluation of Discretion

3.1 Justification for Normative Appraisal

Before evaluating discretion on its normative merits, it is first appropriate to acknowledge a source of confusion within literature pertaining to the Hart/Dworkin debate. Having sufficiently summarized Hart and Dworkin's accounts of judicial decision-making, it may appear that Hart sets forth a descriptive understanding of how judges *do* make decisions, while Dworkin's interpretivism is a normative ideal to which judges should aspire. In this sense, it may seem inappropriate to claim that a normative appraisal of discretion captures Hart's true sentiments regarding how judges ought to make decisions. From the perspective of this objection, Hart may very well believe that judges *should* be bound by morality, but his theory of discretion is meant to be empirical or positivist rather than normative.

Nevertheless, this objection fails to undermine the value of normatively considering discretion for the purpose of this research. First, Hart, while not explicitly making a claim about what judges *ought* to do, "invites us to derive a normative statement...from descriptive statements" (Hershovitz 2015, 1168). His empirical work lays the foundation for making normative statements about the legal obligation of judges, such as the work conducted here. Further, Hart did believe that there "*ought* to be clarity and candor in legal interpretation,

not moralizing...law" (Zipursky 2008, 1170-1171). Accordingly, it is reasonable to assume that Hart believes that morality and law *should* be distinct entities.

Second, even if Hart does not believe that judges should possess discretion, considering the normative value of this adjudicatory process provides a useful metric against which to judge interpretivism. Because a central component of this research is to determine whether judges ought to be bound by morality, taking discretion on its normative terms is the equivalent of a null hypothesis. In this way, discretion acts as a test of whether or not judges should be bound by moral principles. Therefore, even if Hart would not normatively endorse discretion, understanding its desirability is essential in developing a new theory of judicial decision-making.

Finally, many of Hart's objections to Dworkin's interpretivism have to deal with the efficacy of an approach that relies on moral balancing. Discretion is essentially a test of feasibility with regards to interpretivism. Where Dworkin notes that judges ought to weigh competing moral principles, discretion isolates difficulties with adopting and implementing that approach. Normatively considering discretion is a heuristic to determine the extent to which moral balancing is practical or attainable. Accordingly, contemplating the desirability of discretion is not only appropriate, but necessary, in developing a new theory of judicial adjudication.

3.2 Advantage of Judicious Resolution

Perhaps the most significant potential advantage to discretion is in its ability to ensure a number of decision-making approaches are represented within the judicial process. While judges are not elected and therefore do not "represent" the interests of constituents, the American citizenry is incredibly diverse, including with regards to its understanding of the Constitution. Many conservative citizens believe, for example, that the Constitution should be interpreted strictly according to the original intent of the Framers. Conversely, a number

of more liberal citizens view the Constitution as a document meant to evolve with changing social standards in a way that contributes to social progress. Discretion therefore includes a number of those different approaches into the judicial process, ensuring that numerous decision-making criteria are reflected within the legal system.

Further, if judges ought to use the most reasonable method for reaching a decision, then judges in aggregate will tend towards the most prudent and judicious method. Imagining a bell curve of the distribution of approaches helps to conceptualize this argument. While some judges may (in good faith) have extreme approaches to judicial resolution, the methods represented near the average will represent a general consensus regarding the most judicious approaches, thereby ensuring that the vast majority of cases are resolved with prudence. In other words, discretion ensures that the legal system employs the most appropriate method of judicial decision-making determined by the aggregate tendencies of judges.

Nevertheless, this benefit is undermined by two objections. First is that not standardizing the process for resolving hard cases undermines the predictability on which the legal system operates. The law is meant to create a basis for people to predict whether their actions are legal or illegal, so allowing a method of judicial resolution that diverges in such significant ways undermines that very predictability. This predictability concern, as I will demonstrate below, outweighs the benefits gained from allowing judges the flexibility to decide themselves which method is most appropriate to dispose of a particular case. Second is that judges are not elected and are not meant to represent the population within the constitutional design of the U.S. legal system. Accordingly, citizens are not entitled to having their personal preferences for decision-making represented by judges, and assuming so usurps the independence of judges.

3.3 Judges are not Legislators

Dworkin's primary critique of discretion is ostensibly intuitive. If judges are "creating" law in penumbral cases because they are not bound by background principles or rights, they are acting as legislators, which undermines the democratic purpose of judicial independence. Hart does not disagree that judges in this sense are acting legislatively, but he does contest the implications of that conclusion. Hart, in one of the few times he responds directly to Dworkin's criticisms, clarifies, "It is important that the law-creating powers which I ascribe to the judges to regulate cases left partly unregulated by the law are different from those of a legislature: not only are the judge's powers subject to many constraints narrowing his choice from which a legislature may be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes...he must always have some general reasons justifying his decision" (Hart 1994, 273).

Hart's response is compelling and effectively undermines Dworkin's criticisms. While Dworkin is concerned about judges making decisions based on utilitarianism rather than the protection of minority interests, judges' lawmaking power is relatively limited. Judges are making new law under the discretionary approach insofar as they are resolving indeterminacy or extending law to areas in which it was not previously operative, but that is wholly distinct from introducing new broad-ranging statutes.

Hart also notes that even if judges are not democratically elected, that "may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature" (Hart 1994, 275). Further, "the delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy" (Hart 1994, 275). While judges are *not* democratically elected legislators, Dworkin's objection that judges are not lawmakers seems based on hyperbolic concerns about the dissolution of democracy altogether given the limited legislative powers present in the discretionary approach.

Noting that judges have limited legislative powers in penumbral cases is not equivalent to concluding that judges *are* legislators, and accordingly, this objection fails to seriously undermine Hart's discretion. Nevertheless, any theory that provides to judges greater legislative power risks undermining the democratic function of the judicial system. Therefore, judicial legislative power must remain limited.

3.4 *Ex-Post* Legislation and Predictability

Discretion, which allows *ex-post* legislation, undermines procedural fairness and the predictability of the legal system. The law is meant to provide people with a guide for acceptable behavior. For example, people know that if they are going over the speed limit, they are engaging in illegal behavior. According to Hart, when the text of the law is indeterminate, people are free to do as they please because no legal obligation upon behavior exists. If no speed limit exists, motorists have no legal obligation to drive a certain speed. The legal obligation exists only after a judge has used discretion to resolve a case and create law to fill in the gaps. Under the discretionary model, people are engaging in legal behavior and a judge is retroactively concluding that behavior was illegal. For example, if no law clearly established an abortion ban, a woman could legally seek an abortion given the indeterminacy of the law. A judge using discretion to resolve a case in this area could, however, determine after the fact that obtaining an abortion was illegal. At the time of the event, the woman was acting legally, but a judge only later determines that action to be illegal.

Hart responds by expressing that this objection "seems quite irrelevant in hard cases since these are cases which the law has left incompletely regulated and where there is no known state of clear established law to justify expectations" (Hart 1994, 276). This response is vulnerable, however, when discretion is considered on its normative terms. It may be the case that the text of the law is unclear, but it may nevertheless be desirable to craft a method of decision-making that will generate more predictability for people within a legal

system.

Towards this end, Dworkin believes that his interpretivist method helps resolve that predictability by creating a uniform and systematic method of legal resolution. Even if the text of the law is indeterminate, people can engage in this sort of moral balancing to predict how judges will potentially decide hard cases. For example, if people knew that every judge in a hard case would utilize "original intent" to reach a conclusion, people would have clarity regarding how a judge would decide a particular case. To elaborate, if the federal government was considering banning automatic assault rifles, the text of the Second Amendment may not be entirely instructive. Does it preclude banning *all* weapons? Does it permit the government to restrict particularly deadly weapons? If *all* judges were bound by original intent, for example, the government would have the ability to determine what the Framers' intent was in drafting the Second Amendment and can determine whether the proposed legislation is legal or illegal before a judge ever makes a ruling.

Discretion undermines this *ex-ante* predictability because any number of methods could be employed to reach different conclusions. A judge employing original intent in the aforementioned hypothetical may diverge from a judge who views the Constitution as a document that evolves with changing social beliefs. Because Hart views judges utilizing discretion as making law, it becomes impossible to know *before* a case what the law *is*. Similar to how Schrodinger's cat is both alive and deceased until one opens the box, behaviors under the discretionary approach are simultaneously both legal and illegal until resolved by a judge. Discretion therefore undermines the predictability upon which the legal system is founded as it cannot create a reasonable basis for determining whether behavior is legal or illegal at the time of its commission.

3.5 Moral Nihilism and the Limitations of Penumbral Cases

Perhaps the most important objection to Hart not explicitly raised by Dworkin is that of moral nihilism. As I explained previously, Hart directly separates the law from morality and concludes that morals do not confer upon individuals legal obligations. Hart does recognize that there are instances in which these concepts overlap—many legal cases have strong moral considerations. Nevertheless, people, including judges, are not legally bound by morality under this approach. Other scholars have criticized this notion. When a judge is exercising discretion, he or she "may look outside of the law and reference personal preference rather than moral or legal obligation. In other words, when the law runs out, the judge may adjudicate absent any moral sensibilities" (Freidlander 2011, 1401).

This criticism is valid—judges are not bound to make decisions according to morality under this approach, and even are free to make decisions that are antithetical to moral considerations. Nevertheless, the moral nihilism critique as it currently exists in the literature fails to go far enough as it remains limited by the notion of a penumbral case. More important are the consequences of Hart's legal theory in cases in which the text of the law *is* clear but antithetical to moral principles. These cases do not require (or even allow) judicial discretion according to Hart because the law is determinate. Judges are bound solely by the text of the law, so any underlying moral concerns are irrelevant to judicial decision-making in these cases. It is in these cases that the moral nihilism objection is most pertinent.

Let us return to the *Plessy* and *Brown* example. *Plessy*, by establishing the separate but equal doctrine, clearly permitted racial segregation (even though the separate accommodations at issue were not truly "equal"). A judge under Hart's approach would be obligated to uphold segregation in public schools in *Brown* because the text of the law and precedent is clear, despite the strong moral considerations for overturning the separate but equal doctrine. Judges have no leeway for striking down clearly amoral laws or precedent because a

judge is not in the discretionary realm when the law is clear. That is not to say that morality is the *sole* consideration, but rather that "Hartian positivism would legitimize a 'wicked' legal system, full of rules contrary to universal conceptions of morality" (Friedlander 2011, 1401).

The consideration of morality is intrinsically valuable to the judicial decision-making process. Morality in the abstract is a system of distinguishing the "good" from the "bad," so a legal system that provides no method for resolving immorality within law is innately undesirable. In fact, making decisions according to rules alone incentivizes further moral transgressions. Judges simply applying the rules without moral examination are able to abdicate responsibility for unethical decision-making. For example, a judge in *Brown* would be insulated "from ethical consequences and a consideration for others" because he or she could simply conclude that the rules are fixed and that it is not his or her responsibility to change them (Clegg et al. 2007, 404). In this way, the uncritical "application of rules...render those decisions irresponsible" by displacing "ethics from the subject to an organizational or other culture which defines what is 'normal'" (Clegg et al. 2007, 405; 401).

The judge in the *Brown* case simply avoids moral culpability for segregation and instead concludes that segregation is a social and political phenomenon that exists outside the realm of judicial jurisdiction, or that segregation is the fault of the *Plessy* Court. This form of decision-making is decisively unethical by not just allowing, but intensifying, moral indifference. Accordingly, my theory of decision-making must include in some way morality as a binding legal force to avoid the dissolution into moral nihilism. It is clear that, unlike discretion, judges must be empowered to make decisions that at times contradict the extant rules of a legal system if there is an issue of considerable moral consequence.

3.6 Precedent

Similarly, the Hartian approach lacks the ability to overturn precedent. The application of precedent may be ambiguous in a way that requires a judge's discretion, but judges under the discretionary approach lack a true role to overturn precedent. Because precedent is a textual clarification of law established via a rule of adjudication, it is binding upon future cases within Hart's framework. As I just explained, that conception would preclude judges from overturning *Plessy v. Ferguson*. One potential solution to this dilemma within Hart's conception of law is to state that the facts of the case may have been incorrectly interpreted, thereby invalidating the precedent. For example, the *Brown* Court established that separate never means equal, thus challenging the facts of the *Plessy* case by stating the separate rail cars at issue could *not* have been equal accommodations.

That solution is relatively weak. The entire point of a rule of adjudication is that once a decision has been made, that decision becomes recognized as binding law. In other words, once *Plessy* established that separate could mean equal, the *Brown* Court made a decision that explicitly contradicted a previously established legal rule. If the precedent is clear, judges cannot use their discretion to overturn it because discretion can only be exercised in cases in which the law is indeterminate. Therefore, my new legal theory will require a method to overturn precedent, especially to correct a previous, immoral decision.

These criticisms of Hart's discretion are useful in constructing a set of requirements to guide the creation of a new theory of judicial adjudication. Dworkin's theory is posited as a solution to many of these concerns. The extent to which his interpretivist theory is successful at resolving these deficiencies will be evaluated in the following chapter.

Chapter 4

Evaluation of Moral Interpretivism

4.1 One Right Answer

While it may appear at first only an auxiliary part of Dworkin's theory, the One Right Answer thesis is a foundational assumption upon which he constructs his interpretivist approach. This thesis, however, is perhaps the weakest component of Dworkin's argument, and deserves heightened scrutiny in evaluating interpretivism more broadly. It is appropriate to start my criticism here because not only is the One Right Answer thesis problematic in and of itself, but it also complicates other components of Dworkin's theory.

Recall that Dworkin believes one right answer exists in hard cases because the likelihood that the principles are balanced such that the only appropriate outcome is a tie is incredibly unlikely. In order for there to exist one right answer, it must be the case that there is an objective truth regarding the presence and weight of the moral principles at stake. Dworkin does recognize that judges may come to the incorrect conclusion regarding those decisions, but for him, that does not deny the presence of an objectively correct determination. This explanation elides entirely the concept of moral relativism and presupposes the objectivity of moral principles (Guest 2009).

Dworkin does acknowledge that different people have different moral convictions.

His process for judicial decision-making, however, requires judges to ignore those internal beliefs and instead seek out the correct presence and weight of background principles. For example, a judge may internally believe that free speech is not a relevant principle, but if the composition of that judge's legal system includes an explicit right to free speech, that judge is bound by the institutional right. Dworkin therefore believes that it is possible for judges to separate their own moral convictions from the principles that form the basis for a particular legal system.

Describing Dworkin's position as moral objectivism is therefore slightly erroneous. Dworkin differs from traditional revealed law theorists who believe in absolute moral objectivity because he recognizes that the validity of moral principles is dependent upon the system of law in which they exist. For example, assume that there exists an absolute human moral conviction against taking the life of another for any reason. Dworkin would not recognize this universal moral conclusion as legally binding if the constitution of a particular legal system explicitly allowed for capital punishment. In this sense, *even if* the moral conviction against the taking of life is objectively valid insofar as it does not depend on any person's own internal beliefs, it does not legally bind judges if it contradicts the principles enshrined in the legal system.

Dworkin's approach fails to grapple with the ability of judges to separate their own internal convictions from institutional principles, which complicates the ability of judges to find objective truth regarding institutionally contextual principles. In other words, "This...supposes that there is a right answer as to how a given case should be decided, but [there may be] subconscious barriers to a judge's capacity to weigh the relevant arguments prevent the judge from discerning it" (David 2004, 1243).

To demonstrate why this assumption complicates Dworkin's theory, let us use abortion law as an example. Historically, the legal right to an abortion has been founded upon the right to privacy. That right to privacy is not explicitly set forth in the Constitution, although it appears to be a strong background principle upon which the Fourth Amendment

was founded. Nevertheless, the Fourth Amendment does not use the language of "right to privacy." Many have argued that the extension of this right to privacy to the issue of abortion is tenuous at best and rests on legal sleight of hand rather than substantive constitutional principles (Rausch 2012). This weak basis for abortion has made cases like *Roe v. Wade* vulnerable to challenges.

Suppose that Hercules is faced with a case that reconsidered the constitutionality of this right to abortion. For the sake of demonstration, let us assume that the value of precedent is irrelevant to the case such that the only question in front of Hercules is whether abortion is a legally protected right based upon the right to privacy. Discerning whether a right to privacy exists in this case is less clear than the Establishment Clause case. Dworkin would contend that Hercules is restricted from relying on his own moral convictions to determine the outcome of this case, but the ambiguity of the applicability of a right to privacy makes that separation difficult because the presence of an objective institutional principle is less clear. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." The extent to which the background right to privacy extends beyond unreasonable searches and seizures and into the realm of abortion is unclear.

If Hercules himself had a strong moral conviction against abortion for religious reasons, for example, he may be unwilling to conclude that the right to privacy extends to abortion simply because his own convictions make him less comfortable extending this right to privacy so far. He may be influenced by his own beliefs regardless of whether he recognizes their mediating effects. Conversely, suppose that Hercules has a strong internal belief that the government should not interfere in the daily lives of citizens. Hercules would be more likely to extend the right to privacy to abortion simply because he believes that privacy is a component of government non-interference. In both of these scenarios, Hercules may not be explicitly relying on his own convictions, and he may not even be aware of his reliance upon them, but the weight and scope of the right to privacy is mediated by his subconscious

internal beliefs. In other words, the weight given to different moral principles is a matter of perspective. The right to privacy becomes extremely important for Hercules if he has strong opposition to government interference, while the right to privacy becomes irrelevant or inapplicable if Hercules has a religious belief that the government has an obligation to restrict abortion.

Dworkin would respond to this objection by noting that this variance is simply the product of judicial mistakes in decision-making—in one of these outcomes, Hercules inappropriately balances the principle, leading him to an erroneous conclusion. Nevertheless, it seems misguided to simply write off these differences as mistakes. Even if there is an objective "right answer," it may be impossible for judges, who possess human fallibility and limitations on moral perspectives, to objectively evaluate these cases. Separating the institutional principle from one's own moral convictions is impossible when ambiguity is present regarding the presence of weight of the institutional principles. Rather than being a mistake, this realization is simply a reason why there may not be an objective right answer in hard cases because the relative weight of principles can never be objectively determined. Dworkin's One Right Answer thesis is therefore misguided and undermines his theory of interpretivism. Moreover, this limitation is not only an isolated issue, but creates concerns for other components of Dworkin's theory.

4.2 The Origin of Rights

A further complication for Dworkin is the origin of principles. Dworkin theorizes that principles become enshrined into the law for judges to make determinations about, such as how the Equal Protection Clause codifies the more abstract notion of equality. The linkage between the background right and the institutional right seems obvious. But where do these background rights come from in the first place? How does one even know of their existence?

The Establishment Clause example from the Herculean method is demonstrative of

this shortcoming. The institutional right to be free from the governmental establishment of religion could plausibly be based on any number of background rights, such as the right to be free from any government interference or the right to religious liberty. Recall that Hercules is supposed to use the existing corpus of legal opinions to assess whether one background right is more appropriate to rely upon than another but suppose that this case was the first in which an issue regarding the Establishment Clause was raised. How does Hercules know that one of these rights is more appropriate than another? More fundamentally, how does Hercules know that these rights even *exist?* Within Dworkin's theory, there does not seem to be any plausible explanation for how judges are supposed to discern that a particular right exists beyond a general reference to a legal system's texts, which themselves are unclear in hard cases (Friedlander 2011, 1402). This shortcoming leads to a number of potential explanations, each of which is problematic in some way for Dworkin's theory.

Return to the Rule of Recognition

Even if we were to suppose that in Hercules' Establishment Clause case there existed a robust corpus of legal opinions and institutional texts that helped to resolve which background right is a more appropriate fit, returning to the texts of law seems to parallel Hart's rule of recognition. Dworkin's central argument is in fact that there exist legal constraints that exist *beyond* legal text. To conclude that the "origin" of rights is textual in nature contradicts the most fundamental parts of Dworkin's thesis and disagreement with Hart. Further, the very concept of a hard case presupposes textual ambiguity, so relying on text to identify the presence of a right in a hard case is a non-starter.

Majoritarianism

The origin of rights must therefore be beyond what is included in the texts of a legal system. Their genesis cannot be based on an individual judge's understanding or beliefs within Dworkin's theory, as he explicitly states that judges must differentiate rights that they indi-

vidually believe from rights which are appropriate within a legal scheme. To rely upon the rights believed in by individual judges would undermine the protection of minority interests Dworkin is so highly concerned about because it would allow judges' personal convictions to supersede any institutional protections when a conflict arises.

Perhaps, however, rights are based upon a more collective belief in certain protections as fundamental. It seems obvious, for example, that the majority of American citizens would agree that people have a right to freedom in a general sense. To contend that rights are collectively determined, however, contravenes Dworkin's derision of majoritarianism in a legal context. If rights originate from the belief of the majority, then minority rights are, by definition, not truly "rights" insofar as they did not originate from majoritarian preferences. To demonstrate the danger of this perspective within Dworkin's theory, consider a country with a strong, white racial majority. Let us, for the sake of argument, suppose that this white majority believes in a "right" to white supremacy. To concretize this right, picture, for example, a job interview wherein an employer must choose between two equally qualified candidates. The right to white supremacy posits that in situations such as these, white individuals should be given automatic preference over racial minorities. Perhaps this "right" institutes a society of racial segregation and subordination. A legal system that recognizes rights as legitimate based on their alignment with majoritarian preferences therefore clearly contradicts Dworkin's view of legal institutions as a way to protect minority groups.

To provide a more plausible example, consider the abortion debate. Suppose that the predominant group in a legal system is religious fundamentalists who have a strong moral opposition to abortion, yet a considerable number of citizens possess a firm belief in the permissibility of abortion. Perhaps fifty-one percent of citizens are opposed to the legalization of abortion, while forty-nine percent believe there should be a fundamental legal right to obtain an abortion. Within this explanation, if Hercules was to discern the "origin" of a right to abortion, or if he was to determine whether a right to abortion or a right to religious liberty more closely comported with the extant background rights, he would defer

to the majoritarian preference *against* abortion. Nevertheless, this understanding renders irrelevant the moral preferences of forty-nine percent of this population, and in fact explicitly contravenes Dworkin's attempt to view the courts as a vehicle meant to protect minority interests.

In other words, conceiving of rights as originating from the moral beliefs of the majority of society contradicts one of Dworkin's core elements of a desirable legal system, and we must therefore rule out this explanation of the origin of rights within Dworkin's theory.

Revealed Rights

Perhaps then, rights simply exist independently of any person or group of people. This understanding of rights mirrors identically "revealed law," which primarily supposes that law is ordained by God. Within this revealed law framework, one should not kill because God has said as much. Dworkin does not go so far as to say that rights originate from a theological force, but the idea that rights exist independently of any one person deserves attention. The revealed law thesis avoids a tautological collapse into circularity by contending that rights originate from a specific Divine entity. It is clear that Dworkin does not posit a Divine force from which rights originate. If it is true that Dworkin relies upon a revealed law understanding of the genesis of rights, the rights must simply exist rather than be created by God.

The difficulty with this interpretation is that it is tautological and non-falsifiable. To say that rights simply exist independently of any human interpretation or opinion is impossible to negate or empirically test, as any understanding of rights is necessarily trapped within human perspective. In other words, to say that a particular right *exists* requires human appraisal, therefore removing any independence or detachment that would define the revealed law explanation. In other words, how do we know that any given right exists in an objective sense? Given that we have already established no "one right answer" exists, discerning rights as revealed rather than social entities is impossible. *Even if* rights *do* exist

independently and naturally, humans in general and judges in particular would have no way to rule on those rights independently of their own perspective-based limitations.

How does one know that these revealed rights exist? They simply do. The revealed law thesis, especially when separated from a Divine explanation, is therefore nothing more than a baseless assertion, which similarly provides at best a weak basis for the origin of rights.

Accordingly, any theory of law that seeks to rely upon moral principles must incorporate a consistent explanation for the origin of those rights. Absent a plausible origin, principles have little, if any, legal force, necessitating a robust treatment of this shortcoming of Dworkin's theory.

4.3 Limitation of Hard Cases

Another shortcoming of Dworkin's theory is his limitation of interpretivism to hard cases. While there are instances in which it is possible to see how his theory could be applicable in cases that are still "easier" (such as *Riggs* or his discussion of precedent), the mere distinction between easy and hard cases artificially constrains the value of moral balancing in every case.

The value of applying interpretivism to *all* cases is evidenced by Dworkin's theory of overturning precedent. When the moral implications of resolving a historical error outweigh the value of maintaining predictability and consistency, judges are justified in rejecting precedent in favor of moral considerations. Here, Dworkin has identified a small section of cases in which the precedential application is clear, yet the judge may resort to moral interpretivism nonetheless. However, cases in which precedent is clear (but immoral) are only a small subsection of "easy" cases. More importantly are cases in which the letter of the law is clear, yet the underlying foundation of that law is unethical. Because the law is determinate, Dworkin would consider these cases "easy." Yet many are anything but—the presence of a strong, contravening principle may require judicial intervention.

Dworkin, while occasionally alluding to interpretivism in textually easy cases (such as *Riggs*), fails to go far enough in establishing the value of his method beyond hard cases. His overemphasis on cases in which the law is ambiguous unnecessarily constrains the utility of his approach. Even if Dworkin does *allow* interpretivism in easy cases (unlike how Hart disallows discretion in cases in which the law is readily apparent), the very distinction between an easy and hard case obfuscates the importance of moral interpretivism when the law may be clear but immoral.

4.4 Mistakes

It seems odd that Dworkin sees a need to include a remedy for historical "mistakes." Recall that, in describing how his theory allows for judges to overturn precedent, he recognizes that "a justification of institutional history may display some part of that history as mistaken" (Dworkin 1975, 1099). Of course, Dworkin does state that there are some cases that may have reached an erroneous conclusion based upon mistakes in moral balancing (such as giving one principle too much weight over another, or recognizing one right as a strong background right when in fact another right would have been more appropriate). Remember, however, that Dworkin also states that principles can and do change over time, especially in their relative weight. Dworkin derides originalism as an interpretive theory because it "limits such rights to those recognized by a limited group of people at a fixed date in history," therefore demonstrating that rights are slowly but surely malleable (Dworkin 1977, 133).

If it is the case that rights and their relative importance can change over time, then it does not make sense to call certain decisions "mistakes" even if they must be overturned based on the contemporary balance of principles. It may be the case that the judges of that time made the correct decision based on the historically contingent weight and presence of rights and principles, but that the weight and presence of principles have changed over time. That conclusion is especially true given the limitations of the One Right Answer thesis,

because historical decisions may have been historically correct conclusions that would *now* be considered incorrect rather than mistakes.

For example, imagine that in the early 1900s an abortion case was presented to the Court in which the justices had to determine whether there existed a fundamental right to an abortion based upon a more general right to privacy. Suppose that at this time, a strong background right to privacy did not exist, as the relatively limited government surveillance was insufficient to stoke privacy concerns among the population. The justices in this case may reject the privacy claim and therefore rule that the right to abortion is non-existent. Assuming the principles were balanced properly, this decision would be "correct."

Further imagine that in this present day, an identical case arose that sought to establish a fundamental right to abortion via a right to privacy (assuming the absence of *Roe v. Wade* or other abortion-related cases). Given the pervasive surveillance practices of the federal government, society in this hypothetical recognizes a strong right to privacy that has developed over the previous one hundred years. The Court, having balanced properly the relevant principles, correctly overturns the first case and recognizes a fundamental right to an abortion based upon a right to privacy. Concluding that the first case was a mistake, however, would be erroneous because the justices made a decision that correctly balanced the principles of the time.

In other words, Dworkin's concept of "correcting mistakes" itself is a mistake, because justices can correctly make historically contingent decisions that nevertheless would appear incorrect in a different historical context. Simply because precedent can be correctly overturned does not make that previous case a mistake, and concluding that the initial case was in error undermines Dworkin's understanding of rights as context-dependent and malleable entities.

4.5 Interpretivism and *Ex-Ante* Predictability

Finally, Dworkin's claim that retroactive legislation violates procedural fairness is intuitive, yet his theory is ill-equipped to resolve this shortcoming. To reiterate, Dworkin believes that discretion allows for *ex-post* legislation by determining after the fact that a party's conduct is illegal. He argues that, because Hart recognizes there is no law when the text of the law is indeterminate, both parties' actions are legally permissible at the time of their commission. Once a court rules upon a case and clarifies or interprets that indeterminate law, however, the court determines retroactively that one party's action was illegal. Accordingly, Dworkin fears that, under discretion, people lack a predictable guide for daily behavior because there is always the possibility that a given action may be legal at one point but later determined by a court to be illegal.

Dworkin's claim that moral interpretivism ameliorates this predictability concern is based upon the notion that even if the law is indeterminate, parties can independently and *ex-ante* determine the outcome of a potential court ruling clarifying the law because of the legally-binding nature of principles. In this way, Dworkin believes that parties possess a predictable basis for determining whether conduct is legal or illegal even when the text of the law is unclear simply by engaging in the same sort of moral balancing as judges.

Dworkin's contention is suspect at best. First, Hercules, the paragon of moral balancing, possesses characteristics that Dworkin describes as "superhuman" (Dworkin 1975, 1084). While the Herculean process is relatively accessible for judges who have considerable experience interacting with the law, formulating judgments about its contents and background, and developing schemas of law based on the extant corpus of judicial opinions, most citizens lack the knowledge and experience to develop a thorough or accurate understanding of the law as it relates to moral principles. The process of moral balancing is a poor guide for helping citizens determine whether a given action is legal or illegal simply because the average citizen lacks the knowledge, or even the time, to accurately balance or extract principles when the law is unclear.

Second, even if the average citizen *was* able to engage effectively in Dworkin's interpretivism, moral balancing is ineffective at providing clarity for the legality of an action before resolution in court. I have previously described how judges can and do come to different conclusions regarding the moral implications of law, so it is likely, if not inevitable, that citizens, too, will differ in the process of moral balancing. If people differ in their conclusions after moral balancing, then there is little *ex-ante* predictability in the interpretivist approach because any differences of opinion will have to be resolved by a court.

Dworkin would respond by noting that when people differ, one party has made a mistake in its interpretivist process. That response compounds the accessibility issue I described above, because mistakes will be even more pervasive when balancing is done by parties with little legal experience. People would believe that they are acting legally, only to have a court later determine that they had reached the wrong conclusion, and their behavior was impermissible. Dworkin would then reply by stating that parties were always bound by the "right answer," even if they made a mistake in determining *what* the right answer is, unlike retroactive legislation, which declares an action illegal only after the fact.

I have already described why the One Right Answer thesis is flawed, which undermines Dworkin's potential response because there is no singular correct answer in determining whether or not one's behavior is illegal when the law is unclear. People can therefore validly differ in their beliefs about the legality of a particular action, which means that moral balancing cannot provide a uniform or predictable guide for legal action. Further, even if the One Right Answer thesis is true, it does not solve the two issues with retroactive legislation Dworkin identifies.

Recall that Dworkin supposes that retroactive legislation undermines both procedural fairness and the deterrent function of law because people cannot be dissuaded from illegal activity if they reasonably believe their actions are legal. I have already explained why interpretivism does not properly solve the fairness concern because it does not make the law more predictable even when its text is indeterminate. Because reasonable people can disagree

about the presence or weight of certain principles, even if there *is* one right answer, people are generally poor at discerning it. Simply because judges are better equipped at finding the right answer (if it even exists) does not mean that the average citizen can develop a predictable standard for behavior based upon the interpretivist method. Judges will ultimately still need to decide which party's moral conclusion is correct, which is a sort of *ex-post* legislation of moral principles.

That also demonstrates why the interpretivist approach fails to resolve the deterrent concern. Even if people are technically and legally bound by one principle, if they are unable to confidently and accurately ascertain that answer, they cannot be deterred by supposing that a particular action is illegal. In other words, people can judiciously but erroneously conclude their actions are legal after engaging in moral balancing, which means the law is a weak deterrent because violations of the law are based upon a mistaken but good-faith interpretation (which cannot be dissuaded) rather than *malice* (which can be deterred).

In short, my new theory of law either needs to find some way to resolve this predictability issue, or it needs to lessen the importance given to this sort of *ex-ante* predictability. All of these shortcomings of Dworkin's approach certainly undermine the theoretical foundation of moral interpretivism. Nevertheless, there are certainly elements that can and should be included in an improved theory of judicial decision-making and understanding the above limitations will help construct a more robust and defensible approach.

Chapter 5

A New Theory of Judicial Decision-Making

5.1 Requirements

Evaluating discretion and moral interpretivism has explicitly and implicitly revealed a set of requirements that any theory of adjudication must include. However, these requirements are more than just necessary methodological steps in resolving court cases. Instead, they are essential components of a broader *theory* rather than *method* of judicial decision-making. For example, whether one right answer exists to cases under the moral interpretivism framework might not alter how a judge would methodologically approach a case. Even if there is not a singular right answer, judges bound by morality are still obligated to balance principles in good-faith and separate as much as possible their own personal preferences. Nevertheless, these theoretical choices still contain consequential implications that deserve attention. The purpose of this chapter therefore is not to simply describe how judges should resolve a case, but rather to describe a theory within which the decision-making process takes place.

The preceding evaluation of Hart revealed a number of shortcomings that must be addressed by a new theory of decision-making. First, judges should possess, at most, limited

legislative power. A theory that grants judges excessive legislative power fails to withstand Dworkin's critiques regarding the undemocratic nature of judges as unrestrained legislators. Second, concluding that judges are "making" law when resolving a hard case is undesirable because it allows for retroactive legislation that undermines the predictability of the legal system. Given the predictability concern, having a uniform approach to legal resolution is preferable to a system that permits heterogeneity in adjudicatory approaches. Third, moral considerations must be included within this new theory of adjudication. To allow judges to resolve cases absent (and even in contradiction to) morality risks nihilism and the abdication of ethical responsibility. Finally, a new theory needs to have some way to overturn precedent. However, this ability to overturn precedent must be relatively limited or the ability to arbitrarily and erratically overturn precedent will erode the predictability and consistency of the law.

My evaluation of Dworkin similarly raised a number of concerns that must be addressed. Many of these shortcomings demonstrate the difficulty of constructing upon moral interpretation a theory of law. Given that my critique of Hart revealed the necessity of morality-based adjudication, the objections to Dworkin are particularly pertinent to consider. First, my theory needs to acknowledge that judges are unable to entirely separate themselves from their own moral convictions when engaging in moral balancing, which means that my theory must recognize there is not one right answer in hard cases or cases involving competing moral claims. Second, insofar as my theory relies upon the existence of principles, it must address the origin of those rights, unlike Dworkin. Third, a new method should be applicable to *all* cases, rather than solely hard cases. Fourth, this theory needs to leave open the possibility of overturning precedent without recognizing that precedent as a "mistake." Finally, my new theory needs to address in some way the fact that moral interpretivism is unable to entirely resolve *ex-ante* predictability in a way that provides people with a predictable code of behavior even when the text of the law is indeterminate.

5.2 A New Theory of Adjudication

5.2.1 Classifying a New Theory of Adjudication

I will advocate for a process of moral interpretation similar to Dworkin's, with some important distinctions. Unlike Hart, who allows for any number of methods of legal resolution within his theory, I have already demonstrated the importance of having a universal process of adjudication to resolve issues with predictability and consistency. This form of universal logical reasoning based upon principles seems relatively close to legal formalism. Formalism refers to "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect" (Posner 1986, 181). The requirements established above resemble formalism insofar as my new process will rely upon deductive logical inference regarding authoritative moral principles. While I disagree with the One Right Answer thesis, each judge employing this method will be able to declare his or her conclusion as "correct" or "incorrect" based upon the nearly mathematical process of moral balancing employed. I therefore will title this new legal theory "principled formalism" in contrast to Hart's positivism and Dworkin's interpretivism.

5.2.2 Constructivism as a Solution to the Origin of Rights

Principled formalism relies upon deductive reasoning surrounding authoritative premises such as principles. However, as I previously explained, Dworkin is relatively poor at explaining the origin of those principles and precisely why they are authoritative. Dworkin's theory presupposes that "there really are objective and normative facts in the universe, but any further inquiry into the source of these normative facts is fruitless" (Friedlander 2011, 1402). The implication of that conclusion is evidenced within his One Right Answer thesis, because in order to conclude that there is an objectively-correct outcome for each instance of

moral balancing, he weds himself to the notion that moral elements are independently "true" within a given legal system, and that judges have the capacity to discover these truths.

Rather than endorsing this view of the objectivity of moral considerations, my process of principled formalism recognizes constructivism as a potential solution to this dilemma. Specifically, "constructivist moral theory...posits that moral truths are not concepts to be 'discovered,' but rather...are constructed by means of practical reasoning" (Friedlander 2011, 1387). Principles, under this approach, are not objects of discovery but are instead solutions to practical problems of both textual indeterminacy and moral obligation. Principles within constructivism are "maxims that all rational beings could agree to act on together in a workable cooperative system" (Friedlander, 1409). Principles are practically and socially constructed but in a way that avoids concerns about majoritarian preferences. Any understanding that recognizes binding moral principles as simply being based upon the moral preferences of the majority of society has the potential to obfuscate entirely the concerns of minority parties. The constructivist recognition of moral law as maxim that *every* rational person could agree upon ensures equity and fairness. For example, a judge in a white-dominated society could not find a right to white supremacy.

Further, "If normative concepts simply refer to practical problems and their solutions, then there does not need to be any type of external justification for asserting their objective truth" (Friedlander 2011, 1405). Principled formalism therefore recognizes the practically constructed origin of rights contrary to Dworkin's conception of principles as objective concepts to be discovered by the interpretivist judge. Judges under principled formalism can view principles as solutions to the question of how to achieve the most just resolution of a particular case. Judges are thus only legally bound by moral maxims that are universally and rationally agreeable. This approach helps instruct judges which potential moral considerations are and are not legally binding, which is a precondition to subsequent moral balancing. Constructivism also ameliorates the issue with identifying past decisions as "mistakes" because it recognizes that principles can and do change based on social forces. In

this sense, what is agreeable and rational changes over time, so this approach incorporates change and flexibility into its decision-making process.

5.2.3 The Consensus Objection

One could reasonably deride constructivism as overly limiting by conceiving of principles as maxims with which all rational individuals agree. For example, a "right to abortion" or "right to religious freedom" might not be rights that are rationally agreeable to all. In other words, how are judges to discern which background rights are legitimate principles and which are improper under the constructivist approach?

This objection is a straw person, however. The relevant distinction here is between background rights and institutional rights. Judges under the constructivist approach construct, by means of practical reasoning, background rights as solutions to problems pertaining to institutional rights. For example, in a case pertaining to abortion, a constructivist judge would have to consider whether a right to abortion should be institutionally recognized. The constructivist approach does *not* consider whether a consensus regarding abortion exists. Rather, it charges judges with resolving the case based upon background rights agreeable to all rational individuals. It may not be the case that society recognizes a background right to abortion (that is, a right to an abortion is not a maxim with which all rational individuals agree), yet a judge may be able to incorporate a right to abortion based upon some other background right that *is* generally agreeable.

Judges using the constructivist interpretation of principles recognize that background "moral principles inform the creation of legal principles that try to address the problem" (Friedlander 2011, 1406). For example, a judge could not resolve this abortion question by stating that a societal background right to an abortion exists (as a considerable portion of the population would disagree that there exists a right to abortion). The judge could, however, conclude that there exists a strong background right to privacy (based upon general, rational consensus) that the judge then applies to this case to confer an institutional right

to abortion. In this sense, the tools judges use to resolve legal cases must pass a general, rational consensus test. Of course, given the diversity of American (and global) society, few background rights exist in which unanimous agreement could be achieved. Constructivism requires a reasonability test in which judges must consider whether the constructed principle would be accepted by all rational individuals if their identity characteristics were removed or not relevant.

Returning to the abortion example, a right to privacy would be accepted by rational people irrespective of their race, gender, sexual orientation, socioeconomic status, and so on. A right to privacy would therefore pass the reasonability test that allows judges to use that principle to solve a legal problem. In contrast, people's gender, religious background, political affiliation, and so on would preclude a right to abortion from passing this reasonability test. A right to abortion cannot exist as a background right that a judge could use to resolve a legal problem. In this sense, constructivism is about identifying appropriate background rights upon which to justify legal decisions.

5.2.4 Scope

Both Hart and Dworkin restrict their approaches to cases in which the text of the law is unclear. This limitation is misguided. It dichotomizes approaches to judicial decision-making based upon the case by providing an alternative method for resolution when the text of the law is indeterminate. In "easy" cases, judges simply apply the rules, facts, and precedent to arrive at a particular outcome.

As I previously described, there are serious consequences of this view of judicial decision-making. Not only does it provide an account of adjudication that is disunified, but it precludes the possibility of moral consideration when the text of the law is clear. Recall the *Brown v. Board* example. While there are certainly difficult moral questions at issue, this example would not constitute a hard case because of the clarity of precedent. Limiting interpretivism to hard cases therefore suffers from the same moral nihilism objection as

discretion because cases with clear rules but immoral foundations are "easy" insofar as the law is settled. Principled formalism then must be an approach that is generally rather than contingently applicable. The process of moral, logical deduction must take place in *all* cases rather than exclusively those in which the law is ambiguous.

5.2.5 The Principled Formalist Method

Balancing Procedure and Substance

My principled formalism does not significantly differ in technical application from Dworkin's Hercules. Unlike Hercules, however, when faced with a case using the principled formalist method, a judge must first assess the extent to which the the rules, facts, and precedent at issue are clear. If the text of the law remains ambiguous, then the judge must begin the process of moral identification and balancing. However, if the text of the law is relatively clear, the judge must assess whether the moral considerations at issue are sufficiently strong to overwhelm the value of predictability and consistency in the law. Because predictability and consistency are important legal principles, they must be balanced against the other principles. These principles are each considerably weighty because they form the very foundation of the legal system. In their absence, no judicial opinion could ever truly settle a legal dispute because the outcome would always be vulnerable to future decisions arbitrarily ruling in the opposite direction. As such, only substantial moral concerns could justify a departure from a predictable and consistent application of law.

Similarly, the judiciary is limited by institutional design via the separation of powers. Even morally reprehensible legislation or executive orders are treated as legally valid so long as they do not run afoul of the text of the law. The principled formalist approach recognizes that there may be policies or executive orders that are so morally objectionable that the judges may violate the practice of judicial deference. For example, while the Court in *Korematsu v. United States* ruled that the internment of Japanese-Americans was technically legal, the principled formalist judge would have been able to reject that policy even

if *procedurally* valid if the moral concerns outweighed the value of judicial deference.

In other words, the procedural components of the legal system must be balanced against the substantive elements of a case, which is a noticeable departure from Dworkin's approach. The procedural aspects of the legal system are also principles insofar as they ensure due process to individuals engaging the judiciary. Recognizing the serious weight of these principles ensures that the law is not excessively malleable while simultaneously emphasizing that there may be instances in which moral considerations should be given preference over the contradictory text of law.

Extracting Principles

To balance these moral concerns, a judge must then extract valid principles that are pertinent to the case at hand. Similar to how Hercules had to determine whether the Establishment Clause was based upon, among other options, a right to religious liberty or a right to be free from government interference, the principled formalist judge must establish the principle(s) upon which the relevant area of law is founded. Because of the values of predictability and consistency, the judge ought to first try to create a political theory that fits with the Constitution by analyzing the substance and spirit of other case law. Hercules, for example, could not find that the Establishment Clause was based upon a strong background right to the establishment of a church.

However, unlike Dworkin, I recognize that there are cases in which the most appropriate background right may be immoral. In those cases, if there is sufficiently strong moral ground for abandoning the predictability and consistency of the previous case law, the principled formalist judge can eschew the historical background right in favor of a more morally valid one even if it fits less well the institutional schema of principles. The less the new background right fits, the more significant the moral foundation must be to diverge from the institutional set of rights.

Once the principled formalist judge has extracted the principles, they must adopt a

conception of what is meant by those principles. I agree with Dworkin that the Constitution can only express concepts, which are abstract ideas, rather than conceptions, which refers to the specific operationalization of a concept (such as the *concept* of cruel and unusual punishment being conceptualized as including torture). Recall that Hercules had to decide whether a "right to religious liberty [includes] the right not to have one's taxes used for any purpose that helps a religion to survive...Or simply not to have one's taxes used to benefit one religion at the expense of another..." (Dworkin 1975, 1084). Here, a judge must simply use his or her judicious intuition to decide which elaboration of the principle is most appropriate if the case law remains unsettled. However, if the case law *is* settled but contradicts the evolution of conventional morality, the same sort of procedural balancing must occur to determine whether a deviation from the settled case law is warranted.

Balancing and Multiple Right Answers

Once the principles and their conceptions have been identified, the principled formalist must balance the relevant moral considerations. Balancing these principles is not simply a process of determining which moral consideration is more significant, but also requires balancing how *prevalent* each principle is in a given case. It may be the case that a judge has to decide between a right to free speech and a right to communal safety, for example, but perhaps one of these rights is more directly threatened or at issue than the other.

Dworkin supposes that there is a singular, correct answer to this process of balancing in each case. One right is more directly relevant, or one right is weightier than another, and so on. I have already described why this perspective is erroneous. Rights are socially constructed, and the importance of each principle depends in large part on the personal preferences of particular judges. This is not to say that judges ought to rely upon personal preference, but that it is impossible for judges to separate entirely their personal preference from the process of moral balancing. Like I have previously explained, a conservative judge may view the right to religious liberty as more directly relevant to the Constitution than the

right to privacy vis-à-vis abortion. The judge may not even be aware that he or she views this right as weightier than the other. In this sense, the principled formalist is not seeking one objective, metaphysical right answer.

Nevertheless, it may be useful for judges to adjudicate as though there is a singular right answer. In these cases, "there would not be a correct decision. Just the same, judges should approach a case as if a right decision exists, even if there may be some instances where the law does not dictate a decision for one side or the other" (David 2004, 1241). Doing so ensures that judges do not intentionally rely upon their own moral convictions when engaging in moral balancing. If they act as if there is an objectively correct decision, they must engage in the process of balancing in good faith. Treating cases as if one right answer *does* exist requires that "the judge must take care not to import into the law the reasons she has for her own beliefs" (David 2004, 1247). Therefore, having judges adjudicate as if there is one right answer ensures the maximum possible level of judicial independence, which guarantees the courts remain appropriate vehicles to protect minority interests.

Precedent

I have already alluded multiple times to how the principled formalist can overturn precedent. The value of adhering to precedent is a principle pertaining to the predictability and consistency of the legal system. Those principles too can be balanced against substantive principles, such that a considerable substantive moral concern may outweigh the value of adhering to precedent. The justices in *Brown* concluded that the moral value of ending public school desegregation outweighed the value of complying with the precedent in *Plessy*. Again, the more entrenched the given precedent is in the legal system, the stronger the moral argument must be to overturn that precedent. As such, precedent must be included in the process of moral balancing within this principled formalist approach.

5.2.6 Application to *Riggs v. Palmer*

Returning to *Riggs v. Palmer* will help demonstrate the balancing of procedural and substantive principles. Remember that Palmer had murdered his grandfather to ensure his entitlement to his grandfather's estate. This case would have been considered "easy" because the law, if interpreted solely based upon its text, would have entitled Palmer to the estate (Dworkin 1977, 23). The maxim that one should not profit from his or her own wrongdoing was not found in any statute, nor was it a background right to any particular components of the written law. Rather, it was an ethical statement agreed upon by all rational individuals. The judges felt that the moral consequence of allowing Palmer to profit from his murderous actions was so strong that the textual rules of the law were invalid. In this case, the constructed moral maxim outweighed the value of applying the literal interpretation of the law. The judges in *Riggs* relied upon a process parallel to principled formalism by concluding that a strong moral concern outweighed the necessity of applying the clear text of the law.

5.3 The *Ex-Ante* Predictability Objection

I previously charged interpretivism as being unable to solve *ex-ante* predictability because the outcome of moral balancing is dependent upon the given judge and his or her subconscious moral convictions. Because judges employing discretion are "creating" law under that theory, any action is legally permissible when the law is indeterminate before the judge makes law. Dworkin considers interpretivism a potential solution to this problem by claiming that citizens were always legally obligated to behave according to principles even when the text of the law is indeterminate. I do agree that interpretivism (and therefore principled formalism) are superior to discretion in this capacity for two reasons. First, each theory confers upon the population legal obligations based upon moral principles that exist even when the text of the law is unclear. Second, the outcomes of these cases are far more predictable and

unified than those under the discretionary approach because within that framework, the adjudicatory methods of judges are heterogeneous.

Unlike Dworkin, however, I hold no illusions about the ability of principled formalism to completely resolve *ex-ante* predictability. Because I have posited that there can be multiple right answers in the abstract to moral balancing, the potential for unpredictable outcomes is still present (although considerably less so than under the discretionary approach). Due to the the limitations of human judgment, no theory could ever solve *ex-ante* predictability in its entirety. A theory that would be able to resolve that predictability would need to ensure that every judge shares the same adjudicatory processes and the same internal convictions. For example, even if every judge employed the original intent method, different judges might reach different conclusions about the true original intent of the framers.

Nevertheless, perhaps the most potent objection to this principled formalist approach is that because this method ought to be applied in *all* cases rather than in hard cases alone, *ex-ante* predictability cannot even be based upon the clear text of the law. If strong contradicting moral arguments are sufficient to render invalid clear textual laws, one may reasonably contend that there is no reasonable basis for determining whether action is legal or not. To use a hyperbolic example, someone could adhere to a speed limit of 25 miles per hour, only to later have a judge declare that there is a compelling moral reason that the speed limit should only be 20 miles per hour.

This objection is of minor concern. First, overturning clear law requires an incredibly strong contravening moral argument. Because predictability within law is such an important element, it figures prominently in any moral balance, and is outweighed by other moral considerations in only the most extreme cases. Second, because the principled formalist theory recognizes principles as socially constructed rather than objectively extant, people within society are able to identify the most important principles and recognize when there may be strong moral arguments that outweigh the arguments in favor of consistency. Finally, and most importantly, the entire point of principled formalism is that there are some instances

in which predictability is less important than the relevant moral concerns. It may very well be the case that this approach is less well-suited to solve *ex-ante* predictability, but the benefits of allowing for decision-making based upon morality outweigh that uncertainty. Simply because the law may permit unethical behavior does not mean that people are entitled to conduct themselves immorally. Adherence to the law without ethical interrogation causes the abdication of moral responsibility and nihilism. As such, even if principled formalism is unable to entirely resolve *ex-ante* predictability, the benefits of moral adjudication are of greater importance.

5.4 The Court Legitimacy Objection

Individuals could reasonably object to the ability of principled formalism to eschew institutional checks such as the judicial deference or the Separation of Powers. If principled formalism is able to ignore legal traditions, then perhaps the credibility of the courts would be diminished and enforcement of judicial decisions by other branches would dwindle. Nevertheless, this concern is limited for three reasons.

First, this power to abandon legal traditions such as the Political Questions Doctrine (the tradition that courts will not consider cases that are better resolved by the legislature) or judicial deference to other branches is incredibly limited. Judges know the immense value of these customs, so it is only in the most egregious moral instances that a court could abandon these traditions to incorporate an ethical principle. Judges have to weigh the very legitimacy of their courts when deciding to forgo these practices, ensuring that only in the most extreme cases are these practices secondary to the substantive moral issue at bar.

Second, this concern over court legitimacy is empirically denied. The executive and legislative branches know the importance of maintaining court legitimacy, even when a particularly unpopular decision is issued. For example, in the weeks and months after *Brown v. Board*, backlash to the decision was so immense that Eisenhower federalized the National

Guard of Arkansas to enforce the decision, despite its massive unpopularity. Similarly, even in contentious cases, the value of enforcing the decisions of the courts is significant enough to compel adherence.

Third, and most importantly, the principled formalist method ensures the presence bottom-up pressure to enforce the decision of courts. Because the court, in these rare but egregious moral cases, has identified such a significant ethical issue to cause it to abandon legal traditions, the court will have marked particular actors or laws as morally reprehensible. In other words, if a court sidesteps the practice of judicial deference, it is because the moral reason for doing so is of such significance that doing so is absolutely necessary. This sort of moral recognition and labelling creates significant pressure for adherence to the court's decision. Any defection would be identified by the population as ethically deplorable, creating significant costs to repudiation of the court's decision. Accordingly, the legitimacy of the courts, and adherence to their rulings, will remain strong under the principled formalist approach.

5.5 Principled Formalism in Conclusion

Principled formalism requires moral balancing in every legal case. In most easy cases, the value of predictability outweighs even moderately strong moral arguments against consistency, so this adjudicatory process is not a rubber stamp to arbitrarily overturn settled law. Only in rare instances is the gravitational force of a moral argument sufficiently strong to eschew precedent. This process extends moral balancing beyond the limited instance of hard cases. The formalist method alleviates the concerns revealed by the prior evaluation of Hart and Dworkin.

This method satisfies the critiques of discretion. It limits legislative power by requiring judges to make arguments based on the moral principles rather than act as deputy legislators. It further resolves concerns regarding predictability by recognizing that even when the text of

the law is indeterminate, people still possess legally binding moral obligations. Additionally, by unifying the process of decision-making, people have a transparent expectation of the processes used by judges to adjudicate cases. Principled formalism also avoids moral nihilism by requiring judges to make decisions based upon principles. It finally provides a method to overturn precedent yet limits the application of that method in a way that precludes judges from carelessly and superfluously usurping settled case law.

This alternative adjudicatory approach further resolves many of the previously expressed shortcomings of interpretivism. It recognizes that while judges are unable to separate their own convictions entirely from the process of moral balancing, treating the adjudicatory process as if there is one right answer helps to minimize the role of personal preference in decision-making. This theory also more accurately addresses the origin of rights. Rather than objective truths to be discovered by judges, principles are socially constructed maxims that are generally agreeable by all rational individuals. Principled formalism allows judges to overturn precedent without inappropriately overextending this power. Finally, this theory notes that, even if it undermines *ex-ante* predictability, the costs of moral nihilism are so serious that this shortcoming is simply the cost of adopting a morally laudable system of adjudication.

Principled formalism therefore incorporates important lessons from the Hart/Dworkin debate in a way that identifies a more desirable theory of judicial adjudication. Relying on the text of law alone to resolve cases is both impossible and ethically suspect. Adopting decision-making according to principled formalism elevates the core principles of our judicial system: fairness, equality, and justice. Of course, this principled formalist approach is by no means complete. Developing a theory of equivalent robustness to Hart and Dworkin would require years of research, consideration, revision, and dialogue. Yet, principled formalism is an effective starting point for informing future research into judicial decision-making, as it identifies a number of core requirements which must be responded to by those developing other standards for legal adjudication.

Conclusion

Principled formalism represents a new method of judicial decision-making synthesized from the seminal debate between Hart's legal positivism and Dworkin's moral interpretivism. While the friction between Hart and Dworkin is most prevalent in their disagreement regarding how judges should resolve hard cases, I have sought to elucidate the necessity of an adjudicatory process that applies to all cases. Like interpretivism, principled formalism recognizes the urgency of treating the law as if it imposes moral obligations upon citizens. However, this method is distinguishable from Dworkin's in three important ways. First, principled formalism understands that there is no one right answer to these moral dilemmas. Judges are unable to entirely separate themselves from their own subconscious convictions and moral attitudes. Nevertheless, adjudicating *as if* one right answer exists ensures that judges remain as impartial as possible. Second, and relatedly, principled formalism utilizes a constructivist interpretation to explain the existence of principles. Rather than objective concepts to be discovered by judges, principles are practical solutions to legal problems. Finally, principled formalism is a method of judicial decision-making applicable in all cases regardless of the clarity of the legal text. The principles of legal procedures must be extracted and balanced against substantive considerations.

This approach avoids the limitations of both discretion and interpretivism, but most importantly evades the moral nihilism critique. Principled formalism revitalizes judges as moral agents rather than umpires, an oft-used metaphor in judicial confirmation hearings. Conceiving of judges as actors who simply apply the technical rules of the law allows for

the abdication of moral responsibility to those rules. The majoritarian-elected legislature could pass a legally valid but morally-reprehensible law and the judge would have no agency to forestall its implementation. Principled formalism ensures that moral considerations are balanced against the values of procedure.

Nevertheless, principled formalism does recognize the value of many of Dworkin's conclusions. For example, his claim that rights-based arguments possess greater durability than policy-based arguments is instructive and demonstrates the need for a moral-based approach to the law. Further, Dworkin's contention that the U.S. legal design was based upon moral foundations exemplifies the importance of an adjudicatory process sensitive to the process of rights.

Of course, the advocacy presented here is imperfect and should inform future research. The purpose of this research was never to construct an infallible theory of adjudication. For example, questions remain regarding how to actually implement principled formalism within a judicial context, or how the relationship between the judiciary and other branches would change with the principled formalist approach. Instead, the work done herein lays the groundwork for future research and consideration into judicial decision-making. Developing a useful starting point such as principled formalism informs the potential for further thinking pertaining to this question.

Accordingly, developing an enhanced process of adjudication is not the sole contribution of this paper to jurisprudence. This research has revealed two insights that remain important regardless of the validity of principled formalism. First, it has clarified the value and necessity of normatively driven jurisprudence. Descriptive legal theory has not only become stale but less useful. To maintain the relevance of legal theory, jurisprudence should be able to make meaningful contributions to the law and society. Simply obtaining an accurate conceptual understanding of the law fails to satisfy the question, "so what?" The descriptive methodological approach is not itself intrinsically valuable. It is only when normative considerations are made that conceptual understandings are meaningful. The very purpose

of jurisprudential theory can be reinvigorated by considering proposals for the improvement of the legal system, and new insights can be gleaned from seemingly repetitive or outdated scholarship within this new methodological perspective. Even the decades-old Hart/Dworkin debate confers important lessons for the current legal system when re-analyzed normatively. Jurisprudents ought to consider more seriously this normative approach to legal philosophy.

Second, this paper has emphasized the importance of judicial decision-making processes to society more broadly. Because the American "legal system...places an enormous amount of power in the judiciary, questions concerning the proper role of the judge are paramount. The current relevance of judicial philosophy when discussing the modern Supreme Court cannot be overstated" (Friedlander 2011, 1387). Because judges have made and will continue to make decisions that affect every facet of life, considering the processes judges use to come to those conclusions is essential. If anything, it is my hope that this research galvanizes others to contemplate the proper role of judges within our legal system. While some may disagree with the specific process of principled formalism, we can all agree that processes of judicial adjudication deserve greater attention. Anything else ensures we are dissociated from the most fundamental democratic principles and our roles as academics and citizens.

Bibliography

Adler, Matthew D. 2006. "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?" *Northwestern University Law Review* 100(2): 719–805.

Bellamy, Richard. 2013. "The Democratic Qualities of Courts: A Critical Analysis of Three Arguments." *Representation* 49(3): 333–46.

Capurso, Timothy. 1998. "How Judges Judge: Theories on Judicial Decision Making." *University of Baltimore Law Forum* 29(1): 5–16.

Clegg, Stewart, Martin Kornberger, and Carl Rhodes. 2007. "Organizational Ethics, Decision Making, Undecidability." *The Sociological Review* 55(2): 393–409.

Culver, Keith. 2001. "Leaving the Hart-Dworkin Debate." *The University of Toronto Law Journal* 51(4): 367–98.

Dagan, Hanoch, Roy Kreitner, and Tamar Kricheli-Katz. 2018. "Legal Theory for Legal Empiricists." *Law and Social Inquiry* 43(2): 292–318.

David, Gregory. 2004. "Dworkin, Precedent, Confidence, and Roe V. Wade." *University of Pennsylvania Law Review* 152(3): 1221–53.

Dworkin, Ronald. 1975. "Hard Cases." *Harvard Law Review* 88(6): 1057–1109.

Dworkin, Ronald. 1977. *Taking Rights Seriously.* Cambridge, MA: Harvard University Press.

Friedlander, Matthew D. 2011. "Adjudicating in the Kingdom of Ends: A Constructivist Response to the Hart/Dworkin Debate." *University of Illinois Law Review* 11: 1387–1417.

Gamwell, Franklin. 2015. "On the Interpretation of Religious Freedom: A Conversation with Ronald Dworkin." *The Journal of Religion* 95(4): 506–33.

Guest, Stephen. 2009. "How to Criticize Ronald Dworkin's Theory of Law." *Critical Notices* 69(2): 352–364.

Guest, Stephen. 2016. "Dworkins One-Right-Answer Thesis." *Problema. Anuario de Filosofía y Teoría del Derecho* 1(10): 3–21.

Gur, Noam. 2018. "Ronald Dworkin and the Curious Case of the Floodgates Argument." *Canadian Journal of Law and Jurisprudence* 31(2): 323–45.

Hart, HLA. [1961] 1994. *The Concept of Law.* Oxford, UK: Oxford University Press.

Hart, HLA. [1979] 2016. "The New Challenge to Legal Positivism." *Oxford Journal of Legal Studies* 36(3): 459–75.

Hershovitz, Scott. 2015. "The End of Jurisprudence." *Yale Law Journal* 124: 1160–1204.

Himma, Kenneth Einar. 2015. "Conceptual Jurisprudence: An Introduction to Concep-

tual Analysis and Methodology in Legal Theory." *Revus: Journal for Constitutional Theory and Philosophy of Law* 26: 65–92.

Ho, Norman P. 2017. "Confucian Jurisprudence, Dworkin, and Hard Cases." *Washington University Jurisprudence Review* 10(1): 1–27.

Leiter, B. 2003. "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence." *The American Journal of Jurisprudence* 48(1): 17–51.

Ludena, Lorena Ramirez. 2016. "Legal Disagreements: A Pluralist Reply to Dworkin's Challenge." *Revus: Issues in Contemporary Jurisprudence* 28: 1–16.

Mandel, Michael. 1979. "Dworkin, Hart, and the Problem of Theoretical Perspective." *Law and Society Review* 14(1): 57–82.

McIntosh, Simeon Charles Randolph. 1983. "Controversial Propositions of Law and the Positivist Embarrassment: The Hart/Dworkin Debate Reconsidered." *Howard Law Journal* 26: 699–720.

Pocza, Kalman. 2015. "Democratic Theory and Constitutional Adjudication." *Acta Juridica Hungarica* 56(2): 199–212.

Posner, Richard. 1986. "Formalism, Realism, and Interpretation." *Case Western Reserve Law Review* 37(2): 179–217.

Rachlinski, Jeffrey, and Andrew Wistrich. 2017. "Judging the Judiciary by the Numbers: Empirical Research on Judges." *Annual Review of Law and Social Science* 13: 1–44.

Rausch, Becca. 2012. "Reframing Roe: Property Over Privacy." *Berkeley Journal of Gender, Law, and Justice* 27(1): 28-34.

Reyes, Rene, and Jessica Reyes. 2019. "Religion in Judicial Decision-Making: An Empirical Analysis." *Brigham Young University Law Review* 2019(1): 293–338.

Soper, E. Philip. 1977. "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute." *Michigan Law Review* 75(3): 473–519.

Starr, William C. 1984. "Law and Morality in H.L.A. Hart's Legal Philosophy." *Marquette Law Review* 67(4): 673–89.

Stavropoulos, Nicos. 2017. "The Debate That Never Was." *Harvard Law Review* 130: 2082–95.

Van Doren, John W. 1980. "Theories of Professors H.L.A. Hart and Ronald Dworkin - A Critique." *Cleveland State Law Review* 29: 279–309.

Winter, Jack. 2015. "Justice for Hedgehogs, Conceptual Authenticity for Foxes: Ronald Dworkin on Value Conflicts." *Res Publica* 22(4): 463–79.

Yanal, Robert J. 1985. "Hart, Dworkin, Judges, and New Law." *The Monist* 68(3): 388–402.

Zipursky, Benjamin C. 2008. "Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty." *New York University Law Review* 83(4): 1170–1212.