THE LEGAL PHILOSOPHY OF RONALD DWORKIN:

NO RIGHT ANSWER

David CONTER

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Department of Philosophy
McGill University
Montreal, Canada

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ABSTRACT

A hypothesis in legal philosophy is examined, namely, whether in any well-developed legal system on the Anglo-American model there is a uniquely correct legal resolution for every legal dispute. It is claimed that this hypothesis is central to the legal philosophy of Ronald Dworkin, and that it is untenable. It is further claimed that Professor Dworkin's so-called "theory of rights" is not a theory in itself, but rather a set of constraints on any theory of rights, and that the "one right answer" hypothesis is the most important of these constraints. The argument against the hypothesis proceeds under the restriction that anti-realist views about meaning must be allowed no weight. Realist, anti-realist, and holistic theories of meaning are examined. A realist model of a moral theory based on maximin justice is developed, in conjunction with an interpretation of legal propositions as propositions of conditional obligation; and the hypothesis is shown to fail.

RESUME

Le présent ouvrage examine une hypothèse en philosophie du droit, selon laquelle, dans tout système légal développé sur le modèle anglo-américain, il y a une unique solution légalement correcte à n'importe quel conflit de droit. Il montre que cette hypothèse occupe une position centrale dans la philosophie du droit de Ronald Dworkin, et qu'elle ne peut être soutenue. Il soutient en outre que la "théorie des droits" du professeur Dworkin n'est pas, en elle-même, une théorie, mais plutôt un ensemble de contraintes qui s'applique à n'importe quelle théorie des droits. L'hypothèse qu'il y a toujours une bonne solution est présentée comme la plus importante de ces contraintes. Une restriction imposée à l'argument offert contre cette hypothèse est qu'il n'accorde pas de poids aux conceptions anti-réalistes du sens. Les théories réalistes, anti-réalistes et holistiques du sens sont examinées. Un modèle réaliste de la théorie morale, basé sur l'idée de justice maximin, est développé, en conjonction avec une interprétation des propositions légales comme propositions d'obligation conditionnelle. Et l'échec de l'hypothèse en question est démontré.

PREFACE

Legal philosophy I take to be a species of applied philosophy. This essay, therefore, is an essay in applied philosophy. In it, I take various views of some philosophers and logicians, and attempt to draw consequences from them in connection with the problem in legal theory regarding the existence of uniquely correct judicial resolutions to legal disputes.

I wrote this essay because I believed that the influence of Michael Dummett's views on realism and anti-realism might have been an indirect cause of some of Professor Ronald Dworkin's odder pronouncements. Now that seven months have passed since its writing, I find that I am somewhat less enthusiastic in my appreciation of Dummett's work than I was. Also, since September, Hilary Putnam has delivered a panegyric on Nelson Goodman's Ways of Worldmaking, which rather diminishes his credentials as a realist, upon which I had to a certain extent relied; and I have had the opportunity of seeing Richard Rorty's debunking of the whole realist/anti-realist debate in Philosophy and the Mirror of Nature. But the vocabulary of this essay was set by Professor Dworkin, and I believe that the arguments in it still stand. If the reader finds himself irritated by the realist/anti-realist jargon, he might regard this essay as an attempt to present an answer to Professor Dworkin's arguments in the form of an elaborate and rather Teutonic parody.

Many people helped me in the writing of this essay - some of them, perhaps, unwittingly. In particular, I should like to thank

Pepita Capriolo, John Hawthorne, Vishwas Govitrikar, Julius Grey, Anil Gupta, George Kopp, Helen Mackey, and Barbara Scales. Special thanks must go to my mother, Sarah Conter; my brother, Alan Conter; and to Felicia Goldstein. The person to whom this essay owes most is Professor James McGilvray, my supervisor - not least because he made it possible for me to attend the 1978 University of Western Ontario Conference on Pragmatics and Conditionals. As a result, I discovered Bas van Fraassen's paper "Hidden Variables in Conditional Logic" (1974), in which David Lewis' semantics for conditionals is shown to be equivalent to Robert Stalnaker's semantics once supervaluations are added. Though nowhere cited in the text, that paper suggested to me that supervaluations might be able to find a place in the semantics of conditional obligation; and it is on the basis of that suggestion that the whole of the present essay was written.

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PART I: ONE RIGHT ANSWER? ROOTS AND BRANCHES OF A PROBLEM

In Part I I set out a description of legal disputes which entails that for every legal dispute there is only one correct resolution. This is the "one right answer" thesis, which I assert to be false. I indicate something of its history and its special connection with Ronald Dworkin, and suggest that it has often been assumed false, on the basis of cursory argument. It is hypothesized that Professor Dworkin's work on a theory of rights has often over-shadowed the "one right answer thesis", and then it is urged that in fact he has produced no theory of rights, and that what he has produced is crucially dependent on the one right answer thesis. The aim of Part I is simply to establish the necessity for a direct and detailed argument against the thesis; but some of the literature is discussed as well.

1. The "One Right Answer" Thesis, and a Reaction to It

Some people believe that for every legal dispute there is a potential judicial resolution of that dispute which would be legally correct if implemented and which is, moreover, the only legally admissible resolution of the dispute. If some people believe this, what is it that they believe?

Some of them, I think, believe something roughly like this:

The law is a system of entitlements. If the law is a system of entitlements, then legal disputes must be settled on the basis of entitlements. In any legal dispute, some party - the plaintiff or the prosecutor - institutes legal proceedings against another party - the defendant - and the point of the proceedings is to determine whether or

not some specified state of affairs is to be brought about. This state of affairs is one which is sought by the party who institutes the proceedings, and which necessarily involves the party against whom he has instituted them: that party may have to pay damages, or perform some contractual duty, or refrain from some activity, or go to jail, etc., if the proceedings lead to a judicial decision against him. Naturally, he may not want such states of affairs to be brought about, and his part in the legal dispute will be to show that there is no justification for a judicial decision calling for the imposition of such a state of affairs upon him - an imposition, it should be mentioned, that might be achieved through the forcible intervention of the state, if necessary. The judicial decision, in which the proceedings culminate, provides the resolution of the dispute.

The decision must issue in a judgement either for imposition desired by the plaintiff, or against it; but in either case, the decision must be justified. If on the defendant's behalf it can be shown (not necessarily here or now or by us) that (given the relevant standard of burden of proof) there is no justification for a decision calling for the imposition of the state of affairs sought by the plaintiff, then the dispute must be resolved in favour of the defendant and against authoritative imposition. If, on the other hand, it can be shown (not necessarily here or now or by us) that (given the relevant standard of burden of proof) there is justification for a decision calling for the imposition of the state of affairs sought by the plaintiff, the dispute must be settled in favour of the plaintiff. But it has already been suggested legal disputes must be settled on the basis of entitlements.

So if a legal dispute is properly settled in favour of a defendant, that must be because the defendant is entitled to settlement in his favour; and similarly for a plaintiff. Every dispute that is a legal dispute can be settled by judicial decision, and every dispute settled by judicial decision must be settled in favour either of the plaintiff or of the defendant. Since the settlement consists either in the authoritative imposition of a certain state of affairs or in the abstention from such imposition, the settlement can be in favour of only one of the parties to the dispute. Since anything that counts as a justification of a judicial decision in favour of one party must fail to count as a justification of a judicial decision in favour of the opposing party, and since every judicial decision must be justified, then logically there can be only one justified judicial decision for every legal dispute. And, ex hypotheseis, there must be one. In every legal dispute, then, one and only one of the parties is entitled to a decision in his favour. In one sense, the point of the legal proceedings is just to identify one of the parties as the party who has the relevant entitlement, the right-holder in the case. From all of this, at least two consequences follow.

1. Typically, the law as a system of entitlements cannot grant discretion to judges; though it may do so peripherally and within bounds, as with regard to the length of criminal sentences, or to the precise amount of award of damages, etc. The reason for this lies simply in the logic of entitlements or rights. If a judge is granted discretion in the disposition of a legal dispute, then for a number

of alternative decisions it will be permissible for him to select any one of them to resolve the dispute. Then for none among the possible alternative decisions does he have a duty to select it to resolve the dispute. But the resolution of the dispute consists either in the authoritative imposition of a state of affairs desired by the plaintiff or in the authoritative abstention from such imposition. If both of these alternatives were ever really equally permissible, then it could not be that one of the parties had a right to one of them, because his having a right to one of them surely entails that the other party has no right to the other alternative. The fact that one of the parties always has a right to one particular decision eliminates the other alternative as a possible resolution to the dispute, and renders any decision incorporating it unjustified and hence impermissible. But according to the hypothesis of judicial discretion, that alternative would sometimes be permissible. Hence the hypothesis of judicial discretion must be incorrect.

2. For every legal question, there is, in an odd but non-trivial sense, one and only one right answer. For it is possible to imagine the law of a given jurisdiction in the following way: take each possible pair consisting of plaintiff and defendant (where these are defined as persons-in-roles) and each possible combination of circum-

stances defined for each pair and each possible dispute defined for each pair in each possible combination of circumstances. Then the law will determine how any dispute involving any such pair is to be resolved on the basis of the circumstances in which the pair find themselves involved. That is, the law determines a set of true conditionals or a set of functions, each taking a plaintiff, a defendant and their circumstances over into one and only one resolution of a dispute between them. The law does this for all possible plaintiffs, defendants, circumstances, and disputes. If this were not so, then it would be merely an accidental fact about disputes which actually arose that for each of them there was a single correct resolution. But all of this suggests that the set of such true conditionals is not only determined by the law - it is exhaustive of the law. The sense of this claim is that once the set of such true conditionals were known, there would be no substantive question of law left unanswered. Since every legal dispute has but a single correct resolution, the set of true conditionals implies no conflicts; and since it has been stipulated that the set of conditionals allows for no logical gaps in the range of the conditionals' antecedents; it may be inferred that for every substantive, unambiguous question about the law of a given jurisdiction there is an answer which is a truth function of the conditionals

true in that jurisdiction. In virtue of such conditionls, the law is fully determinate.

I began by asking what some people believe, and I have tried to give a rough idea of what I think they might believe, but I doubt whether anyone has ever believed or ever will believe unqualifiedly in just those propositions to which I have given expression. Even so, the outline crudely presented here of a chain of reasoning, may be enough to do something with. The chain of reasoning I shall call "the one-right-answer thesis", for obvious reasons. I have set the thesis out in a bald and unqualified form, not mediated by any context of argument. I did this because I wanted to throw into clear relief what this essay is about: it is about the one-right-answer thesis. I take that thesis to be false, when it is construed as a conjunction of propositions; if it is construed as an argument in the indicative mode, I take it to be unsound; if it is construed as implying a set of normative propositions, I take compliance with them jointly to be sometimes impossible. I should like to persuade people that these are the appropriate reactions to the one-right-answer thesis (hereafter abbreviated as ORA), even though the foreseeable laboriousness of such a task is necessarily somewhat disheartening.

2. Some Bibliographical Information, and the Apparently Limited Interest of ORA

But, the reader may ask, mightn't it be true that everybody already believes ORA to be false, unsound, and productive of normative quandaries, so that such persuasion is not required? No. For a number of years, there have been philosophers and lawyers who have defended

ORA against all comers. Among these are Professor John C. Smith, his occasional collaborator, Professor S.C. Coval, and Professor Rolf Sartorius. But the most famous of the defenders is undoubtedly Professor Ronald Dworkin; and indeed the ORA to which the others subscribe may fairly be said to have originated with him. ORA was first supported by Professor Dworkin in 1963 in a Journal of Philosophy Symposium called "Judicial Discretion", where Professor Dworkin undertook to deny what Professor Hart had affirmed in The Concept of Law, that "in every legal system a large and important field is left open for the exercise of discretion by courts and other officials ..." (Hart 1961, p.132). The denial of judicial discretion is, of course, not the whole of ORA, but it could easily be argued, I think, that the assembling of the other elements of ORA was motivated by the need to explain and justify the denial of discretion. It is for instance a fact that an argument from the nature of rights to the denial of discretion seems both explanatory and justificatory: it would be much odder to assume that the denial of discretion might be the sort of thing that could explain or justify the nature or existence of certain rights. (This is because (a) the generic nature of rights is characterized for a wide range of problems of human conduct, extending beyond the limited area where the question of judicial discretion can arise; and (b) insistence on the denial of discretion will seem arbitrary and unreasonable in the face of opposing argument so long as the only rights violated by the denial of the denial are those which the denial itself explains and justifies. But more of this later.)

To continue with the genealogy of ORA: in 1966 Professor Sartorius' critical study of Hart's The Concept of Law appeared; and

when Professor Sartorius first intimated there that he too inclined towards ORA, he cited Professor Dworkin's Symposium paper (v. Sartorius 1966, p.156). A defense of ORA formed the capstone of Sartorius' 1975 book Individual Conduct and Social Norms - in the context of that defense Professor Dworkin's work is cited no less than twenty-three times. Professor Smith's book Legal Obligation came out in 1976: in its Preface, Professor Dworkin is thanked for having examined part of the manuscript, and his work is acknowledged as having influenced the book's composition; the explicit aim of the chapter on the judicial decision, which was co-authored by Professor Coval, is to provide arguments stronger than Professor Dworkin's for ORA (v. Smith 1976, p.151). These facts lend substance to a particular identification of ORA with Dworkin's oeuvre; and in the main it is Professor Dworkin's brand of allegiance to ORA that I want to investigate in this paper.

Professor Dworkin has had many critics, including Professors Sartorius, Smith, and Coval. Yet to my knowledge, only these three have accepted ORA. By contrast, none of the ten critics cited in the two versions of Professor Dworkin's 1977 Georgia Law Review contribution has embraced ORA, and nine of them have at the very least expressed doubts about it. These nine include the philosophers David Lyons, David Richards, J.L. Mackie, Joseph Raz, and of course, H.L.A. Hart. Nevertheless, even in the work of critics who have, like the five philosophers just mentioned, explicitly rejected ORA, detailed arguments justifying such rejection are not frequently to be found. Thus neither Professor Lyons nor Professor Richards has devoted more than half a page to the dismissal of ORA (v. Lyons 1977, p.421; Richards

1977a, p.1314). As for H.L.A. Hart, beyond that denial of ORA entailed by his assessment of judicial discretion in The Concept of Law, he has himself produced no further arguments against ORA, relying instead on positions developed by J.L. Mackie and Kent Greenawalt. Similarly, Dr. Raz has published only one attack on ORA (v. Raz 1972, pp.843-848), and it can hardly be regarded as especially significant since it seems mainly to consist of the argument that

(a) as Hart showed, it is of the nature of legal rules to give rise to judicial discretion in the interpretation and application of the rules;

(b) legal rules include as a subspecies those legal principles based on rights which Dworkin had thought to be inconsistent with judicial discretion; so that

(c) it cannot be that the existence of Dworkinian rights or principles entails the truth of ORA.

Dr. Raz himself seems to be aware that little intrinsic interest can attach to so derivative an argument: Professor Dworkin has replied to Dr. Raz's argument, and the reply is contained in Dworkin's book Taking Rights Seriously; but when Raz reviewed the book he failed to mention the rebuttal and indeed ignored ORA entirely (v. Raz 1978).

What facts like these may suggest is that ORA must be of strictly limited interest.

3. One Reason for this Appearance

It is not hard to understand why ORA should appear in this light. Suppose that among Professor Dworkin's critics, many believe

ORA to be certainly and obviously false. Then insofar as these critics wish to provide sympathetic and constructive accounts of Professor Dworkin's work, to draw on it in some way or to build on it, they may be indisposed to labour over those of its features which they regard as misguided and unacceptable. At the same time, should any of the critics desire to urge the claims of one or another hypothesis about the nature of adjudication or of law, they are not likely to spend much time specifically arguing the merits of their favoured claims over against the claims of ORA, when ORA, assumed to be false, is already regarded as failing to present any viable alternative hypothesis. This demotes ORA to a rather lowly position. Professor Dworkin's view is clearly that a theory of law which entails ORA is better than a theory for which this entailment fails (v. e.g., Dworkin 1978a,p.81). His opponents then, at least as we are presently imagining them, may avail themselves of two kinds of options. For any position of Professor Dworkin's which an opponent likes or endorses or approves of, an attempt may be made to show the invalidity of arguments leading from that position to ORA. Conversely, assuming the falsity of ORA, and the validity of Professor Dworkin's arguments leading to it, positions providing the ex hypothesi false premises of those arguments may be shown to be untenable. ORA thus affords Professor Dworkin's opponents with a special vantage point from which to survey a great deal of his work; but in the unfavourable perspective thus gained, the work itself must appear to wilt and wither. Moreover, the perspective has the disadvantage of being unreachable by any supporter of Professor Dworkin or indeed by anyone who believes in ORA. This, of course, is more of a tautology

than an observation; but it may serve as a practical reminder that anyone who wants to persuade Professor Dworkin's supporters of the inadequacies of some of his theoretical formulations could do worse than to set about arguing explicitly against ORA. In the second and third parts of this essay, that is what I shall do.

Such a strategy, however, may not recommend itself to the observer who for one reason or another regards himself as obliged to consider Professor Dworkin's views as a whole. Argument against ORA, it seems, could hardly proceed by way of argument against arguments for ORA - surely there are indeterminately many of those, and if one of them should be refuted, there may still be indeterminately many left. This line of thought, then, may lead one away from a concentrated examination of Professor Dworkin's work: if arguments for ORA are better simply by-passed, then it might be better if, at the level of particular arguments, Professor Dworkin's arguments for the thesis were by-passed too. Someone who, on the other hand, wishes particularly to attend to arguments specifically put forward by Professor Dworkin, might well wish to forego the effort of constructing independent arguments supporting propositions incompatible with ORA, even if he regards ORA as false. At least, some reasoning such as this may suggest one kind of explanation of the comparative lack of energy that has been directed against Professor Dworkin's adherence to ORA.

4. More Reasons, with More Bibliographical Information

Another kind of explanation may be picked out in the very pattern of the development of Professor Dworkin's ideas. Over the

years these ideas have been ramified, and they are now very complex. The effect, I think, has been powerfully distracting. It seems to me worthwhile to try to convey some crude impression of the gradual production of this effect, and to provide a background against which ORA may be viewed; and so I now offer up for the reader's perusal the following brief, if scandalously simplistic, intellectual chronicle (couched for euphony's sake in the historic present):

In 1963, Professor Dworkin introduces ORA, in terms not unlike those used in the first section of this essay. In the course of defending it, he constructs an imaginary game called "Policies" - a game like baseball except that in it, umpires are directed to act so as to abide by the rules or alter them in such a way as "to bring the game closer to the realization of certain fixed policies or to make it more consistent with certain fixed principles" (Dworkin 1963, p.629, emphasis added). This game Professor Dworkin contrasts with a game called "Limited Scorer's Discretion", also like baseball, except that in it umpires are given discretion to call any pitch not taken by the batter as either a ball or a strike depending on the umpire's personal preferences or ideals. Professor Dworkin suggests that the law is more like "Policies", than like "Limited Scorer's Discretion"; that in "Policies", given the umpire's direction with regard to principles and policies, he may properly be said to have no discretion; and that a similar conclusion should be drawn with regard to a judge in a legal system.

In 1967 Dworkin argues not only that legal principles and policies are standards binding on judges, in such a way as uniquely to determine the application or interpretation of identifiable legal rules,

when these are vague or elliptical; but also that the identification of these principles and policies cannot be established by appeal to anything like a legal rule.

> "We argue for a particular legal principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the pervasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards." (Dworkin 1978a, p.40)

The recalcitrance of a protean body of principles with regard to incorporation in anything recognizable as a set of rule-formulae is now taken to refute Hart's rule-based legal positivism, and its accomodation of judicial discretion.

In 1972, the specification of this protean body of principles is declared to be a task inextricably related to the justification of substantive political and moral judgements. The identification of the principles is to be established by appealing to "the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question ..." (Dworkin 1978a, p.66, emphasis added). And arguments for one theory of law over another are to "include arguments of normative political theory, like the nature of society's duty of equality [sic], that go beyond the positivist's conception of the limits of the considerations relevant to deciding what the law is." (Dworkin 1978a, p.68)

Also in 1972, a classificatory scheme is outlined for the sort of justificatory legal theories just described. According to the scheme, competing legal theories are to be understood as embodying different conceptions of the same concept. Thus, a concept that figures

in the law - say, fairness, or legality, or equality, or cruelty - is thought of as setting up a certain area for the exercise of legal judgement, whose specific boundaries may be drawn in different ways according to each of a variety of theories of fairness, legality, equality, etc. (cf. Dworkin 1978a, p.135). From among these theories a best theory in each area must be chosen. This classificatory scheme is attributed to John Rawls, and Rawls' "A Theory of Justice" is commended to legal thinkers as indispensable.

In 1973, political arguments and justifications for any sort of action are divided into three distinct classes. Thus, any appeal to (expected) benefits in the aggregate for an entire community is to be defined as an argument of policy on behalf of a collective goal; any appeal to (expected) benefits of such a kind that it would be wrong to deny the (expectation of those) benefits to an individual (person, institution, minority group, etc.) is defined as an argument of principle on behalf of an individuated right; and any purely deontologically based appeal is defined as an argument on behalf of a duty. This division somewhat clarifies the application of the words "principle", "policy", and "right", as used by Dworkin since 1963. It turns out that claims of justification may run from arguments of principle to deeper, underlying arguments of policy; that conversely, rights may justify goals; that duties may give rise to rights, etc. Nonetheless, the hypothesis is put forward as reasonable that a particular normative political theory "will give ultimate pride of place to just one of these concepts; it will take some overriding goal, or some fundamental set of rights, or some set of transcendent duties, and show other goals, rights, and duties as subordinate and derivative." (Dworkin 1978a, p.171, emphasis

added.) Dworkin argues that Rawls' theory of justice is a right-based theory founded on the right of each individual to equal concern and respect - to treatment as an equal (though not to equal treatment). This theory is said to be consonant with the traditional liberal conception of American democratic institutions.

In 1975, Dworkin argues that judicial decisions in hard cases, where the application or interpretation of simply identifiable rules of law is not settled, must be based on arguments of principle and not of policy, so that decisions must be based on, and must enforce, the existing rights of individuals, and not of the goals of the community. This important thesis is called the rights thesis, and it strongly constrains the output of the theories which insure that judicial decisions are never a matter for the discretion of judges.

In 1976, Dworkin suggests that a preference-based utilitarianism would seem to satisfy each individual's right to treatment as an equal, each person's preferences being measured on the same scale and figuring at just one term in the utilitarian calculation, if it were not for the fact that people are likely to have external preferences regarding the assignment of goods and opportunities to others, above and beyond the personal preferences people may have regarding the assignment of goods and opportunities to themselves. This "corrupts" the utilitarian calculation "because the chance that anyone's preference has to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life" (Dworkin 1978a, p.235). It is not always possible to reconstitute a utilitarian argument so as to count only personal preferences, and where this is

the case utilitarian arguments purporting to justify a certain course of action will be "not simply wrong in detail but misplaced in principle", as contravening the basic right to treatment as an equal.

In 1977, Dworkin argues that any idea of a "right to liberty" is "misconceived" - "untenable and incoherent; there is no such thing as any general right to liberty" (Dworkin 1978a, pp.271,277).

In 1978, Dworkin accounts for the difference between American liberals and American conservatives by attributing to them different political theories embodying different conceptions of the concept of the right to treatment as an equal. Liberals suppose that treatment as an equal must be characterized without reference to any particular conception of the good life, or of what gives value to life (Dworkin 1978b, p.127). Conservatives suppose that treatment as an equal cannot be characterized independently of "some theory about the good for man or the good of life, because treating a person as an equal means treating him the way the truly good or wise person would wish to be treated" (Dworkin 1978b, p.127). The content of the conservative's conception is filled out by a traditionalist and nationalist account of the good life (Dworkin 1978b, p.136f). The idea of liberty plays no constitutive role in either liberal or conservative theories (Dworkin 1978b, pp.123-126).

Well, Professor Dworkin has gone a long way from variations on the game of baseball, and the conditions under which an umpire may or may not be said to exercise discretion. "Policies", "principles", "positivism", "rights", "utilitarianism", "external preferences", "concepts and conceptions", "normative theories", "democratic institutions", "equality" - it is hardly surprising that words like these

should catch the interest of commentators and turn their attention away from the relatively humble ingredients of the original ORA, and also away from Hart's analysis of law as the union of primary and secondary rules, against which ORA came early to be directed, and which may now look positively monkish in its austerity.

In fact, the cynosure of almost every critical eye has been Dworkin's accounts of rights, of the right to treatment as an equal and of the consequences of these accounts for the "right thesis": the thesis every judicial decision must be grounded upon arguments of principle, not policy, and must enforce existing legal rights. This thesis is, of course, connected to ORA, since ORA includes the proposition that in every dispute properly susceptible of resolution by judicial decision there is one and only one party such that he has an entitlement or right to a decision in his favour. But the rights thesis does not entail this proposition of ORA, since even granting the rights thesis, it at least might have been the case that none of the parties to legal disputes had rights to decisions in their favour; that they might nevertheless have some rights to which legal argument could always appeal, and which would often be decisive; and that in the case of right-based arguments more or less vaguely comparable in strength, the judicial decision might permissibly ground itself on any one or other of just those right-based arguments. It is not clear that this possibility contravenes the rights thesis, but it is clearly incompatible with ORA. This is one half of an argument for the independence of the rights thesis from ORA. On the other hand, it may seem plain that the falsity of the rights thesis will entail the falsity of ORA. Yet I

doubt that this is true in quite the full-blooded sense in which it might be meant; and so the rights thesis may indeed be independent of ORA. Admittedly, ORA refers to rights which figure in every legal dispute, but if some duty on the part of the judge settling the dispute could invariably be discovered, there might be nothing to prevent the derivative introduction of logically superfluous rights attributable to the parties to the dispute. For instance, according to adherents of a certain stripe of act-utilitarianism, who worry about the problem that befell Buridan's ass, utilitarianism will always determine a unique procedure available to an agent for settling upon a choice of one out of a number of alternative options, even in the extraordinary case where all the relevant probabilities and preferences including the agent's own initially fail to determine such a choice (cf Narveson 1976, p.176). The adoption of such a procedure, however, will be the act-utilitarian's duty even where the identity of the duty is such that were the act-utilitarian's preferences to be different, the duty would be different too. Suppose in the legal case that, given a procedure rightfully adopted by the judge, both the probability of judgement for the plaintiff and the probability of judgement for the defendant are less than 1. Then the right of each party to the dispute will be neither more nor less than his right to just the level of the probability of an outcome in his favour determined by the rightful choice of procedure made by the judge of the dispute. In this kind of case, act-utilitarianism might come vanishingly close to satisfying ORA, since the act-utilitarian judge could not have acted differently (given his preferences) without acting wrongly and failing in his duty, though oddly enough,

the outcome - the actual judicial decision - might have been different without any of the parties' rights being violated, because of the randomising properties of the selected decision procedure. J.H. Sobel once played about with the idea that if ideal rule-utilitarianism were not vacuous, it would still be incomplete in the sense that its rules would fail to answer certain moral questions, but that it might be made complete by allowing act-utilitarianism to govern decisions not governed by rule-utilitarian rules. (As an act-utilitarian, he found this idea unattractive. v. Sobel 1968, p.156f) In order, however, to guarantee the uniqueness and completeness of the set of correct judicial decisions generated by the legal system of a given jurisdiction, one might suggest a similar conjunction of clear legal rules with act-utilitarianism, in the manner just envisaged: so that where the legal rules failed to determine a unique decision, act utilitarianism would remedy that situation, thus meeting the requirements of ORA. Of course, whatever its defects, this system would on Professor Dworkin's view be liable to violate the right of each individual to treatment as an equal, because any given utilitarian calculation might be irredeemably corrupt due to the influence of external preferences. If the rights thesis is entailed by the right to treatment as an equal, as there is on Professor Dworkin's views reason to believe, then the rights thesis too might be violated by the utilitarianly supplemented legal system. But ORA might still be satisfied. ORA may, therefore, be independent of Dworkin's ideas about rights. The upshot of all this is that it seems possible for discussions of the nature of rights, of the rights thesis, and of the right to treatment as an equal to fail to touch upon ORA.

Moreover, if ORA may stand or fall on the grounds occupied by the exotic philosophical doctrines of contemporary act-utilitarianism, it might seem more profitable to abandon discussion of ORA and to engage in other discussions - say, discussions of the rights thesis. One can imagine at least two practical advantages for doing so.

1) There is some doubt as to whether the consequences of the truth of ORA can be practically different from the consequences of its falsity (v. Greenawalt 1975, pp.362f,398f; Cross 1977, p.220; Hart 1977, p.987; Munzer 1977, p.1061; Nickel 1977, p.1134; for other views, also inconclusive, compare Cohen 1977, p.337f; Mackie 1977, p.15f). But there is at least a powerful presumption that acknowledgement of the rights thesis, for instance, would make some practical difference. Recall the prohibition entailed by the rights thesis barring judges from considering arguments of policy, and consider the following remarks of Lord Denning in the Spartan Steel case regarding recovery for economic loss in the law of tort:

> "At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable - by saying that they are too remote - they do it as a matter of policy so as to limit the liability of the defendant."
>
> (cited in Cross 1977, p.221)

There are two possibilities: either Lord Denning's remarks are incompatible with the rights thesis, or they are not. If, as seems most unlikely, there is no incompa-

tibility, that indicates that Professor Dworkin uses the words in a very different way from Lord Denning, and perhaps from everybody else, too. This, in fact, has been argued by MacCormick at some length in Legal Reasoning and Legal Theory (1978, pp.259-264), and also by Richards (1977, p.1308f), and it is something that we should be aware of, if it is true; just because if it is not true and Professor Dworkin is right, we shall be compelled to regard as invalid any and all judicial reasoning styled upon Lord Denning's dicta. (Professor Dworkin declares that his views are not incompatible with Lord Denning's - 1978a, p.84.) Now Lord Denning's recent book, The Discipline of Law, which consists of grouped excerpts from a number of his judgements, linked by elucidatory comment, makes it quite plain that what he at least considers considerations of policy are not uncharacteristic of his approach to legal reasoning. Suppose that in many of the cases that came before him, the reasoning behind his judgements depended on considerations of policy; on this supposition, if the rights thesis is correct and incompatible, pace Dworkin, with Lord Denning's characteristic approach to legal problems, it must be the case that the texts of Lord Denning's judgements in these cases are worse than worthless, because false and misleading - even if per accidens Lord Denning has always decided favour of the party with the right to the decision. Well, should lawyers

spend their time studying Lord Denning's judgements, or shouldn't they? Since Lord Denning is certainly among the most important British judges of this century, this is very clearly a practical question, and one on which rights thesis has a direct bearing; though of course it is impossible to say what that bearing is until we know what the rights thesis means and whether or not it is true. These questions, therefore, have a more obvious urgency than direct questions about ORA.

2) Another practical advantage of concentrating on rights and the rights thesis, and one more germane to the concerns of this essay, is that such concentration might result in the practical refutation of ORA. I have argued that the falsity of the rights thesis would not entail the falsity of ORA, because ORA might be true, albeit in a rather stretched way, if a system of legal rules could be coherently supplemented by act-utilitarianism. But the practicality and coherence of act-utilitarianism are themselves extraordinarily problematic, and so it might be the case that if the rights thesis were false, and paradoxically act-utilitarianism were the only way of shoring up ORA, then it would be practically necessary to acknowledge (a) the absence of any duty on the part of a judge, owed to one or the other party to a legal dispute, to decide the case in that party's favour; and hence (b) the falsity of ORA.

In any case, a different argument against ORA might proceed with a claim that the rights thesis must be false or practically vacuous. In the one case it would be shown that at least some judicial decisions are based on policy; in the other, that at least some judicial decisions are based on what we call policy, though Professor Dworkin might not; then reference might be made to Professor Dworkin's own account of arguments of policy, according to which such arguments do not uniquely determine choices, since such arguments must reflect compromises among individual goals and purposes even though we have no objective means of establishing precisely how the arguments must reflect the compromises and are forced to rely on imperfect approximations provided by the legislation of representative democracy (cf. Dworkin 1978a, pp.85,324f); finally, a normative argument would be presented to defuse the objection that in reaching judgements on the basis of policy-arguments, judges violate democratic principle by acting as unelected legislators. With this argument a case would have been made against ORA based on the assessment of the rights thesis as descriptively objectionable and normatively unconvincing; and in the process many of Professor Dworkin's increasingly broad concerns would have been discussed.

In these lines of thought, I believe that a rationale can be found for stances taken up by many of Professor Dworkin's critics. Certainly, it is true that they have been more inclined to deal with

general hypotheses about rights, principles, policies, and goals than with the bare elements of ORA. As I mentioned earlier, Dr. Raz's review of Taking Rights Seriously passes over ORA entirely, concentrating entirely on the wider issues of rights, conservatism, and natural law. In his review, David Lyons declares flatly that the particular issue of judicial discretion is red herring in Professor Dworkin's legal theory (Lyons 1977, p.421); and this, by implication, must apply to ORA. It is Lyons' view that Professor Dworkin is mainly motivated by anti-positivism, and he points out that a system of clearly identifiable legal rules is at least possible which disallows judicial discretion and is nevertheless perfectly susceptible of positivist description (Lyons 1977a, p.424). Indeed a system formed from a set of legal rules supplemented by an act-utilitarian rule in Sobel's style would be just such a system - if it existed, which there is every reason not to believe. (Lyons is a commentator sympathetic to utilitarianism. For Sobel's rule MU, see Sobel 1968, p.156. The necessary modifications for the legal case are obvious.) As a result Lyons concentrates mainly on Dworkin's characterization of positivism, and of various aspects of the rights thesis. Critical depreciation of ORA, however, is perhaps most strikingly exemplified in the work of Kent Greenawalt. Considering the citations of his first essay on Dworkin by both H.L.A. Hart and Sir Rupert Cross, and the fact that his critical efforts have earned him almost forty pages of reply from Professor Dworkin, Greenawalt is arguably the most important of the Dworkin critics. His first essay on Professor Dworkin's work was written before the distinction between principles and policies had appeared in print, and is directed squarely at the issue of judicial

discretion and the question of alternative admissible resolutions in hard cases. Early in his second essay, however, he repudiates the emphasis of his prior considerations: "... I now believe that whether or not a judge should be characterized as having discretion is much less central to Dworkin's theory than appeared from his earlier writings. I do not discuss the question of judicial discretion explicitly in this Article" (Greenawalt 1977, p.992, fn.8). He then proceeds for sixty pages to discuss "Policy, Rights and Judicial Decision". For a number of critics, then, it seems that ORA has drifted into the peripheral areas of their vision.

5. Misconceptions about the Rights Thesis, and the Real Importance of ORA

In the preceding two sections I have tried to explain how it may be that critical attention has been disposed to direct itself away from ORA and towards more general issues in political and legal theory. Now I should like to say that I regard this orientation as mistaken, and symptomatic of an important misinterpretation of Professor Dworkin's ideas about rights.

The rights thesis is said to have both a descriptive and a normative aspect; and it is not a general thesis, meant to apply to all legal systems, but is instead grounded on some features characteristic of Anglo-American legal systems generally, and perhaps some features specific to the constitutional arrangements of the United States (v. Lyons 1977a, p.426; for the qualification indicated by "perhaps", v. Richards 1977b, p.34). But whether it be taken as descriptive or as normative, one might suppose it to be required of any account of rights,

goals, principles, policies and their interrelations, that such an account, designed to give content to the rights thesis, must provide as well a conception of rights adequate for general employment in discussions of the problems with which rights are connected in Anglo-American jurisdictions. Such an account must explain what rights are in such a way as to show how questions about particular rights figure importantly and characteristically in normative discussions. There seems to be widespread agreement among the critics whose work I have seen, that Professor Dworkin has failed to provide such an account. The assumption is that according to this standard, significant complaints may be raised against Professor Dworkin's account, a catalogue of which might include the following:

- He underplays the importance of the protection and extension of rights as a social goal; he ignores the goals of individuals and minorities as opposed to their rights (minorities may have the goal of forming a powerful legislative pressure group); he characterizes arguments of principle as opposed to policy in terms of a requirement of articulate consistency, or theory-dependence, but declares that this applies in varying strengths to all political officials, including presumably legislators, so that what looked like a dichotomous partition turns out to be a continuum (v. Marshall 1977, p.136f).

- He fails to see that First Amendment liberties granted to individuals, for instance, may reflect a social policy, while an aggregate measure of efficiency may be given by the Pareto principle; that a legislative concern with minimum levels of social welfare may be based on a consideration of rights, while the conservation of judicial resources may be dictated by a social goal (v. Richards 1977a, p.1309;

1977b, pp.31,54).

- He overlooks the facts that social policy may be the natural source of differing standards of negligence or nuisance in tort cases: a private person driving a car may conduct himself negligently, where a policeman or fireman driving in a similar manner may not be negligent; the levels of industrial air pollution or noise pollution that constitute a nuisance in a given area may depend on the population density of the area; judicial decisions in cases of this type may be explained by reference to the rights of non-parties to the legal proceedings, but only at the cost of trivializing the rights thesis (v. Greenawalt 1977, p.1016).

- The idea that the rights of the parties to hard cases must be pre-existent so that judicial decisions will be justified, is vacuous: the identity of these rights is in doubt until the decision is reached; so that the rights cannot have provided the parties with any guides to action, and the corresponding duties must therefore be regarded as suffering from a parallel attenuation (v. Munzer, p.1062).

- The elimination of external preferences from utilitarian calculations doesn't provide an adequate basis for a general theory of rights, but only for a theory of counter-majoritarian rights; a majority may have the right to the installation in office of the political representative which that majority elected (v. Nickel, pp.1137, H37).

- The creation of new rights by the courts, disallowed by Dworkin, does not violate the ex post facto clause of the first article of the United States constitution; the creation of new rights is not

inconsistent with the rationale for the ex post facto clause as considered by the Framers (v. The Federalist Papers, p.282); the rights thesis in its descriptive guise is not subject to empirical falsification (v. Brilmayer, pp.1179,1181).

- The relationship of rights to claims and duties is not made clear by Dworkin (v. Raz 1978, p.138).

- The result of Dworkin's distinction between principles and policies is just that any argument, if a judge considers it important enough, may be called an argument of principle (v. Umana, p.1181).

As I indicated above, I believe that the complaints in this catalogue are grounded on the assumption that Professor Dworkin's account of rights, to be acceptable, must be responsive to the variety of judgements normally made about rights, goals, principles and policies. This might be put rather pompously by saying that these judgements form the data for which a theory on rights must account, if it is to be descriptively adequate. Since there is evidently a body of data with which Professor Dworkin's account conflicts, the account that he offers is not descriptively adequate. That, at least, is how the assumption works itself out.

In testing the acceptability of Professor Dworkin's views, however, I think it will be better to proceed on the basis of the denial of the assumption. Why do I think this, and what does it mean to think this? I'll give three sets of reasons why I think this, and in the course of giving them, the question about meaning may be answered, too:

i) The First Reason

The first reason arises directly from the nature of ORA. Think for a moment of the judgements normally made about rights. The set of such judgements has no doubt very fuzzy borders; it is nonetheless virtually certain that it does not contain judgements asserting for every legal dispute a right of one or another of the parties to the dispute to a judicial decision in favour of that party. For an account of rights subject to the constraints imposed by ordinary judgements, any entailment of the existence of these rights is not a desideratum; indeed, to anyone who like Professor Richards, for instance, believes in the rarity of the right of a litigant to win a case, the entailment would be an obstacle to acceptance of the account (v. Richards 1977a, p.1315). ORA, however, demands the existence of a full panoply of such rights. It can hardly be surprising, then, that an adherent of ORA should be prepared to hold in abeyance some of the constraints on an account of rights insisted upon by opponents of ORA, if the implementation of those constraints appear to be unfavourably prejudicial against ORA. And the prima facie oddness of the idea that litigants may generally have legal rights to win cases at law, is surely strong evidence that a requirement of conformity to ordinary judgements would have just such a prejudicial effect on any account of rights which accommodated ORA. In this light, some of the polemical force of the charge of descriptive inadequacy levelled against Professor Dworkin's account of right must suffer a diminution, since it draws on a presupposition about theories of rights which it is natural for Professor Dworkin to reject. It is possible to go further than this, however. For it is not implausible to suppose that as far as Professor Dworkin is concerned, it is ORA that must impose a constraint on any acceptable theory of rights.

This is a rather strange idea, but it is more faithful to the chronological development of Professor Dworkin's views than any idea can be which takes ORA to be a primitive, merely vestigial excrescence on the rights thesis. It also has the advantage of exposing the weakness of an argument that might be raised by opponents of Professor Dworkin. The argument is that, while it is all very well for Professor Dworkin to want a theory of rights to accord with ORA, any candidate theory must first meet the requirements that its output conform with our everyday judgements about how rights are connected with social goals, policies, etc. The weakness of this argument is, of course, that an exactly symmetrical argument can be launched from a position which grants primacy to the constraint imposed by ORA. The exasperated sense, apparently felt by many critics, that in discussing rights Professor Dworkin misses what is obvious may tend to evaporate somewhat in the realization that Professor Dworkin, starting from a different presupposition, may clearly find obtuse much of the criticism directed against him.

To take a convenient example: the presupposition of the primacy of ORA clearly vitiates the strategy touted as plausible in Section 4 of this essay of arguing against ORA by arguing <u>first</u> against the descriptive adequacy of the rights thesis, and <u>then</u> in favour of the normative acceptability of judicial discretion. In the first place, the propriety of any particular standard of <u>descriptive</u> adequacy for theories about rights, such as conformity to everyday judgements about rights, is just what is placed in doubt by the existence of alternative presuppositions regarding such standards, such as conformity with ORA.

In the second place, as a matter of logic, the normative acceptability of judicial discretion cannot by itself be sufficient to eliminate the presupposition of the primacy of ORA as a constraint on accounts of rights. For any supposition to the contrary would seem to guarantee the appropriateness of a constraint on accounts of rights formulated simply in terms of normative acceptability, because any attempt to strengthen the constraint descriptively would involve the risk of petitio principi, by creating the risk of conflict between normative and descriptive criteria. In consequence, the constraint imposed by ORA must be judged more restrictive than the constraint formulated in terms of the denial of ORA, since the former constraint rules out some accounts of rights, viz. those that leave open the possibility of judicial discretion, which the latter constraint fails to rule out. But as a matter of method, a more restrictive constraint on a class of theories must be preferred to a less restrictive one, because the more restrictive constraint will lessen the range of indecision allowed by a theory belonging to the class. So the normative acceptability of judicial discretion can have no proper bearing on the acceptance or rejection of ORA, any more than the so-called descriptive inadequacy of Professor Dworkin's rights thesis can. As far as I can see, joinder of issue with Professor Dworkin is possible on two grounds only.

(a) One might argue that a legal system allowing judicial discretion is not only normatively acceptable but normatively preferable to a legal system which attains the standard set by ORA. The possibility of such an argument seems to me problematic. It is one thing to say that in a democracy it is all right for judges to be granted discretion

to shape the institutional patterns which govern people's lives; quite another to say that is is better for this discretion to be granted to them than withheld. On the assumption that both of these are live options, argument could only proceed on the basis of disputable answers to complicated questions about social policy. Moreover, Professor Dworkin's claim on behalf of the descriptive adequacy, not of his account of rights, but of ORA as a characterization of (Anglo-)American adjudication would have to be carefully investigated.

(b) One might argue that a legal system satisfying the standards set by ORA is impossible. That, of course, is what, at the beginning of this essay, I said I would argue; I am a little sorry to have taken such a long way of saying why I think that that is a reasonable way of doing things, and little more sorry that even now there are still a few things to be said before that argument can begin to get underway. The first of these is that both the methods of argument I have just outlined take ORA and not any account of rights to be absolutely central to Professor Dworkin's thought; only an approach such as this can explain why an account of rights like Professor Dworkin's should, so to speak, hang upon a theory of adjudication. This is the real importance of ORA.

That constitutes one rather abstract and convoluted set of reasons for thinking that Professor Dworkin's work should not be assessed on the assumption that is is constituted of an explication of some ordinary notion of rights. The two sets of reasons to follow are somewhat less abstract, somewhat more textually oriented, but unfortunately, no briefer.

ii) The Second Reason

Professor Dworkin has nowhere produced a theory of rights. That, of course, is the burden of many of the complaints listed at the beginning of the present section of this essay; and it is the explicitly expressed view of Professor Richards who says,

> "In summary, then, it appears that Dworkin's normative rights thesis is more successful at identifying and illuminating the hitherto unnoted necessity for developing a solid normative theory on which to base jurisprudential arguments than it is at defining the contours of such a theory."
>
> (Richards 1977a, p.1331)

If, as has already been argued, Professor Dworkin is best understood as exploring the consequences of a novel constraint on theories of rights, Professor Richards' judgement is accurate but infelicitous, presupposing (as it seems to) an irrelevant standard for the assessment of Professor Dworkin's work. But the idea that Professor Dworkin has not attempted to set out a theory of rights is belied by his own words, e.g. "I should add here ... that the theory of rights I offer ..." (Dworkin 1978a, p.366). So I feel obliged to say something in defense of the interpretation here suggested.

I believe that there are features that emerge in Professor Dworkin's treatment of rights, particularly in his most recent "Reply to Critics", which are incompatible with a view of that treatment as constituting a <u>theory</u> (v. Dworkin 1978a, pp.291-368).

By far the most important of these features is the minimal contact in Professor Dworkin's treatment between <u>statements</u> about rights and <u>knowledge</u> about rights. A theory is nothing if not an organized body of <u>knowledge</u>. From a theory of rights one might suppose that a

man could come to know that he had a right, say, to treatment as an equal; or to know, at least, of the possibility that he had such a right. But for a man to know this sort of thing would be for him to know some proposition to be true, or possibly true, or to know at least what it would be for such a proposition to be true. Let a "proposition" be that which can be asserted or denied, let an "assertion" be an asserted proposition, and let an "assertion of right" be an assertion of the form "a has a right that b ϕ" where a and b stand in for names of persons and ϕ for some predicate. Now the fact is that Professor Dworkin's account of rights is hardly at all concerned with true assertions of right, and instead almost entirely given over to consideration of successful claims of right. His earliest published explication of the idea of a right appeared in 1970 and runs as follows:

> "In most cases when we say that someone has a 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference. I use this strong sense of right ..."
>
> (Dworkin 1978a, p.188)

By 1977 this has become:

> "A successful claim of right, in the strong sense I described in 1971, has this consequence. If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."
>
> (Dworkin 1978a, p.269; emphasis mine)

In between these comes the 1975 formulation in which a man is said to have a right to something "if it counts in favour of a political decision that the decision is likely to advance or protect the state

of affairs in which he enjoys the right" (Dworkin 1978a, p.169; emphasis mine); and in the 1973 formulation a man is said to have a right "to a particular political act, within a political theory, if the failure to provide that act, when he calls for it, would be unjustified within that theory ..." (Dworkin 1978a, p.169; emphasis mine). The point of quoting these formulations is just to demonstrate how all but the earliest of them refer to speech acts, their occasions, and their consequences. The intial difficulty with this is to see how claims of right could be sensibly put forward (as candidates for "success") independently of any assumptions about the truth or falsity of assertions of right; but if suspicion is justified here, it must taint any attempt to account for the truth of assertions of right in terms of the fate of claims of right, as for example, "success" or "counting in favour of a political decision". The formulation in terms of a claim justified within a political theory escapes this difficulty, but it openly passes on to an unconstructed political theory the responsibility of accounting for the truth of assertions of right, and so confirms the idea that Professor Dworkin is plainly not committed to the effort of producing a theory of rights that would organize a body of knowledge of true propositions of right.

This explains his otherwise baffling reply to Dr. Raz's review of his book in which he wants to "argue that claims of right must be understood functionally, as claims to trump some background collective justification that is normally decisive" (Dworkin 1978a, p.364). The analogy to a game of cards is naturally reminiscent of Michael Dummett's analogies to games, employed by him to illuminate

the notion of the force of a linguistic utterance, which involves the variety of kinds of linguistic act which may be effected by an utterance, on the assumption that the sense or cognitive content of the utterance is already given (v., e.g. Dummett 1973, pp.297,301f,307,ch.10 passim, 1975b, p.74; 1978, pp.2,8-10,420). The danger is that Professor Dworkin's account of the force of claims of right may be taken (even perhaps on occasion by Professor Dworkin) not to assume, but to exhaust the sense of assertions of right, and this danger is exacerbated when Professor Dworkin says, "Particular political rights can only be understood functionally, as I have just said, by attending to the role of these rights in the political process" (Dworkin 1978a, p.367; emphasis added). This seems to imply that when people make assertions of right, the sense of their assertions may be learned from examining only the occasions and consequences of actual assertions similar to theirs in the context of actual political processes. This wreaks havoc with the idea, accepted by Professor Dworkin and surely by everybody else as well, that an assertion of right may be true even when a claim of right based on it is unsuccessful because overridden, whether justly or not. Of course, hypothetical claims of right in hypothetical situations can be envisaged, and consideration of their hypothetical successes and failures might provide the sort of food for thought that Professor Dworkin might find appetizing; but without an independant theory of rights it is difficult to see why intuitively independent and distortive circumstances and consequences of speech-acts should be screened out in such a way that the counterfactual fates of claims of right could, in a normatively acceptable way, give sense to assertions of right.

There is no theory of rights to be extracted just from a naturalistic examination of the circumstances of speech acts: the idea that there is smacks of a politically conservative and philosophically old-fashioned meta-ethics. If despite his intentions, Professor Dworkin has been accused of conservatism by Dr. Raz (v. Raz 1977, pp.133-136), and of kowtowing to consensual morality by Professor Richards (v. Richards 1977a, p.1324), his "functional" perspective on rights, apparently readily confused with a theory of rights, may be in part to blame. But I would ask the reader to note that the functional perspective is adequate to the requirements of ORA. The issue in ORA is so simple that one party's right to a decision in his favour, if he has that right, cannot be supposed to be overridden by his opponent's right to a decision in his favour. The rights in question are mutually exclusive, and are so very specific that the criterion of the success of a claim of right, though fallible as a means of identifying the right-holder in a legal dispute, can hardly lead to puzzles which demand recourse to counterfactual suppositions about claims of right; in fact the very specificity of the rights in question virtually precludes such recourse. This is just another way in which Professor Dworkin's account of rights may be regarded as having been tailored to ORA.

Another more blatant indication of Professor Dworkin's refusal to commit himself to a theory of rights appears in the reply to Professor Greenawalt. As the reader may recall, Professor Greenawalt offered a number of counter-examples to the rights thesis, based on the treatment of negligence and nuisance cases in the law of torts. In his opinion, the standards determining what is legally to count as nuisance

or negligence must be regarded as being set by considerations of social policy unless accounts were to be taken of "rights" to one thing or another held by non-parties of legal disputes hinging on negligence or nuisance. In that case, however, he supposed that a criterion for the acceptability of judicial decision would be trivial if it were grounded on the distinction between considerations of social policy and considerations stemming from rights. The relevant part of Professor Dworkin's reply is his acknowledgement that there are a variety of available theories of rights, each differing from the others as to the range over which it permits calculation of the consequences of, say, a judicial decision to affect the overall assignment of rights. As examples of this variety, Professor Dworkin outlines an act-utilitarian theory of rights, an ideal-rule-utilitarian theory of rights, a plausible-rule-utilitarian theory, a Rawlsian theory, and an institutional rule-based theory (v. Dworkin 1978a, p.313 ff.). He declares that judges may hold any of these theories, severally or in combination, and that they may hold other theories (Dworkin 1978a, p.315). He then argues that the rights thesis would be trivial only if there were no conceivable theory of rights according to which political or judicial decisions might differ depending on whether they were supported by arguments of principle or by arguments of policy (Dworkin 1978a, p.317). The form of this argument is clearly such that no particular theory of rights need be appealed to, so that Professor Dworkin even feels quite free to commend to the reader's attention a theory of rights extracted by David Lyons from ideas of Mill's, (even though Lyons' development of the theory seems in part to have been provoked by Professor Dworkin's own hostility to utilitarianism - v. Lyons 1977b, p.115 - a fact which

Professor Dworkin neglects to mention). On the other hand, the very breadth and mildness of Professor Dworkin's sympathies in these matters has lead that anti-utilitarian, David Richards, to regard the "Reply to Critics" with relief, apparently because in it he finds Professor Dworkin "relying on utilitarianism as a technique rather than a philosophical model" (Richards 1977a, p.1312). The relief is apparently due to Professor Dworkin's emphatic rejection of the view - attributed to him mistakenly, he says - that rights might be analyzed in terms of a utilitarianism purged of external preferences (v. Dworkin 1978a, p.357). The moral of all this, I believe, is that Professor Dworkin's catholicity is not just a matter of diplomacy or good manners; rather it marks a systematic avoidance of committment to a theory of rights.

At another point where he might be regarded as castigating Professor Dworkin for failing to produce a theory of rights, Professor Richards himself unleashes a potential source of untold misunderstanding. Richards complains that because of Dworkin's preoccupation of rights as constituting a response to any prejudices that deform utilitarian balancing, "the upshot appears to be either a theory of rights based on utilitarian considerations, or an intuitionist theory containing the two basic normative judgements of equality or maximum utility, which are to be balanced against one another, as the intuitionists say, by 'judgement'" (Richards 1977a, p.1327). Now the problem is that, while the first alternative - utilitarianism - seems already to have been ruled out as an element in the interpretation of Professor Dworkin, the second alternative - intuitionism (?) - cannot be allowed to stand; for it either (a) collapses into the first alternative or (b) is eliminable on other grounds.

(a) The "intuitionist theory" characterized by Richards - without provenance - occurs as item D.1 in the list of conceptions of justice provided by Rawls for ranking by the anonymous parties to the original position (Rawls 1971, p.124). Rawls attributes versions of it to Richard Brandt and Nicholas Rescher (Rawls 1971, p.34). Taking Rescher's version as an exemplar he summarily objects to it its lack of specificity (Rawls 1971, p.317). Richards' basic idea here is that equality and utility must be taken as logically independent factors, susceptible only of reconciliation by "intuitionist" trade-off; and the objection is that the choice of a trade-off procedure is not readily determinable. But in this case, the basic idea itself is highly questionable, in the light of Derek Parfit's arguments on behalf of a conceptual interdependence between utilitarianism and the idea of equality among persons. Parfit argues against that interpretation of utilitarianism favoured by Rawls, Richards and Thomas Nagel, according to which utilitarianism fails to take seriously the distinction between persons, conflating, as it were, all lives into one, and maximizing utility from that perspective, identifiable as the perspective of the ideal observer (v. Parfit, pp.149-153; Rawls 1971, pp.184-188; Richards 1971, pp.86-88; Nagel, p.138). If Parfit is right and Richards wrong about the connection between equal respect for persons and utilitarianism, then Richards second alternative collapses into his first. Confusingly, Richards appeals to Bernard Williams' "Critique of Utilitarianism" for independent support of the idea that utilitarianism doesn't take seriously the distinction between persons (Richards 1977a, p.1330); but despite his continuing abhorrence of utilitarianism, Professor Williams has more recently suggested both that Parfit's interpretation of utilitarianism

may be sounder than that of Rawls, Richards, and Nagel and that the moral theory propounded by these men in opposition to utilitarianism is in any case itself guilty of violence to the idea of what a person is (v. Williams 1976, pp.215n,201,209-214). Richards' volte face vis à vis Professor Hare has further muddied these waters: in 1974 Richards publicly apologized to Professor Hare for an "ill considered" dismissal of the latters' views as symptomatic of "a deficiency in philosophy"; he recognized that, to the contrary, Hare's theories could be understood as "a kind of application of the contractarian theory" characteristic of Rawls (v. Richards 1974, p.91n; Richards 1973, p.71n). But Hare had already published his attack on Rawls' theory, and in that attack, had acknowledged Parfit as having had an influence on the attack (Hare 1973, p.81). Professor Hare, of course, espouses utilitarianism, and is far from being an "intuitionist". Professor Richards has said that Professor Hare's theory "may clarify legal ideas" (v. Richards 1974, p.71); but in commenting on the actual work of utilitarians directed toward that end, he says that they practice "the moral philosophy of the Stone Age" (Richards 1977a, p.1338). In fact, in the legal sphere, John Umana has explicitly attempted to identify Professor Dworkin's rights thesis with Professor Hare's universalizability (Umana, pp.1194-1197); but according to Hare universalizability leads to utilitarianism (Hare 1974, p.116). How one is to distinguish Professor Richards' hypothesized "intuitionistic theory" from utilitarianism, or to interpret any of Professor Richards' remarks here, becomes more and more problematic, especially when it is noticed that Richards' apologetic acknowledgement of the relations between Rawls and Hare includes a reference to Brian Barry's The Liberal

Theory of Justice. In that book Hare's universalizability thesis and Rawls' idea of conditions of choice for a social contract are indeed linked together (Barry 1973, pp.13-15; cited in Richards 1974, p.91); only to be rejected together, for failing to provide a rational basis for a complete set of social decisions, i.e. a set of social decisions such that there is a rational decision for every possible situation. The irony is that Professor Barry is himself an intuitionist (v. Barry 1965, pp.4-8; 1973, pp.6,168), and that in his original discussion of intuitionism Rawls had objected to intuitionism on the grounds of just such incompleteness as Barry finds in his Rawls work (v. Rawls 1971; p.39); the same sort of incompleteness, coincidentally, as Sobel had objected to rule utilitarianism. At this point, confusion takes over completely: act-utilitarianism, rule-utilitarianism, contractorianism, and intuitionism are each seen to have supporters, and the supporters of each position attack the other positions as incomplete. Now Professor Dworkin demands completeness from a social decision procedure so that ORA may not be falsified. Professor Richards probably meant to complain that Professor Dworkin may be committed either to act-utilitarianism, or to a social decision procedure - intuitionism - that is incomplete. But he ignored the facts that the decision procedure at issue might not be properly identifiable as intuitionism and might even so be incomplete, and that if the literature is any guide, incompleteness seems in any case to be a virulent infection to which theories of social decision are prone. But perhaps one shouldn't believe everything one reads in the pages of lawyers and philosophers.

(b) There is a further confusion to be considered. Suppose that Parfit is wrong, and that egalitarianism combined with utilitarianism yields not plain old utilitarianism, but "intuitionism". For Rawls at least, this would not eliminate it as an alternative to be weighed against other alternative conceptions of justice - that is why three forms of it occur in Rawls' list of conceptions to be considered in the original position , and why he says, given Barry's sort of explication of intuitionism in terms of trade-offs mapped by indifference curves: "Now there is nothing intrinsically irrational about this intuitionist doctrine. Indeed it may be true" (Rawls 1971, p.39). For Professor Dworkin, however, it seems that intuitionism must be precluded from consideration. Strangely, this attitude toward intuitionism makes its first appearance in Dworkin's interpretive essay on Rawls. Though he nowhere comments on Rawls' attitude to intuitionism, he proposes a "constructive model" of Rawls' notion of reflective equilibrium that has as a consequence the unacceptability of intuitionism. The "constructive model", he says, demands that "decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions" (Dworkin 1978a, p.162; emphasis mine). But Rawls says of the intuitionistic weighting of values which he regards as providing a possible alternative conception justice, that there may exist no expressible ethical conception which underlies these weights" (Rawls 1971, p.39; emphasis mine). This contradiction with Professor Dworkin's views would appear to provide reasonable grounds for dismissing Dworkin's "constructive model"; and indeed the model has been criticized by the arch-Rawlsian Professor Richards as

inadequate to Rawls' ideas and to the moral arguments in which those ideas are meant to figure (v. Richards 1977a, p.1324). Nonetheless, Professor Dworkin seems to appeal to Rawls for support when he begins to build up background argument for the rights thesis: the rights thesis marks out a special application of the doctrine of political responsibility, articulated above in the description of the "constructive model". That doctrine "condemn s a style of political administration that might be called, following Rawls, intuitionistic" (Dworkin 1978a, p.87).

If Rawls believes that the doctrine of intuitionism may be true, why does Professor Dworkin suppose that he can peremptorily invoke the doctrine of political responsibility to dismiss intuitionism, and still remain faithful to Rawls? And isn't Professor Richards somewhat bald in his dismissals, in the face of Prof. Dworkin's special preoccupations? These questions are extremely difficult, I think that I can begin to suggest an answer to the first of them, but its vindication will have to wait until Part 3 of this essay.

I believe that the Professor Dworkin fears that intuitionism may be <u>inconsistent</u>. If it were inconsistent, then it would provide more than one answer to some political or legal question, and possibly more than one correct decision for some legal disputes. That is, intuitionism might violate ORA. Is there any reason to suppose this? Not for those who follow Barry's outline of intuitionism, as Rawls claims to do, where it is effectively stipulated that the intuitionistic trading-off of values must not lead to inconsistent choices (v. Barry 1965, p.4f). Where does the danger lie, then? I believe that it is

seem to lie in the threatening possibility that there will be no way of choosing a unique method of carrying out the intuitionistic trade-offs, so that, left with a plurality of intuitionistic methods, one will inevitably end up with a multiplicity of possible choices, some of which will be naturally incompatible with others. Fear of just such a result as this seems to be the dominant note in Rawls' already cited objection to the lack of specificity of Rescher's intuitionistic scheme; and such fear is more openly and generally expressed in Richards' work (v. Richards 1971, p.120). Thus, Professor Dworkin is not without some support for his position regarding intuitionism; and it seems that Professor Richards' criticism of him must be heavily qualified, if it is to stand at all.

But now - are there intuitionistic theories or are there not? I believe that there are. I believe that Rawls was right to think that there are. I believe that he was wrong to object to them on the grounds of incompleteness. And I believe that he has provided no argument against them. But most importantly, I believe that the sorts of mistakes that Rawls makes about intuitionism, are just the sorts of mistakes that are involved in supporting ORA. In showing why ORA is false, it is possible to show why intuitionism is so appealing. Yet although Professor Dworkin relies on false, Rawls-inspired positions regarding intuitionism, it seems to me better to show how ORA is false without appealing to the falsity of Rawls' positions, so as not to be open to the charge of misinterpreting Rawls. Once more, it seems that ORA provides a more useful key to Professor Dworkin's work than more general speculation about the nature and variety of acceptable moral theories.

What is perhaps most remarkable in the reply to Professor Greenawalt, amidst all the dithering about theories, is the stipulation in the absence of any theory that in the judicial sphere, an argument which denies an argument of principle is itself an argument of principle (v. Dworkin 1978a, p.303ff). That is, an argument of any kind which refutes a litigant's claim of right is eo ipso a right-based argument in favour of his opponent. It is surely unnecessary to belabour the extraordinary counter-intuitiveness of this way of classifying arguments. All that is necessary is to point out that its effect is to reduce the rights thesis to ORA.

(Incidentally, the reply to Professor Greenawalt has appeared in two versions. The first version is contained in the 1977 Georgia Law Review Jurisprudence Symposium, where Professor Dworkin replies to only those comments on his work that had figured in the Symposium. The later version is contained in the second edition of Professor Dworkin's Taking Rights Seriously. In the later version, Professor Dworkin sees fit to supplement his original reply with comments on Professor Greenawalt's earlier paper on "Judicial Discretion". Evidently the topic had not lost as much importance for Professor Dworkin as Professor Greenawalt had supposed.)

iii) The Third Reason

Happily, the third set of reasons for disbelieving in the centrality of a Dworkinian theory of rights can be briefly stated. In fact, this set of reasons is a unit set consisting of no more than a tendency in some of Professor Dworkin's recent writings to deal with matters not of substantive political theory, but of logic. Naturally,

the "no more" is, to my mind, unfairly prejudicial: I think that these recent writings are not less important than the most influential of Professor Dworkin's pieces, and I believe that Professor Dworkin would agree with this assessment. In a brief epilogue to his review of Taking Rights Seriously, Professor Richards reports that Professor Dworkin, having seen a pre-publication draft of that review, objected to the characterization of his views contained in the review, in part because the review insufficiently emphasizes the last chapter of (the first, 1977, edition of) the book (v. Richards 1977a, p.1340). Unlike most of the book, that chapter had not been previously published, and its explicit aim is to defend ORA not by any appeal to the logic of rights, but by suggesting analogies between the "logic" of judicial decision-making on the one hand, and the "logic" of literary criticism and world-class chess refereeing on the other (Dworkin 1978a, pp.280-282; the curious example of chess-refereeing had previously been discussed at some length in the 1975 article "Hard Cases" - v. Dworkin 1978a, pp.101-105). Similarly in his "Introduction" to the Oxford Readings volume on The Philosophy of Law, Professor Dworkin compares judicial decision making to the acceptance as true of scientific theories by scientists, of historical explanations by historians, of interpretations of literary works by literary critics (v. Dworkin 1977b, p.8f). And in "No Right Answer?" he has proposed yet another analogy in the form of a strange literary game in which Dickens scholars build up a set of propositions about David Copperfield, starting with a set entailed by what Dickens said, and building the set up according to the rule that

> "...as [sic] further proposition about David is assertable as true (or deniable as false) if that further proposition provides a better (or worse) fit than its negation with propositions already established because it explains in a more satisfactory way why David was what he was, or said what he said, or did what he did, according to those established propositions..."
>
> (Dworkin 1977a, p.75)

The purpose of these analogies is to show that since, in a variety of superficially unlikely enterprises, the logical principle of bivalence may hold for propositions characteristic of such enterprises, the principle of bivalence may likewise hold for propositions of law, so that ORA will be true as a matter of logic. It is plain that the special nature of rights does not play a role in the putatively analogous enterprises, so that the arguments by analogy are arguments for ORA that are independent of any account of rights. Indeed, the free use of analogy recalls the very first argument for ORA based on the modified game of baseball called "Policies", which appeared before anyone had reason to suspect the richness of Professor Dworkin's specifically political imagination. In "No Right Answer?" Professor Dworkin declares his opinion that the issue of ORA is "central to a large number of controversies about the nature of what law is" (Dworkin 1977a, p.58); in the last chapter of Taking Rights Seriously he suggests that the falsity of ORA would constitute a pervasive and destructive objection to the other arguments in that book (Dworkin 1978a, p.279); and in the second version of the "Reply to Critics" he promises us a "reprinted and expanded" version of "No Right Answer?" to appear in the New York University Law Review. All of this seems to me to indicate that in future discussions of Professor Dworkin's work, ORA, as an independently

interesting thesis, must take its rightful place at the very centre of attention.

Addendum to Section 5: The "Sociological" Importance of ORA

There are, I am sure, many flaws, both apparent and less apparent, in the foregoing argument. There is one apparent flaw that the reader may consider especially irritating, which I should like to show as more apparent than real. The flaw consists in the following tactical inconsistency:

First I outlined a thesis - ORA - which I claimed to be false. Then I suggested that it was necessary to argue that ORA is false, because it is not widely believed to be false. But I went on to claim that the reason for its not having been hitherto generally argued that ORA is false is just that many people have simply assumed ORA to be false. - Yet if they have assumed that ORA is false they have surely believed it to be false; they surely haven't merely entertained the supposition that ORA might be false, in order to see what might follow from that. Indeed, I have argued that nobody has bothered much about what follows for ORA, just because of the assumption that ORA is false. But if this is so, then contrary to my supposition, there seems to be no need to try to persuade people that ORA is false.

Thus baldly stated, I hope that the fallacy in this reasoning is obvious. Certainly among the eleven or twelve people whose opinions I have considered in this essay, there seems to be an assumption that ORA is false. Some of these eleven or twelve are very distinguished, but it must be admitted that none of them has been given anything like the widespread attention lavished on Professor Dworkin.

For example, in the September 5 issue of 1977, Time Magazine (!) published an article called "Treating People as Equals: A Yank at Oxford Rethinks Individual Rights" (Time, p.36). The article is accompanied by a picture of Professor Dworkin in a bathing suit piloting a small boat in waters off Martha's Vineyard. Among other things, the reader is informed of his possible dinner companions for the evening - Lillian Hellman, William Styron, or Anthony Lewis - but admonished that "for Professor Dworkin, the leisure is not idling, however, but a way of getting new ideas to augment his original thinking on individual rights". It is no wonder that Professor Richards begins his review of Taking Rights Seriously not without a certain acidity, announcing that:

> "Ronald Dworkin is rapidly becoming the doyen of American jurisprudence, if only by fiat of the New York Review of Books (which recently trumpeted in inch-high type: DWORKIN ON BAKKE). As Professor Dworkin's influence becomes increasingly felt ..."
>
> (Richards 1977a, p.1267)

What is unfortunate about all the brouhaha, quite apart from the occasionally amusing lapses of taste, is that Professor Dworkin in all his flamboyance has continually managed to suggest that while his approach to legal thinking takes questions of morality seriously, legal positivism makes moral criticism of the law irrelevant, and turns judges into weak-kneed secretaries of the unwashed hordes. (Cf. the last section of "Hard Cases" where Herbert J., a positivist modelled on Professor Hart, is compared with Heracles J., a man of principle; Dworkin 1978a, pp.123-130). But it must be obvious that positivism ought to be discussed, not slandered.

I believe that Professor Dworkin's influential insistence on ORA furthers his persuasive attack on positivism, by setting up a target

for legal theories, which legal positivism can't reach. It is all very well to say as Professor Lyons does, that positivism does not logically exclude the denial of judicial discretion, but I find it very difficult to see how an accurate and revealing positivist description could be provided for a legal system comparable in complexity to those typical in Anglo-American jurisdictions and in which there is no room for judicial discretion. What would remain "unrevealed" would surely be the means whereby such discretion was excluded. As I shall indicate, this is a problem which has affected the work of the positivist supporters of ORA, Sartorius, Smith and Coval.

I don't suppose that the argument I shall put forward against ORA in Part 3 of this essay will gain any currency and in that way affect Professor Dworkin's powerful influence. But perhaps it will encourage one or two more qualified persons to try their hands at providing more compelling ways to falsify ORA. And their efforts might provoke further efforts, etc., so that his persuasive efforts might be discredited, and his influence diminished.

FOOTNOTES TO PART 1

1. J.H. Sobel has, in fact, shown that in certain situations act-utilitarian calculation becomes impossible, so that utilitarianism fails to dictate practical decisions in those situations (v. Sobel 1972, pp.162ff). Now, I said in Section 1 of this essay that I believed ORA to lead to normative quandaries, though I spoke more recently as if a set of legal rules supplemented by the act-utilitarian rule might allow for an acceptable interpretation of ORA. Sobel's results concerning act-utilitarianism lead me to doubt this, as does his repeated citation of Hodgson's Consequences of Utilitarianism in which it is argued that act-utilitarianism is self-defeating. Allan Gibbard (1978) and David Lewis (1972) have argued against Hodgson, but Sobel has remained unimpressed (1976, p.47n). It might be thought that Sobel's dilemma could never arise in a utilitarianly supplemented legal system, but I am not sure that this is true, since ex hypothesi the act utilitarian rule comes into play only in dilemmas where other legal rules fail to determine a decision; and in the case of the hunters and their camp fire described by Sobel, the dilemma requires the hunters to be exclusively act-utilitarian relying on no other sorts of rules, only on the assumption that the dilemma would have been foreseen by the hunters and so would have been resolved by some rule or other, if other sorts of rules had been available to them. Once the unrealistic assumption of foreseeability is dropped, the hunter-type dilemma may arise even in the presence of other rules, so long as the rules don't apply to the problem in hand, and only the act-utilitarian rule does, as we are supposing in the legal case. The bearing of Sobel's argument

on act-utilitarianism is, nevertheless, problematic whether the argument is correct or not; for Sobel himself is a self-confessed act-utilitarian, and - rather quixotically, it may appear - declares that when a dilemma arises for act-utilitarianism, what is wrong is not act-utilitarianism, but the situation (v. Sobel 1975, p.688).

PART II: PROBLEMS AND QUESTIONS ABOUT A REALIST ARGUMENT

In Part I the need for a direct argument against ORA was stressed. That argument will not be presented until Part III of this essay. In Part II several constraints on the form of that argument will be introduced. The chief of these will be that an acceptable argument against ORA must be compatible with a realist theory of meaning, and it must not presuppose an anti-realist theory of meaning. This constraint is important because on it hinges the question of whether logical argument alone can sustain ORA. In order to investigate this question, it will turn out to be necessary to examine at some length various proposals about how legal propositions come to have any sense or meaning at all. The examination will include discussion of such Dworkinian topics as: "secret book" theories of law; the analogy between legal reasoning and the reasoning of literary critics; and the relations between realism, logical positivism, and legal positivism. In the end, it will be maintained that no logical argument based on the objectionable qualities of anti-realist theories of meaning can be sustained against the denial of ORA; and that an argument against ORA can be mounted on the basis of a realist theory of meaning.

6. Constraints on Possible Arguments against ORA

I have said, more times perhaps than anyone might have cared to hear, that it would be worthwhile to argue directly and in detail against ORA, so that an arsenal of persuasive weapons might be built up, for the purpose of disarming some of the positions held by Professor

Dworkin. But it may appear that this is not a very sensible idea because, of course, there already have been arguments mounted directly against ORA - arguments that have plainly not had the desired effect. Indeed, the most important of these arguments against ORA - HLA Hart's argument in The Concept of Law - is precisely what provoked Professor Dworkin's onslaughts in the first place: if Hart hadn't argued against ORA, perhaps Professor Dworkin would not have argued for ORA, in which case there would have been not even a pretext for the present essay. As things are, however, there is at least a pretext, and also a problem, and that is how to provide an argument against ORA whose persuasive force will not be deflected as the force of other arguments has been.

A suitable opening gambit, it seems to me, is to allow that the supporters of ORA have set up a string of objections against the denial of ORA which must be met by anyone who wants to battle for that denial. These objections can be viewed as imposing limits on the shape of any argument for the denial of ORA. Insofar as they narrow the range of strategies that can be considered, they provide a set of not unwelcome constraints on the argument. For efficiency's sake, so as not to waste time in entertaining ideas of impossible options, it seems as well to set out these objections immediately. I will list six of them, although undoubtedly there are more that have been made. I shall make no serious attempt, however, to comment on them at the moment. Rather, the objections will be treated intermittently as the argument slowly develops. (The "slowly" is meant to discourage false hopes.) They may thus play a useful role in determining the pattern of that development.

Here are six objections to any proposal which denies the truth of ORA:

i. The denial of ORA is inconsistent with reccgnition of the teleological nature of law. (Smith, p.19f.)

ii. The denial of ORA is less rational than the assertion of ORA from the judge's point of view (Dworkin 1978a, p.286).

iii. The denial of ORA is inconsistent with the principles of democracy (Dworkin 1978a, p.84).

iv. The denial of ORA violates the rights thesis.

v. The denial of ORA is inconsistent with a certain "noble" ideal of justice (Dworkin 1978a, p.338).

vi. The denial of ORA evinces a commitment on the part of the deniers to an anti-realist theory of meaning (Dworkin 1977b, p.8).

Exhibited in this bald manner, the objections perhaps do not look very impressive. For example, I have already urged that the rights thesis was concocted specifically to entail ORA, so that objection iv. fails to stand as an independent objection. In a different vein, objections i. and iii. are distinctly quixotic in tone.

In the present context, however, I believe that objection vi. is the most important, not in spite of, but because of its obscurity. This obscurity is not merely a matter of the phrasing of the objection as it has been given here. Discussions of the merits of realist and anti-realist theories of meaning have come to the fore only recently, and they are themselves rather mysterious, and prima facie quite removed from the problems of legal philosophy. Despite the fact that

anti-realist theories of meaning are something of an unknown quantity, objection vi. is the reason for the presence of the word 'realist' in the title of Part II of this essay. Because the ideas of realism and of meaning are both clouded and controversial, Part II is mostly about realism and the theory of meaning.

Professor Dworkin uses the adjective "anti-realist" only five times, and mentions it once in quotation marks to establish it as a predicate employed in the philosophy of language and having nothing to do with the species of legal philosophy known as Legal Realism. In Professor Dworkin's work the word occurs only in the "Introduction" to the Oxford Readings volume. But the consideration of truth-conditions and meaning, which the reference to anti-realist theories of meaning imparts, undoubtedly has pride of place in Chapter 13 of Taking Rights Seriously and in "No Right Answer?" These were the writings cited in Section 5 of Part I as reasserting the primacy of ORA, and for that reason, deference to the force of the objection against anti-realism will be the major constraint on the argument to follow. Though some care will be taken to meet the other objections, their influence will be, perhaps unfortunately, comparatively slight.

There is another more "global" constraint on the form of the argument against ORA worth mentioning. It arises not from any objection to the denial of ORA raised by ORA-supporters, but from the specific detail of the argument launched on behalf of ORA by Professor Dworkin. According to this constraint, the argument against ORA must reflect - whenever they are not manifestly unacceptable - the very premises used in the argument devised by Professor Dworkin on behalf of ORA. The point of imposing this constraint is not just to ensure that the

invalidity of Professor Dworkin's argument will be demonstrated; it is rather to show how a set of premises, similar to if not identical with Professor Dworkin's, will not merely allow, but actually entail the denial of his conclusion. If this can be shown, then (a) it will be open to supporters of ORA to try to make alterations in the set of Professor Dworkin's premises to avoid this result, without having to construct an entirely new argument, while b) those who deny ORA may rest in the comfortable belief that, since those arguments for ORA are false that have been nurtured for over sixteen years by a distinguished thinker to whose position those arguments are crucial, so all arguments for ORA must be false. This constraint, too, will be seen to be connected with realism.

7. The Nature of the Requirement Imposed by the Constraint of Accomodating Professor Dworkin's Premises, with Reflections on Professor Dworkin's Realism

Professor Dworkin's argument for ORA has a surprisingly distinctive form. It can be seen to consist of two steps:

(a) First, Professor Dworkin shows how ORA might be true, by describing a hypothetical situation in which it would be true. For this purpose, he employs what is certainly his most famous device, an imaginary judge named Hercules, who is the star of Professor Dworkin's magisterial article of 1975, "Hard Cases" (Dworkin 1978a, ch.4). Hercules is philosophically inclined; and he is "a lawyer of superhuman skill, learning, patience and acumen" (Dworkin 1978a, p.105). He acts as a judge in some representative American jurisdiction and he accepts the main constitutive and regulative rules of law in his jurisdiction.

His specialty, however, is the construction of first-order and higher-order theories about what the content of the law is: he builds theories which determine the allocation of legal rights responsibilities and duties. Naturally, he uses such theories to resolve hard cases - that is, to determine the allocation of rights and duties in cases where this allocation fails to be specified by the clearly identifiable rules of law in his jurisdiction. This is what the theories are for.

The task of conveying the richness of the theories that Hercules constructs is problematic, not least because Professor Dworkin invariably contrives to express himself as if he were giving to the reader only the roughest reports of the contents of these theories, for the reason that full accounts of them would be incomprehensible to anyone lacking Hercules' superhuman understanding. While one may be somewhat baffled by the way in which this sort of exposition involves a peculiar reification of imagined but never specified theories, it is at least possible to some degree to appreciate the range that the theories cover. For example, Hercules develops a theory of the constitution:

> "...The constitution sets out a general political scheme that is sufficiently just to be taken as settled ... S ince he is Hercules ... he can develop a full political theory that justifies the constitution as a whole ... He must develop a theory ... in the shape of a complex set of principles and policies that justify that scheme of government ... He must develop that theory by referring alternately to political philosophy and to institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution [sc., the political scheme as a whole]..."
>
> (Dworkin 1978a, pp.106-107)

Hercules develops theories of individual statutes:

> "Hercules must begin by asking why any statute has the power to alter legal rights. He will find the answer in his constitutional theory: this might provide, for example, that a democratically elected legislature is the appropriate body to make collective decisions... But that same constitutional theory will impose on the legislature certain responsibilities: it will impose not only constraints reflecting individual rights, but also some general duty to pursue collective goals defining the public welfare. That fact provides a useful test for Hercules in a hard case involving statutory interpretation . He might ask which interpretation more satisfactorily ties the language the legislature used to its constitutional responsibilities.... This calls for the construction, not of some hypothesis about the mental state of particular legislators, but of a special political theory that justifies this statute..."
>
> (Dworkin 1978a, p.108)

His biggest job is to develop a theory of precedent (v. Dworkin 1978a, pp.110-115).

> "You will see now why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal ordering. The vertical ordering is provided by distinguishing layers of authority, that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States [etc...]
>
> "Suppose Hercules, taking advantage of his unusual skills, proposed to work out the entire scheme in advance, so that he could be ready to confront litigents with an entire theory of law should this be necessary to justify any particular decision ..."
>
> (Dworkin 1978a, p.116f)

He supplements this theory of legal institutions with a theory of judicial mistake:

> "...Hercules must expand his theory to include the idea that a justification of institutional history may display some part of that history as mistaken ... He must develop a theory of institutional mistakes and this theory of mistakes must have two parts. It must show the consequences for further arguments of taking some institutional event [sc., decision] to be mistaken; and it must limit the number and character of the events that can be disposed of in that way. [Etc.]
>
> (Dworkin 1978a, p.121)

He also develops theories of religious liberty, negligence, and human dignity (v. Dworkin 1978a, pp.107, 119ff, 128f). All these theories will be legal theories because they are required to justify the existing body of law; and the reader is left to conclude that their rather overwhelming wealth will be sufficient to provide a balance of justification for one decision over another in any possible case. Professor Dworkin may seem to gesture tentatively in the direction of qualifying this conclusion, when he says that Hercules may not reach the same conclusions that any other judge would reach about cases involving a controversial concept like human dignity (Dworkin 1978a, p.128); but what he plainly does not do, is to suggest that Hercules may fail to reach the uniquely correct decision, as ORA requires. In a similar vein, in "No Right Answer?" Professor Dworkin canvasses the theoretical possibility of ORA's being false, but he goes on to suggest that in a modern developed legal system the "density of information" provided by an existing body of law", and "the intersections and interdependencies of different legal doctrine" will insure that ORA is true (v. Dworkin 1977a, p.83f). Whatever else may be the case, in "modern complex and developed legal systems", it is certain that Professor Dworkin believes that from Hercules' hypothetical point of view the factors of density of information and interdependency of legal doctrine will guarantee the truth of ORA.

That prise de position constitutes the first step in Professor Dworkin's argument. The purpose of the second step is to translate, as it were, the truth of ORA in the hypothetical situation into truth for ORA in the actual world. I am not aware that this step has ever been commented on, but an understanding of what it involves is necessary for a proper appreciation of Professor Dworkin's otherwise remarkably opaque claim that in "Hard Cases" he has provided an "effective reply" to (nameless) "anti-realists". This is the claim that lies behind objection vi.

On Professor Dworkin's account, anti-realists claim that (a) there need not be a single correct resolution to every legal dispute, because (b) there are controversial cases whose resolution is not dictated by a clearly identifiable theory-independent rule of law, and (c) where this is the case, propositions controversially attributing rights or duties to the litigants "cannot be assigned any straightforward sense, and must therefore be understood in some special way if at all" (Dworkin 1977b, p.8). According to Professor Dworkin, the argument of "Hard Cases" does assign a sense to these controversial propositions of law (v. Dworkin 1977b, p.9). And it assigns this sense in terms of truth conditions. The truth conditions are given as follows:

> "...Controversial propositions of law are true just in case the political theory that supplies the best justification for non-controversial propositions of law provides for the rights and duties which the controversial proposition describes."
>
> (Dworkin 1977b, p.9)

> "A proposition of law ... is true if the best justification that can be provided for the body of propositions of law already shown to be true provides a better case for that proposition than for the contrary proposition..., but is false if that justification provides a better case for that contrary proposition than for it."
>
> (Dworkin 1977a, p.82)

> "A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law. It may be denied as false if it is less consistent with that theory of law than the contrary."
>
> (Dworkin 1978a, p.283)

There are differences between these formulations, and difficulties with each of them. Particularly noticeable in the last two formulations is the odd manner of the assignment of the value 'false' to propositions of law: Professor Dworkin takes "contrary proposition" to mean "negated proposition", so that a proposition of law is false, not if its truth condition merely fails to hold, but only if the converse of its truth condition holds. This is a very strong condition on falsity, and renders doubtful the "realist" idea that propositions of law must be simply either true or false. The truth conditions are constructed out of relational predicates which are assymetrical: "__ is a better justification than ..."; "__ as-a-case-for-p is better than __ as-a-case-for-not-p"; "__ is more consistent with T than __". If the formulations are meant to tie in with "classical" or "realist", bivalent truth, definitions, then an unstated assumption must simply be taken to be that the sets of justifications, cases, and propositions over which these relations range each form a strict ordering such that no pair of elements are equivalent with respect to the ordering. This

may seem unacceptable. On the other hand, if the formulations are not meant to tie in with "classical" or "realist" bivalent truth-definitions, then it is very difficult to see how Professor Dworkin could suppose himself to be replying to anti-realists, since in the relevant respect anti-realism might be held to be the complement of realism.

I have been speaking for some time now about "realism" and "anti-realism", and about "realist" or "classical" truth conditions. Certainly in order to assess the effectiveness of Professor Dworkin's self-styled "reply" to anti-realists, it is necessary to be clear about what realism, anti-realism, and realist or classical truth conditions are.

Perhaps some terminological reminders would be in order at this point. Anti-realism characteristically requires that the sense of a proposition be given in terms of conditions recognizable by ordinary human beings warranting the assertion of that proposition; and that the sense of the negation of a proposition be given in terms of conditions recognizable by ordinary human beings warranting the denial of that proposition. In the place of the classical or realist notions of truth and falsity, it substitutes the notions of warranted assertability and deniability; but, whereas the classical or realist conditions for truth or falsity are so conceived that if conditions for one of them do not hold, then conditions for the other must hold, the conditions for warranted assertability and deniability are not such that if conditions for one do not hold, then conditions for the other must hold. It might be that no recognizable conditions warranted the assertion of a particular proposition and that none warranted denial.

Then the anti-realist substitutes for truth and falsity would differ from their classical or realist counterparts, in that a proposition might be characterized by neither of them. In this way anti-realism denies bivalence. But it nevertheless accepts tertium non datur: it does not allow that there is some other thing a proposition could be, independently of its being assertable or deniable.

According to Michael Dummett, who has single-handedly brought anti-realism into the foreground of contemporary philosophy, multivalence is not a mark of anti-realism, because "the various different undesignated values are not on the same level as the condition of having a designated value and that of having an undesignated one" (Dummett 1978, pp.xxiii,14; 1973, p.431f); and these can be related to realist truth and falsity. Also, it seems quite clear that, according to Dummett, any possible-worlds semantics for a modal logic should not be considered as meeting the requirements of an anti-realist theory of meaning. This will be so, I think, even though such a semantics, regarded as a "theory of meaning", will take, not truth and falsity, but truth-in-a-possible-world and falsity-in-a-possible-world as its central notions. It will be so because for the sentences of a language, the ideas of truth - or falsity-in-a-possible-world are just the ideas of truth- or falsity-on-a-bivalent-valuation. Dana Scott has argued that many-valued logics should themselves be understood as logics involving a number of bivalent valuations (v. Scott, pp.265-273); if he is right, then once Dummett's position about many-valued logics is granted, there is at least a shadow of a good reason to call possible-world semantics realist. Of course, there might be good reasons independently of these considerations, too:

among which are Dummett's own anti-realist attacks on possible-worlds semantics (v. Dummett 1973, pp.285-290; 1978, pp.421,441). The casual reader might be inclined to hesitate a moment over this element in the present characterization of Dummett's view, recalling the "anti-realist solely about the past" in Dummett's paper "The Reality of the Past", for whom statements about the past are true if they are true in every possible past history. A possible past history is, of course, very much like a possible world. But the anti-realist about the past is an anti-realist because possible past histories are defined in terms of recognizable conditions constituting present evidence for what is a possible past history; and he is an anti-realist solely about the past - a realist that is, in other matters - because every sentence not explicitly about the past - every non-past-tense-sentence - is determinately either true or false in every one of the possible past histories. These sentences are, therefore, realistically interpreted. —— Similarly, when an alethic modal operator is itself interpreted with reference to a set of possible worlds membership in which is not defined in terms of recognizable conditions now providing warrant for assertions of possibility, such an operator is interpreted realistically.

This is important, because if it can be argued that every legal proposition should be understood to be fronted by a possibly or partially orthographically suppressed, realistically interpreted modal operator - if this can be argued then ORA can be defeated without any appeal to anti-realist theories of meaning. For, if p and ∿p could be identified as legal propositions, their real forms would then be understood to be Lp and L∿p, where L was some more or less standard, classically defined modal operator. Then, if p were the proposition

that "In the case at bar, A is legally entitled to a judicial decision in his favour", and the proposition "Lp v. L~p" were not logically true in the relevant logic (as it isn't in any modal logic that I am aware of), then it might be the case that A was neither legally-entitled, nor not-legally-entitled, to a decision in his favour; and similarly for whomever his opponent happened to be. Then ORA would be false. In fact this foreshadows the form that the argument of Part III of this essay will take.

In the most curious way possible, I think, an argument rather like this one has already been anticipated by Professor Dworkin, in Section II of Part III of "No Right Answer?" What is particularly curious is his attitude to the argument. I shall say more about this at the end of Part II, in Section 9; but the following brief observations are worth making right now.

i. Professor Dworkin calls his version of the argument the "argument from positivism", because he reads "L" as meaning something like "A sovereign has commanded that.." in the manner of Austinian legal positivism (v. Dworkin 1977a, p.70f). And as is well known, he dismisses legal positivism. But an argument that depends on a modal operator need not admit of this reading of the operator, nor indeed of any reading that would be favourable to positivism. Furthermore, as has just been urged, the sense given to the operator need not be anti-realistically admissible. A modal argument is, therefore, not ruled out by Professor Dworkin's particular qualms about positivism or anti-realism.

ii. Professor Dworkin includes his version of the modal argument in a part of his essay ostensibly dealing with attempts to deny the bivalence of legal propositions (v. Dworkin 1977a, p.67). But given that "L" is the operator of a standard modal logic, then propositions in which "L" occurs will be bivalent, since standard modal logics are bivalent. There is no reason here for supposing or fearing that the argument may import anti-realism. There is every reason, however, to suppose and to fear that in devising the misnamed "argument from positivism" Professor Dworkin imagined that he was creating a straw man, and so failed to recognize the force of his own creation. For he bizarrely laid down that the operator "L" was to be truth-functional, and that in particular "$Lp \equiv p$" was to be true (v. Dworkin 1977a, p.72). But then, by the usual rules of uniform substitution and substitution of equivalents, it is elementary that all formulas containing "L" must be eliminable and the ostensible modal logic for legal propositions collapses into the non-modal propositional calculus (v. Hughes and Cresswell, p.59). From this observation, Professor Dworkin proceeds in effect to argue that what this shows is the futility of introducing an operator like "L". What it shows, of course, is just that "L" must not be truth functional, which is what anyone looking around for a <u>modal</u> logic of legal propositions would appear already to have known.

iii. The introduction of a modal operator along the lines just suggested, would solve the problems mentioned above in connection with Professor Dworkin's own proposals for truth conditions. The operator would allow for a gap between the truth of a legal proposition and the truth of the denial of a legal proposition in such a way as to maintain bivalence and, hence, realism. The reasons for Professor Dworkin's rejection of a proposal of this kind are very obscure - obscure, that is, if his commitment to ORA is forgotten.

Here, a foolishly implausible idea comes to mind which is, however, worth exhibiting not only for the increase of light which it may reflect on Professor Dworkin's attitudes to both realism and anti-realism, but also because it points to the identity of the second step in Professor Dworkin's argument for ORA. The implausible idea is this:

'Despite the fact that Professor Dworkin links anti-realist theories of meaning with positivism and the mistaken doctrine of judicial discretion (v. Dworkin 1977b, p.7), nevertheless, in making an answer to the anti-realists, his intention is not to oppose anti-realism by putting forward a realist account of the sense of controversial propositions of law, but rather by way of appeasement to offer an anti-realist account of these propositions. The purpose of this account is to show how anti-realism is in fact compatible with the denial of any need for judicial discretion, and with the affirmation of ORA. In this way Professor Dworkin may be regarded as replying to the anti-realist by showing him that his anti-realist approach to

meaning need not commit him to any pernicious doctrine as, for example, legal positivism. This would explain the failure of Professor Dworkin's formulations of the truth conditions of propositions of law to guarantee bivalence; for the abandonment of bivalence is what is characteristic of anti-realism.'

Of course, this is nonsense. ORA is not compatible with anti-realism: ORA is said to be true in the actual world (v. Dworkin 1978a, p.288)é In the actual world, therefore, propositions of law are either true or false. If in the actual world they were sometimes neither true nor false, then ORA would sometimes be falsified in actual world, and if falsified, then false. But, as has just been said, in the actual world ORA is supposed to be true. If ORA is true, and anti-realism is correct, then the notions of truth and falsity according to which propositions of law are true or false must be the anti-realist notions of truth and falsity.

Now, there is room for confunsion here of the realist notion of truth either with the anti-realist notion of truth or with the (pre-theoretical) notion of truth or with both - as Michael Dummett (who started all this "realist/anti-realist" talk) has recently pointed out - in connection with his own writings. Anti-realism, it must be remembered, consists of a particular approach to the theory of meaning. But, as has already been indicated, it has consequences for the notion of truth, as Dummett says.

> "In the last paragraph but two of "Truth", I urged that meaning should be explained, not in terms of the (in general unrecognisable) condition under which it is true, but in terms of the (recognisable) condition under which it may be correctly asserted. This

> proposal has consequences for the concept of truth, however, namely that we cannot suppose that a statement may be true even though we should be unable to arrive at a position in which we might correctly assert it ...: or rather, we must already have rejected this supposition before the proposal about meaning can reasonably be made; for if we had a notion of truth with respect to which the supposition could be made, why should we not regard the meanings of our statements as being given by the conditions for them to be true under that notion of truth? ... I should now be inclined to say that, under any theory of meaning whatever ... we can represent the meaning (sense) of a sentence as given by the condition for it to be true, on some appropriate way of construing "true": the problem is not whether meaning is to be explained in terms of truth conditions, but of what notion of truth is admissible.
>
> (Dummett 1978, p.xxii)

The fact that Professor Dworkin supposes that he can give the sense of propositions of law in terms of truth conditions, then, does not make him a realist. The suggestion currently under review is that he is an anti-realist, and that in upholding ORA he may rely on an anti-realist notion of truth. Now what notion is that? A number of such notions seem to be available, but whatever notion is accepted, the anti-realist truth conditions associated with the notion will have to be such that when they obtain, they are recognizable by "beings with our particular restricted observational and intellectual faculties and spatio-temporal viewpoint" (Dummett 1975a, p.100). The anti-realist will not admit truth conditions such that their obtaining could only be recognized by and decidable for a hypothetical being "whose observational and intellectual powers transcend our own, such powers being modelled on those which we possess, but extended by analogy" (Dummett 1975a, p.98); he will not admit an account of meaning based on truth conditions like these because such an account imputes to us "an apprehension of the

way in which those sentences might be used by beings very unlike ourselves, and in so doing, fails to answer the question how we come to be able to assign to our sentences a meaning which is dependent on a use to which we are unable to put them" (Dworkin 1975a, p.100). The appeal to a hypothetical being is characteristic of a realist and not an anti-realist view, because the realist wants to call true or false all sentences, including those not decidable by us: he invents a hypothetical being for whom they are decidable.

Now I claim that it was just for this realist purpose that Professor Dworkin invented Hercules.

What the invention of Hercules makes clear, I believe, is that the appeals to "best theories" and "best justifications" contained in Professor Dworkin's truth conditions for propositions of law are not appeals to best-theories-available-to-commonplace-lawyers or even best-justifications-available-to-commonplace-Supreme-Court-Justices. The appeals are rather to imagined ideal legal theories: being ideal, these will not leave any legal question about rights and duties unanswered. It is his willingness to rely on undecidable truth conditions involving ideal justifications for propositions of law that marks Professor Dworkin as a realist - despite the curiosities in his presentation of truth conditions.

ProfessorDworkin has occasionally admitted that the situations in which lawyers and judges may find themselves might turn out to be such that no right answer to a legal question presents itself to them, though he believes this to be unlikely (v. Dworkin 1978a, p.289; 1977a, p.83f). Yet he has never seemed to evince the slightest discomfort in

upholding ORA. Professor Lyons has nevertheless declared that in making these admissions Professor Dworkin has "conceded the general point" against ORA (Lyons 1977a, p.121). I believe that this is a minintertpretation of Professor Dworkin's intentions. If Professor Dworkin is a realist about legal propositions, it is open to him to admit that in the actual world some legal propositions may not be decidable by lawyers and judges in their real-world situations as either true or false: while maintaining that in fact either their truth conditions, stated in terms of an ideal best theory, do or do not obtain, so that the propositions are either true or false. Even given this undecidability in the actual world, ORA is incompatible with anti-realism "in the actual world"; but if Professor Dworkin is not an anti-realist, then the fact of undecidability should give him no reason to abandon ORA, contrary to Professor Lyons' suggestion.

The second step in Professor Dworkin's argument for ORA, then, may be called the realist step. It may be expressed as follows: if appeal may be made to a hypothetical situation in which a superhuman judge constructs ideal legal theories, then by the realist step, the actual world ORA is true as a matter of logic. For, having realist weapons to hand, the supporter of ORA can depend on the law of the excluded middle in deriving ORA. Let propositions of the form "X has a legal right to a judicial decision in X's favour" be legal propositions. Allow, if you will, that such propositions may never be barely true, that possibly there must always be some class of propositions about, say, other kinds of legal rights - this class not containing trivial variants of members of the original class - to which any class containing members of the original class can be reduced (v. Dummett 1975a, p.94);

but in that case, let the negation of such propositions be true just in case the propositions themselves are not true (v. Dummett 1975a, p.102). Then if realism holds for legal propositions, the law of the excluded middle will hold for this class of legal propositions, as the reader may establish for himself.

Now let Heckle and Jeckle be any pair consisting of plaintiff and defendant involved in a legal dispute. The issue is whether, as Heckle desires, some state of affairs is to be authoritatively imposed on Jeckle; or not, as Jeckle would prefer. This issue, which admits of only two outcomes, will be resolved by a judicial decision. In virtue of realism: either Heckle has a legal right to a decision in his favour or he does not. Suppose that he does have such a right. Then by the truth conditions for legal propositions, there is an ideal justification for the proposition that he has that right. By the stipulation that ideal justifications preserve the truth of ORA, there is no ideal justification for the proposition that he does not have that right. By the same authority as for the previous proposition, ideal justification for that proposition is equivalent to ideal justification for the proposition that Jeckle has a legal right to a judicial decision in his favour. Since absurdity quickly follows from the assumption that there is ideal justification then for the proposition that Jeckle has a right to a decision in his favour then there is no such ideal justification. Then it is not true that Jeckle has a right to decision in his favour. But if Jeckle has no right to a decision in his favour, a judicial decision in his favour cannot not be justified, because the law is a system of entitlements. Judicial decisions must

be justified, by hypothesis. Only one other judicial decision is possible, viz. a decision in favour of Heckle, and it is justified. Thus there is one and only one admissible judicial decision, and one and only one correct resolution of the legal dispute, whether or not any judge in the actual world can discover it. That is one half of a proof for the truth of ORA and it is very easily formalized. The other half begins with the supposition that Heckle does not have a legal right to a decision in his favour, and proceeds to the same conclusion reached as before. Then by disjunction elimination, ORA is true in the actual world, even if, as a result of less than ideal theory construction, actual judges fail to maintain a vivid appreciation of this fact.

This, I believe, constitutes Professor Dworkin's argument on behalf of ORA. Professor Dworkin's legal theory often seems both imaginative and elusive by turns: if it includes the very strange argument from ideal theories that I have outlined in this section, that should be unsurprising.

The original purpose of this section, however, was to indicate the nature of the constraint on argument against ORA expressed in the requirement that that argument reflect the premises of Professor Dworkin's argument for ORA. I hope the reader will have grasped what an important constraint this is. Professor Dworkin's premises include those dealing with ideal theories and superhuman judges, and he makes those premises work for him by taking the realist step. In Section 6, I conceded that a successful argument against ORA must not rely on anti-realist positions. The upshot is that, although there are many good

reasons for objecting to Professor Dworkin's use of an imaginary situation to make his general point, these perfectly reasonable objections must be passed over as irrelevant in the present context. Instead, the argument must be brought to bear upon the very hypothetical situation that Professor Dworkin has imagined: the argument must show that even from Hercules' point of view, ORA is false.

8. Hercules, Ideal Observer Theories of Ethics, the Ideal Mathematician in Intuitionist Logic, etc., and Many Second Thoughts about Realism

8.1 Ideal Observer Theories

While there are powerful strategic reasons for not letting any crucial argument against ORA turn on Professor Dworkin's rather startling ideas of what realist truth-conditions may consist in, I find that I cannot let his account pass without making some comment.

Comment is called for, I believe, because his account so immediately recalls Roderick Firth's famous ideal observer theory of ethics, which is similarly supposed to "objectivist" - that is "realist" (v. Firth 1952, p.322ff). The major difference between the accounts is that for no moral question need an ideal observer engage in any intellectual operation like theory-construction in order to arrive at the moral position he takes up vis à vis that question. In this, he is unlike Hercules, from whom legal questions invariably seem to call for theory building. The view Professor Firth seems to favour is that of the ideal observer's taking up a moral position with regard to a situation, but he also canvasses the view that perception provides the model for the ideal observer's apprehension of moral phenomena (v. Firth 1952, pp.328f, 324f). He pointedly rejects the idea that the relevant reac-

tions of an ideal observer could consist in the formation of moral beliefs, because this idea would make the ideal observer account evidently circular (v. Firth 1952, p.326). The reasoning behind this is plain: an ideal observer theory of ethics is intended to provide truth-conditions for moral propositions, where these truth conditions are meant to provide information about the meaning of ethical terms; consequently the ethical terms must not occur in the statement of the truth conditions, for their occurrence would guarantee that someone who did not know the meanings of such terms before coming across the truth conditions would be no better off after having found the truth conditions containing them. This raises one painfully obvious question about Professor Dworkin's reliance on Hercules; but there is another which has to be brought out before the first one can be dealt with.

The second question is related to the first because it too hinges on ideas connected with perception. The question is suggested by the fact that whenever Michael Dummett describes the way in which the realist constructs the analogy between, on the one hand, the determination of truth values of sentences as carried out by ordinary human beings, and on the other, the more extended assignment of truth-values made by hypothetical superhumans, he does not fail to refer to the perceptual powers of these superhumans (v. Dummett 1973, pp.465,466; 1975a, pp.99,100; 1978, p.314). The question is: why should this be so?

Undoubtedly, the reason is bound up with a regulative principle about truth which Dummett has consistently upheld, viz., if a statement is true, there must be something in virtue of which it is true (v. Dummett

1978, p.14; 1973, p.465; 1975a, pp.89-101). Now the "something" here must in the general case be taken to be something which is to some degree independent of the existence of the maker of the statement, something in the world, something real. It must not be thought, for instance, that according to anti-realism, the world is just identical with the continuous activity of what intuitionist mathematicians might call the "creative subject". Dummett, concerned to oppose the extreme mathematical constructivism of Wittgenstein, therefore, produces a remarkable, generalized, anti-realist argument against subjective idealism:

> "After all, the considerations about meaning do not apply only to mathematics but to all discourse; and while they certainly show something mistaken in the realist conception of thought and reality, they surely do not imply outside mathematics the extreme of subjective idealism - that we create the world. But it seems that we ought to interpose between the Platonist [i.e. realist] and the constructivist [i.e. Wittgersteinian] picture an intermediate picture, say of objects springing into being in response to our probing. We do not make the objects but must accept them as we find them (this corresponds to the proof imposing itself on us); but they were not already there for our statements to be true or false of before we carried out the investigations which brought them into being."
>
> (Dummett 1978, p.185)

"Not already there for us" - something tantamount to the denial of this is just what is supposed to be made sense of by the postulation of a hypothetical ideal observer. 'The objects are there for us' - that is what the realist wants to insist. And it must be logically true that these objects must be independent of any ideal observer, since their reality is what is being alleged by the realist, while his unreality is freely admitted. He is only hypothetical - of course

he doesn't exist! It is only because this logical independence is maintained that Professor Firth, for example, is able to insist that ethical properties are real, that they are the actual properties of objects - properties such that *if* a hypothetical observer were to observe them, he *would* react in the relevant way. Dummett implies that even realism in this hypothetical mode could not tolerate a decision procedure for the truth of a proposition which *altered the reality* that the proposition was meant to be true of (v. Dummett 1975a, pp.95-97).

Now there is a dilemma for Hercules. He does not merely observe, or directly react - he constructs legal theories. The legal theories must consist of sets of legal propositions (unless Professor Dworkin uses the word "theory" in an extraordinary, non-standard way - which perhaps cannot be ruled out.) But these propositions cannot be meaningless - they must have some sense. What sense do they have? The appropriateness of the question demonstrates exactly the danger that Professor Firth avoided by making his ethical theory an ideal *observer* theory and not an ideal moral *judge* theory in order to avert the problem of the content of "ideal moral beliefs". The problem that, by contrast, now appears to face Professor Dworkin, is to give the sense of the legal propositions that are the product of a hypothetical ideal theory. Perhaps these propositions are susceptible of a realist interpretation. If so, however, then the ostensible truth conditions that Professor Dworkin has set out amount to nothing more than promissory notes for realistic truth conditions that remain unrevealed. Professor Dworkin's truth conditions are on this view circular, unlike

Professor Firth's analysis. I do not know why anyone should think that promissory notes are a fair return for accepting ORA.

8.2 Non-realism in Ideal Theories and the Central Core of Professor Dworkin's Legal Philosophy

There is, however, an alternative to realistically interpreting Hercules' ideal legal theories. Or rather, there is another branching line of thought that looks like it might suggest alternatives. I will point to two branches that I can see. The branches themselves do not appear to me to be very strong, but the limb from which they grow is rather fascinating in shape.

This limb is just the idea that the ideally best theory of law, that is, the ideal set of legal propositions need not be given a realistic interpretation; and that even if this possibility is realized, legal propositions as used in the actual world may be properly characterized as true and false, and susceptible of a realistic interpretation. It is, of course, very difficult initially to see how this idea can be correct, or even intelligible. But perhaps some of the difficulty may be dissipated by the following suggestion: ideal legal propositions and the ideal legal theories which they form are not true, not because they are false, but because they are not the sort of things that can be realistically true or false.

Perhaps some persuasion would be appropriate at this point. Let the argument proceed from the actual, not the ideal, case. Here is a subsection of a section of Martin's Annual Criminal Code for 1974:

> 193(1) Everyone who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.

Is this true or false? One possible response (in 1979) is, "Well, I don't know, I'd have to look at Martin's Annual Criminal Code for 1979." Another reply, also possible, surely, is that one feels at least a slight discomfort in having to employ the notions of the true and the false in connection with a criminal statute. - Here is another more famous example, this time from Lord Atkins judgement in Donoghue v. Stevens:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question, who is my neighbour? receives a restricted reply. .....You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."
>
> (1932 A.C. 562, p.580)

In an introductory book on the law of torts, John Fleming says:

> "This pronouncement, as classic in its simplicity as it is profound in its affirmation of secular virtue, represents more than a mere aspiration: it has with the years become the unchallenged model for moulding the shape of the law of negligence, a yardstick for appraising novel claims no less than older precedents."
>
> (Fleming, p.47)

That is as may be - but is what Lord Atkin said, his "pronouncement", is it true?

A philosopher of language must blanch at the thought of providing a systematic and informative truth conditional semantics for

Lord Atkins' remarks. (One is reminded of Austin's aside: "Judges seem to acquire a knack of conveying meaning, and even carrying conviction, through the use of a pithy Anglo-Saxon which sometimes has literally no meaning at all" (Austin, p.197n). There is, for instance, the extremely curious fact to be considered by the philosopher of language, that when Lord Atkins spoke, it was as the member of a majority group in the House of Lords hearing Mrs. Danoghue's appeal; if he had said the very same words as a member of the minority, his pronouncement might never have become the model that John Fleming claims it to be. - Would that have made his words, taken as legal propositions, false? If the answer to this question is, "Yes, as a matter of meaning," then one might suppose it necessary to admit that judges sitting in panels to try cases should often forego the attempt to include in their judgements only true propositions of law; for, on the present assumption, such an attempt by a judge would just be equivalent to an attempt by him to make his opinion into a mirror of the majority decision. Since this might appear to eviscerate both of the accepted views (a) that judicial mistakes are possible even at the highest level, and (b) that in this very respect the recording of dissenting opinions is valuable in itself, it might be suggested that legal propositions must be capable of being true or false simpliciter irrespective of how they come to be "pronounced".

In fact, however, the doctrine of judicial mistake, given expression by Professor Dworkin in his stipulation that Hercules have a "theory of mistakes", is precisely what makes it difficult to suppose that classical truth and falsity apply to legal propositions. This I shall now try to show by returning once more to the plane of ideal abstraction.

First, assume that from the statute books and the law reports, legal propositions can be extracted, stripped of rhetoric, of analogical usage, of metaphor, of idiomatic construction, of conversational implicatures, of everything that renders those propositions unfit for treatment by a simple (-minded) semanticist. Assume, to begin with, that some pretheoretic notions of truth and falsity can be linked up with these legal propositions. The task is to determine whether these notions are classical. The first thing to note is that both Professor Dworkin and his opponents would agree that consequential considerations - considerations about consequences "for society" - may on occasion be relevant to the truth of a legal proposition (cf. Dworkin 1978a, pp.294-301, 311-317; and e.g. McCormick, chs. v, vi). This way of putting things is less than precise, however and perhaps only barely intelligible. What is meant is that the social as well as the logical consequences of declaring a legal proposition to be true, are relevant to the truth of the proposition; and because social consequences are unlike logical consequences in that they must be temporally located, the implication is that they affect the truth or falsity of legal propositions in time. Now, that legal propositions - even true legal propositions - are not always true ("throughout eternity") is something that may be obvious to anyone who knows what "legislation" means, and who isn't a very metaphysical natural lawyer. Nonetheless, the idea has some rather interesting consequences for the notion of an ideal legal theory. These consequences have their source in the probably unarticulated half-thought that while in a given jurisdiction timeless truth doesn't attach to propositions of law in abstracto, it does attach to dated

propositions of law. The doctrine of judicial mistake accepted by Professor Dworkin can be shown to make this idea untenable even in the ideal case, and this in turn suggests that the truth attaching to legal propositions in an ideal theory of law is not realist truth. For the following is possible:

At time t_1 Hercules delivers the majority opinion on an appeal heard in the highest court in his jurisdiction. The judgement includes the uniquely correct finding for the case, and is based on a legal proposition of some, though not necessarily great, generality. This proposition - P_1 - is derived from the ideal theory of law - T_1 - which is the single best theory of law that can possibly be constructed to justify the legal system in Hercules' jurisdiction at t_1. The first appearance of P_1 in the legal literature of Hercules' jurisdiction occurs in Hercules' judgement at t_1. P_1 is true according to T_1. But Hercules, though of "superhuman skill, learning, patience, and acumen" is not omniscient; and he is not the only judge in his jurisdiction. Years pass. At t_2, another appeal comes before Hercules' court, to the disposition of which P_1 is directly relevant. Social conditions have changed, and one or more of three things have happened. (a) Because of the change in social conditions, Hercules' decision at t_1, and in particular his articulation of P_1, are now widely regretted within the pertinent branch of the legal profession (v. Dworkin 1978a, p.122). (This is plainly a contingent matter, even when Hercules' uncommon abilities are taken into account: it is plainly not a logical impossibility. - Logical distinctions like this are important here, because the problem at hand is not some impressionistic description of some more or less likely legal system, but rather an idealized character-

ization of the notion of truth for a class of propositions.) (b) Over the years, judges have increasingly restricted the application of P_1 when they have not tried surreptitiously to ignore it. If Hercules upholds P_1 again, it will foreseeably cause inconvenience and bring about injustice, though not necessarily for the parties to the case at bar. (c) The same as (b), but now the injustice will directly touch the parties to the case at bar. Clearly, once the idea is granted that judicial mistakes may occur, it is at least conceivable at t_2, in order to resolve the case before him, Hercules should contruct an ideal theory of law T_2, taking into account whichever of (a), (b) and (c) are true, and such that P_1 is false according to T_2. Then P_1 is true in T_1 and false in T_2. Now consider the question, "But which is it really, apart from T_1 and T_2?" If the classical notion of truth applies to legal propositions, it should be possible to give at least a sense to this question, if not an answer.

It might be thought that this could be done on the basis of the consideration that if P_1 is false according to T_2 and P_1 is derived from T_1, then T_1 itself is false according to T_2; and since T_2 is, in quite a simple sense, more comprehensive than T_1, T_2 is not just ideal, but true; then T_1 is false, so that P_1 is false simpliciter. This is quite evidently wrong, as must be realized as soon as it is recalled that T_1 is <u>an ideal theory</u>. Since at t_1, T_1 is the single best of all legal theories, Hercules would have been wrong not to eliminate T_2 at t_1 as an admissible source for his judgement. If there is, therefore, any reason at t_2 to say that T_2 is not merely ideal but true, then exactly the same reasons operate at t_1 for saying that T_1 is not merely

ideal but true, so that now T_2 is false, and - contrary to what T_2 entails - P_1 is true simpliciter. The situation is now that P_1 is false simpliciter and that P_1 is true simpliciter. Needless to say, a realist notion of truth will not accomodate itself to this situation. Clearly, some remedy is called for. A non-remedy would be to take the expression "At t_2 it is false that P_1" and "At t_2 it is true that at t_1 it is true that P_1," and suppose that they could be simultaneously true. Then P_1 would simply have changed its truth value. The structure of legal justification will not, as embodied in a theory of mistakes, allow this. If it is true at t_2 that it is false that P_1, then if Hercules judged at t_1 that it is true that P_1, then the theory of mistakes must tell us Hercules made a mistake, however blameless he may be. If it is true at t_2 that it is false that P_1, then it is true at t_2 that it is false at t_1 that it is true that P_1. It is ridiculous to imagine that Hercules made a mistake at t_1 by propounding a legal truth. But this would be the consequence of supposing that dated legal propositions are tenselessly true. By definition, if a dated legal proposition is tenselessly true/false, it is true/false at all times. If "At t_1 it is true that P_1" is false at t_2, then it is always false - even at t_1. Similarly, if "At t_1 it is true that P_1" is (tenselessly) true, then it is true at t_1 and at t_2; but then at t_1 no mistake is made, and so no theory of mistakes can account for that fact that at t_2 it is false that P_1. In any case, the idea of dated legal propositions may be a little stranger than it looks. Of course, one is used to the idea that statutes and regulations may specify the time interval over which a certain obligation is said to exist. But in the case of

the judge-made precepts of the common law, this would surely be extremely unusual. Although these could be dated from the time of their first appearance in the law-reports, they are surely conceived to have legal effect over an unbounded if finite interval. The temporal limits of their effects are determined by the truth of other propositions of law, which may or may not have the same character. Judge-made precepts, expressed in propositions of a legal theory, would surely be most properly represented without dates attached to them. The idea of trying to solve logical problems by attaching dates to legal propositions as a short-cut to tenseless truth seems, at best, ad hoc.

A different remedy, which doesn't require the dating of every legal proposition, might seem to be hiding somewhere in the unpromising motion that theories that are ideal at late points in time are simply more ideal than theories ideal at earlier points. A simple but silly proposal comes to mind: in any jurisdiction, take the legal theory ideal at the last moment of the actual history of the political regime containing the jurisdiction. That particular ideal theory is the ideal legal theory for the jurisdiction, and propositions of law whether dated or not, are tenselessly true in that jurisdiction if they are part of that particular ideal legal theory. This proposal is evidently normatively unacceptable. To see this it is only necessary to imagine a political regime whose end is in part brought about by the increasing weakness and incoherence of its legal system. The legal theory which ideally justifies a legal system already shot through with corruption hardly qualifies as an acceptable standard of truth for legal propositions applicable during those stages of the legal history of the jurisdiction which precede the onset of weakness and corruption;

it seems not impossible that the employment of such a standard - if by some strange chance it could be employed - might abet the destruction of the very regime for which the legal theory in question is ideal. One might, I suppose, claim to see some grim sort of appropriateness in the destruction of a regime whose very ideal of a legal system played a contributory role in the regime's collapse. But the rather mad reasoning behind this claim would, apart from its circularity, depend on an equivocal use of the term "ideal legal theory". In the present context, that term is being used to denote, not the legal theory which some or any persons, possibly unhappily situated, regard as ideal for an actual legal system, but a theory which actually is ideal for the system, whether any ordinary human being can identify the theory or not. The ideal legal theory must be the normatively best one possible for a legal system; and the relevant normative consideration must surely exclude the idea that the best theory justifying the legal system may appropriately make the system self-extinguishing. Because this proposal is thus unacceptable, it cannot be used to solve the problem of the truth of legal proposition.

A more complicated proposal along the same lines may be made in the following way: for a given jurisdiction take all the logically possible social histories of the political regime containing the jurisdiction, the histories all starting with the actual situation in which the regime containing the jurisdiction is first constituted. (If this seems insufficiently restrictive, let it be stipulated that each possible history must have the regime terminate in less than, say fifteen hundred years. Even this may seem over-generous in the light of political reality, but the reader is free to set his own limits in this

connection.) If there is no single longest of these histories - one would expect this to be the case - use some measure of social welfare to rank the longest histories in such a way that there is only one top-ranked history. (The term "social welfare" should be understood in the completely colourless sense used by welfare economists. It may seem unrealistic to suppose that no two distinct histories could both be top-ranked; it should be remembered, however, that all the proposals presently under consideration involve idealizations in which ORA is true.) Or, if the commitment to durability imposed by the restriction to longest histories seems undesirable, rank all the possible histories irrespective of length, according to a measure of social welfare, in such a way that there is only one top-ranked history. In either of these cases, take the legal theory ideal at the last moment of the best possible history of the political regime containing the jurisdiction in question. That particular theory is the ideal legal theory for the jurisdiction, and legal propositions are (tenselessly) true or false in the actual world in that jurisdiction, if they are part of that particular ideal legal theory. If a proposal along these lines were correct, it would give an account of the truth and falsity of legal propositions.

The reader may recognize in a proposal of this type a version of natural law theory relativized to particular political regimes. It provides for a theory of law obtained, as it were, from a legal system which makes no mistakes, in which no decision is ever made that is less than the best possible for the society whose system the system is. According to the proposal, this theory is what makes propositions of law true or false in the actual world; and it is what sets the standard

for determining whether any particular judicial pronouncement is a mistake. The flaws of this type of proposal are so obvious, however, that one might wonder whether there could be any point in setting the proposal out at all ...

But at this juncture I might say, risking perhaps a digressive breach of dialectical decorum, that the point is partly autobiographical. For a long time I thought that Professor Dworkin, with all his insistence on ideal theories, had just this kind of ideal theory in mind. And I now think that Professor Dworkin thinks that many of his critics think that he thinks that ideal theories of just this kind are ideal (!) My reason for thinking as I do about all this thinking is connected with Professor Dworkin's recent broadside against what he has dubbed the "secret book" theory of law. Thus the point of setting out the proposal contained in the previous paragraph is not wholly autobiographical.

A secret book theory of law maintains that

> " ... in a hard case, if the plaintiff really does have the right he urges, then since that right cannot be deduced from propositions in public books, it must be deducible from propositions written in some secret books, available neither to the public nor judges nor lawyers. In that case judges in purporting to decide hard cases on arguments about legal rights are simply guessing what they would find in those books if they could get at them.... This picture has, I think, excercised a great hold on jurisprudence. It lies behind Holmes' famous observation that legal rights must be only the rights that are laid down in actual terrestrial books because law cannot be a "brooding omnipresence". It also lies behind the assumption that non-positivists must believe in something called natural law, which is taken to be the contents of celestial secret books."
>
> (Dworkin 1978a, p.337)

To anyone attempting to interpret Professor Dworkin's work, this passage must be initially astounding. It is absolutely certain that according to Professor Dworkin legal propositions are true in virtue of acceptability or preferability of certain ideal, albeit hypothetical, theories. There is no available conception of theories which does not make theory into linguistic entities of some more or less abstract kind. Granted that this is so, isn't there good reason to suppose that Professor Dworkin has proposed a kind of secret book theory? Aren't ideal theories a species of secret books? Yet his very characterization of secret book theories is meant to parody descriptions by critics - HLA Hart, Stephen Munzer, and Lea Brilmayer - of his own work. He attributes the misconceptions involved in the secret book theory to them. They attribute the misconceptions to him. They are wrong. He is right. Why?

The best, though almost certainly not the shortest, way of seeing why is to begin by considering a passage from Professor Hart's essay, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream". Hart there presents himself in the guise of an interpreter of Professor Dworkin, but behind this guise Professor Dworkin espies the influence of the secret book theory. Hart's "interpretation" goes like this:

> "According to the new Dworkinian theory, the judge, however hard the case, is never to determine what the law shall be: he is confined to saying what he believes is the law before his decision, though of course he may be mistaken. This means that he must always suppose that for every conceivable case there is some solution which is already law before he decides the case and which awaits discovery. He must not suppose that the law is ever incomplete, inconsistent or indeterminate; if it appears so the fault

> is not in it, but in the judge's limited human powers of discernment, so there is no space for a judge to make law by choosing alternatives as to what shall be the law.
>
> (Hart 1977, p.983)

The last sentence is surely an allusion to Hercules; but what is mainly interesting about this passage is its insistent temporal reference. The presupposition seems clearly to be that there can be only one ideal theory over time, whose propositions are always true, and whose existence determines the truth of legal propositions in the actual world. In his reply to this passage Professor Dworkin takes issue particularly with the idea of the "existence" of such a theory, but his main concern, seems to be to repudiate its pre-existence, as it is in his reply to Professor Munzer (v. Dworkin 1978a, pp.293,337) question is he says "whether judges determine what the parties have a right to have"; and the emphasis seems to rest on the immediacy of the social context in which such a determination must take place - an immediacy of social context comparable to that in which political decisions are made (v. Dworkin 1978a, p.293). This is very vague, and the analogy between judicial and political decisions is fatal for at least one of Professor Dworkin's ostensible purposes: while it is true that no one would normally suppose the optimality of a particular political decision to be accountable in terms of the timeless or eternal existence of a set of abstract objects, it is also true that no one would normally suppose that the genuine expression of a political decision should be judged true or false, on the basis of the optimality of the decision. This reply of Professor Dworkin's seems improperly aimed against Professor Hart.

Could Professor Hart then be right about what is entailed by Professor Dworkin's "new theory". No, as I have said. Indeed, in "Law in the Perspective of Philosophy: 1776-1976", Professor Hart actually quotes evidence from Professor Dworkin's writing to show that his own later interpretation of Professor Dworkin must after all be wrong.

The subject of discussion in that essay is Professor Dworkin's much discussed review of Robert Cover's Justice Accused, a book about a number of pre-Civil War Northern judges who upheld and did not stint in applying the Fugitive Slave Acts - statutes which they opposed personally and which offended ordinary notions of due process held at the time. As a result of their applying these statutes, slaves who had escaped to free states were ordered by the courts to be returned to their masters. Professor Dworkin's opinion is that the judges in question ought not to have decided these cases as they did, and that their doing so must be regarded as in part, the consequence of "a failure in jurisprudence". This assessment is based squarely on the claim that the judges "missed a chance to develop an alternative to both natural law and policy oriented positivism" (Dworkin 1975, p.1437, col.5). The alternative referred to is, not surprisingly, the one that Professor Dworkin has tried to develop. The claim is intriguing, however, because of the notion of chance presupposed by it. The implication seems to be that it is not for every judge to be enmeshed in a failure of jurisprudence; it isn't the case that every judge at every moment of his career has a "chance" to develop a theoretical approach to legal decision-making. The reason that these judges had a chance

to do so, according to Professor Dworkin, is that "the law was not already settled against the slaves", and that a theory of the constitution could have been made out to justify finding against the slave-catchers (v. Dworkin 1975, p.1437, col.2). Now, both Professor Hart and John Mackie have protested against Professor Dworkin's maintaining that the law in these cases was not "settled". Professor Hart has pointed out that even on Professor Dworkin's account the judges at least claimed that the law was settled, and John Mackie has drawn the conclusion - prejudicial, he obviously thinks - that Professor Dworkin's theory "often takes as unsettled issues which on a legal positivist view belong clearly to the realm of settled law" (Mackie 1977, p.10). Professor Hart has gone even further in making the accusation that Professor Dworkin impugns the sincerity of the Northern judges.

> "[...T]he judges themselves, as Professor Dworkin says, said that the law was settled. He implies that the judges could not have believed what they said for, in spite of what they said they believed, they were making new law: 'The decisions were surprising not because the judges refused to bend the law to their own convictions, but because, though they believed they were making new law, they made law they themselves thought immoral'."
>
> (Hart 1976, p.550; citing letter from Professor Ronald Dworkin to the Editor, in London Times Literary Supplement (London) Jan. 9, 1976, p.35, col.1).

The alleged inconsistency, of course, is that the judges claimed that the law was settled while they believed that they were making new law. But note how this alleged inconsistency in Professor Dworkin's account begins to evaporate upon contact with the recollection of Michael

Dummett's interposition of a third picture between the pictures offered by Platonist realism and subjective idealism, in a passage quoted above (supra p. 76). The relevant adaptation of his remarks to the jurisprudential case would read: "We do not make the law but accept it as we find it (this corresponds to the derivation of a judicial decision from our theory of law); but the law was not already there for our statements to be true or false of before we carried out the development of our theory, which brought the law into being." Only if something like this image were somehow tied up with Professor Dworkins legal philosophy could the admission that judges make the law be reconciled with the claim that judges have no choice in deciding what law it is permissible to make.

But this observation done is not sufficient to dissolve the inconsistency; and furthermore the inconsistency itself is not of primary interest. The observation is not sufficient unless a certain hypothesis is also granted; and that is, that Professor Dworkin's viewpoint it could be said that the judges were aware of making new law in the sense of deriving hitherto undrawn legal conclusions from a legal theory which they nonetheless accepted as correct and hence settled. Here is where the matter of interest begins to materialize. Professor Dworkin maintains that the law was not settled against the slaves. The judges, he admits, "said it was"; and Professor Hart and John Mackie take him to mean that according to the judges the law "was settled" - as if he had implied that the judges had two logically independent ideas in mind, viz. (i) that the law, whatever it was, was settled; and (ii) that, as it happened, it was settled against the slaves. That is not the best way of reading Professor Dworkin, I think. It suggests

that if the law had been "unsettled" then a decision either for or against the slaves would have been admissible. But on Professor Dworkin's principles, if the law was not settled against the slaves, then it was settled for them. Professor Dworkin is clearly of the opinion that a better theory of law would have resulted in decisions in the slaves' favour. Such decisions would have been the "right answers" in their cases. But now a question arises. If these "answers", though never given, were the right answers, then the legal propositions requiring decisions against the slaves must have been false. In deciding against the slaves, the judges must have propounded false legal propositions. It is quite clear that although Professor Dworkin thinks that at the time the decisions were made, the law was not settled against the slaves. Nevertheless, he doesn't suppose that it is impossible that the law should have become settled against the slaves. Indeed, his saying that "the law was not already settled against the slaves" suggests that he thinks that the law did in fact become "settled against the slaves", and this as a result of the decisions made by the judges in question. And this possibility is to be explained by reference to Professor Dworkin's express acknowledgements that an ideal legal theory must provide the best possible justification for the full range of legal materials that present themselves to him at the time when he has to make his decision. Judicial precedents are naturally included in this range. The judges who are the subject of Professor Cover's book had, according to Professor Dworkin, a chance to develop legal theory in a certain way. Perhaps they had an obligation to do so as well. But the implication of Professor Dworkin's lament for lost opportunity, is that the judges who followed these judges did not have

the same opportunity that they did. Ideal theories of law for them would have to have been constrained by the need to justify explicit decisions against the slaves, and the ideal arguments available to their predecessors for deciding for the slaves, must have been cast in doubt by the very decisions that those arguments, if they had been canvassed, might have discouraged. Thus on Professor Dworkin's own account, the proposition that the slaves had a right to a decision in their favour might have been false at one time and have become true at another. So Professor Dworkin's account here gives the lie to the idea that there is some one legal theory ideal over time in terms of which legal propositions are true or false. For note that propositions whose truth value changes include propositions that refer to specific times and places. For, of one of the unfortunate slaves involved in the trials under discussion, it might have been said at one time that this slave in this case at this time has no right to a decision in his favour - and this might have been false; and at a later time, it might have been said that the very same slave in that very same case at that very time really did have no right to a decision in his favour - and that might have been true. It might have been true because the ideal theory of law at that later time might not have been able to justify a decision for a slave in a position similar in all relevant respects to the slave in the earlier case, in which case it would have threatened normative paradox to claim that the earlier slave had had a right to a decision in his favour.

Possibilities of this sort may be unhappy-making, because of the complexity then introduce, but acknowledgement of them seems necessary. A legal philosophy on the model of natural law theory, which

divorces the truth of legal propositions from the actual history of legal institutions, is in the plain man's sense of "realism", too unrealistic to be worth bothering about. There is just no reason why a set of legal propositions ideal at some point in time should be singled out as providing the truth conditions for legal propositions at all other points in time. The capacities of an individual or a system to realize one value or another change over time; in particular, if some obligation is not met, then it may be futile and destructive to meet a second obligation whose importance is contingent on the meeting of the first obligation. Consider: Sally is driving to the hospital. She ought to hurry. At t_1 she finds herself behind a slow-moving truck. She ought to change lanes and pass the truck. If she changes lanes, then she ought by t_2 to have accelerated to a certain degree. For whatever reason she does not change lanes. But she acts to meet her obligation to accelerate to a certain degree by t_2. She cannot get to the hospital by meeting this obligation; the truck in front of her does not accelerate. She crashes into it and dies. Deontic logicians discuss this sort of thing endlessly. The reader may imagine less dramatic legal examples at his leisure. (The example I have given is a modification of one given by Holly Goldman, who has written two remarkable papers on dated moral propositions (v. Goldman 1978, p.186 and passim; 1976). Many of the ideas in the preceding paragraphs were suggested by her work; I am sadly conscious of their failure to reflect its lucidity and elegance.)

It might still be urged that a single ideal legal theory is possible which would be true over time. Such a theory would make the truth of legal propositions conditional on the legal history of the

jurisdiction in which the propositions were meant to be true. It seems to me unlikely, however, that any such theory could even be formulated. The propositions of a legal theory are themselves legal propositions. But on the current proposal, the propositions of the legal theory are conditional propositions relating legal propositions to possible legal history. In stating the legal history, however, mention must be made of legal propositions. Thus the antecedents of the legal propositions contain legal propositions which are themselves conditional propositions whose antecedents are legal propositions which are themselves conditional propositions whose antecedents ... theories of this kind do not seem to be formulable.

The only alternative left appears to be the one that appeared worth trying to avoid, viz., that the propositions of ideal legal theories are true according to those theories and not absolutely; and that a succession of theories is necessary to accomodate the requirements of extra-legal social reality. This view is compatible with the law's being responsive to the contingencies of social change in a way that is clearly desirable; while at the same time it identifies the legal system with an optimal set of propositions, and not with anything that can be identified simply by reference to a set of social facts, such as the propositions actually propounded by judges. As a hypothesis about Professor Dworkin's legal philosophy then, it does not break the connection between, on the one hand, his more general jurisprudential views about the immediate political nature of the judicial decision, and, on the other, his notion of an ideal theory. Thus it remains possible to see why a critic might suppose Professor Dworkin to be in thrall to a secret book theory; but it shows why it is <u>wrong</u> to suggest

that he is so in thrall - for a secret book whose paragraphs and sentences are constantly changing to reflect the visissitudes of social history must be so unlike an ordinary book that it had better not be called a book at all.

That is one matter of interpretation out of the way. But this particular exegetical effort began as an attempt to show how the propositions of ideal legal theories are not susceptible to realist interpretation. The result so far has been that there appears to be no way of extracting legal propositions from the ideal theories which contain them in order to apply the notion of truth to them simpliciter. Now it is necessary to show that because this is so, it is reasonable to suggest that there is no way of giving characteristically realist truth conditions to the legal propositions of an ideal legal theory. Fortunately, this is easy to show, thanks to two arguments provided by Hilary Putnam, and thanks also, particularly to Michael Dummett's discussions of Quine and his brilliant attack on Donald Davidson. The first two arguments suggest that if any notions of truth apply either to ideal legal theories or to the propositions contained in ideal legal theories, these notions of truth do not correspond to the realist, or classical, notion of truth. The third argument suggests that even if some notion of truth does apply to the propositions of an ideal legal theory, there are grounds for denying that statements of truth conditions for these sentences will provide a realist account of the sense of these sentences.

i) In the first place, it is perfectly clear that the predicate "is an ideal legal theory", applied to legal theories, is not equivalent to the predicate "is (classically) true". According to the

preceding argument, there can and indeed there must be more than one ideal legal theory over time, just as, in general, there can be more than true theory over some partition of domains. Let T_1 and T_2 be two ideal theories. Now if the predicate "is (classically) true" applies to theories, then necessarily, if it is true that "T_1 is true" and true that "T_2 is true", it is true that "the conjunction T_1 & T_2 is true". But suppose it is true that "T_1 is an ideal legal theory" and true that "T_2 is an ideal legal theory" - it may nevertheless be false that "the conjunction T_1 & T_2 is an ideal theory". This is because, as has been argued at length above, T_1 may entail a proposition whose negation is entailed by T_2. In that case, if T_1 is conjoined with T_2, then a contradiction will be derivable from the conjunction. Surely then the conjunction of T_1 and T_2 is not an ideal theory. Since for the predicate "is (classically) true" the distributive law holds for conjunction, while for the predicate "is an ideal legal theory" the distributive law fails to hold for conjunction, the predicate "is an ideal legal theory" cannot be equivalent to the predicate "is (classically) true". Though not necessary to the argument, an even stronger conclusion is possible. If T_1 and T_2 are ideal legal theories which are distinct, then there must be some legal proposition over whose truth-value they differ; so, in fact, there can be no conjunctions of ideal legal theories. So it is <u>necessarily</u> the case that for the predicate "is an ideal legal theory" the distributive law for conjunction fails to hold and thus the application of "is an ideal legal theory", <u>never</u> coincides with the application of "is (classically) true". (This argument is adapted from an argument in Hilary Putnam's "Explanation

and Reference" (Putnam 1975a, pp.196-214, v. p.210f) - a paper attacking anti-realist theories of meaning which the reader might consult if he is unhappy with the brevity of what is here presented.)

ii) Let T_i by any ideal legal theory. Then the operator "according to T_i it is true that" is not equivalent to the operator "it is (classically) true that". Now it is a feature of the operator "it is (classically) true that" that it commutes with the operator "it is (in some intelligible sense) probable that". (Perhaps the reader will object that there is no intelligible sense in which a legal proposition may be probable either simpliciter or according to a theory. I should not allow such an objection. In his book The Implications of Induction, Jonathan Cohen gives a syntax for inductive-support gradings one interpretation of which is expressly applied to legal propositions (v. Cohen 1970, pp.155-171). In his more recent book, Cohen shows how the syntax of inductive support gradings can be transformed into a syntax of inductive probability. This turns out to be a generalization of the modal logic S_4, and is susceptible of a legal interpretation (v. Cohen 1977, pp.240ff, 336f). Cohen, therefore, provides an explicit logical theory for a sense of "probable" in which a legal proposition may be probable. In any case, I believe that most people, including lawyers, would admit that some legal propositions might be more or less probable than others. To continue:) If P_i is any legal proposition, then "it is probable that it is true that P_i" is equivalent to "it is true that it is probable that P_i". But the operator "according to T_i it is true that" does not commute with the operator "it is probable that". Thus, if it is true that (a) "it is probable that according to T_i it is true that P_i" it may nevertheless

not be true that (b) "according to T_i it is true that it is probable that P_i". This is because (a) may be true in virtue of some evidence or other about the content and the deductive structure of T_i; it may be true even if it should turn out that in fact T_i entails $\sim P_i$; but if this is the case (b) must be false; for if T_i entails $\sim P_i$, then it makes it maximally probable. The operator "according to T_i it is true that" is therefore not equivalent to the operator "it is true that" since they have different logical properties. (An objection might be raised at this point: i) since the evidence in virtue of which (a) may be true might be very different from the evidence in virtue of which (b) might be true, then the sense of the operator "it is probable that" may be different in (a) and (b). ii) That might mean that the failure of truth functional equivalence between (a) and (b) might not be due to the non-equivalence of "according to T_i it is true that" and "it is classically true that". — On Cohen's account of inductive probability sentence i) of this objection is in fact too weak. The range of relevant variables on the basis of which (a)'s truth may be assessed are clearly not identical with the range of variables on the basis of which (b)'s truth may be assessed. For Cohen this makes it necessarily true that the Operator "it is probable that" has a different sense in (a) than in (b) (v. Cohen 1970, pp.42ff, 89-95; 1977, 137-143). On the other hand, when (a) and (b) are replaced by their classical counterparts, then on Cohen's account the operator "it is probable that" need not be equivocal. The fact that the theory-relative assertions entail the equivocity of "it is probable that" whereas the classical assertions don't, indicates that the conclusion of non-equivalence may stand.) The truth that attaches to legal propo-

sition in virtue of their being contained in ideal legal theories is therefore, not classical truth. (This argument was suggested by a sentence in Hilary Putnam's "Reference and Understanding" which is another attack on anti-realist theories of meaning (v. Putnam 1978, pp.97-119; v. p.104).)

iii) The question remains of the possibility of giving the meaning of the propositions of an ideal legal theory by providing truth-conditions for them - realistically construed truth conditions. I am inclined the think that very little of this question remains; but for the sake of completeness it seems appropriate to give some direct answer. By way of making a kind of apology, let me say that if the reader has grown more and more unhappy at the relentlessly otherworldly tone of this discussion of non-existent ideally best legal theories, he is not alone in this: I too find the issues in question both disconcerting and rather dizzying, if only meretriciously. But there is something at stake here, and might be as well to try to recollect what that is.

If realist truth conditions can be provided for all legal propositions, including those about the rights and duties of particular plaintiffs and defendants, then ORA will be saved; and in view of the failure of the rights thesis to amount to a substantive theory of what rights people have, it seems as if the possibility of providing realist truth conditions for legal propositions is essential if ORA is to be preserved. It was argued in Section 8.1 and implicitly concluded that the truth-conditions actually provided by Professor Dworkin were evidently circular and that realist-truth conditions had, therefore, not been provided. In an effort to escape this undesirable conclusion and

its consequences, Section 8.2 began with the suggestion that (a) legal propositions in the actual world might have realist truth conditions, even if (b) the propositions of an ideal legal theory were realistically neither true nor false. Although, taken as a whole, this suggestion seems implausible; nevertheless, in Section 8.3 it will be argued that the suggestion is acceptable. But the suggestion involves the supposition that the propositions of an ideal legal theory need not be held to be realistically true or false. And this supposition had to be given some foundation. First, a brief gesture was made in the direction of the sources and grounds of actual legal propositions, viz. e.g. statutes and judicial decisions, in order to evoke a certain disinclination to believe that even actual legal proposition should have truth or falsity ascribed to them. Such a disinclination, it seemed to me, might then be analogically transferred to the ideal case, the strategy behind this being that the disinclination evoked in the actual case might later be eliminated with the help of abstract argument, should the whole programme succeed. A consideration of the significance of the publication in the law reports of dissenting opinion naturally led to the problems connected with a doctrine of judicial mistake. Prima facie this doctrine seemed to countervail against the disinclination to believe that in the actual world propositions of law were neither true nor false. But it was then argued at some length that at least in the ideal case imagined by Professor Dworkin, the doctrine of judicial mistake argued against a realistic interpretation of legal propositions. This question is not yet quite settled, but it is about to be.

Recall that Professor Dworkin wants his plan of giving truth conditions for legal propositions to constitute an "effective reply"

to the anti realist theory of the meaning of those propositions. Insofar as such a reply is intended to be effective, it must be presumed either to meet the requirements that anti-realists impose on the acceptability of any theory of meaning, or, for any requirement that the reply does not meet, to provide an independent argument against that requirement. Now it is a fact that the provision of a formal theory of truth in the manner of Taski or, better, of Davidson, as part of a theory of meaning, is not sufficient to characterize that theory as either realist or anti-realist. This is because the intuitionist logical connectives, whose meanings are the model for all anti-realist accounts of meaning, can be translated so that according to the translation and the intuitionist rules of inference, a set of theorems is derivable which looks exactly like the set of all theorems of classical - "realist" - logic. For this set of theorems it is possible to give a formal theory of truth exactly like the one for the theorems of classical logic. But in the theorems of this theory of truth, the predicate " - is true" means what "the negation of - is not provable" means. Thus, given a set of sentences and a (homophonic) formal theory of truth for them, it is impossible to tell whether the meanings of the sentences should be construed realistically or anti-realistically (v. Putnam 1978, pp.25-29; cf. also Wright 1975a, p.238f). But a formal theory of truth for a set of sentences paradigmatically states the truth conditions of sentences. This has led anti-realists to demand that a theory of meaning include some informal account of the notion of truth to supplement the theorems of the formal truth theory (v. Wright 1975a, p.237). At least some who are not anti-realists have endorsed this

demand; thus John McDowell has suggested that if a theory of sense for a language is to arise out of a theory of truth for that language, it will be necessary antecedently to characterize the notion of truth in a way that passes beyond the bare feature that "is true" is the predicate which occurs in the "T-sentences" which are the theorems of the truth-theory, that is, in the theorems of the form "s is true iff p" (where "s" is a structural descriptive name of a sentence "p") (v. McDowell, p.42f; and perhaps cf. Strawson 1971, p.180). This may seem so obvious as not to be worth mentioning, unless it is remembered that the main interest of a truth theory of the kind in question lies, not in this antecedent characterization of truth, but in the recursive mechanisms it specifies for attributing semantic properties to molecular structures on the basis of the semantic properties of their atomic parts. The question for such theories is that of logical form, and everybody knows that for the sentences of natural languages it is extremely perplexing. As I say, this feature of truth theories is something to be remembered; and I shall take a moment to point out that it is something Professor Dworkin seems to have forgotten. - It would be rather artificial to think that the legal propositions which Professor Dworkin says lawyers "use to describe or declare" legal relationships were anything but sentences couched in some natural language (v. Dworkin 1977b, p.5); and one must suppose, too, I think, that the same holds for the propositions that Hercules would use in constructing his theories if he existed. In the circumstances, therefore, it seems that any man's claim to have suggested truth conditions for legal propositions would have to be anchored to at least some

intimation of the form that these propositions take. Professor Dworkin is thus, à moins dire, mildly eccentric in having persistently dealt with this requirement by dodging it: he appears to feel that propositions cannot be straightforwardly linked to more mundane items like sentences, yet he has nowhere offered any perspicuously articulated set of links to join legal propositions to recognizable linguistic entities. This creates the difficulty that one can only guess what he means when he talks about legal propositions. In a remarkable passage, he denounces the idea that propositions can be individuated, thinking apparently, that the purpose of trying to individuate propositions is so that they can be counted, and not realizing that propositions must be individuated if one is to be able to distinguish between the expression of one proposition and the expression of a different proposition (v. Dworkin 1978a, p.75). If one is going to talk about propositions at all, one must surely have some idea of how they are to be told apart from each other; it is ridiculous to tell people that lawyers "use" propositions, while maintaining that nobody in the world can tell which ones they are using. There is some reason to suspect that in the notion of a legal proposition Professor Dworkin conflates the notions of the sentence used in making a statement about the law, and the content of the statement made by using the sentence. This hypothesis accounts for his believing both that there can be no useful notion of a canonical form for legal propositions - since the same sentence can be used to express different statements (propositions) - and that lawyers can nonetheless use legal propositions (sentences) in making descriptive or declarative statements about the law (v. Dworkin

1978a, p.75f, 1977a, p.4f). But if something like this is his view, then there is, I think, no way for him to avoid conceding that in giving the meaning of or the truth conditions for legal propositions one must give the meaning of or the truth conditions for sentences used in enunciating legal propositions. This will be so, even if one is committed to maintaining that really it is not a sentence, but what a sentence is used to state, a proposition, that is true or false. How the meanings of sentences may be given on these terms is a matter of great puzzlement. Professor van Fraassen and others, using what is called two-dimensional modal logic, have suggested an approach to the problem, according to which the meaning of a sentence is a mapping from those contexts in which a statement expresses a proposition, to the truth value in those contexts of the proposition so expressed (v. van Fraassen 1977, p.76f). Here a context is interpreted as a part of a possible world; a proposition is regarded as a set of possible worlds; and a possible world makes a proposition true if that world is included in the set of possible worlds that defines the proposition. The difficulty in this approach is the apparent hopelessness the task of providing a general means for specifying which proposition is expressed by a sentence in a context, which statement is made by using the sentence in that context. (For a thoroughly depressing discussion see Ziff's "What Is Said" (Ziff 1972, pp.21-38).) Yet it is perfectly clear that there is no progress to be made in this direction which does not involve giving an account of the meanings of sentences. If a theory of truth has any place in that account, unfortunately for Professor Dworkin the canonical verbal formulations that he so abhors might be

welcomed in the account of the senses of "legal propositions"; for as Donald Davidson has said about the theorems derived from a theory of truth:

> "On the left-hand side of a T-sentence, a sentence of the vernacular, its structure transparent or not, is described; on the right of the "if and only if" a sentence of that same vernacular, but a part of the vernacular chosen for its ability to make explicit, through repeated application of the same simple devices, the underlying semantic structure. If a theory of truth yields such a purified sentence for every sentence in the language, the portion of the total language used on the right may be considered a canonical notation."
>
> (Davidson 1977, p.250)

What claim does a theory of truth on the Davidson model have, to be regarded as a respectable part of a theory of meaning? Its claim rests - not unsoundly surely - on the fact that it plays some role in meeting the requirement that a theory of meaning be a theory of <u>understanding</u>. According to Paul Ziff, the concept of understanding must involve the idea of some kind of "analytical data processing", and must presuppose that whatever is understood have the sort of complex structure necessary to provide the input for such processing (v. Ziff 1972, pp.17-20; in relation to truth definitions cf Peacocke, p.183). The incorporation of a theory of truth in a theory of meaning at least shows that linguistic objects such as sentences are such that they may be understood. Professor Dworkin is not to be congratulated for his conspicuous failure to dirty his hands with these matters. Certainly his suggestions regarding the truth conditions for legal propositions contribute nothing to an account of understanding in the sense just considered. But this is not to say that his suggestions are incompatible with such an account. Indeed, one must suppose, optimistically perhaps, that they couldn't be.

Prior, however, to the foregoing brief excursus on the significance of formal theories of truth, the problem was raised of the need, insisted upon by anti-realists and admitted by some realists, to give some antecedent characterization of the notion of truth that is employed in formal theories of truth. This problem, too, has to do with the idea that a theory of meaning must be a theory of understanding. But the issue in this connection is not the complex structure which makes linguistic objects appropriate for understanding; the issue is rather the nature of relationship between sentences and speakers and hearers in their various situations. What must be determined is how the use of sentences by speakers and hearers is related to their understanding of the sentences as true or false. This is the point on which realists and anti-realists differ. Anti-realists maintain that since "the grasp of the sense of a sentence cannot be displayed in response to unrecognizable conditions", no one learning a language as it is used could ever come to know that a sentence could be used in such a way that unrecognizable conditions were relevant to its truth. This is to say that the sense of sentence must be given in terms of those conditions which recognizably govern its use; or to put it another way, that its truth conditions must not be verification-transcendent or warrant-transcendent. For there is no means by which a language learner could come to understand that its truth-conditions were in this way transcendent. The realist reasons otherwise. Here is Professor Strawson's reply to the anti-realist:

> "It is enough for the classical truth-theorist that the grasp of the sense of a sentence can be displayed in response to recognisable conditions -

> of various sorts: there are those which conclusively establish the truth or falsity of the sentence; there are those which (given our general theory of the world) constitute evidence more or less good, for or against the truth of the sentence; there are even those which point to the unavoidable absence of evidence either way. The appropriate response varies, from case to case, in the last case being of the form, "We shall never know whether p or not".
>
> (Strawson 1976, p.16f)

The task now at hand is to see whether these different views as to the nature of admissible truth-conditions can sensibly be applied to the sentences used in the expression of the propositions of an ideal legal theory constructed by a hypothetical superhuman judge. If the distinction between realist and anti-realist interpretations of these sentences cannot be maintained, then the circularity which seemed to threaten Professor Dworkin's brand of realism may vanish.

And it seems that it is not sensible to try to maintain the distinction. It has already been argued, at some length, that ideal legal theories cannot be so ranked that the truth or falsity of the propositions of one theory may determine the truth or falsity of the propositions of other theories. It seems only sensible to suppose that this argument should be construed as applying to the sentences of the theories, and these sentences should not in general be thought of as containing indexical references. The sentences of the theories must therefore be considered true, and the problem is to characterize a notion or truth according to which this is possible. For any sentence of any ideal theory the question of whether its truth is to be interpreted realistically or anti-realistically must be resolved by saying whether its truth conditions can or cannot be considered to be verification-

transcendent or justification-transcendent, if you will. But it is immediately obvious that the question which must be answered this way is very odd. For the verification-transcendence at stake applies to the truth conditions of sentences which may not have been and may never be used or even framed in the actual world. The sentences in question are the sentences used by an hypothetical superhuman judge, and the question must be whether the truth conditions of these sentences may transcend his powers of verification or justification. If it is said that the truth conditions of such sentences may transcend even his Herculean powers of justification, then it must be the case that the presence of some of the sentences in his theory is not justifiable by him, although as it happens the sentences are in the relevant sense true: it is just that he cannot know this. I think that this must be a silly and gratuitous speculation. For if the sentences were true in the relevant sense, and included in the ideal theory, there could be only one reason for supposing that the hypothetical author of the theory might not know that the sentences in question were true: that reason would be that in deriving the sentences, the author had made a mistake in inference, so that there would be some true proposition such that if the author had known it, he would not have arrived at a derivation of the sentences in question. So Gettier-problems would have invaded the realm of Hercules! This is plainly ridiculous. Hercules was postulated to construct theories. For the sublunary perspective that Professor Dworkin and the rest of humankind share, there can be no reason to attribute to Hercules the particular cognitive modes or capacities that give rise to Gettier problems. It is true that Hercules

is not omniscient with respect to the future; but as has been argued, the truth of ideal legal propositions must be immune to the effects of unforeseen future contingencies: otherwise, theories won't be accounted ideal that, according to the previous argument, should be so accounted. It is just nonsense to hypothesize an ideal judge and then to impute to a necessary capacity for error of inference, in order to be able to say that even for him, it is possible that some sentence that he utters would be false for all he knows, even though the sentence is admittedly true. But if this is so, then there is no reason to insist that sentences of a hypothetical ideal theory need be realistically interpreted.

Another line of thought leads to the same conclusion. The truth conditions for a proposition of law given by Professor Dworkin are given within terms of degree to which it fits in with an ideally best legal theory. But this would surely be better put by saying that a proposition of law is true just in case the ideally best theory of law which contains it is better than the ideally best theory of law which contains its negation. The advantage of this formulation is that is exposes one implication of the doctrine of judicial mistake, viz. that a background of theory cannot be held fixed in order that the testing of propositions and their negations may take place one pair at a time. This kind of testing cannot be acceptable. Take, as an example of a legal proposition, the following

> (P_1) In English courts for the purposes of liquidation proceedings, on claims for a liquidated debt payable in foreign currency, judgement must be given for the appropriate amount of English currency as at the date when payment was due.

This proposition was held true by the House of Lords in 1961, and it had been held to be decisive in modern cases since 1898. In 1975 the

English Court of Appeal held that it was false, and in 1976 the House of Lords held that it was false, though the House of Lords held that the Court of Appeal had been wrong in holding it false. (For the history of the truth-value of this proposition, v. Cross 1977b, pp. 147-151; 1977a, pp.89,99,105, et passim; Denning 1978 pp.305-308; Lord Denning there argues in effect that if the Court of Appeal had not had the nerve mistakenly to hold P_1 to be true, then the House of Lords would not have had the opportunity correctly to hold it to be true, and so to change the law; for the case heard by the Lords was only filed on the basis of the report of the incorrect decision of the Court of Appeal. None of this contrives to suggest that a standard of notion of truth is operative in discourse about this universe of discourse.) If this proposition had been held true in 1976 then it could not at that time have been true that

> (P_2) The plaintiff in Miliangos v. George Frank (Textiles) Ltd. has a right to judgement in Swiss francs rather than in pounds sterling devalued since the due-date of the debt.

That is, there are very strong reasons for saying an ideal legal theory containing P_1 and $\sim P_2$ would then have been preferable to an ideal legal theory containing P_1 and P_2. It is, after all, pretty clear that P_1 entails $\sim P_2$. On the other hand, if in 1976 P_2 had been true, then an ideal theory containing $\sim P_1$ and P_2 would clearly have been preferable to an ideal theory containing P_1 and P_2. Again, it is pretty clear that P_2 entails $\sim P_1$. But for the House of Lords, the point of hearing Miliangos v. George Frank (Textiles) Ltd. was just to decide whether P_2 or $\sim P_2$. Since the House had held P_1 in 1961: and since the House could be said to have been under a Dworkinian obligation to construct a theory

that would best justify the whole body of extant legal material including P_1, it could not take $\sim P_1$ as given. Consequently, it had to test for the truth of two propositions simultaneously and could only logically, therefore, do so by taking pairwise conjunctions out of atomic elements P_1, P_2, $\sim P_1$, and $\sim P_2$, and then ranking theories distinguished in terms of the pairwise conjunctions so formed.

Since Professor Dworkin's truth conditions for legal propositions suggest no sharp line of demarcation between those already propounded legal propositions that are susceptible to a revision of truth value in the way that P_1 has been shown to be, reasoning along these lines quickly and naturally leads to the conclusion that what is ideally involved when a case comes to trial is the confrontation between, on the one hand, the total justificatory situation provided by the actual world and, on the other, the full range of possible complete theories of the law. For the theories can themselves be construed as conjunctions of axioms, and since they are ideal in any case, it seems not to matter if they are very long conjunctions of axioms. Only one such theory will be best; and since for every legal proposition all complete theories will contain either the proposition or its negation, the case at hand, having prompted the construction of the various possible theories (conjunctions), will be decided by the choice of one of these theories. On this view, the meaning of a legal proposition will be determined by nothing less than the full range of total justificatory situations which at different moments single out as ideally best some of the various theories (conjunctions) of which that proposition is a part (by which it is entailed). But this makes the primary unit of

"legal meaning" the legal theory and not the legal propositions contained in the theory.

This is why it may seem difficult to say precisely what the relations are between a proposition, e.g. P_1, which is an element of ideal theory at a time t_1 and the negation of that proposition, $\sim P_1$, when the negation is an element of an ideal theory at a different time t_2. Are they contradictories? Certainly a theory that contains the one must not contain the other, if it is to be ideal. But given the multiplicity of ideal theories, this is not decisive. The problem here is the same one that arose in the consideration of the fugitive slave cases. An appropriate suggestion for trying to settle this question can be extracted from the following intuition: if P_1 and $\sim P_1$ are contradictories, and one person believes that P_1 and the other person believes that P_2, then one of them must logically be mistaken in his belief. Of course, this does not take into account indexical references actually made in the sentences P_1 and $\sim P_1$, but holding these constant, surely the intuition has some plausibility. And it gives the desired result in connection with a theory ideally best at a given moment. If at t_1 a person A believes that P_1 and a person B believes that $\sim P$, then since the ideal theory at t_1 will contain only one of P_1 and $\sim P_1$; and since, of P_1 and $\sim P_1$, the one that is true can be true if it is contained in an ideal theory; and since at any time t_1 there is only one relevant theory; then at t_1 one of A and B must be mistaken in his belief about the law. When we come to consider different times, however, the results are not nearly so clear. In 1961 Lord Denning upheld P_1; in 1975 he denied it: must he have had a false belief about the law at one of

those times? I suppose it might be held, on grounds I cannot envision, that between 1961 and 1975 the total justificatory situation could not have changed in so radical a way that an ideal theory of law in 1961 would have included P_1 and an ideal theory of law in 1975 $\sim P_1$. This is not true. Between 1961 and 1975 Britain had joined the European Community, and because the 1975 case involved a German company, the assertion of P_1 by Lord Denning in 1975 would have been in violation of the Treaty of Rome, which was and is part of English law. As a matter of fact, however, there is reason to suggest that he was mistaken in some belief about the law when he affirmed $\sim P_1$ in 1975; in 1976 the House of Lords rebuked the Court of Appeal for supposing that it could depart from the precedent set by the House in 1961. By contrast, in 1976 the House was able to depart from that very same precedent, though it could not have done so before 1966, without laying itself open to some attribution of a false belief about the law, for between (1861 or) 1898 and 1966 the House had been bound to follow its own precedents, except in special circumstances, none of which could have been considered to hold in Miliangos v. George Frank (Textiles) Ltd. in 1976 (v. Cross 1961, pp.106f, 130ff, 145); but in 1966 the House delivered the Practice Statement in which it declared its intention to "depart from a previous decision where it appears right to do so" (cited in full in Cross 1977a, p.109). So there may at least be no reason to think that if person A in 1961 believed that P_1, and person B (possibly identical with A) in 1976 believed that $\sim P$, either A or B must have been mistaken. Insofar as Professor Dworkin's theory has this consequence, it is to be welcomed. But it leads to the conclusion that P_1 and $\sim P_1$ need not be contradictories.

This is, I think, in no way a surprising result. It is a consequence of the hypothesis, to which I believe Professor Dworkin is committed, that the primary unit of meaning of the language used by lawyers is the legal theory and not the legal proposition.

But the hypothesis that the legal theory is the primary unit of meaning has further - though I should claim, routine - consequences for the notion of truth-conditions for individual legal propositions, as well. Thus, it is limpidly clear that truth conditions in the form suggested by Professor Dworkin are simply not coherently formulable. This is because the truth-conditions of a proposition of an ideal legal theory are given with reference to other propositions identifiably belonging to that theory. Then other propositions are true according

to the theory - that much is, so to speak, analytic. Unfortunately, however, those same true propositions are not necessarily antecedently identifiable. This is just what was argued two paragraphs up. For each proposition and its negation, there may be some doubt as to which of them belongs to the theory. Even if some fixed body of propositions were recognizably immune from revision, there would still remain the possibility that the truth values of many apparently atomic legal propositions and their negations could only be established given the truth values of other legal propositions and their negations, which in turn could only be established given the truth values of the first set of legal propositions. This is so because, whatever general legal theory is suggested by Professor Dworkin's peculiar truth conditions, it is clear that in its ideal guise, at any rate, the theory is holistic. What is more, it is clear that a theory of meaning for the propositions of ideal legal theories must be holistic, too. The propriety of the inference here may not be evident at a bare glance, but it can be made so. Recall the demand imposed on both realists and anti-realists alike, requiring some informal antecedent characterization of the notion of truth as it occurs in the formal truth theory that can presumably be constructed for a language by realist or anti-realist indiscriminately. This characterization is intended to relate the use of sentences by speakers and hearers, to the capacities and abilities of speakers and hearers to understand the sentences as true or false. In this way, the question of what a speaker or hearer knows when he knows the meaning of a sentence, is linked to the question of what a speaker or hearer can know tout court. ("The theory of knowledge and the theory of under-

standing are inseparable." Strawson 1976, p.16.) Or rather one should say that the question of what a speaker or hearer knows when he knows the meaning of a sentence, is linked to the question of specifying a conception of what can be known, in such a way that that conception may be attributed to a speaker or hearer, in the sense that the conception might be said to govern his linguistic responses. Such a conception is specified for a superhuman judge by Professor Dworkin's truth conditions. At a given moment, a legal proposition can be known by a superhuman judge to be true, if the superhuman knows that it is part of what is at that moment the ideally best legal theory. But then the conception of what can be known is holistic, since it is not the case that single propositions are tested against each other for truth; rather whole theories are compared and ranked according, surely, to global criteria. What Hercules knows primarily is that one legal theory is better than all others. If in the way of a dividend he knows that this or that legal proposition is true, any explanation of his knowledge must be traceable back to his primary theoretical speculation. The conception of knowledge that informs Hercules' propounding of legal propositions is a holistic one, and for this reason the conception of knowledge appropriate to a theory of understanding, that is, to a theory of meaning for those legal propositions, is holistic, too.

There is something that should be observed here, and that is that a person who adopts a holistic approach to knowledge may tend to side-step rather than meet the demand accepted by realists and anti-realists. Asked for an informal characterization of the notion of truth as it applies to individual sentences, the holist will tend to

reply that there is nothing much to say. Both Gilbert Harman and Keith Lehrer have devoted whole books to giving coherentist accounts of knowledge; in each of the books lip service is paid to the traditional requirement that for a proposition P a man must not be said to know that P unless P is true (v. Harman 1973, p.171; Lehrer, pp.33-36). But Professor Lehrer quickly opts for a Ramsay-style elimination of truth, and Professor Harman spares just a moment to explain that a theory of truth can be no more than a theory of logical form (v. Lehrer p.37; Harman 1973, p.61). Quine's ideas about truth, too, have been subjected to an attempted Ramsay-like compression (v. Grover, Camp and Belnap). The effect of these manoeuvres is to free the concept of knowledge from a concept of truth, so that when in independent investigations the concept of knowledge is presupposed, as it may be in a theory of meaning, the concept of knowledge need not impart any substantive notion of truth. Where both realist and anti-realist want to make a connection between an informal characterization of truth as it applies to individual propositions, on the one hand, and knowledge, on the other; the holist provides instead an account of knowledge which renders such an informal characterization of truth apparently dispensable; and it is this account of knowledge as theory construction or global inference that is offered to supplement a formal truth theory. Professor Dworkin suggests a holistic theory of legal inference - that is, of the valid transition from one set of legal propositions to another set - and in doing so he provides the informal supplementation that would be required for a formal theory of the truth of legal propositions if such a theory were to be incorporated in a holistic theory of meaning for those propositions.

Holistic theories of meaning are not immediately coherent, whatever else one might think of them. To illustrate what this may mean, it should be pointed out that the immediate results for the present example are either that negation is wildly nonstandard for legal propositions, or else that P_1, taken (insofar as it can be) by itself, had a different sense in 1961 than it had in 1976. This second alternative seems not unacceptable. A rather closely related suggestion that seems, however, intolerable, is this: that P_1, taken by itself is ambiguous. This would at least appear to entail the possibility that in 1976 a person could truly have asserted that $\sim P_1$, and explained his assertion by saying that he was using the constituent expression P_1 of $\sim P_1$ in the way that it had been used in 1961. I don't think that this can be acceptable, for the very reason that such an explanation would ignore the connection between P_1 and the theories in virtue of which it manages to have any meaning at all, according to the view presently being entertained. The idea of giving a holistic theory of the meaning of legal propositions may indeed be a more attractive idea than that of giving a holistic account of the meaning of all the sentences of a natural language (v. Dummett 1975b, p.136ff). But Professor Dworkin's pretension to have given the sense of individual legal propositions by giving their truth-conditions must be regarded as a blind.

Yet as should be perfectly evident, this is not to say that on Professor Dworkin's truth conditions could not be given for the individual propositions of an ideal legal theory ranked primus inter pares in the face of some particular justificatory situation. There is no reason why a formal theory of truth could not be given for the

for the propositions of such a theory. In one perfectly good sense, the formal theory would give an account of the truth conditions of the propositions. But, as has been stated, the truth conditions provided by that kind of theory would not determine whether or not the individual legal propositions were too realistically interpreted. - And that is just the conclusion to which the present argument has been directed.

It has turned out then, that it is at least possible, without wandering too far away from Professor Dworkin's arguments, to suppose that the propositions of an ideal legal theory need not be realistically interpreted. Curiously enough, this conclusion was reached through an initial consideration of the doctrine of judicial mistake, and the importance of dissenting opionions in the law reports. Where these items had seemed to make the case for realism, the truth seems now that they necessitate a rather less straightforward treatment than might have been expected.

(The entire development of the argument that began from the idea of judicial mistake is my bull-in-a-china-shop fantasia on the beautiful treatment by Michael Dummett of Donald Davidson's questionable holistic use of the notion of linguistic mistake, - v. Dummett 1975, pp.117-120. It should be mentioned, as against the holistic interpretation of Professor Dworkin which I have offered, that holism can hardly be regarded as constituting per se a reply to anti-realists, which is what Professor Dworkin apparently wants to give, since Michael Dummett has done more than anyone to expose the inadequacies of holism, and he is the leading anti-realist.)

There is one small point that might be raised, which I should like to deal with briefly. The whole of the foregoing argument has been built on the assumption that a legal proposition in the actual world could not be true in virtue of a <u>false</u> proposition contained in an ideal legal theory: ideal legal theories do not contain false propositions. But in discussing Hercules' treatment of mistakes, Professor Dworkin speaks of embedded mistakes, meaning certain legal propositions which, though mistaken, must be included in an ideal theory because of the authority that attaches to them in virtue of the official level at which they were introduced (v. Dworkin 1978a, p.121). This may suggest that ideal legal theories may contain flase propositions. This is not so. In the first place, there is every reason to say that the notion of mistake being employed here is an intuitive and pre-theoretic one, which is not relevant to the assignment of truth-values to legal propositions determined by the ranking of ideal theories. And second, there is a distinction made by Professor Dworkin himself that can be incorporated into an ideal theory which neutralizes the notion of an embedded mistake. Professor Dworkin distinguishes between the specific authority or the enactment force of a legal proposition and its gravitational force (v. Dworkin 1978a, p.111). The enactment force of a proposition is a matter of the particular practical decision or class of practical decisions with regard to which the proposition is propounded. The gravitational force of a proposition is a matter of the inferences that may be drawn, given the truth of the proposition, <u>vis à vis</u> practical decisions beyond the literal scope of the proposition. According to Professor Dworkin, an embedded mistake is a proposition whose force is limited to its specific authority, it is a proposition

from which no inferences may be drawn regarding practical decisions outside its literal scope. Professor Dworkin also implies that if the proposition is one propounded by a judge in the course of delivering a judgement on a case, and has no other official backing, then its literal scope may, if desirable, be regarded as exhausted by the single decision made by the judge in the case in whose judgement the proposition is contained. Now Professor Honoré has proposed for independent reasons that all legal propositions should be understood to be prefixed by a phrase of the form "For the purpose of ___" where the blank is filled in such a way as to fix the scope of the proposition that follows the prefix-phrase (v. Honoré 1977, p.109). Note that prefixes in this form are non-truth functional sentential operators. It is only necessary to allow that sometimes this phrase should read "For the purpose of ____ only" in order to accomodate the distinction between enactment force and gravitational force. In the case of propositions whose scope is a single judicial decision, there can be no objection to regarding them as true, since even if they are so regarded, their scope is fixed so that they cannot figure in inferences so as to lead to otherwise false conclusions. In the case of propositions whose scope is broader than a single decision, it is absolutely necessary that these propositions, with their scope fixed, be regarded as true, for otherwise it will be impossible to infer the legal propositions regarding the proper disposition of cases which fall within their scope. An ideal theory must include such propositions "as true" if the hierarchy of legal decision making is to remain stable. I conclude that ideally best legal theories do not contain false propositions.

(There is at least a hint that Professor Dworkin supposes his distinction between gravitational force and enactment force can beneficially subvert the judicial hierarchy at least in regard to a strict doctrine of precedent. In Taking Rights Seriously on p.121f, he almost certainly alludes to a proposition propounded in Le Lièvre v. Gould (1 QB 491), viz., (P_1): In the absence of a contractual or fiduciary relationship between plaintiff and defendant, a defendant is not liable to a plaintiff for economic loss occasioned by the plaintiff's reliance on a negligent mis-statement made by the defendant. Professor Dworkin appears to suggest that a judge bound by the precedent of Le Lièvre v. Gould might restrict the scope of P_1 by, as it were, giving it a prefix to get: "For the purposes of the decision in Le Lièvre v. Gould only, P_1." In this way the judge might give himself the opportunity to affirm a proposition P_2 entailing $\sim P_1$. This is one interpretation of what Lord Denning did in his dissenting opinion in Candler v. Crane, Christmas & Co. (1951, 2 KB, 164), heard in the Court of Appeal, which was bound by its own decision in Le Lièvre v. Gould. In 1964, in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (1964 AC 465) the House of Lords affirmed Lord Denning's dissent, but from Lord Reid's judgement, the following propositions can be inferred: (a) that Lord Denning's P_2 was true; (b) that in arriving at P_1, the Court of Appeal had reached a wrong conclusion in Le Lièvre v. Gould even though the case itself may have been rightly decided; (c) that in 1951 the Court of Appeal had nevertheless been right to affirm P_1 because of the doctrine of precedent binding that Court to follow its own rulings; (d) that in 1951 it was, therefore, wrong to judge that "For the purposes of the

decision in Le Lièvre v. Gould only, P_1" was true, for the conclusion of Lord Reid and the House was that P_1 was false, even in Le Lièvre v. Gould (v. Wright and Linden, pp.495-499). If Professor Dworkin meant to suggest that the distinction between enactment force and gravitational force could have justified Lord Denning's dissent - in spite of the doctrine of precedent which bound him - and done so in terms of a restriction of the scope of P_1, he would appear to have been mistaken. (On the doubtful propriety of Lord Dennings' reasoning, cf. also Hodgson, p.131f).)

This sub-section is now complete. A reading has been given of a number of doctrines that seem central to Professor Dworkin's legal philosophy. The major result has been that the propositions of an ideal legal theory need not be understood realistically. The problem now is to see whether this allows for a realistic interpretation of legal propositions in the actual world, and whether this will lend support to ORA.

8.3 Hilary Putnam's Brand of Realism

At least partially in response to Michael Dummett's anti-realist writings and lectures, Hilary Putnam has recently set out a version of realism that would seem to provide an ingredient that might meet the needs of the present argument. Professor Putnam distinguishes between realisms. For him, there is metaphysical realism, and there is empirical realism. Metaphysical realism he identifies as the doctrine that a theory might be ideal in every respect, and still be wrong. That is, an ideal theory is one that would be complete and consistent; it

would explain or justify or account for or predict every datum, so far as human beings could ever know; it would meet every "operational" constraint; it would be "beautiful", "simple", "plausible", etc.; and metaphysical realism would hold that it could still be (in reality) false (Putnam 1978, p.125). According to metaphysical realism, truth is not equivalent to verification or justification even in the ideal limit. Professor Putnam offers a short mathematical argument to show that metaphysical realism so construed is incoherent, if the ideal theory in question is taken to be an ideal empirical theory of the whole world. I don't see how an argument of that type could in any way be applied to legal theories ideally best at a given moment. But it turns out that that doesn't matter. For Professor Putnam goes on to argue that a formal theory of truth could still be given for the propositions of such an ideal theory, even if the ideal theory weren't realistically interpretable in the metaphysical sense, that is, even if the ideal theory weren't held to be true or false of some external reality (v. Putnam 1978, p.135ff). This is just the possibility that was argued for in the preceding subsection with respect to legal theories ideally best at a given moment. Professor Putnam further argues that the denial of metaphysical is compatible with a doctrine of empirical realism.

Empirical realism, or alternatively, internal realism, is not a metaphysical doctrine about the objective correlates of linguistic objects. Rather it is an epistemological doctrine concerning the reliability of learning; and the kind of correspondence between languistic items and extra-linguistic reality that may come to obtain in virtue of

causal relationships between (a) factors in the environment of a speaker or hearer and (b) propensities of a speaker or hearer to use language in one way rather than another, given his environment (v. Putnam 1978, pp.100,105f). The idea is that what has to be explained is the fact that many of people's beliefs are true, and the appropriate method of explanation for this linguistically-tinged fact is causal. Professor Putnam gives an example: the psychology of visual perception gives a causal account of the facts that presented with an object that is green a speaker will probably accept the sentence "The object presented is green", and presented with an object that is not green, the speaker will probably accept the sentence "The object presented is not green"; but an acceptable truth theory will entail that "The object presented is green" is true iff the object presented is green, and that "The object presented is not green" is true iff the object presented is not green; so if the object presented is green and as a result the speaker probably accepts "The object presented is green", then it must follow that the speaker probably accepts what is true; and similarly if the object is not green; so in either case, the psychology of visual perception causally explains why the speaker probably believes what is true; and the fact that what-he-believes-is-true is true enters into the explanation of his believing that it is true. In this way causality and correspondence are intertwined. (For the less compressed original, v. Putnam 1978, pp.103-107.) This account of the reliability of learning may sound very trifling, but it has rather remarkable implications when its application is transferred from reliable knowledge about ordinary material objects, to reliable knowledge about say, electrons. Surely there is such knowledge; and Professor Putnam's favoured mode of explana-

tion would account for such knowledge in terms of the existence of electrons. Electrons, on this view, cannot be mere theoretical constructs, on the contrary, when people talk about electrons, what they say is true or false in virtue of the way electrons are - not in virtue of the simplicity of the theories they construct about electrons, nor in virtue of the nature or degree of conformity those theories have with the observable data base, nor, etc. (v. Putnam 1978, pp.19-25). - Note, however, that empirical realism would be empirically refuted, if it turned out that knowledge about electrons was not reliable. And knowledge about electrons might turn out not to be reliable in more than one way. Of course, it might be true that any theory postulating electrons would eventually lead to false predictions, but that is not the interesting way in which realism about electrons could be refuted. The interesting way that realism could be refuted would be if the succession of theories postulating electrons were such that successor theories accepted as better than their predecessors failed to preserve the approximate truth of the propositions about electrons contained in the earlier theories. For if the truth-value assignments to prepositions about electrons were unstable, there would be no reliable knowledge about electrons as such, and then there would be nothing that realism about electrons could explain. Realism would be a superfluous hypothesis, and if the complement of realism is anti-realism, then anti-realism would be correct.

Now it should be clear that realism in this vein has no obvious application to the problems of legal theory that vex Professor Dworkin. Granted, it is undeniable that lawyers may have reliable knowledge about the law; but it would be ludicrous to declare one's "realism" by proposing

say, that a lawyer's reliable knowledge about contracts is in part causally explained by the existence of contracts. It surely cannot be Professor Dworkin's claim that legal positivists, whom he calls anti-realists, deny the existence of contracts. The suggestion would be incredible. Nor does the realism/anti-realism distinction, drawn along Professor Putnam's lines, readily lend itself to Professor Dworkin's defense of ORA. For the point of ORA is that even in hard cases - in legal disputes whose resolution is not determined by any clear rule of law laid down by some institution in advance, in legal disputes whose resolution is inherently potentially controversial - there is nonetheless some right held by one of the parties which determines the proper resolution of the dispute. But the fact that such rights in such cases are themselves controversial entails that there is no reliable knowledge that anyone has about such rights that has to be explained by the hypothesis of realism with regard to those rights. In any case, the whole idea of providing causal explanations for the specific reliability of lawyers' knowledge of the law seems, as a programme for cognitive psychology, very oddly skewed.

Professor Putnam's empirical realism, however, has a by-product. The by-product is a determination of the minimum content of any realism. This by-product emerges from common sense consideration of the fact any explanation of human cognition must allow for the possibility of human error. That is, it must be possible, for example, that a person might seem to see a green object presented to him and that there not be a green object presented to him. The existence of such possibilities is a fact about human beings. Now let "warrantedly assertible" represent

any anti-realist substitute for the adjective "true" classically understood. That is, let warranted assertability be defined in terms of the satisfaction of whatever recognizable conditions an anti-realist might put forward, as for example, the kinds of conditions associated with constructive provability in mathematics, or with effective verifiability, or with constructive provability from the axioms of currently accepted physical theory, or with effective falsifiability, etc. Then, the fact of the possibility of human error will make it the case both that sentences of a certain form are true, and that such sentences must be deemed contradictory if an anti-realist notion of truth is substituted for the pre-theoretic notion. The form of such sentences is given in the example

(S_1) "P_i" might be warrantedly assertible, even though $\sim P_i$.

Thus, in the case of the subject of an experiment in visual perception presented with an object that is not green, it may be true that

(S_2) "The object presented is green" might be warrantedly assertible even though the object presented is not green.

Sentences like S_2, which are in the form of S_1, will be true if, for all that recognizable conditions may warrant, they warrant the assertibility of the sentences mentioned in such sentences, even when the sentences thus mentioned are not true. This shows that anti-realism's "warranted assertibility" cannot be straightforwardly substituted for truth. For the anti-realist admit that:

> "Even the crudest attempts to state, in (an expansion of) a given language, the application of the predicate "true" to sentences of that language must ... yield each instance of the equivalence thesis i.e. an instance for each sentence "P", of a sentence of the form " 'P' is true iff P"..."
>
> (Dummett 1973, p.463)

Presumably this constraint is imposed on anti-realist contruals of the predicate "is true", as it is on realist contruals. Suppose that this is so, and let the anti-realist truth predicate be "is $true_w$", corresponding to the predicate "is warrantedly assertible". Then the sentence mentioned in S_2, viz. "The object presented is green", will have as an instance of the equivalence thesis

> (S_3) "The object presented is green" is $true_w$ iff the object presented is green.

Then, substitution of provable equivalents in S_2 yields something like

> (S_4) It might be the case that the object presented is green even though the object presented is not green.

(The provability of the equivalents comes from the formal theory of truth that the anti-realist constructs.) Now there is a reading of S_4 in English which allows S_4 to be non-contradictory, but that reading would definitely be unacceptable to Professor Putnam. His idea is clearly that S_2 should be read on the model of S_2'

(S_2') The following is possible: that the sentence "The object presented is green" be warrantedly assertible, and yet that the object presented not be green.

Application of S_3 then yields

(S_4') The following is possible: that the object presented be green, and yet that the object presented not be green.

Since this contradictory result arises from a perfectly general procedure, the anti-realist cannot admit the truth of sentences of the form of S_1.

Has the anti-realist a reply to this argument? Take some sentence in the form of S_1; S_2, for example. S_2 will be true in case some error on the part of the subject of the experiment is due to some neurological distortion and it is the case that the absence of such neurological distortion is not to be counted among the recognizable conditions of the warranted assertability of the sentence "The object presented is green". This last condition is surely properly thought of as both imposed upon and fulfilled within any account of the conditions on warranted assertibility; the anti-realist who would deny this renders his position, I think, indefensible. If, per contra, the condition, C_1 of the recognizable absence of neurological distortion were among the conditions for the warranted assertability of "The object presented is green", a different sentence might be constructed, viz.

(S_5) "Condition C_1 obtains" might be warrantedly assertible even though $\sim C_1$.

Here the argument against the anti-realist would begin again.

In general, the doubts that arise about a realist argument like Professor Putnam's have their source, I think, in the feeling that an anti-realist need not, and in fact would not, allow the set of recognizable conditions warranting assertibility to be so vulnerable to mere accidents that might affect the perceptual or intellectual capacities of speakers or hearers, and so destabilize warranted assertibility. Warranted assertibility, according to Michael Dummett, is not a matter of any particular speaker's entitlement to make an assertion (v. Dummett 1975a, p.119; though difficulties may arise when a distinction parallel to this is applied to intuitionist logic - v. Dummett, pp.239-247); the implication is that in his particular situation a speaker may not be entitled to make the assertion he makes, and yet his assertion may be warranted nonetheless, since even if he cannot provide justification or verification for his assertion still, the needed justification or verification can be provided, and this without any appeal that passes beyond ordinary human perceptual or intellectual capacities. A further implication might seem to be that is his particular situation a speaker might not be entitled to make an assertion but only because an assertion by him would be unwarranted, since neither he nor any other human being could verify or justify his assertion, and yet it might still seem to him and perhaps to everybody else, as if the recognizable conditions warranting an assertion by him obtained,

so that his entitlement to make an assertion would fail to be called into question, with the result that his assertion would be enveloped in a subtle counterfeit of warranted assertibility. This counterfeit of warranted assertibility would be identified as a merely alleged anti-realist element referred to in sentences of the form of S_1: it would be maintained that real warranted assertability could not attach to, say, the sentence "The object presented is green" if there were some way of recognizing the object presented as not green. The difficulty with an anti-realist reply in this vein, is that it seems to allow that the meaning of a sentence may be explicated in terms of an unknown set of recognizable conditions warranting assertibility. Thus in the case of S_2, it might be said that the assertibility of the sentence "The object presented is green" really does after all depend on the non-occurrence of some constellation of unidentified distortive neurological factors. The idea is not in itself incoherent, but it would be incoherent for the anti-realist to support it. This is because the anti-realist is committed to explaining the use of sentences by speakers in assertions, by reference to the speaker's grasp of the recognizable conditions that warrant assertibility. The postulation of unknown sets of recognizable conditions makes such explanation impossible; since it is unacceptable to say that a speaker's grasp or understanding of those conditions is manifested in his linguistic behaviour, when by all accounts it is admitted that those conditions may not be identifiable either by speakers or by linguistic investigators. The difference between the empirical realist and the anti-realist lies in this: that, whereas as the anti-realist looks for conditions that may be understood by the speaker as warranting assertion,

the empirical realist looks for the causal factors that influence assertion by influencing the disposition to assert. In this respect the realist is not attempting to produce a theory of meaning in the way that the anti-realist is; that is, the empirical realists theory of meaning is not going to be coextensive with his theory of understanding, should he develop one. On the other hand, an anti-realist attempt to accomodate the truth of sentences of the form of S_1 would seem to violate the premises of the anti-realist programme according to which the theory of meaning is the theory of understanding. In this way, then, sentences of the form of S_1 provide a kind of test whereby realist versus anti-realist attitudes can be distinguished in terms of the positions these attitudes entail vis à vis such sentences.

Now it is clear, I think, that if the truth of legal propositions in the actual world is determined by their identity or correspondence with the propositions of an ideally best legal theory, then given any anti-realist construal of the notion of warranted assertibility, it may turn out at a given moment that recognizable conditions in the actual world warrant the assertion of some legal proposition, and yet that that proposition may not correspond with or be identical with any proposition in an ideally best legal theory at that moment. This logical possibility arises simply because any lawyer's or judge's understanding of legal propositions in the actual world is not accounted for in terms of his knowledge of the contents of an ideally best legal theory. How a lawyer or judge actually does come to learn what individual propositions of law mean has been left undetermined; perhaps he learns how to use these propositions by way of constructing approximations of ideal legal theories, but perhaps

not. In any case, just because the contents of an ideally best legal theory ne-d not be known to anyone in the actual world, it is the case that recognizable conditions may obtain which a lawyer or judge might grasp and understand as warranting the assertion of a legal proposition, and yet because of some failure to have arrived at some knowledge of the content of an ideally best legal theory, in making the assertion the lawyer or judge may simply be mistaken. That is, his assertion would have been justified if anti-realist standards of justification were employed, but it remains the case that what he says is wrong.

In this way, legal propositions may be seen as passing a minimal test for "realist content", despite the fact that their truth-values are determined with reference to the propositions of an ideally best legal theory which do not meet this test for realist content. As has been repeatedly emphasized, there is no acceptable sense in which a proposition can be said to be included in an ideally best legal theory and yet be false: in the case of propositions of ideal legal theories, inclusion in the best justified theory is, at a given moment, identical with truth.

And this is just the conclusion that has been sought since the beginning of Subsection 8.2. I do not say that it is plausible. In particular, ideal theories in legal discourse can hardly be regarded as playing the causal role performed by the objects denoted in empirical discourse, so that the motive for a realist construal of empirical discourse must be regarded as absent in the case of legal discourse. Nonetheless, the logical possibility, however artificial, stands. The question now is whether this not very substantial possibility provides a way of by-passing the charge of circularity levelled against the

attempt to provide a realist interpretation for the propositions of law familiar in the actual world.

The reader will surely have guessed that I have not engaged in the telling of this long story with the intention of giving it a happy ending.

The realism that Professor Dworkin requires for the preservation of ORA is a realism characterized by bivalence. Every proposition must be determinately true or false in virtue of something or other. On this basis, the law of the excluded middle can be asserted, and it can be used in the derivation of ORA, as was shown towards the end of Section 7 in connection with a legal dispute between Heckle and Jeckle.

Unfortunately for Professor Dworkin, Professor Putnam is quite clear that the type of realism he advocates does not require a classical logic and does not require the assumption of bivalence (v. Putnam 1975, p.192-197, on the merely "heuristic value" of "operational" definitions of non-classical, realist logic, 1978, p.34; and cf. replies by Dummett in Dummett 1973, p.606f; 1978, ch.16; Professor Putnam does not explicitly deny the law of the excluded middle, but he does deny the distributive law for conjunction, and thus violates the realist principle of dissection; v. Dummett 1975, p.93). All that is required for empirical realism is that it should be possible for a sentence to be warrantedly assertible in the actual world, while being false. The appropriateness of calling the positions thus characterized "realism" lies just in the acknowledgement which the position entails, that things are not as they are as a matter of the mere say-so of human beings - things have a reality of their own. Whether that reality is most appropriately to be characterized in a language which includes a classical logic is an independent issue.

It follows from this that Professor Dworkin cannot rely on the fact that legal propositions pass Professor Putnam's minimal test for realist content, to give him the warrant to assert that legal propositions are bivalent, that they therefore satisfy the law of the excluded middle, and that their realist contents makes possible the derivation of ORA from the law of the excluded middle.

On the other hand, ORA might be true. It might be true in two cases: (i) ORA might be true by convention. This case has a special interest, but only because it couldn't be regarded as fulfilling Professor Dworkin's intentions. Professor Putnam points out that because a non-realist approach to ideal theories seems more appropriate than a realist one, it is possible to regard ideal theories as having certain features solely in virtue of human stipulations to the effect that theories not having such features are not be be accounted ideal (v. Putnam 1978, p.137f). He goes so far as to suggest that only on the assumption that metaphysical realism is incoherent is it possible to understand how there can be a priori truths, even as a limit. It is hard to resist the temptation to think that for Professor Dworkin ORA is true a priori, and true, therefore, in virtue of what he stipulates is to count as an ideal theory. On this view, a legal theory ideally best at a given moment would contain simply by stipulation a legal proposition providing for the resolution of every possible legal dispute; or perhaps more arbitrarily, one would have wished to say, a legal proposition providing for the resolution of every actual legal dispute, the merely possible ones now being of no account. In Section 1 of this essay I dismissed the latter suggestion because it seemed to make miraculous the fact that contingently occurring disputes should be governed by ORA

while contingently non-occurring disputes should fail to be so governed. But if ORA is true by stipulation, there is of course no miracle to balk at. An ideally best theory simply is one which is stipulated to contain the relevant legal propositions.

It might be thought that this idea about ORA is simply too contrived to be worth talking about. Such a reaction would, I think, be premature. There are philosophers who believe that the logic of obligation is parasitic upon the logic of imperatives, and who believe that the logic of imperatives is strictly parallel to the classical logic of indicatives for which the law of the excluded middle holds. Hector-Neri Castañeda is one of these, and in 1972 he published a paper in which he maintained that for any action-ascribing proposition, there was a deontic proposition which made the satisfaction by an agent of either the action-ascribing proposition or its negation, the duty of some person (v. Castañeda 1972, pp.683,692f). On Professor Castañeda's 1972 account, then, for every judicial decision, a judge is either under obligation to reach that decision, or under an obligation not to reach it. Since in the judicial case, if one decision is reached regarding a dispute, then the only other possible decision is eliminated, it follows from Professor Castañeda's law of the excluded deontic middle, that either a judge has a duty to decide for the plaintiff or the judge has a duty to decide for the defendant. This sounds very much like ORA. It turns out, however, that it is like conventional ORA. Professor Castañeda holds that deontic propositions are true in virtue of the "endorsement" that may attach to the imperatives corresponding to those propositions, whether this endorsement must be a matter of consent or acquiescence to the laws and customs of society, or is instead a matter

of the recognition of actions necessary for the attainment of some goal or purpose. But he recognizes that the dictates of law, custom, and practical reason may not suffice to determine which imperative is to be endorsed from every pair of imperatives prescribing either the satisfaction by an agent of some action-proposition or its negation. In such cases, in order to preserve the truth of the deontic excluded middle, he assigns the value "true" to that deontic proposition corresponding to whichever proposition an agent happens to satisfy of a pair consisting of an action-ascribing proposition and its negation (v. Castañeda 1972, p.692; a result like this is apparently not uncommon in the logic of imperatives, cf. Lemmon, p.55f). On an account such as this, if Hercules, per impossibile found in a given case no reason to endorse one judicial decision rather than another, but in spite of this decided the case arbitrarily, then he would be deemed to have had a duty to decide as he did, and not as he did not. The legal proposition regarding the rights of the parties to the dispute with regard to a decision in favour of either of them would be included in the current ideally best legal theory, and the truth of the corresponding legal proposition in the actual world would have been determined, "realistically", in virtue of Professor Castañeda's stipulative approach to truth of deontic propositions. (In his 1975 book Thinking and Doing, Professor Castañeda abandoned the exclusion of a deontic middle, but retained excluded middle for imperatives - v. Castañeda 1975, pp.241-245,137ff.) A realist interpretation of legal propositions in the actual world which satisfied ORA in this manner would have to be regarded as unacceptable.

ii) ORA might be preserved on a realist interpretation of legal propositions in quite another way. The difficulty is to say precisely what this other way is. ORA would be preserved in a desirable way iff it were not preserved merely by convention or stipulation. But what does this mean? One way of explaining what it means would be to say that ORA would be preserved and not by convention, if the propositions it required, regarding the rights of individual plaintiffs and defendants in individual cases, were included in an ideally best legal theory at a given time as theorems and not as axioms. In that way ORA could be regarded as following from the ideal theory instead of constituting it. But in order for people to assure themselves that this might be so, the theory would have to be thought of as more than a collection of sentences produced by an ideal judge. The theory would have to be laid out systematically, and an explanation would be required of the inference patterns whereby one proposition might be derived from others. Moreover, this would have to be done in a language that people already understood. It would be of no help to anyone if Hercules were simply to "explain" the inclusion of certain propositions in the theory by merely announcing that they were "theorems" or "axioms" or that many of them was "more consistent" with the total body of theory than their negations. For just as the propositions required by ORA might be included in an ideal legal theory by stipulation or convention, so, once that were done, it might be declared that such propositions were by convention held to be "more consistent" with the theory, or "better justified" than their negations, or "theorems" and not "axioms". That is why people would have to understand an ideal theory off their own

bats, if they were to believe that ORA was preserved by it. Realism as it has been sketched out in this section is not sufficient to guarantee ORA.

But now a full circle has been turned. At the end of Subsection 8.1, one interpretation of Professor Dworkin's realism was rejected, because the realist features of normative legal theories which were supposed to support ORA had only been circularly defined - in terms of ideal theories, for which no realist interpretation had been given. Now an anti-realist interpretation has been given for ideal legal theories, which allows a realist interpretation of legal propositions in the actual world; but again ORA remains unsupported, and must remain so until the features of ideal legal theories are specified in such a way and to such an extent that it seems unreasonable to expect this to be done by anyone except a Hercules. This means, however, that as far as the logic behind ORA is concerned, Professor Dworkin seems to be whistling in the dark.

In Part Three of this essay the argument that I shall put forward against ORA will be realist in the sense outlined in this subsection. That is, I shall suggest that an ideal legal theory would have a certain character, and I shall show that an interpreted theory having that character would violate ORA. The failure in the ideal case will show that ORA will fail on a realist interpretation of legal propositions in the actual world. In line with at least Professor Dworkin's pronouncements, the ideal theory will be taken to be Rawlsian, in a sense made precise by the logical techniques of welfare economics. In this way, the argument will exploit the only hint that is available about

the sort of theory Professor Dworkin believes to be ideal. The interpretation of the ideal theory itself will be in terms of truth conditions, a full comprehension of which would be far beyond the capacities of ordinary human beings. Moreover, the truth-conditions will be such that although legal propositions may not themselves be bivalent, they will be reducible to bivalent propositions. The question of whether lawyers happen to agree or disagree over the truth or the warranted assertibility of a legal proposition in the actual world will not touch the actual truth value assigned the proposition.

But before beginning Part Three, there are still some loose ends I should like to tie up in connection with Professor Dworkin's realism (or anti-realism) and his reliance on Hercules.

8.4 The Ideal Mathematician in Intuitionist Logic; Models of Reasonable Linguistic Behaviour; and a Long Discussion of Professor Dworkin's David Copperfield Game

It is possible to investigate the properties of non-classical logics by providing a semantic framework for them in a classical meta-language. In particular, it is possible to do this for intuitionist logic, which is a logic proto-typically suited to anti-realist interpretation; and it is possible to do this for intuitionist logic in terms of tree-diagrams whose nodes represent the possible states of information in which an idealized mathematician finds himself at given moments of time. In each state the mathematician is represented as having ascertained the truth of various atomic statements and as being able to deduce from these more complex statements. From each state he may proceed to a later state in which he ascertains the truth of further

atomic statements, or else he may fail to ascertain the truth of any further atomic statement so that no further complex statements may be deducible. Now there may be difficulties in determining precisely in what ways and to what extent a representation of this kind "gives the meaning" of items in the intuitionist object language (v. Dummett 1977, pp.201-208, on the defects of Kripke trees; pp.403-418, on the adequacy of Beth trees as a semantic framework, but not as a semantics for intuitionism); but at least it can be seen that representations of this kind are "well-motivated" for an account of mathematics that directly relates the truth of mathematical propositions to the theoretical activities of which the propositions are products (cf. Fraenkel et al. p.245f).

The details of such representations in connection with intuitionist logic are not to the point here. The point is just that an attempt to represent the truth of legal propositions in terms of the theories constructed by an ideal judge finds a better analogy in the ideal mathematical theorist of the semantics for intuitionism, than in the ideal observer of Professor Firth's ethical theory. In saying this, I do not mean merely to indicate in a general way that Professor Dworkin's legal theory may be more closely related to anti-realism and more distant from realism than he appears to think, though I am certain that that is so. What I want to highlight is the fact that representations in terms of a hypothetical ideal theory-builder are parasitic upon available notions about what could actually count as an acceptable theory. Because the language in which Professor Dworkin describes Hercules as a theory-builder is most naturally interpreted realistically, it seems at least possible to imagine that Hercules

should perform certain feats of theory building; and possible to imagine, too, that in consequence, for any legal problem that comes before him, he is always able to derive the conclusion either that the plaintiff has a right to a decision in his favour, or that the defendant has that right. At least, we can form an imaginative picture of someone whom we identify as an ideal judge, and we can envision how things would seem to us if we believed that he always reached the one right answer to each legal question. But the trouble is that this picture outruns the notions of justification that we have. There is simply no compelling model of linguistic behaviour according to which, as ORA requires, for any proposition whatever, if a yes/no question is asked with regard to that proposition, either an affirmative or else a negative answer is reasonable or justifiable. This will be so no matter how ideal the imagined respondent. For some classes of propositions, justifiability for one of the affirmative or the negative can be shown to hold; for others not. The classical propositional calculus is decidable; the classical predicate calculus is not except in the monadic case; the intuitionist monadic predicate calculus is not decidable. The very queerest feature of Professor Dworkin's whole approach is that he seeks to guarantee the bivalence of all legal propositions by appealing to the output of theories, when it is well known that many theories must be such that for some propositions the theories cannot be shown to generate either the propositions or their negations. For someone whose linguistic behaviour is governed by the deductions he makes, it will simply not be reasonable to answer yes or no to any yes/no question whatever. If it is reasonable for a superhuman theoretician to do so with regard to legal questions, that must be in virtue

of certain properties of legal propositions which Professor Dworkin has not even hinted at. The appeal to Hercules in this connection is therefore illicit - illicit because he is characterized more like an ideal mathematician than an ideal observer.

It might be objected that the restriction of reasonable, linguistic behaviour to behaviour governed by deductive reasoning is unfairly prejudicial to Professor Dworkin's case. Hercules is essentially a theory-builder, not a theory-user: the idea that he merely performs deductions from premises he has at hand harks back to the discredited secret book theory of legal propositions. But if his behaviour is governed by anything analogous to inductive reasoning or inductive generalization, the situation for Professor Dworkin is even worse. Every inductive logic must come to grips with the lottery paradox, a paradox consisting essentially in the fact that in some cases, a disjunction must be regarded as inductively acceptable, while all of its disjuncts must be regarded as inductively unacceptable. The analogy to the legal case is obvious: a logic of inductive acceptability will allow the following trio of second order legal propositions to be conjointly true in some possible situation.

1) "Either the plaintiff in the case at bar has a right to a decision in his favour, or he doesn't," is justified.
2) "The plaintiff in the case at bar has a right to a decision in his favour," is unjustified.
3) "The plaintiff in the case at bar has no right to a decision in his favour," is unjustified.

According to the canons of inductive logic, joint assertion of these propositions might be reasonable. If in the legal context joint assertion

of them would never be reasonable, that cannot be because of the nature of inductive reasoning. (I would remind the reader that patterns of inductive reasoning need not be held to be radically different in the "practical" case as compared with the "theoretical" - v. Harman 1976, p.451 ; Cohen 1977, p.127. For treatments of the lottery paradox, v. Levi, pp.38-42; Harman 1973, pp.155-161; Lehrer, pp.192-196; Cohen 1977, p.321f.) Again, there is no general model of reasonable linguistic behaviour that renders compelling the picture of Hercules justifiably pronouncing judgement in every case. Whether that picture represents a real possibility of not, is undetermined by anything Professor Dworkin says.

It might be objected at this point that the restriction of reasonable linguistic behaviour to behaviour governed by the canons of deductive logic and of an inductive logic that applies at the level of individual sentences is unfairly prejudicial to Professor Dworkin's argument. Hasn't it already been shown that the acceptability of a legal proposition cannot be tested for that proposition alone, and that whole theories must be compared. In that case it could not make sense to reject all theories that contained 2) above, and all theories that contained 3). If sentence 1) above is true, then one of 2) or 3) must be false, and the lottery paradox cannot create difficulties for inductive reasoning that is holistic. Of course this objection is ill-taken in the sense in which it is intended, for the holistic solution to the lottery paradox is just to say that ceteris paribus there is nothing to choose between a theory that makes 2) false and a theory that makes 3) false. The reasonableness of asserting one rather than the other is

justified remains in question even if inductive reasoning is holistic. But independently of this, the appeal to canons of acceptability for whole theories is interesting because it raises another problem about the justification of legal propositions. The problem is that if theories are constructed at all in such a way that each of them has at least one consequence different from the consequences of all other theories, the canons that rank them cannot be applied to all the possible theories that can be constructed, because the class of all possible theories that can be constructed in a language cannot be enumerated. The result of this is that there can be no computation once and for all of ranking of all possible theories (v. Putnam 1975b, pp.284,290,302). The meaning of this result is that more and more inclusive classes of theories can be ranked so that there will be better and better rankings, but there can be no "best" ranking that can be carried out. Thus, choice of theory will be a function of both the canon of acceptability and the incomplete class of theories to which it is applied. This imparts an inherent vagueness into any assignment of truth values to legal propositions, if that assignment is made to depend on the activity of theory construction; and this applies even when the theories are only imagined. Professor Dworkin has bizaarely argued that the vagueness of the terms of ordinary language may be eliminated when the terms occur in legal propositions because there are within the law rules of interpretation which render them precise (v. Dworkin 1977a, p.68f); but it turns out that his own chosen truth-conditions for legal propositions makes the identity of the true legal propositions ineliminably vague, even for a super-theoretician, even at a given moment. It is interesting

that Professor Sobel, for reasons similar to these Godelian ones, once expressed the opinion that ideal rule-utilitarianism might have no consequences at all for action, since there could be no identifiably best set of ideal rules, only sets of better and better rules (v. Sobel 1968, p.156f,fn.); interesting, too, that Professor Dworkin has on occasion nodded approvingly in the direction of rule-utilitarianism (v. Dworkin 1978a, p.95).

It might be objected that in spite of these general considerations, ORA is validated by the nature of legal reasoning because legal reasoning is sui generis. Professor James McGilvray once put forward this heart-breaking suggestion and something like this is said by O.C. Jensen in The Nature of Legal Argument (pp.7-31). The suggestion is heart-breaking because it is at once a promise, and a refusal to honour that same promise: it is simply an attempt magically to immunize the legal reasoning behind ORA from any action taken to test its validity.

I shall now explain how to construct an example of a kind of reasonable linguistic behaviour that is sui generis and conforms to the law of the excluded middle: I select more or less at random a set of indicative sentences from my week's reading of novels, newspapers, magazines, philosophy texts, etc.; I transform each of these sentences into yes/no questions; I have you sit down in my presence; I place a loaded gun to your head and order you to answer the questions one by one, each within ten seconds of its being asked, and in such a way that I will be able to grasp some intelligible pattern in your responses; you do so successfully, responding in sequences consisting of two negative replies followed by an affirmative reply. In the circumstances

your linguistic behaviour is reasonable and for every sentence on the list, either it or its negation is "held true". Is the legal reasoning that governs the judicial patterns of assent and dissent like this? Evidently, if it is sui generis, it is not huius generis. Cuiusnam generis? That remains to be specified. The position so far is that ORA is true and that legal propositions are true in virtue the legal theory ideally best at a given moment. From this it can be inferred either that ideal legal theories are always decidable, or that the canons of inductive acceptance for ideal legal theories invariably uniquely determine a best theory which, at least for a specially selected proposition, contains it or its negation, even if the theory itself is not in general decidable. This is sui generis indeed.

The appeal to models of reasonable linguistic behaviour constitutes not a reply to anti-realism but an invitation to it to deny ORA. Professor Dworkin states that there are many disciplines in which linguistic practice seems to challenge the anti-realist position (v. Dworkin 1977b, p.8). This seems to me to be a serious mis-statement of the situation. In Michael Dummett's exposition of anti-realism, systematic considerations about language use and language learning are used to derive general principles calling the propriety of some linguistic practice into question. The mere existence of the practices can hardly be said to challenge proposals which demand the reform of those practices. The anti-realist proposals can only be defeated either if they are shown to be internally incoherent, or if the justification of existing practices outweighs the justification of anti-realism. But there is no logical compulsion to regard the existence of some practice or other as justifying

itself. At least, this applies to Michael Dummett's anti-realism.

Furthermore, and unfortunately for Professor Dworkin, there are anti-realisms even more extreme than Michael Dummett's; namely, those defended by Wittgenstein and more recently by Dr. Crispin Wright. Dr. Wright has argued that the theory of meaning may in general have to be construed more behaviouristically than is commonly thought, and if so, it may have to take linguistic practice as given independently of any coherent systematic set of rules that might govern a speaker's or hearer's linguistic responses (v. Wright 1975b, p.246f; 1975c.) Thus he proposes that if people accept the law of the excluded middle, then even if anti-realism is correct, the law need not be given up; rather it may simply have to be admitted that linguistic and inferential practices should not be taken to reflect any kind of systematic understanding (v. Wright 1975a, p.243f). Perhaps in the light of an extreme Wittgensteinian conventionalism, the objection that legal reasoning is sui generis has some force.

Can Professor Dworkin be an extreme conventionalist in the manner of the late Wittgenstein? My own reaction to this suggestion is to be both amused and confused at the same time. If the suggestion were correct, I have no idea what its practical consequences would be. I have, however, already suggested that Professor Dworkin's theory of the meaning of legal propositions must be regarded as a holistic one; certainly there are well-known links between holistic theories of meaning and behaviourist approaches to the problem of meaning; and so one link might be made between Professor Dworkin's ideas and an idea that is at least frequently attributed to the late Wittgenstein. In the same vein,

perhaps Michael Dummett's rejection of holistic theories of meaning could be linked up with his rejection of Wittgenstein's extreme conventionalism; this would provide further evidence for at least an affinity between certain lines of thought, one of which, at least, is clearly evinced in Professor Dworkin's work. If it weren't the embarassing intrusion of ORA, one might argue that Professor Dworkin's attack on legal positivism is better explained as an attack on the atomistic nature of legal positivism rather than on its anti-realist violation of the excluded middle. But having aired these speculations, I leave it to the reader to draw conclusions.

There is, however, one markedly Wittgensteinim sortie that Professor has made, which in my view calls for comment. In "No Right Answer?" Professor describes an "enterprise" in which the participants undertake to assign truth-values to propositions about the characters in David Copperfield where these propositions are not entailed by the propositions that Dickens actually included in David Copperfield (v. Dworkin 1977a, pp.73-83). He also calls this "enterprise" a "game", and describes a number of sets of rules according to which it could be played. The preferred set of rules consists of only a single recursive rule which operates for a start on just the sentences contained in the novel; and it is analogous to the truth-conditions that Professor Dworkin proposes for legal propositions.

> "The rules of this third form of the game provide that a further proposition about David is assertable as true (or deniable as false) if that further proposition provides a better (or worse) fit than its negation with propositions already established, because it explains in a more satisfactory way why David was what he was, or said what he said, or did what he did,
>
> .....(cont'd.)

> according to those already established propositions. In fact literary criticism often takes the form of an exercise much closer to this third form of excercise than to either of the other two."
>
> (Dworkin 1977a, p.75)

According to Professor Dworkin, this form of the game is such that the number of questions about David Copperfield for which a "right" answer is undetermined in the game consists of a class of "very boring questions no one would wish to ask" (v. Dworkin 1977a, p.75). This game is held to provide an analogy for judicial activity, with the ideal of "narrative consistency" replacing "equality of respect for persons".

The employment of a verbal game to argue for the possibility of the well-nigh universal satisfaction of the law of the excluded middle for what seems a most unlikely class of propositions is quite Wittgensteinian, I think. But the employment of the game in an analogical argument about the actual rules used in current practice in a specific and unrelated linguistic domain seems to me to be alien to Wittgenstein's characteristic technique. In particular the game itself in this case requires so much linguistic sophistication on the part of the players that it can hardly be used to illuminate any very specific linguistic puzzle that arises in that practice.

The chief interest of the game lies in the peculiar way it seems to parody realism. One's reaction to it can only be that if the reality of legal rights and duties is as determined by judicial activity, comparable to the reality of David and Stearforth and Little Em'ly et al., then legal rights and duties are fictious after all. This is not merely a joke or a hyperbole; Professor Dworkin in fact seems to be only vaguely

aware of the implications of his own views. For it is perfectly clear that the propositions about David Copperfield asserted as true according the rule of the game are not true of David Copperfield. For the same game might be played by two different sets of participants, each set following the same rule but playing independently of the other set. Now plainly, the order in which propositions are put up for consideration by the sets of participants will in part determine the totality of propositions about David accepted as true at any given time. This is because the rule makes reference to "propositions already established". Thus, if each group begins by considering a different proposition, the totalities of propositions accepted by one group at a given time may contain the negations of propositions accepted as true by the other group at the same time. Thus, David may come to satisfy contradictory predicates. This surely suggests that there is no David for the propositions to be true of; if the propositions are true they are true not in virtue of the way David Copperfield is, but in virtue of the fictionalizing activities of the different groups, and David himself drops out of the picture. Of course, the rule of the game might be altered so that as the game continues to be played by both groups, only and all conjunctions of a certain length are compared - the length being determined by the amount of time during which the game has already been played - and the propositions assertible as true are identified as those which are members of the best ranked conjunction. - This, of course, is holism all over again. The fact that Professor Dworkin fails to realize its application in the case of the game gives rise to a suspicion that he also fails to recognize the implications of his denial of the secret

book theory of legal propositions. In any case, as far as the literary game is concerned, the introduction of holism makes the game appear even more pointless than it would otherwise have seemed - for if the object of the game is to determine the "truth" of propositions, why should the participants waste their time by beginning with one atomic proposition, then considering conjunctions with two conjuncts, and then three-membered conjunctions, etc.? Why not simply begin with maximal consistent sets of sentences, "complete novels" as Richard Jeffrey says, that is, possible worlds, each with a history ending at the last moment of the novel? Of all the possible worlds in which the sentences of David Copperfield are true, the participants would choose the one which provided the best explanation for David Copperfield. That this is not a sensible enterprise is clear, but it seems to me that it is what Professor Dworkins' game amounts to, if it is construed as an effort to maintain by and large the law of the excluded middle for fictional discourse.

Professor Dworkin claims that only a few very boring questions would be left without a right answer if the game was played according to his rule. Did Caesar cross the Rubicon in the David Copperfield world? Perhaps a world in which he didn't better explains David than a world in which he did. Certainly the question whether Caesar crossed the Rubicon in the world of David Copperfield is not boring: it opens up whole new vistas. Or consider another kind of case: in an introduction to George Eliot's The Mill on the Floss, Gordon Haight explains to the reader that the geography of the novel is confused because George Eliot was initially unfamiliar with Lincolnshire, where the novel is set,

so that the early landscapes are reminiscent of Warwickshire, where George Eliot was born; but after the novel was in progress she visited Lincolnshire and the landscapes of the novel change while its setting remains the same (v. Eliot, p.v). For the participants of Professor Dworkin's game, this sort of reasoning appears to be inadmissible; they might be driven to conclude that really The Mill on the Floss isn't set in England at all; perhaps in the possible world which best instantiates The Mill on the Floss, the action takes place on a planet other than Earth; perhaps The Mill on the Floss is science fiction.

The problem of an author's inconsistency can be even more serious than this, however, for Dworkinian gamesters. Here are the comments of W.F. Jackson Knight, a translator of the Aeneid:

> "There are little misfits and incongruities in the Aeneid as we have it, but so there probably are in all long literary works, especially the greatest. The same remark or action may be attributed and in another to someone else; and sometimes it is hard to see how a period of time, or a distance, squares with what Virgil has said in some other part of the poem. None of these little oversights matter. Possibly Virgil would have corrected some of them if he had lived."
>
> (Virgil, p.19)

If what Jackson Knight says is true, then Professor Dworkin's game may frequently be impossible. For given a literary work containing any contradiction, however trifling, the assertion as true of its propositions by the participants will commit them to the assertibility of every proposition. This is not just a silly problem: if logic is taken seriously as somehow modelling the underlying structure of the language people use, then the fact that people are willing to overlook

contradictions in fiction shows something about their understanding of fictional language, and logicians are rightly interested in this. Professor John Woods, for instance, has argued that the logic of fiction is a modal logic, so that contradictions in fiction occur within the scope of suppressed operator and are naturally not understood as real contradictions (v. Woods, passim).

Professor Dworkin by contrast might offer us a theory of mistakes. In the Mostellaria, Plautus makes his heroine Philematium the daughter of a non-Athenian; this has the evidently unintended consequence that as a manumitted slave she could not lawfully marry her Athenian lover; the issue is never raised in the play, which has an ostensibly happy ending (v. Plautus, p.xv). Now it would be one thing to say that there is an inconsistency in Plautus' plot, quite another to suggest that Plautus must have represented Philematium falsely, that she must have been an Athenian after all, because that better explains the action of the play. Is this how the language game is played?

Professor Dworkin's remark about literary criticism taking the form of his game is ridiculous. The sort of realism about fictional characters exemplified in the game is perhaps most widely associated with A.C. Bradley's Shakespearean Tragedy, which appeared in 1904; when Bradley's name is mentioned nowadays it is usually to claim that perhaps he did not really espouse the naturalistic approach for which he has been so much reviled ever since (v. e.g. Watson, p.124; Wilson Knight, p.v). Wilson Knight's extraordinarily influential The Wheel of Fire, published in 1930 and introduced by T.S. Eliot, roundly condemns the naturalistic approach and goes so far as to eschew even the use of

the word "character" (v. Wilson Knight, pp.9-12); in 1933 L.C. Knights' scathing attack on naturalistic approaches to character appeared - in an essay astringently entitled "How Many Children had Lady Macbeth?" in which Wilson Knight is cited with approval (v. Knights, p. 17). - One might compare Bernard Williams' much later remark: "part of what it is for Lady Macbeth to be a fictional woman is that there are many questions to which with regard to any real woman, there must be answers (though we may not know what they are), but which have no answers in the case of Lady Macbeth" (Williams 1973b, p.71); or Dummett's remarks about Hamlet's moustache (v. Dummett 1977, p.384f). Wilson Knight's influence can also be traced in the work of even so conservative a critic as C.S. Lewis, whose 1942 British Academy Lecture is called "Hamlet: The Prince of the Poem?" Not surprisingly, the prince is rejected in favour of the poem. The attack on naturalistic approaches to character was most strongly fought in connection with Shakespeare's characters; but not long after Bradley wrote Shakespearean Tragedy, Henry James began to write the Prefaces to the New York Edition of his works, which are widely regarded as laying the foundations for modern criticism of the novel. Does Professor Dworkin perhaps suppose that these Prefaces contain Henry James' speculations as to the circumstances and motives that might best explain characters' attitudes and behaviour? In the first of these Prefaces, the Preface to Roderick Hudson, the characters of that novel are discussed; that is, Henry James' treatment of them is discussed, the major point of the Preface being that structure of the novel can be seen to be centred on Rowland Mallet instead of Roderick Hudson, though James declares that he was unaware of this when Roderick Hudson was written in the mid-1870's. With regard to the

"subject" of the novel, James comments:

> "Really, universally, relations stop nowhere, and the exquisite problem of the artist is eternally but to draw, by a geometry of his own, the circle within which they shall happily appear to do so... The prime effect of so sustained a system, so prepared a surface, is to lead on and on; while the fascination of following resides, by the same token in the presumability somewhere of a convenient, a visibly appointed stopping-place. Art would be easy indeed if, by a fond power disposed to "patronize" it, such conveniences, such simplifications had been provided. We have as the case stands to invent and establish them, to arrive at them by a difficult, dire process of selection and comparison, of surrender and sacrifice."
>
> (James 1969, p.10)

Placed beside this passage, the awful poverty of Professor Dworkin's fatuous vision of literary criticism stands exposed, for the point of James' remarks is just that there is nothing to be gained and everything to be lost in pretending that art is "reality". And the bearing of this point on discussions of literary characters, is that literary criticism must deal with questions about the construction and the functions of literary characters, in ways that would make no sense if literary characters were to be regarded as having a reality independent of literary art. To maintain a Dworkinian realism about literary characters is, it seems to me, to ignore what must be characteristic of fictional modes of literature. The suggestion that literary criticism might or should be carried out along Dworkinian lines appears to me to be a recommendation in favour of the abdication of the critical function. As a literary critic, James himself well understood the uses that characters can have. James' critical discussion of his treatment of Henrietta Stackpole in the Preface to The Portrait of a Lady can be seen as something of a precursor of the famous distinction made in

E.M. Forster's Aspects of the Novel between "round" and "flat" characters - a distinction that "realism" about fiction is incapable of making (v. James 1966, p.xvff; Forster, pp.75-85). Northrop Frye, perhaps the foremost living literary critic, has noted this distinction and comments unfavourably on Forster's own preference in his novelistic practice for life-like or "round" characters as opposed to stock or "flat" characters: "a contrast is marked ... between the refined writer too finnicky for popular formulas, and the major one who exploits them ruthlessly" (Frye 1957, p.168). The "major one" referred to here is Charles Dickens, and the novel under discussion is David Copperfield. Professor Frye goes much farther than Forster would:

> "All life-like characters, whether in drama or fiction, owe their consistency to the appropriateness of the stock type which belongs to their dramatic function. That stock type is not the character but it is as necessary to the character as a skeleton is to the actor who plays it."
>
> (Frye 1957, p.172)

This passage is quoted with approval in the leading English exposition of structuralist literary criticism, Dr. Jonathan Culler's Structuralist Poetics (v. Culler, p.135).

I have spent some time on this matter because Professor Dworkin seems to have placed a good deal of weight on the fact that one of his critics has "accepted the analogy" between the David Copperfield game, which Professor Dworkin calls "literary criticism", and law (v. Dworkin 1978a, p.332f). The critic is Professor Munzer, who calls the analogy "unhelpful" (v. Munzer, p.1056f). Professor Munzer raises the literary question of how much the deceived wife, Maggie Verver, in Henry James' The Golden Bowl, knows about her husband's affair with her own mother-

in-law. Professor Munzer maintains that there is no right answer to this question. Professor Dworkin replies that if this is Professor Munzer's view, that is because he "cites" the opinions of literary critics on both sides of the question (v. Dworkin 1978a, p.333; "cites" is in quotes, because Professor Munzer doesn't cite a single critic). Professor Dworkin himself appears to believe that it is a serious literary question whether David Copperfield "had a homosexual affair with Steerforth" (Dworkin 1977a, p.73; he cites no critics either). In the absence of any reference to either the theory or the practice of actual literary critics, the discussion of these points takes place in an intellectual vacuum. It is hardly surprising that Professor Munzer's question is not among those treated in Henry James' Preface to The Golden Bowl, nor in Leon Edel's analysis in the last volume of his famous biography (v. Edel, p.208-220); nor in the discussions of The Golden Bowl by Graham Greene or Stephen Spender or F.W. Dupee or J.I.M. Stewart; the question is not so much boring as pointless, as asked, for Professor Munzer makes no attempt to raise it in any connection with the novel on which it is based. Like Professor Dworkin's question about David and Steerforth, it seems merely vulgar. Of course, to be vulgar is not to be bad: but to be pointlessly vulgar, in the service of academic aims, can hardly be thought to be good.

Professor Dworkin makes the point that critics disagree about the interpretation of the narrative line in many works of fiction. This is certainly true. A famous and important example concerns the development of the narrative in Paradise Lost. Whether Paradise Lost is a "work of fiction", is of course, a question for literary critics.

Great controversy has raged over whether the narrative is consistent or not. One might contrast Lewis's A Preface to "Paradise Lost" with Waldock's "Paradise Lost" and Its Critics. If Professor Dworkin were to be believed, all the critics ought to have been trying to produce the most consistent narrative interpretation possible, given the text of Paradise Lost. This is expressly contrary to Waldock's aim since he wants to show how the structure of Paradise Lost can be better understood on the assumption that it was in part determined by Milton's comparative inexperience and naiveté in connection with narrative technique (v. Waldock, p.17ff). Again, on Professor Dworkin's account, all the interpretations of Paradise Lost are in competition, and only one of them can be top interpretation. That interpretation provides the true narrative of Paradise Lost. The disagreement is about which interpretation is really top interpretation. Here, however, is a rather different view of the controversies which have Milton as their centre, expressed by Professor Christopher Ricks:

> "Of the needs to which he ministers, one of the greatest is our need to commit ourselves in passionate argument about literature. Not as part of the academic industry, but because literature is a supreme controversy concerning "the best that has been thought and said in the world" (to adopt the words which Matthew Arnold applied to culture). By the energy and sincerity of his poetry, Milton stands - as no other poet quite does - in heartening and necessary opposition to all aestheticisms, old and new." (Milton, p.xi)

Professor Dworkin seems entirely unaware that the conflicting interpretations to which a work of literature may give rise are to be valued in themselves, and not just incidentally, as a sort of side-show to the main attraction, which consists of "getting the facts". Edmund

Wilson once wrote an essay called "The Ambiguity of Henry James". As it appears in the third edition of The Triple Thinkers, it has appended to it two postscripts, each of which significantly reverses interpretive judgements contained in what had earlier been published. If Wilson's aim had been to come up with a single unified consistent interpretation, his method of publication would have been incomprehensible. But since, instead, it is ambiguity itself that is at the heart of the matter, any hostility directed against a multiplicity of interpretations cannot but be thought of as ill-judged. Ambiguity, multiple, interpretation, tension, contradiction - for great critics like William Empson and Clearth Brooks, these are at the heart of literary experience. At the end of The Secular Scripture, Northrop Frye suggests that the interpretive experiences that works of art and interpretations of works of literature afford are such as to make a human being's situation a little like God's: literature, even for the interpreter, affords the opportunity of free imaginative creation. The poliferation of conflicting interpretations is to be encouraged, for the body of literature "is not an ordered hierarchy, but an interpenetrating world, where every unit of verbal experience is a monad reflecting all the others" (v. Frye 1975, p.185ff). Catholicity need not mean lack of discrimination, but merely a willingness to benefit from variety - "the reader, the mental traveller, is the hero of literature, or at least of what he has read" (v. Frye 1976, p.185). Professor Dworkin, by contrast, in making David Copperfield "real", surreptitiously manages to eliminate the creativity of the reader from literary experience.

Professor Dworkin pallidly claims that literary critics assume the superiority of some competing interpretations of literary works over others. This he claims is argument for realism with regard to the value of interpretations. Professor Frye's view is pragmatic: some interpretations, like some works of literature repay attention more than others do. Of the ranking of literary works, he says that "the whole procedure involved is an anxiety neurosis prompted by a moral censor, and is totally devoid of content" (Frye 1957, p.24). I have no doubt he would say the same about the ranking of interpretations.

I conclude that Professor Dworkin's one sustained attempt to present a credible model of reasonable non-legal linguistic behaviour conforming to requirements of realism is a dismal failure. Anti-realism is a position expressly tailored to account for linguistic behaviour. Realism, by contrast, has to be reconciled with the limitations of speakers and hearers. The idea of arguing for realism by appealing to linguistic behaviour can only be judged perverse.

9. Final Doubts about Realism, Anti-Realism, and the Meaning of Propositions of Law

This is the last section of Part Two of this essay. In a way I am sorry to have to write it - not because I want to go on considering realism and anti-realism ad infinitum, but because I am well aware that what must appear in this section can only cast doubt on the plan and the content of the two long sections that have gone before it. The main result of those sections, insofar as the interpretation of Professor Dworkin's legal philosophy is concerned, was a largely negative conclusion, viz., that Professor Dworkin's ideas about the meaning of

legal propositions are amorphous, and that any attempt to characterize his views as either realist or anti-realist must be attended with the difficulties of reconciling conflicting themes.

But in this section it will be suggested that the problem apparently posed by anti-realism may have been improperly conceived as such to begin with. If this is correct, it would bespeak a merely depressing confusion.

Professor Dworkin proposes both that legal positivists cannot assign any straightforward sense to controversial propositions of law, and that legal positivists are anti-realists (v. 1977a,p.8). If legal positivists were anti-realists, and really believed that the sense of any legal proposition was to be given in terms of certain conditions - viz., the conditions in which it might be demonstrated beyond controversy that the assertion of a legal proposition was warranted - then logical positivists would have absolutely no trouble in assigning a sense to a controversial legal proposition. The sense of a controversial legal proposition would be given in terms of the conditions in which its assertion as a proposition of law would be uncontroversially warranted. This is elementary. Anti-realism has no difficulty with the sense of controversial propositions of law. On an anti-realist view, they are not senseless; and they are not assertible.

Then what in the world can Professor Dworkin have been thinking of? There is some evidence that he has confused anti-realism with the kind of verificationism associated with logical positivism. Michael Dummett has suggested that, quite apart from their holding that the meaning of a sentence is to be given in terms of the conditions under which it would be verified, the logical positivists may have believed

undecidable sentences to be senseless. But in that case they would have been realists:

> "The logical positivists can, as already noted, be interpreted as holding that the only meaningful sentences are those that are decidable, and hence as advancing a theory of meaning that was realistic and verificationist at the same time: this would explain their failure to repudiate classical logic on verificationist grounds."
>
> (Dummett 1973, p.589; emphasis mine)

A similar charge about logical positivism has been made by Gordon Baker - the only writer I know to have tried explicitly to import anti-realism into legal positivism (v. Baker 1977, pp.44-57).

> "Indeed, orthodox logical positivism is a version of Classical Semantics, with a restrictive notion of what counts as a truth condition."
>
> (Baker 1974, p.166)

Certainly the transformation of orthodox logical positivism into holism, which is in one sharp sense neither realist nor anti-realist, seems to have been motivated by the desire precisely to maintain some accomodating relationship between verificationism broadly conceived, and a logic with classical quantifiers and connectives (v. Hempel, pp.421-426; 428-432). Legal positivists, so far as I know, have not explicitly proposed abandoning classical logic: perhaps they are to be classed with logical positivists.

Is there any reason to suppose that Professor Dworkin might have confused the verificationism of the logical positivists with the views of contemporary anti-realists? There are possibly three reasons for supposing this:

i. The first is the striking irrelevance of Professor Dworkin's major arguments in "No Right Answer?" and "Can Rights Be Controversial?", to the problem posed for ORA by anti-realism. The strategy of the arguments is such that they seem to be addressed to persons who maintain that propositions about the law or propositions about fictional characters cannot be true or false at all, even when there is agreement about which of a pair consisting of a proposition and its negation may be warrantedly asserted.

In both "No Right Answer?" and "Can Rights Be Controversial?", an enterprise is described, the activity of whose participants consists in the assertion of propositions, about fictional characters in one case and about law in the other. This activity is governed by "ground rules" with which the participants are familiar, and which even a "philosopher" may learn, by regularly joining the literary games-players or by going to law school, as the case may be (v. Dworkin 1977a, pp.73-76,79; 1978a, p.283). The philosopher will come to learn that claims about truth and falsity made within the enterprise may be different from those that might be made from a standpoint external to the enterprise (Dworkin 1977a, p.81; 1978a, p.288). As a result, he may come to learn to use the words "true" and "false" in a new way. There will be broad agreement among the participants in the enterprise as to what propositions should be asserted. But sometimes there will be disagreements. Yet even so, the propositions over which there is disagreement will be true or false, at least from the point of view of the participants. This must be the case, because their disagreements are precisely over the question whether the propositions are true or false.

The argument thus baldly summarized is plainly not cogent. (I hope I have not been unfair.) Professor Dworkin takes a fair amount of trouble to explain how the ground rules of an enterprise can come to govern the linguistic behaviour of the participants in a reasonable way, so that they come to judge propositions as true or false. But nothing that he says implies that the concepts of truth and falsity involved in such judgements must be realist concepts. And nothing that he says even encourages the belief that because propositions about law or literature may sometimes be correctly judged true or false, the inference is warranted that they must always be true or false, even in the absence of agreement as to whether their truth or falsity can be demonstrated. Only in conjunction with a realist conception of truth would such an inference be warranted. It follows that Professor Dworkin cannot use his arguments against those who reject such a conception. Since logical positivists, however, adopt a realist logic, an argument that established legal propositions as potential truth bearers, would for them ipso facto establish legal propositions as actually true or false tout court. Moreover, logical positivists are stereotypically the sort of people who would deny that legal propositions can be true or false tout court. Professor Dworkin's argument is therefore nicely tailored for to impress logical positivists, but not anti-realists.

But could an anti-realist conception of truth be ascribed to the participants of one of Professor Dworkin's "enterprises"? If not, then the foregoing interpretive hypothesis would be untenable. Here is a very rough sketch of how such an assumption could be made. Let the participants of an enterprise be utility-maximizers of some kind -

egoists, altruists, universal altruists, as each of them or as the reader pleases:

Let the "enterprise" be construed as a kind of coordination problem, requiring, in particular, coordination of assertion. The participants each want to assert the same things that other participants assert. For each participant, let a preference for coordination of assertion over non-coordination weigh appreciably in the pay-off scale according to which his options are ranked, but not in such a way that coordination is always the dominant choice within the enterprise. The participants have other aims than mere agreement; these deflect the achievement of coordination. The rule of action is for each participant to assert as true those propositions that maximize his particular expected utility. This allows for disagreement as to truth. A proposition "within the enterprise" is true if (a specified degree of) coordination of assertion of the proposition is achieved; its negation is true if a specified degree of coordination of assertion of the negation is achieved; otherwise neither it nor its negation is true or false. Assertion may be expected to influence coordination, so disagreement may continue to a certain degree after a proposition has been established as true, if some of the participants have reasons, independent of their desire for coordination as such, for desiring different solutions to the coordination problem than the one constituted by the existing pattern of dispositions to assert. When this is the case the rule of action may require them to assert as true a proposition which is false. Since all the participants value of coordination of assertion-as-true over non-coordination; and since as the enterprise

is set up the only outcome with which assertion-as-neither-true-nor-false could be associated is non-coordination, it follows that none of the participants has reason to assert of a proposition that it is neither true nor false, except perhaps occasionally as an intermediary strategy in trying to shift the pattern of coordination. Finally, if in general the pay-off for coordination is high enough, or the cost of disagreement or non-coordination great enough, it may be expected that agreement will be reached on virtually every proposition which the participants are given to consider. But even if agreement is invariably reached, so that for every proposition given to the participants to consider, either it or its negation were established as true in the way outlined, it does not follow that the participants in the enterprise must be credited with a realist conception of truth for the propositions in question, in order to account for their behaviour.

In line with all of this, belief that a proposition were true will be explained as belief in the warranted assertibility of the proposition, according to the rule of action presupposed by the enterprise. It need not be assumed that the participants have any theory of truth which is so inconsistent with the account given here as to disturb seriously the pattern of their thoughts or behaviours; any such assumption about the practical efficacy of a theory of truth in the actual world would be plainly unrealistic. On the other hand, although the present outline of the notion of truth for the propositions "within the enterprise" may not correspond to the participants' own beliefs about truth or warranted assertibility, it will ex hypothesi at least encourage a tendency to assign the same truth-values to propositions as are assigned by the participants.

There remains the question of the meaning of the propositions asserted within the enterprise and the content of the disagreements that may arise between participants. For, after all, there must be some point behind the assertion of a proposition by one group of participants in face of the assertion by another group of its negation beyond the satisfaction of a preference achieved by self-expression. In the case of legal propositions, I should say that the content of a legal disagreement is to be understood in terms of a difference in the probabilities assigned to indicative non-legal propositions about human action that are recognized as potential consequences of the legal proposition in question, if that proposition is established as true among the participants of the legal enterprise. A disagreement about which is true out of a pair consisting of a legal proposition or its negation gets its point from the probable consequences of the establishment of one of them as true, as opposed to the other. Part of what a participant of the legal enterprise must believe when he believes that a legal proposition is true, is that a certain recognizable set of probable consequences <u>are</u> in fact the probable consequences of the establishment as true of what he believes to be true. If such beliefs are shared among the participants - and this is hardly a strong condition, when the propositions are legal propositions, and the participants lawyers and judges - then an answer has been suggested to questions about the point of legal disagreements, and the meaning of legal proposition, such that it allows for disagreement. - In the case of the enterprise of filling in the narrative details that Dickens may have omitted from <u>David Copperfield</u>, the point of disagreement and the meaning of the propositions asserted by the literary gamesters is much less clear.

just because there seems to be so little of consequence that attaches to one assertion as opposed to another; but I have already indicated my dissatisfaction with Professor Dworkin's literary speculations.

That is an account of propositions-asserted-as-true-within-an-enterprise which offers not the slightest encouragement to believe that such propositions obey the law of the excluded middle, no matter how many of them are assigned truth-values. Whether the account is true or not, I neither know nor care. But Professor Dworkin has so little succeeded in ruling it out that one is sorely tempted to suppose he never intended to try.

ii. There is a second reason for supposing that anti-realism was never Professor Dworkins' intended victim, and that something rather like logical positivism has been his real quarry. This second reason is perhaps less a reason than a suspicion.

In "No Right Answer?" the argument based on the "ground rules of an enterprise" is directed against an "empiricist philosopher" (v. Dworkin 1977a, p.80). The empiricist philospher accepts what Professor Dworkin calls the demonstrability thesis.

> "This thesis states that if a proposition cannot be demonstrated to be true after all the hard facts that might be relevant to its truth are either known or stipulated, then it cannot be true. By "hard facts" I mean physical facts and facts about behaviour (including the thoughts and attitudes) of people. By "demonstrated" I mean backed by arguments such that anyone who understood the language in which the proposition is formed must assent to its truth or stand convicted or irrationality."
>
> (Dworkin 1977a, p.76)

Professor Dworkin rather remarkably supposes that anyone who held this thesis would deny the law of the excluded middle for legal propositions.

This is impossible unless negation is non-standardly defined. Professor Dworkin declares that this would be accepted by anyone who "holds a strict form of empiricism in metaphysics" (Dworkin 1977a, p.77); why such an empiricist would accept a non-standard definition of negation is never suggested. Professor Dworkin holds that the thesis provides an argument against the truth of legal propositions in hard cases. This, he says, is because lawyers might reasonably disagree about the interpretation or construal of statutes containing vague terms and cannot be convicted of irrationality for not assenting to the truth of a legal proposition backed by argument. The conclusion that legal propositions in hard cases could not be true or false would follow on the demonstrability thesis only, however, if the lawyers continued reasonably to disagree after all the physical facts and all the facts about people's behaviour and thoughts and attitudes that were relevant to the assertibility of the proposition were marshalled in a demonstrative argument. But there is no immediate reason to conclude that this would be so, if all the facts were taken account of, and the argument were really demonstrative; at least so the "empiricist philosopher" might claim. But note that because of the way the demonstrability thesis is stated - in terms of all the facts, without reference to any specifically human modes of or capacities for knowledge - the supposed argument the thesis provides against the truth of legal propositions in hard cases is a realist argument. It is made to look anti-realist by the gratuitous interpolation of non-standard negation.

My suspicion regarding the "empiricist philosopher" against whom the argument from the ground rules of enterprises is directed, is that he can be identified with John Mackie. John Mackie is an empiricist;

he has specifically denied that any objective moral claim can be true; and his denial has been cited in Professor Dworkin's work (Dworkin 1978a, p.349). Professor Dworkin assumes that on Mackie's ethical view, a provision of the American Constitution say, which makes the constitutionality of punishment dependent on a moral property like, cruelty, is not susceptible to objective interpretation. That is correct. But it has nothing to do with the contingency of anybody actually being able in the real world to demonstrate the truth of any proposition to anyone.

Mackie is a realist; he is not a verificationist; he is not a logical positivist; he is a "strict" empiricist; he does not believe that the propriety of actual linguistic behaviour must be regarded as a donné for philosophy (v. Mackie 1973, p.10f). His main argument against the objectivity of values, as he calls it, has nothing to do with the meaningfulness of prescriptive terms or the capacity of prescriptive judgements to be "objectively" justified.

> "Indeed I would not only reject the varifiability principle but also deny the conclusion commonly drawn from it, that moral judgements lack descriptive meaning. The assertion that there are objective values or intrinsically prescriptive entities or features of some kind, which ordinary moral judgements presuppose, is I hold, not meaningless but false."
>
> (Mackie 1977b, p.40)

The second sentence is complicated. Professor Dworkin thinks that Mackie is committed to the view that ordinary moral judgements must be false or neither true nor false; for Professor Dworkin says that claims about the constitutionality of capital punishment grounded on claims about its cruelty would be either false or neither true nor false, if something like Mackie's view were accepted. This is clearly

false to Mackie's text according to which arguments supporting evaluative conclusions may include prescriptive premises, as long as the truth of these is appropriately relativized (v. Mackie, p.30). One relativized notion of truth appropriate for some purposes might be the one roughly outlined in i) above.

But haven't I said that Mackie is a realist? And wasn't that an outline of anti-realist notion of truth? Not quite. Indeed it was an outline of a notion of truth that may hold for propositions whose conformity with the law of the excluded middle is highly questionable. But there are more ways than one to skin a cat, and more than one way to arrive at a non-classical logic, as Dummett points out in "The Philosophical Basis of Intuitionist Logic". With regard to mathematical objects considered as forming a special ontological class of creations of the human mind, it would be possible, he says, to hold that "there is no notion of truth applicable even to numerical equations save that in which a statement is true when we have actually performed a computation (or effected a proof) which justifies that statement" (v. Dummett 1978, p.247). This might be held, not on the basis of any general considerations about meaning, but on the basis of a "resolute skepticism" concerning subjunctive conditionals about the results of carrying out a proof. The skeptical claim must be that there is nothing in virtue of which a subjunctive conditional could be true, if the subjunctive conditional stated what the result of a proof-procedure would be if the proof-procedure were actually employed. Dummett believes that this skeptical claim is implausible in connection with the procedures for effecting a mathematical proof, just because of

the comparative specificity of the notion of what may count as "effecting a proof". For it must be understood that the skepticism at issue here, concerning the results of proof, must apply to the results of every proof, even for decidable propositions. This is because the skepticism is supposed to have its basis in the special ontological status of mathematical objects, attributable to them precisely in virtue of the fact that they are creations of the human mind. A distinction drawn amongst propositions about these objects, according to which some of the propositions are decidable and some undecidable, is an epistemological distinction; and it must, therefore, not be allowed to touch the source of the skepticism about subjunctive conditionals, whose effect is to make the notion of truth applicable to mathematical propositions a distinctly non-classical notion. It is the specific notion of the nature of "creations of the human mind", and not any set of general systematic considerations about meaning or language learning, which must be held to give the logic of mathematical propositions its non-classical character, on the view presently under examination. The question of anti-realist theory of meaning is simply by-passed on this view. But for the very reason that there is after all a viable distinction to be drawn between decidable and undecidable mathematical propositions, Michael Dummett is of the opinion that a skeptical attitude in connection with subjunctive conditionals regarding the results of a proof-procedure for a decidable proposition would be almost impossible to sustain. For the skepticism would have to extend to the extent of maintaining that, given an instance of the law of the excluded middle in which a decidable predicate is predicated of some

specific individual, there could in the nature of things be nothing in virtue of which such a disjunction would be true, if it entailed either that if a proof were carried out, the predicate would be shown to be true of its subject, or that if a proof were carried out, the predicate would be shown not to be of its subject. Because this skepticism about the results of proof is so extreme, Michael Dummett believes that it cannot be sustained, and that if this is so, then anyone who is intuitionist in mathematics cannot be so on the basis of this skepticism, and so, as an alternative, must adopt an anti-realist theory of meaning. Thus, it is at least logically possible to construct for ontological reasons a notion of truth that allows denial of the law of the excluded middle and the adoption of such a notion does not logically require one to be an anti-realist. (On all of this, v. Dummett 1978, pp.243-247.)

Now suppose someone were to view legal rights as the "creations of human political society" and he held that the notion of truth appropriate to propositions ascribing legal rights to persons (natural or judicial) must be non-classical, in order to reflect that aspect of legal rights in virtue of which they are "creations". Could he maintain this position without being an anti-realist? It certainly seems that he could, and much more easily than the intuitionist who does not subscribe to anti-realism. If, for instance he extended the little "coordination" model given above, in such a way that the truth of legal propositions - ascribing rights, say - were held to depend on coordination not only of assertion but also of other patterns of social behaviour, then, as in the original model, the law of the excluded

middle would be violated. Moreover, since the methods of establishing the truth or falsity of legal propositions might be extremely complex, it would be a great deal easier to deny the truth of disjunctions whose disjuncts were subjunctive conditionals concerning what would be the results of employing such methods. That is, at a given time, it might not be true that if such methods were employed, some proposition would be established as true; and at the same time, it might not be true that if such methods were employed, the negation of that proposition would be established as true. No sharp notion of "decidable propositions" makes itself felt here as causing discomfort for anyone who adopts a skeptical attitude toward the truth of subjunctive conditionals of this kind. As a result, anti-realism in Michael Dummett's sense, fails to force itself on anyone who wishes to deny that the logic of legal propositions is classical. Note that as the model was outlined above, none of the participants of the legal enterprise was given privileged status; no sovreign was introduced; and no class of participants was specified as having a decisive influence on the patterns of coordination in virtue which legal propositions are held to be true. It follows that the model may allow for the possibility that even judges acting in their official capacity may assert legal propositions which are untrue, merely in virtue of the fact that the relevant pattern of coordination does not exist. Yet a parochial notion of warranted assertability might be defined for judges, in terms of which some at least of the untrue propositions which they assert might be warrantedly assertible, in the circumstances in which the judges find themselves. In this way, the model could accomodate realism in Professor Putnam's sense.

But now it may seem that the model outlined above must be realistic, and this incompatible with anti-realism. Yet didn't I predicate my sketch of the model on the assumption that it could be regarded as a model for one of Professor Dworkin's language games and no less compatible with anti-realism for all that it preserved the characteristics of the game. In fact, the model is compatible with both realist and anti-realist theories of meaning. The difference between those theories, if it is to be reflected anywhere, must be reflected in the reasons a person may have for accepting the non-classical implications of the model: a realist who accepts them must do so on the basis of an ontological assumption about legal rights and a skepticism regarding subjunctive conditionals regarding the results of the employment of characteristic methods of establishing the truth of a legal proposition; the anti-realist, if he accepts the model and its implications, need not accept the implications because he accepts the model, since he holds no brief for classical logic in any case; and yet it is open to him to accept some such model even so, if he finds it descriptively appealing. This amounts to saying that if the denial of the law of the excluded middle for legal propositions and the consequent denial of ORA are characteristic of legal positivism, that need not be because legal positivists are committed to anti-realism as a theory of meaning. Whether they are or not must be determined by looking elsewhere than at the logic they attribute to legal propositions. This is just the lesson of Section 8.2, stripped of holistic trappings and of the special epistemilogical entanglements of Section 8.3.

Professor Dworkin seems to have some inkling of this when he suggests that the position of the "empiricist philosopher" raises the ontological question of "what there is" (v. Dworkin 1977, p.74). This is a question he thinks he can side-step by making his disastrous appeal to "the ground rules of enterprises" - that is, to language games. In this way he is led to consider the conditions of justification for assertions, and to the erroneous supposition that the "empiricist philosopher" is worried about "demonstrability". If the "empiricist philosopher" really is John Mackie, who denies the "objectivity of values", then the mistake consists in the supposition that for Mackie, the objectivity of values is merely something that could never be demonstrated, even when all the facts are in. In fact, Mackie's central argument is that the objectivity of values is simply inconceivable: an objective value would have to be something whose motivating or action-guiding force exists in virtue of nothing that need be defined in terms of human motivation or desire, the existence of value would have to be conceivable even in the absence of potential valuation. Objective values would as a result be very queer (v. Mackie, pp.38-42); for Mackie this constitutes a priori argument against their existence. The point is not that human beings cannot demonstrate the existence of objective values; the point is that anything which even looked like a demonstration of the existence of objective values would be for that reason alone automatically suspect. No general second-order considerations about language learning or language use or linguistic justificatory practice are involved here; the details of first order discourse about values and valuation suffices conclusively to exclude

the possibility of objective values. Similarly, first order legal discourse suffices to refute the secret book theory; as a theory of what the law actually is at any given place and time, a secret book theory is inconceivable. And the objection to it is not that it is undemonstrable or meaningless; it is just out of the question: among the competing hypotheses that explain or justify what has to be explained or justified it simply does not find a place. Professor Putnam has on occasion suggested that faced with any problem of reasoning, a human being confronts it with a set of hypotheses in an a priori simplicity ordering, so that, broadly speaking, inductive considerations will govern his attempt to reach a solution. Thus, again broadly speaking, inductive considerations such as generalizability, testability, corrigibility, articulateness, simplicity, conformity with known fact, may together determine that some "hypotheses" are simply not in the running as solutions to problems of reasoning. Professor Putnam asserts that the "hypothesis" of the malin génie belongs in this class; so no doubt, does the "hypothesis" of the "secret books"; and perhaps the hypotheses of a Platonic form of Goodness does, too. But all this touches directly on the problems of ontology, without any mediating appeal to particular notions of truth as appropriate to this or that class of propositions. Linguistic behaviour, assertion, denial, agreement, controversy - none of these is immediately relevant to the programme of the "empiricist philosopher"; they would be if the philosopher were a logical positivist, but if I am right, he is not.

Why do I think that Professor Dworkin thinks that the "empiricist philosopher" is a logical positivist? The main reason is

that Professor Dworkin's arguments can be seen as better constructed if directed against a logical positivist opponent, than if they were aimed at anyone who would subscribe to empiricism. Then, too, if John Mackie were the empiricist philosopher, although it would be wrong to call him a logical positivist, it would be reasonable. At the end of his book on ethics he records an intellectual debt to C.L. Stevenson and A.J. Ayer (v. Mackie 1978, p.241); and in the text he admits that the issue of "objectivity" is old-fashioned; more important perhaps is the antique tone of his ringing declaration, contained in the "argument from queerness" that the ideas "of essence, number, identity, diversity, solidity, inertia, the necessary existence and infinite extension of time and space, necessity and possibility in general, power, and causation" - all of these ideas must be given "empircist foundations" if they are not to be eliminated by very same argument that invalidates objective values (v. Mackie 1978, p.69). This is just the sort of polemic evoked by Professor Dworkin's reference to "orthodox empircism"; and perhaps only a logical positivist might fail to blanch at it.

iii. The last, best, and most obvious reason for thinking that Professor Dworkin's target has not been anti-realism, is, of course, that legal positivists are not anti-realists. The idea that legal positivists have supposed themselves to be giving the semantics of legal propositions in general has no motivation whatever. To take a not irrelevant example: in the first chapter of The Concept of Law, H.L.A. Hart admittedly discusses the problem of "definition" at some length, but only in connection with a single word, viz., law. There is certainly no indication that he would like to give definitions or anything that would do in place of definitions for all the words that

occur in legal propositions - and a good thing, too, for any proposal to that effect would be ludicrous. The linguistic properties of legal propositions, including their senses, are what they are because of the linguistic properties of their constituent words and because of the admissible modes of combination of those words in the natural language in which the propositions are couched - in short, because of the phonetic, phonemic, morphemic, syntactic, semantic, and pragmatic features of the language. In the end, Professor Hart disavows the intention to provide a definition for even the single word "law" (v. Hart 1961, p.17); and the tenor of his introduction to The Concept of Law is such as to suggest that if he had decided to attempt any "semantic analysis" as such, the analysis would have been limited to operators which are functions from sentences into sentences such as "According to English law, _", "It is a proposition of French law _", "That _ is a law in state of Massachusetts", "Legally speaking _", "From the legal point of view _", etc. - where the blank is to be filled in by some well-formed sentence whose sense is taken as given. It is because the senses of the filler propositions have to be taken as given that there is an opportunity for the question of realism versus anti-realism to be asked and answered before legal theory even begins. Moreover, the effect of introducing a rule of recognition, as Professor Hart does, to determine which propositions are propositions of law in terms of one set or another of properties which the propositions can be recognized as having - the effect of this is to make invisible the distinction between realism and anti-realism in connection with the assignment of truth-values to legal propositions, that is, propositions whose main operators importantly resemble the operators listed above. This because the reliance on

recognizable criteria comes to be required, not by a certain general approach governing the content of a semantic theory, but rather by the common semantic properties of a set of single lexical items, namely, the operators mentioned above. It is open to anyone to dispute this approach as providing any contribution to legal theory; but it bespeaks a misconstrual to suppose that the approach implies or presupposes anything questionable in the theory of meaning. The only significant presupposition is that meaning is compositional, and few people would dispute that.

Even this elementary characterization of a rule of recognition casts a dark shadow over Professor Dworkin's analysis of the positivist treatment of legal propositions. Professor Dworkin claims that for legal positivists, a legal proposition such as a proposition ascribing a right, can only be true if it is recognized to be true - if there is controversy over it, then it cannot be true, from the positivists' standpoint. Whatever force this claim has rests on an illicit equivocation. Consider the proposition:

(P_1) A pregnant woman, up until the twenty-fourth week of her pregnancy, has the right to have an abortion performed on her, if she so demands.

Since the existence of rights may be discussed in abstracto, as it were, as is the case when people discuss the existence of moral rights, it is clear that there can be a great deal of controversy over the truth of P_1. On Professor Dworkin's account, this fact alone must suffice to guarantee the falsity of P_2.

(P_2) According to Canadian law, P_1.

- even if there is a Canadian federal statute to the effect that P_1, and the statute has been ruled constitutional by the Supreme Court of

Canada. That this should be a consequence of anybody's version of legal positivism is simply not credible. If it is a consequence of anything it is probably a consequence of Professor Dworkin's queer assumption that sentence-forming operators like the one in P_2 are truth-functional.

It might be more perspicuous to represent Professor Hart's intention by rewriting the operator in P_2 as "Recognizably, according to Canadian law _" or "According to Canadian law, definitely _". Indeed, what all such operators have in common could be represented by the operator "Definitely _". And fortunately, there is some agreement on the appropriate logic for this operator; it is the modal logic T with the necessity operator interpreted as meaning "definitely" (v. Dummett 1978, p.182f; Fine 1975, p.294). This is the "logic of vagueness"; it is appropriate for Professor Hart's positivism because, as Michael Dummett has pointed out in connection with Wittgenstein's philosophy of mathematics, the notion of what is recognizable is vague. For Professor Hart, then, the notion of vagueness is imported into legal theory quite independently of the vagueness of the individual words that occur in legal propositions; this was shown to be the case for Professor Dworkin's own theory in Section 8.4.

Kit Fine and others have developed the logic of vagueness in terms of Bas van Fraassen's ideas about supervaluations. In Part Three the argument against ORA will also make use of supervaluations; it will require that only one notion be taken as vague, viz. the notion of legal obligation. This requirement will be justified with reference to the analysis of a Rawlsian social preference function by Professor A.K. Sen. The logic of legal obligation will be the modal logic S_5 which is the

logic of vagueness, when only first order vagueness is admitted - that is, when it cannot be only vaguely true that something is vaguely the case: if something is vaguely the case, it is definitely vaguely the case.

These considerations lead directly to Part Three. I shall say nothing more about realism and anti-realism. The main results of Part Two are these:

- Non-classical logic is not the key to anti-realism.
- Bivalence is not the key to all varieties of realism.
- Professor Dworkin's legal theory may be much closer to anti-realism than he seems to think.
- Professor Hart's legal theory may be more realist than Professor Dworkin seems to think.
- Vagueness is imported into legal theory, not by specifically verbal considerations, but by the general idea of legal justification or legal obligation.
- In order to protect the idea that the existence of legal rights does not depend on the sayso of any particular class of persons, it is unnecessary to adopt a realism that requires bivalence.
- Linguistic practice may not provide a justification for the assumption of bivalence.
- Nothing that Professor Dworkin says about meaning or logic provides the slightest reason to accept the truth of ORA.

PART III. CONSTRUCTING THE ARGUMENT

In Part III, an argument against ORA is constructed.

10. What is an Argument against ORA?

I have emphasized the desirability of constructing argument against ORA. But what is an argument against ORA?

An argument against ORA is an argument for the proposition that it is not the case that for every legal dispute there is some potential resolution of the dispute which would be legally admissible if implemented and which is the only resolution that is legally correct. It is an argument for the proposition that, for some legal dispute, either there is no potential resolution that is legally admissible, or there are more than one such resolutions. In his discussion of the ways in which a legal system may fail to generate "one right answer" for every legal question, Professor Richards puts it this way:

> " The set of all applicable principles and rules may be in equipoise in many cases, and so fail to provide a determinate outcome. The system may achieve equipoise in two ways. First the applicable rules and principles may yield contradictory holdings. Because principles are self-justifying, nothing in their nature can prevent them from being prospectively inconsistent, and nothing in Hart's definition of rules would require that even they must be absolutely consistent. Second, the problem is sometimes not that rules or principles balance one another, but that there is an indeterminate matter requiring decision."
>
> (Richards 1977a, p.1314f)

The import of this passage is intuitively clear enough, and its details are not important. Of course, it is possible to imagine legal systems which occasionally generate conflicting obligations, or which fail to provide a decisive method for determining in a given case whether a

certain legal obligation has been incurred by a particular party or not. Given, however, the "realist" constraint imposed on any argument against ORA, it must seem highly doubtful whether any probative force can attach to the mere ability to imagine or even to point out legal systems in the actual world which fail to satisfy ORA in the ways described by Professor Richards. The realist constraint requires that attention be fixed upon ideal legal theories. That an ideal legal theory should fail to be fully determinate may seem to be an unsatisfactory idea; even more so, that it should generate inconsistencies. If an acceptable argument against ORA is to be developed, it must be possible to characterize the denial of ORA in a less tendentious, albeit a less vivid, vocabulary.

The vocabulary of welfare economics and preference orderings comes to mind. Suppose that legal theories determine preference orderings among the outcomes of legal disputes. Then there are two ways in which legal theories might be said to violate ORA. First, a theory might violate ORA by ranking the two possible outcomes of a given case equally; thus the theory might be indifferent between the outcomes, and so fail to determine a choice between them. Second, a legal theory might determine an "incomplete" or "unconnected" preference ordering of the potential outcomes of legal dispute. A preference ordering is "incomplete" or "unconnected" when there are at least two elements described as within its range such that the ordering fails to rank either as preferred over the other, and also fails to rank them as indifferent, so that no comparative ranking of the elements is determined at all. If an ideal theory determines a preference ordering

among the possible resolutions of legal disputes, then if the ordering is incomplete or allows for indifferences, then ORA will be falsified. In Sections 10 and 11, just this will be argued. But before the argument is constructed, a little more should be said about the words "indifferent" and "incomplete".

The trouble with these words is that they are so plainly "theoretical", that their use is plainly determined by a demand for "technical" descriptions of theories about preferences; and that, as a result, a description of an ideal legal theory, in which these words are used, may seem unattached to the sorts of ideas about legal-systems that are expressed, for example, in Professor Richards' description of legal systems quoted above.

The problem is less acute in connection with indifference than with incompleteness. A preference ordering is determined by preferences. Certainly, faced with two options, a person - in the lay and not the legal sense - might prefer one over the other, or he might be indifferent between them: he might simply not care which option were realized. In this example, at least, there is nothing technical to fret about. Yet could an ideal legal theory be indifferent in this sense? The question is rather obscure, but a negative answer would seem hard to justify. For suppose that the underlying rationale of an ideal normative legal theory is the promotion of the welfare or the protection and extension of the rights of all who come within the jurisdiction of the legal system for which the theory is ideal. If their welfare is indifferently served or their rights indifferently protected and fostered by either of the two possible judicial resolutions of a

given dispute, then it is hard to see why an ideal legal theory should not be indifferent between the options. More specifically, if a preference ordering effected by an ideal legal theory is determined on the basis of the preference orderings of the individual persons within the jurisdiction of the legal system for which the theory is ideal - and this would be the case if a normative ideal legal theory were among the sorts of theories typically studied by welfare economists - then, when all the preference orderings of the individuals in a given jurisdiction were indifferent between two options, it would be almost impossible to see why the social preference ordering determined by an ideal legal theory should not be similarly indifferent. Of course, if in a given jurisdiction what is in question is a legal dispute, then it cannot be that the preferences of all the individuals within the jurisdiction are indifferent between the two possible judicial resolutions of the dispute; for if there were no clash of preferences in regard to the different possible outcomes, there would be no dispute. But all I am trying to point out at the moment, is that indifference between options is no less inconceivable for social groups than it is for individuals; and that if a choice between indifferent social options has to be made, it may have to be made more or less arbitrarily; there is no guarantee that justification for a decision in favour of one option over another may be available. And this fact, I think, is what Professor Richards is adverting to when he speaks a legal system's "achieving equipoise" when the problem it must address is "an indeterminate matter requiring decision"; for he elucidates this phrase by appealing to the example of "the importance of predictable rules

allocating property rights, where the point is often that rights be allocated, not that they be allocated in a certain way" (Richards 1977a, p.1315). It is precisely with regard to such cases as this, where a legal problem may be solved by social coordination that is "conventional" in David Lewis' sense, that rule-utilitarianism, for instance, must fail to determine a unique solution. This is significant because Professor Dworkin frequently alludes to rule-utilitarianism as an example of the general sort of theory of rights that a judge might subscribe to (v. Dworkin 1978a, pp.95,313f,317; for David Lewis' definition of a convention which requires the existence of alternative coordination equilibria as equally admissible solutions to a problem of social coordination, v. Lewis 1968, pp.16,69-80; on the failure of rule-utilitarianism to solve coordination problems, v. Sobel 1968, p.153f).

The meaning of "indifference" then, is comparatively straightforward and intuitive. It might be objected that the reliance on the vocabulary of welfare economics and preference orderings is illicit, because the preference orderings studied by welfare economists can only come into play after the constraints imposed on social choice, say, by individual rights have been satisfied. An argument along these lines has been suggested by Robert Nozick (Nozick 1973, p.60f; 1974, p.165f); but it has been defused, in my opinion at least, by Professor A.K. Sen. Professor Sen has pointed out that if a social preference ordering among options "is supposed to reflect a judgement of social welfare taking everything into account" as welfare economists assume, then "the ability to exercise these rights must enter the social ordering after all" (Sen 1974, p.230). In fact, a natural way of understanding the

question whether the conferring of a set of rights on a group of individuals could be consistent is to regard the question as asking about the possibility of providing an ordering for the options that might result from the exercise of those rights (v. Sen 1974, p.234f). In Sections 11 and 12 I shall assume that social choice theory or welfare economics - faute de mieux - must provide a suitable framework for the discussion of ideal legal theories. And I believe that the mere conceivability of social indifference is enough to wreak havoc with ORA. But because of the non-indifference of individual preference orderings that must be involved in a legal dispute, I shall base the argument against ORA on the idea of the possible incompleteness of the preference orderings determined by an ideal legal theory, and not on its possible indifference.

What intuitive meaning does "incompleteness" have? For the preference ordering of an individual person, incompleteness might reveal itself in an inability to choose between options, where it is felt that the inability is not a result of the fact that any such choice must be merely arbitrary; one may not know which of two options to choose, and this may not be because one feels that, as far as one's preferences go, there is really nothing to choose between them (cf. Sen 1970, p.3). This phenomenological description is not, I believe, either empty of inconsistent; yet it may seem to have little relevance to the content of ideal legal theories, just because it is phenomenological. Nonetheless, it can be applied analogically to the problem of constructing a normative theory of social choice. In Section 5, Part One, of this essay, an "intuitionist" proposal of Nicholas Rescher's was discussed,

in which the principle of average-utilitarianism is combined with a principle of equality. According to that proposal, social choices should be made to maximize the "effective average", that is, the average utility minus some fraction of the standard deviation from the average. This keeps inequalities down by discounting benefits which deviate from average levels, at the expense possibly of lowering the average level of utility. But the proposal is "incomplete". If, as Professor Rescher suggests, the relevant fraction of the standard deviation is taken to be $\frac{1}{2}$, then for any social state in which the distribution of individual utilities is such that the standard deviation is itself greater than the average utility in that state, the cardinality of that state will be calibrated at less than half the average utility (v. Rescher 1966, p.36). The point to notice is that for such states, the equity component of the "effective average" principle may be regarded as cripplingly distortive. The upshot is that although the "effective average" principle combines considerations of utility and equality, it does so in a reasonable way only for a limited class of cases, viz. those cases when choices must be made between states in which the distribution of individual utilities does not vary too greatly about the average utility. When the variation is great, the principle tends to discount average utility entirely, with the result that anyone attracted by the harmony the principle promises between equality and utility, must find himself without a guide in cases where this occurs. In these cases Professor Rescher laconically declares that the effective average is "undefined", that is, incomplete; but the intuitive significance of the incompleteness lies in the fact that the principle of the effective average must

fail to generate conviction in any social choice made in the cases for which it is undefined. If one had to make a decision in such a case, there would be good reason to say that one could not know, on the basis of the principle of the effective average, which choice to make. And this need have nothing to do with any kind of indifference.

What is interesting about the idea of incompleteness is that it captures a sense in which an ideal legal theory might generate inconsistent judgements without itself being inconsistent. A theory may be declared incomplete in certain cases just because the application of the theory in those cases can rightly seem to have outrun the underlying rationale of the theory so that attention to the rationale prompts one judgement, while the theory entails another. Theories, after all, do not apply themselves; the principle of the effective average does not have a neon sign attached to it, announcing that it tends to discount gains in average utility if the distribution of individual utilities reaches a certain level of variation; and so the domain of the application of a theory based on that principle may be a matter of dispute or of decision, where there need in the nature of things be no further theory to appeal to in reaching the decision or resolving the dispute. Theories are not magical.

But could an ideal legal theory fall into these sorts of difficulties about incompleteness? This question raises an important problem about rationality. There is no doubt, for instance, that the principle of the effective average can consistently be used to determine social choices even among options where average utility is less than the standard deviation from the average; the question only arises whether it is reasonable to use the principle to determine such choices. And

surely the question of reasonableness is not to be regarded as settled a priori, in advance of the choices that have to be made. Similarly it can be argued that the reasonableness of any normative theory is not to be regarded as settled a priori, in advance of the choices that have to be made. But since the phrase "any normative theory" includes in its extension any ideal legal theory, it seems that the problem of incompleteness cannot be eliminated by mere repetition of the logical truth that an ideal theory is an ideal theory.

Moreover, it would seem that any attempt to dispel the problem by means of such incantations must involve a committment to a sort of irrationality. The idea that reasonableness may and must attache a priori to all the consequences of some set of normative generalizations surely involves a false notion of practical reasoning. For it is undoubtedly the case, for some normative judgements, that if they are implemented, some persons may be made to suffer harm, as for example, the loss of money or of a remedy, or of freedom, or of life, as a result of an adverse judgement in a case at law. And it is at the very least reasonable for a person to want not to be instrumental in it bringing about that another person suffers such harm. But the legal positions of some persons may be essentially such that they are capable of bringing about such harm for others, merely by declaring the consequences of some set of normative generalizations. Now it may be that for a wide range of cases, for any of a number of sets of generalizations declaring the consequences of the generalizations is reasonable, because the harms brought about by the declarations seem not unreasonable. In this way reasonableness might be said to attach to the consequences themselves.

But without knowing in advance all the practical implications of the logical consequences of a set of normative generalizations, including especially the implications of harms, it would surely be unreasonable to commit oneself in advance practically to upholding those generalizations no matter what their consequences should turn out to be. That is, it would be unreasonable at anytime, say, to give over, irrevocably and without reservation, all practical reasoning within the domain covered by those generalizations, as a task henceforth to be carried out by machine programmed to make decisions in accordance with the generalizations. By the standards of our present notions of practical reasoning, a man who could conceive of this possibility as a reasonable possibility, would have to be judged as endorsing not the regimentation of practical reasoning, but its abandonment. For what committment to a complete normative theory suggests is that a person who has undertaken such a committment could give up case by case practical reasoning and without loss, substitute for it a kind of quasi-mechanical calculation - had he but paper enough and time. A complete ideal theory would ensure that practical reasoning could be removed, as it were, from the haphazard pushes and pulls of practical reality. But the other side of this coin is that so long as it seems reasonable not to admit such removal, then even for the best possible ideal theories will it remain conceivable that they should be incomplete.

I should point out that Professor Dworkin appears quite willing to allow - theoretically, at least - judges to abandon judging and take up computing instead. This comes out in his characteristically ham-fisted discussion of Professor Rawls' notion of reflective equilibrium. According to Professor Rawls, reflective equilibrium is achieved through

the process of successive mutual adjustment between isolated pre-theoretic intuitions about justice on the one hand, and principles of a theory of justice on the other; it is the "resting point" where principles and judgements coincide. The achievement of reflective equilibrium may be likened to the achievement of a perfect fit between a generative grammar and particular intuitions of grammaticality (v. Rawls 1971, pp.47,50). Professor Dworkin, however, "interprets" the role of reflective equilibrium in developing a theory of justice as requiring the suppression of intuition when it conflicts with theoretical principle: he proposes his constructive model of a normative theory, which "demands that we act on principle rather than on faith" (v. Dworkin 1978a, p.162). He implies that when intuition conflicts with principle, one must disregard intuition; one must steel oneself against its influence "if that is required to achieve the harmony of equilibrium" (v. Dworkin 1978a, p.165). Though he cites Quine's "Two Dogmas of Empiricism", he is apparently unconscious of the fact that the holistic implications of the technique of reflective equilibrium must leave undetermined the precise locus in a conceptual structure composed of theory and observation where adjustment may be made to accomodate the pressures of conflict. It should be obvious - though apparently it is not - that an intuition that refuses to give way is a bad place to attempt conceptual revision, so that harmony of equilibrium cannot require revision of such intuitions. Yet just because there are such intuitions, Professor Dworkin proposes that theories of justice must ignore them, in order that principles may be honoured. The argument above suggests that the only consequence of this must be for principles to acquire a certain immunization against the dangerous and debilitating effects of that deadly force, intelligence;

so that the consequences which are their progeny may proliferate unchecked by human intervention, rather like cancer cells.

Not surprisingly, perhaps, Professor Dworkin has drawn some of his hostility to intuition from the work of Professor Hare, whose critical study of Professor Rawls' theory of justice contains a violent attack against the idea of any appeal to "considered judgements" as data that a theory must take seriously (v. Hare 1973, pp.82-85), and whose floundering efforts to distinguish on his own principles between morality and unreasoning fanaticism have been notoriously unavailing. Professor Hare's views on the inadequecy of pre-theoretic moral opinion have recently been subjected to a devastating re-assessment by Professor G.R. Grice. Professor Grice accepts Professor Hare's argument that a moral theory which can be modified under the pressure of received opinion cannot be used to settle moral questions in a way that is independent of received opinion; but where Professor Hare draws from this the conclusion that pre-theoretic judgements must be allowed no probative force whatever in normative ethics, Professor Grice concludes that on the contrary the argument shows the futility of constructing grand normative theories to dictate the solutions of practical problems, since it seems impossible to do so without appeal to pre-theoretic judgements about, for instance, what may constitute <u>harm</u> for a human being (v. Grice, p.9). Professor Hare's own utilitarianism is granted something of an exemption from Professor Grice's strictures against theories, but only under the assumption that, as Professor Hare claims, his utilitarianism is <u>logically entailed</u> by the logical doctrine of universal prescriptivism alone. (This claim has been refuted conclusively, in my opinion; v. Fullinwider,

pp.170-173.) Professor Grice's idea is that if a normative theory could be shown to be entailed by a logical doctrine alone, it could thus be demonstrated to have the requisite independence of ordinary judgement to settle questions where ordinary judgement fails to do this. Since Professor Dworkin has never indicated that an ideal normative legal theory might be supposed to have a purely logical foundation, Professor Grice's argument suggests that Professor Dworkin's treatment of intuition and received opinion must be regarded as presumptuous or premature because it leaves him without a foundation for his normative theory. This is especially clear insofar as a normative legal theory is obliged to take as data a heterogenous set of normative materials whose common acceptance by a democratically elected citizenry as opposed to a band of cultists is surely better understood as acceptance in sensu diviso than as evidence of acceptance once and for all of some body of theoretical normative generalizations, together with all of their logical consequences, no matter how intuitively objectionable or harmful these should turn out to be. Professor Grice's argument, then, must incline one to believe that normative theories cannot be freed from the constraining power of considered but pre-theoretic normative judgement; and if this is so, then an ideal theory may be as ideal as you like, without it being possible to secure it against the risk of being incomplete, in the sense described in this Section.

ORA demands completeness of ideal legal theories. Professor Dworkin and Professor Sartorius both argue that it is "rational" to accept ORA (v. Dworkin 1978a, p.286f; Sartorius 1977, p.1273f). From the realist point of view adopted in this essay, if it is rational to

accept ORA, then for some ideal legal theory it is rational to accept that theory as complete. If it is rational to accept for some ideal legal theory the completeness of that theory, then it is rational to be willing to suspend intuitive normative judgement in favour of uncritical acceptance of the consequences of some ideal theory, whatever they might be. I do not believe that this could ever be rational in connection with any theory. I do not believe that it is rational to accept ORA. Professor Dworkin and Professor Sartorius both seem to argue from the fact that since for each individual legal dispute it may be more rational than not to accept that it has only one legally correct resolution, it must follow that it can be no less rational to accept that every legal dispute has only one legally correct resolution. But argument along these lines is exposed as fallacious by the mere existence of the lottery paradox discussed in Section 9. Just as it is wrong to argue from the probability that any one of a thousand lottery tickets will be a loser in a fair lottery, to the probability that all the tickets will be losers; so it is wrong to argue from the acceptability of a judge's hypothesis about any particular case before him that it has a unique correct solution, to the acceptability of a legal philosopher's hypothesis that every case has a unique correct solution. One expects the description of legal systems offered by legal philosophers to be more responsive to logical distinctions than such argument would indicate. But in this sphere, as in others, expectations are liable to be disappointed.

To summarize: in this Section I have maintained that an argument against ORA will succeed if there is reason to believe that an ideal legal theory may either be indifferent among judicially pos-

outcomes of legal disputes, or else be incomplete - where "indifference" and "incompleteness" are understood as welfare economists understand them. In Sections 11 and 12 I will try further to justify the application of the social choice theory developed by welfare economists to the problem set by Professor Dworkin's failure to specify the nature of an ideal legal theory. In the meanwhile, if the assumption is granted that an appeal to social choice theory is justifiable, a mere consideration of the words "indifferent" and "incomplete" is enough to suggest that acceptance of ORA is unreasonable.

11. Gewirth, Rawls, Richards, Dworkin, and the Idea of a Right-based Political Theory

In Part Two a constraint was imposed on the argument against ORA requiring the assumptions of the argument against ORA to match those of the argument for ORA, insofar as this was possible. If this requirement is to be met, the foundation of the argument has to be established within the confines of a "right-based political theory".

It is, however, not easy to say what a right-based political theory is. Recently, in an extraordinarily sustained effort Alan Gewirth has attempted to derive a single supreme moral principle that is clearly right-based, arguing only from the effects of a demand for consistency on the reasoning of any agent whose concern is to insure for himself the continuance of his capacities to act. The idea is that the basic or generic requirements of agency make it reasonable for an agent to maintain claims against other agents, demanding some measure of non-interference or positive assistance from them. If he is to do this in all consistency, he must acknowledge that if the generic requirements of agency are not met for those against whom he maintains his claims, then

it will not be reasonable for him to make his claims; for what he claims is just that other agents must act in certain ways, and if the generic requirements of agency are not met for them, they will not be able to act at all, and so not be able to act in such a way as to satisfy the claims made upon them. The upshot of this line of argument is the right-based rule of action for all agents: "Act in accord with the generic rights of your recipients as well as yourself" (v. Gewirth, p.135). Since Professor Gewirth holds violations of this principle to be inherently irrational, it follows that social activities and institutions, including not only voluntary associations but the state as well, must be governed by the principle, even though the effect of this is that the principle may cease to be absolute for particular actions of agents acting within institutional settings, since these actions may now be governed by institutional rules (v. Gewirth, p.272). Professor Gewirth claims that the principle is complete (v. Gewirth, p.327); by this he means that once an agent has properly applied the principle, there are no moral considerations left to be considered by the agent regarding the determination of the moral status of any option available to him. He does not mean, however, that application of the principle must uniquely determine one option as obligatory or as the one that ought to be selected over any other (v. Gewirth, p.352). Nevertheless, apart from this inconsistency with ORA, Professor Gewirth's right-based principle seems a much more likely candidate to provide backing for a right-based political theory, than does Professor Rawls' theory of justice. ("More likely" does not mean "likely".) This is because Professor Rawls is quite clear that his theory of justice has as its "subject", not the moral status of parti-

cular actions, but rather the basic structure of society. This is especially evident in his recent capsule-statement, "The Basic Structure as Subject":

> "The first principles of justice of fairness are plainly not suitable for a general theory. These principles require ... that the basic structure establish certain basic equal liberties for all and make sure that social and economic equalities work for the benefit of the least advantaged against a background of fair opportunity. In many if not most cases these principles give unreasonable directives."
>
> (Rawls 1978, p.49; emphasis mine)

This pronouncement is hardly designed to inspire confidence in the reliability of the assumption that in any case where the guiding capacities of legal rules run out, judges confronted with hard cases can in the last resort fall back on the Rawlsian theory of justice to provide the one right answer that ORA presupposes.

It might further be said that despite Professor Dworkin's endorsement of Professor Rawls' theory, that theory should not be identified with the right-based political theory in which Professor Dworkin places his trust, for the very reason that the theory of justice is not complete in the required way. What makes the theory a right-based theory is that it is a contract theory, not that it entails the two particular principles of justice that it does entail. Professor Rawls himself says that his theory is not even a "complete contract theory", and that the contractarian idea could be extended beyond the choice of a basic structure for society to "the choice of more or less an entire ethical theory" (v. Rawls 1971, p.17). Perhaps a contractarian theory of this scope could more appropriately serve as a fall-back device for judges confronted with hard cases. In fact, just such a theory was

developed by Professor Richards in A Theory of Reasons for Actions; but as the quotation at the beginning of Section 10 showed, Professor Richards believes that ORA is false. It would seem then that Professor Richards' theory might not be the appropriate type of right-based political theory either.

But it may be that Professor Richards' rejection of ORA is not implied by his moral theory. Perhaps it is implied by some of the positivist aspects of his thought. Part of the contractarian conception itself requires that the parties to the social contract choose principles of social organization and morality of such a kind that the principles may be public and learnable (v. Rawls 1971, pp.17,133,461, 473,582). This suggests that if legal positivists' requirement that rules of law be recognizable is responsible for the indeterminacy which they claim results in the falsification of ORA, then that same factor may render the indeterminate principles chosen by the parties to a social contract, so that appeal to those principles could not guarantee that every legal question will have one right answer, any more than an appeal to rules of law could do so. (Professor Richards has offered a somewhat different argument here.) And this will be so because of a feature inherent in the contract argument.

A reply to this might take the form of an attempt to distinguish this "legalistic" aspect of a contract theory, from that aspect which makes such a theory a right-based theory. In the essay "Justice and Rights", originally entitled "The Original Position", Professor Dworkin attempts to isolate the particular feature of Professor Rawls' contract argument which makes his theory of justice a right-based theory. His

effort is, to my mind, entirely unsatisfactory. The feature that he selects is that a contract provides every party with a potential veto because agreement on the contract must be unanimous (v. Dworkin 1978a, p.173). Because of the potential veto, then even if it is a fact that the principles chosen by the contractors in Rawls' original position do not have the consequence when implemented that in a society governed by the principles agreed on each individual receives equal treatment; nevertheless, the principle of equality remains intact: it is preserved in the power of veto accorded to each of the contractors; for the fact that such power is accorded constitutes in itself the extension to each contractor of the right to "treatment as an equal". According to Professor Dworkin, this is what lies at the heart of the contract argument, and this is what gives the Rawlsian theory of justice its right-based character.

As an interpretation of A Theory of Justice this is unacceptable. Rawls explicitly states that the effect of the introduction of the now celebrated "veil of ignorance" that is to bring it about that the choice of a theory of justice in the original position might just as well be regarded as being made by a single individual:

> "To begin with, it is clear that since the differences among parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the choice in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice over another, then they all do, and a unanimous agreement can be reached."
>
> (Rawls 1971, p.139)

The arguments in question are supposed to be deductive (Rawls 1971, p.121). The idea that anyone in the original position could "veto" a deductive argument is simply incoherent. This is what prompts Rawls to insist that it is a "very important consequence" of his approach that "the parties have no basis for bargaining in the usual sense" (v. Rawls, p.139). The exercise of a veto in the course of choosing a set of principles to govern social organization only makes sense as a bargaining strategy. The idea of a potential veto suggests that there might be some sanction attached to the failure of the contractors in the original position to reach a unanimous agreement; this idea is clearly linked to an assumption that the contractors are not merely engaged in a discussion of the merits of one conception of justice over another - the possibility of veto introduces the further issue of practical inducements to reach agreement on one conception of justice rather than another. The device of the original position was introduced precisely to neutralize the effects of practical inducements, so that discussion on the merits, or moral geometry could be carried on without the distortions characteristic of practical negotiation. In the context of the original position, the idea of veto has no place. (On bargaining vs. discussion of merits, v. Barry 1965, p.86f.)

Furthermore, in connection with the requirement of agreement on a contract, the idea that any individual may exercise a veto to prevent a contract from being formed is particularly associated with the Pareto principle. If the Pareto principle is taken to provide the basis for a complete normative theory of social choice, it certainly fails to answer to any ordinary notion of what is involved in the

existence of rights. The Pareto principle is a collective choice rule according to which one social situation out of a set of social options is Pareto-wise better for a society than another "if at least one person is better off (has more of his wants satisfied) in the first situation than in the second and nobody is worse off in the first than in the second" (Barry 1965, p.49f). According to Brian Barry, the satisfaction of the quoted condition suffices to make the first situation Pareto optimal compared with the second; but a more precise extension of the terminology here may be desirable. One situation is Pareto-wise indifferent to another if everybody is indifferent between them. According to Professor A.K. Sen, any situation out of a set of social options is Pareto optimal if no situation in the set is Pareto-wise better than it (v. Sen 1970, p.21). In consequence, every member of a set of Pareto-wise indifferent options is Pareto optimal; and, much more importantly, if a set of options is such that each option in the set is preferred by at least one person over every other option in the set, then all the members of the set are Pareto optimal, although none of them is Pareto-wise indifferent by comparison with any other option in the set. Thus, when a group of individuals entertains incompatible preferences among options, the options will be Pareto optimal, but the Pareto principle will require neither that the group be indifferent to any particular selection among the options, nor that any particular option be selected by the group. In short, the principle is incomplete: it doesn't locate all the options in a weak ordering, let alone a strong or linear one; it doesn't define a relation over the options which is reflexive, transitive and complete (or "connected").

But the Pareto principle can be made complete in at least two different ways. Either all Pareto optimal options may be declared indifferent (not, of course, Pareto-wise indifferent); or the status quo may be singled out for unique consideration, so that if no option is Pareto-wise better than any other, maintenance of the status quo becomes the option of choice. In the first case, considerations of distributive justice drop out of the class of determinants of social choice entirely, and the free market system will be adhered to, apart from compensatory arrangements that may be entered into if market transactions impose costs on non-parties (v. Sen 1970, p.191; cf. Buchanan and Tullock, p.91); in the second case, which may be scarcely different from the first, the principle of social choice will lay down a method of "supreme conservatism" such that "even a single person opposing a change can block it no matter what everybody else wants" with the consequence that "Marie Antoinette's opposition to the First Republic would have saved the monarchy in France" (v. Sen 1970, p.25; emphasis mine). These are the implications of the notion of potential veto which, as Professor Dworkin sees things, apparently epitomize the right of each individual to equal respect, and which lies at the heart of a right-based political theory. Professor Sen remarks that a social decision rule with consequences like this seems "grotesquely unsatisfactory".

It might be argued that while Professor Dworkin appears to hold that something like the Pareto principle lies at the heart of Professor Rawls' theory of justice, because the theory is based on a contract argument; nevertheless he may not hold that the Pareto principle constitutes the whole of the theory. After all, the present argument was introduced on the assumption that it would show how a logical wedge

might be driven in between the principle chosen by the contractors and that aspect of the contract argument which makes the theory of justice incorporating it a right-based theory. Nonetheless, one would expect that the particular feature of the theory that makes it a right-based theory would be in some measure reflected in the content of the theory. Thus, in the present instance, one might expect that if the theory is not constituted by the Pareto principle extended in either of the ways suggested in the previous paragraph, it should at least not violate the Pareto principle in those choice situations where the principle determines a choice among options where this is not the effect of doubtfully legitimate extensions of the principle. Then the first principle of a social choice theory should be Pareto-inclusive. Unfortunately, in Professor Sen's Collective Choice and Social Welfare an argument is given to the effect that if even as few as two people within a social group are each allowed to determine by their own choice which of two options shall be selected, each person being assigned a distinct pair of options to choose from then the Pareto principle will be violated (or it will not apply where it could apply, which is almost the same thing); and similarly for any principle of social choice that is Pareto inclusive. This will be so even when the choices granted to each individual are restricted to one trivial personal matter, such as whether he himself will sleep on his back or his stomach (v. Sen 1970, pp.79-88; 1974, pp.218f,233). It would seem that a social group which did not allow more than one of its members to make at least one such choice could hardly be said to respect its members' rights, for it would be at least uncertain whether they could be reasonably regarded as having any rights at all. For suppose, in accordance with Professor Dworkin's

assumptions about the supervenience of rights to liberties, that rights should be characterized essentially in terms of a distribution of benefits to individuals, and not in terms of choices open to individuals unconditional upon the preferences of society as a whole. Then it may be that some Pareto inclusive rule would entail an appropriate distribution of benefits. But if Professor Sen's argument is correct, then it would be a violation of the Pareto inclusive rule to allow individuals the choice of claiming or not claiming those benefits, even where the benefits had been denied improperly according to the Pareto inclusive rule in operation; for this primary violation of the Pareto inclusive rule could hardly justify a secondary violation of the rule: without inconsistency a supreme Pareto inclusive rule could hardly be used to justify a violation of itself. - But if individuals cannot claim what is due to them, the sense in which they have rights must be severely attenuated, even from Professor Dworkin's point of view. There is, therefore, nothing in Paretian considerations to suggest that they might figure somehow in ordinary liberal notions about rights. Inveterately oblivious, however, Professor Dworkin actually cites Professor Sen's extended defense of Sen's own argument for "the impossibility of the Paretian liberal", evidently unaware that the argument in question invalidates his own assumptions about what might characterize a right-based political theory (v. Dworkin 1978a, p.357; Sen 1974).

In the end, Professor Dworkin's identification of Professor Rawls' theory of justice as a right-based theory comes down to this: it is a right-based theory because the parties to the contract in the original position should be thought of having the "right" to prevent the theory of justice from having the content that it actually has; the

theory is right-based because any one of the contractors might have insured that some other theory (some other option) might have been the referent of the definite description, "the theory of justice". Given such an oblique characterization of what a right-based theory is, it is hardly surprising that a right-based theory should entirely fail to reflect in its content the feature in virtue of which it may appropriately be called "right-based".

Moreover, since on the present interpretation, the content of a right-based political theory is, after all, entirely undetermined by its being a right-based theory, it is utterly inappropriate to take the facts that a theory is right-based, and that it provides perhaps the best available justification for the sort of liberal constitutional democracy in which the American legal system is embedded, and on the basis of these facts alone, to argue that the content of the theory must be sufficient to provide a single resolution to every legal dispute. For if the content of the theory is undetermined by its being right-based, this consequence cannot be guaranteed.

I conclude that Professor Dworkin's interpretative approach to A Theory of Justice is entirely gratuitous, and that it also fails to provide support for Professor Dworkin's speculations about the results of adjudication. The fact remains, however, that Professor Rawls' theory is the only one which Professor Dworkin has called "right-based", and this provides the only available clue as to the sort of political theory a judge might appeal to in deciding hard cases. It has already been shown that the principles of such a theory - since they must be recognizable and learnable, rather like rules of law - must, rather like

rules of law, be inadequate to guarantee the truth of ORA. The question more recently under consideration has been whether it is possible to step behind those principles, to discover whether the right-based aspect of the theory of justice might be such as to provide the required guarantee. Professor Dworkin's attempt to delineate that aspect has been dismissed as gratuitous and inadequate. Could the task be accomplished by starting from a different angle?

The only starting place that I can think of lies, indeed, "behind" the principles chosen by the contractors in the original position; it is to be discovered in strategy of reasoning employed by the contractors, that is, in the famous "maximin" strategy. The maximin strategy gives rise to a complete social choice rule. Furthermore, it is incompatible with the Pareto principle. Additionally, in one very simple sense, whenever the maximin strategy determines a social choice, the right of some individual can be regarded as justifying the choice. As well, a maximin rule could be employed by an ideal judge in a way compatible with the description of the activity of an ideal judge outlined in Part Two of this essay. And, finally, the hypothesis of its employment in this way would permit a realistic interpretation of legal propositions as they are used in the actual world. In the next section of this essay, I shall assume that maximin determines the content of an ideal right-based politico-legal theory; I shall show that maximin allows for the falsity of ORA and indeed makes it overwhelmingly probable; I shall conclude that ORA is false on the best possible detailed interpretation of Professor Dworkin's assumptions.

12. A Fragment of a Right-based Political Theory which makes ORA Overwhelmingly Improbable

In this section I shall describe a rule of social choice determined by the maximin strategy. Towards the end I shall suggest that the ordering of social states effected by the maximin rule can be regarded as an ordering of possible worlds and that this ordering may be taken to provide an appropriate partial specification of a semantic framework for the logics of conditional obligation investigated by Bengt Hansson, Bas van Fraassen, David Lewis, and Wolfgang Spohn (v. Hansson 1969; van Fraassen 1972,1973; Lewis 1973, pp.96-104; Spohn 1975). I shall claim that the semantic framework for these logics is also an appropriate semantic framework for propositions asserting legal obligation. But I shall mention only a very few features of the logics, for most of their details are not important in the present context because they are not really problematic. The facts that are important are (a) that the maximin strategy, which is supposed to underlie the reasoning of the parties to Professor Rawls contract may be regarded as defining an ordering of social states in the precise sense of the theory of social choice, and (b) that such an ordering may inject a special content into the semantic framework for a seminal class of legal propositions. This is important if only because results in the formal theory of social choice can illuminate some of the limits on the application of the notion of consistency in the justification of practical judgements within social groups. - I use the word "limits" advisedly, because it is in this connection that a problem arises; and before describing maximin in detail I should like to take a little time to construct a dilemma about the application of social choice theory to

problems in legal philosophy.

The reader will recall that Professor Dworkin makes the explicit demand that judicial decisions manifest "articulate consistency", and implicitly demands that the principles of justification underlying the decisions must be so ordered that intuitionistic "balancing" need not figure in the derivation of specific decisions (v. Dworkin 1978a, p.87f). In Section 5, Part One of this essay, it was conjectured that the implicit demand had its roots in a fear that inconsistency might arise if no unique method of balancing the principles were specified. If this conjecture is correct, then clearly a precise standard of consistency is presupposed in Professor Dworkin's arguments. In Section 8.2, Part Two of this essay, however, the idea is implicit that the interraction between temporal parameters and the theory of judicial mistakes might properly be said to entail a very loose notion of inconsistency, insofar as this interraction allows later decisions to be justified even when they conflict with earlier decisions. The effect of this, obviously, is that the precise notion of consistency implied by the rejection of intuitionism can in no way be "read off" from what is included in the law reports or in other institutional legal materials; and, of course, this means that examination of the precise notion cannot begin until all the legal "data" have been subjected to a good deal of "interpretation", with the result that the precise notion of consistency may seem like something of an artifact of legal theory. But the point I want to make is a point of emphasis, and it can only be partially made in terms of the observation that there is a certain lower limit of regimentation that must be imposed upon legal materials before

a precise notion of consistency can be applied to them - even though this observation cannot be gainsaid. The fact that bears noticing, however, is that even if legal materials can be brought up to this lower limit of regimentation, then whether the legal theory involved in this process is distorted or not, the precise notion of consistency made available by the process will itself be the subject of severe limitations. And this is because the precision of its results does not prevent the theory of social choice from giving rise to serious difficulties of understanding.

From the point of view of the social choice theorist or welfare economist, the maximin strategy and the collective choice rule derived from it cannot be considered as "basic", in any sense at all. The welfare economist typically begins by laying down a number of plausible conditions constraining the ways in which preferences of individuals for different social states may determine according to a collective choice rule a ranking of social states attributable to the society of which the individuals are members. The basic elements of social choice theory are these conditions. Examples of the conditions might be: that a collective choice rule not generate cyclical social preferences; that it satisfy the Pareto principle; that if out of a set of social states, the rule were to rank one state higher than every other, then it should also rank that state higher than each of the other states taken severally; that in determining the relative ranking of two social states, the rule should take no account of individual preferences over any social states but the two being ranked; that the preferences of no single individual be allowed to determine all social preferences, etc. (v. Sen, 1977a). Given a host of conditions like

these, the welfare economist formulates a collective choice rule and sees how it combines with various combinations of conditions. Since satisfaction of the conditions constitutes what is, intuitively, a rational desideratum of any rule of social choice, the virtue of the formalization employed by welfare economists is that it permits a plain view of the possible inconsistencies derivable from a given rule coupled with a particular set of conditions. An inconsistency poses the choice of modifying either the rule or the set of conditions. If collective choice rules were taken as given, then there would be nothing for welfare economists to investigate.

I think that the implications of this are not always understood. Professor Dworkin, in the course of explaining that representative democracy is "an imperfect machine for pursuing the general welfare", rather oddly classes welfare economists with "utilitarian party theoreticians", and suggests that their efforts are directed toward the production of an "independent non-institutional definition of the general welfare" (v. Dworkin 1978a, p.324). But it is implausible to attribute any such monolithic aim to the activity of welfare economists. In the first place, not all collective choice rules can be regarded as plausible candidates for a single functional role. For consider: the method of majority decision takes individual judgements about pairs of social states as determining a collective decision in favour of one or the other members of the pair; while a positional rule such as the "Borda rule", takes individual rankings over sets of social states, and by assigning weights to the positions in each individual ranking, determines a social ranking which reflects intensity of indi-

vidual preferences for one social state over another. Since a positional rule requires more information than the method of majority decision, the opportunity for its employment may be more limited. It would hardly be rational, however, to suggest that either the method of majority decision, or else, alternatively, a positional rule should be used exclusively - no matter what purpose is meant to be served by the determination of social preference in a given case. In formulating public policy, for instance, and in deciding among policies already formulated, some method of determining social preference may be desirable; but there is no reason to suppose that the same method must be used, or that it is reasonable to impose the same informational constraints for both purposes. And, of course, examples like this could be multiplied.

This line of thought leads to a related one, and that is that the conditions on collective choice rules investigated by welfare economists are not all of a piece. A condition which rules out the dictatorship of some individual over a set of options is hardly "similar" to a condition which demands that indifference in social preference be a transitive relation. For a particular class of problems the condition against dictatorship may be appropriately waived - for example in the class of problems where the social states are defined in terms of whether an individual sleeps on his back or his belly, everything else remaining equal, and the "dictator" is the individual himself (v. Sen 1977b, p.1545); for a different class of problems the requirement of transitivity of indifference may be waived - as in problems of decision where the method of majority rule is employed simply to make some choice or other out of

a set of options, and the requirements of consistency is weaker than that involved in the derivation of judgements about optimizing social welfare (v. Sen 1977a, p.55). This is not because "policy considerations" are somehow more appropriately taken account of in a democratic vote, as Professor Dworkin continues to suggest (v. Dworkin 1978a, pp. 81,356f); but rather because the pressure for some practical decision - it may not matter which - need not be interpreted in terms of a binary concept of "being at least as good as" which orders all social options (v. Sen 1977a, p.55). Because the problem of practical decision does not give rise to an intuitive need for such interpretation, the condition of the transitivity of indifference has no obvious application. The non-comparability of conditions on social choice rules is extremely important: one might ask oneself, for instance, how maximin is to be compared with the method of majority decision, if maximin provides a complete ordering of social options while the method of majority decision does not (v. Sen 1977a, p.77f); and how an answer to this question might be related to the notion of "democracy", which, on the hypothesis currently being examined, seems to be supposed to weigh in favour of judges making their decisions on the basis of the application of the maximin rule, and never on the basis of the expression of public preference for one sort of social option over another. - But consideration of these issues must be pushed into the background, as yet another set of complexities entailed by a reliance on social choice theory comes naturally to the fore.

Suppose that, despite the opacity and incommensurability of conditions on collective choice rules, a legal philosopher insists

on choosing some such rule for the sake of providing legal decision-making with a single, precisely defined, exhaustive theoretical foundation. Among welfare economists, Professor Sen has admitted that this might involve a dangerous distortion. The effect of the "welfarism" of social choice theory is that it severely restricts the information about social states that can be used in ranking them or choosing among them. In determining a ranking of social options, the maximin rule, for instance, renders inadmissible any information about the amounts of individuals' gains or losses in welfare; similarly, in any given choice situation, both the maximin rule and the utilitarian rule render inadmissable any information relating to the pattern of past choices; both of them are blind to any discriminations between classes of choices where as collective choice rules they apply, and classes of choices over which individuals are allowed to be decisive, so that they are both incompatible with any degree of liberalism; and finally, even maximin, though it may respect egality in terms of individual welfare, may be incompatible with the ordinary conception of equal treatment before the law, since information about institutional procedures is not admissible in arriving at social preference (v. Sen 1977b, p.1559ff).

What is the upshot of these considerations? The upshot is that although social choice theory can provide regimented formulations of rules of social choice according to which precise notions of consistency can be defined, the practical significance of these formulations is extremely difficult to estimate, so that the notions of consistency appropriate to these formulations are, in a practical sense, opaque. And now the dilemma is this. If a precise notion of consistency

for legal decisions is introduced via social choice theory, the import of the notion will be hedged around with all the difficulties that attend the interpretation of results in the theory of social choice. Thus, even if every logically possible answer to a legal question is classifiable as right or wrong in accordance with the application of a collective choice rule, it will remain entirely doubtful whether such a classification can be responsive to any practical requirement that a society might impose on its legal system. On the other hand, if no precise notion of consistency for legal propositions can be introduced, then the sense in which one answer to a legal question can be said to be "right" while another is "wrong", is left undetermined; and this leaves ORA itself without content. This second horn of the dilemma I take to be somewhat sharper than the first, despite the fact that it might occasion an objection. The objection would be that to demand that a precise notion of consistency be defined is to demand a <u>specification</u> of an ideal theory of law; and that this is contrary to the spirit of the "realist step" described in Section 7, Part 2 of this essay, and vindicated in Section 8.2. But this objection has no force, for reasons indicated throughout Section 8. "Realism" will be satisfied even if the truth conditions for legal propositions can never be recognized as holding; but the claim on behalf of realism and ORA cannot be maintained, unless some truth conditions are given, that is, unless it is possible to know what the conditions are that may never be recognized as holding. I take it, then, that Professor Dworkin is forced to embrace the first horn of the dilemma. In specific terms, this would appear to mean that for legal propositions that provide answers to legal questions raised in hard cases, truth-conditions must be given in terms of the

maximin rule. The force of the first horn of the dilemma is to make entirely puzzling the question why this should be so. Yet if it is not so, there would seem to be no way left to understand Professor Dworkin's position. And so I think that even a far-fetched interpretation of Professor Dworkin's views in terms of the maximin rule is better than no interpretation at all. At least it is substantial enough to be disputed.

The maximin rule is an extension of the maximin strategy employed by the contractors in the original position described in Professor Rawls' theory of justice. The maximin strategy is a strategy for rational choice by individuals in a condition of uncertainty, and it directs them to select that option of the options available to them in which the minimum of expected utility is maximized. As a result of being guided by this strategy, the contractors in the original position choose principles of social organization which maximize the minimum expected utility for the worst-off members of their society. The contractors do this because in the original position they do not know who they are - do not know what position in society they occupy; and desirous of maximizing their own minimum expected utility, they choose principles favouring the worst-off, on the assumption that they themselves may turn out to be the worst-off. In A Theory of Justice the contractors choose Rawls' two famous principles of justice; in David Richard's A Theory of Reasons for Actions, the contractors choose not only those principles, but also eleven other principles governing the efficiency of institutions, obedience to institutional norms including promise-keeping and truth-telling, the obligations of non-maleficence, mutual aid, non-interference,

paternalism, politeness, respect, mutual love, beneficence, and moral development. Not even in Professor Richards' work, however, is the maximin strategy allowed to determine social choice "act by act", as welfarism requires (v. Sen 1977b, 1560). This leaves open the possibility mentioned in the previous section, that the principles decided upon "by the contractors", that is, in accordance with the maximin strategy, should be inadequate to determine a choice in every conceivable choice situation.

Yet it is important to note that the maximin rule can be used as a critical tool in the discussion of legal questions, even when its domain is restricted and it is used to generate principles of general application rather than specific resolutions. David Richards has used the contractarian framework to argue the justice of specific positions regarding equal opportunity in education, pornography, the right to commit "unnatural acts" in private, and the right not to be discriminated against on the basis of sex (v. Richards 1973,1974,1977d, 1977c,pp.162-178). In each case he has appealed, not to the system of the thirteen lexicographically ordered principles derived in A Theory of Reasons for Action, but more directly to the considerations available to a contractor employing the maximin strategy in the original position. The significance the maximin strategy has for Professor Richards can be gauged from his assertion that "if, as critics have argued, the maximin strategy does not follow from Rawls' set of assumptions about the original position, then these assumptions should be reinterpreted so that it would follow" (Richards 1977a, p.1325). Nevertheless, it seems clear that he would not subscribe to the idea that the maximin strategy

could determine a resolution for every legal dispute. For Professor Richards, maximin and its attendant considerations come into play when legal disputes raise clear moral questions over which there may be disagreement; in particular, the contractarian theory provides a way of articulating moral criticisms of legal judgements, irrespective of whether the legal propositions in which those judgements are expressed are true or not; the contractarian theory does not provide truth-conditions for legal propositions (v. Richards 1977c, p.34f). It seems unlikely that Professor Richards would be disappointed if maximin failed to determine a decisive principle in accordance with which, say, a uniquely admissible resolution would have been determined for the case of Spartan Steel and Alloys Ltd. v. Martin and Co. (Contractors) Ltd., which Professor Dworkin considers to be a hard case (v. Dworkin 1978a, p.83). That case raised the question of whether the precise extent of liability for damages should include damages for purely economic loss, such as loss due to interruption of industrial production due to the negligence of a defendant's employees, held responsible for temporarily cutting off the supply of electricity to the plaintiff. It simply does not seem plausible to approach this question by way of the moral criticisms that might be made of the possible positions: the question does not primarily suggest moral issues. Perhaps Professor Dworkin would agree; perhaps he would say that Spartan Steel need not be resolved in terms of maximin. But any generalization of this speculation would have Professor Dworkin allowing some hard cases to be resolved according to this rule, others according to that; yet unless there were a supreme rule governing the application of subordinate rules to particular sets

of hard cases, the result would be intuitionism; and unless at least one rule were specified as an unrestrictedly applicable rule of last resort, there might be cases without resolutions, in violation of ORA. The present hypothesis is just that the maximin strategy can be converted into such a rule, to be applied in hard cases, when all else fails. Such a maximin rule would have to be regarded as constituting a distinct institutional mechanism. (Professor Sen, however, suggests that collective choice rules like the maximin rule function more naturally as tools of social criticism than as actual institutional mechanisms, thus implicitly siding with Professor Richards against Professor Dworkin (v. Sen 1970, p.190f).)

The maximin rule which extends the maximin strategy is given in terms of a preference relation defined over social states. This preference relation determined by orderings of social <u>welfare levels</u>, different orderings being attributable to the individuals who comprise the social group for which the preference relation is defined. An individual orders the set of possible social states not merely from his own point of view, but also on the hypothesis of interpersonal permutations of preferences. Thus, for a single individual, if there are m possible social states and n members in his society, then his ordering will be defined over mn elements, the Cartesian product of the set of social states and the set of individuals: he will compare the welfare levels of every member of his society in each possible social state. The ordering of the individual will define a binary relation R which is transitive, reflexive and complete (connected); which can be read as "is at least as good as"; and whose terms are

ordered pairs consisting of a social state and a person. If x and y are social states, and i and j are persons, then "<x,i> R <y,j>" can be read as, "To be person i in state x is at least as good as to be person j in state y". This would be to say that the welfare level of person i in state x is at least as high as that of person j in state y. Then a relation M of "maximin justice" can be defined in terms of R. If x and y are social states, and i and k are variables ranging over persons then: xMy iff $(\exists k)((i)\langle x,i\rangle\ R\ \langle y,k\rangle)$. That is, x is at least as just as y iff to be anyone at all in state x is no worse than to be some particular person in state y. If there is not a single person in state y such that everybody in state x is at least as well off as him, then state x is not at least as just as state y. x is more just than y iff xMy and $\sim$yMx. x is the most just social option iff x is the option in which the worst off member is at least as well off as anyone who would have been worst off if any other option were chosen.

But the relation M has so far been defined in terms of the point of view of a single individual, since only one individuals' ordering of the Cartesian product of the set of social states and the set of individuals has been taken account of. This M, therefore, fails to represent a relation of social preference, though it does reflect the commitment of an individual to assess social states according to the maximin strategy, on the assumption that such assessments should be carried out as if he did not know which position he himself occupied, or as if he felt that the position of those whom he regards as worst off must determine his own ranking of social states.

The problem now is to turn M into a relation of social preference. There are two ways of doing this, one "stronger" than the other. The weaker way requires that for each individual i, his ranking R_i of welfare levels must respect the rankings of every other individual with regard to that individual's own preferences. Thus, if individual j prefers x to y for himself, then individual i's ranking R_i must not make true the proposition $\sim(\langle x,j\rangle\ R_i\ \langle y,j\rangle)$. This requirement is expressed in the axiom of identity: where X is the set of social states and I the set of persons.

$$(x)(y)(i)(j)(x\varepsilon X\ \&\ y\varepsilon X\ \&\ i\varepsilon I\ \&\ j\varepsilon I\ .\supset:\ \langle x,i\rangle\ R_i\ \langle y,i\rangle$$

$$\equiv\ \langle x,i\rangle\ R_j\ \langle y,i\rangle)$$

According to Professor Sen, this axiom "can be justified on ethical grounds as an important part of the exercise of extended sympathy" (Sen 1970, p.156). A much stronger requirement is expressed in the axiom of complete identity which makes the ordering R_i of each individual i identical with the ordering R_j of each individual j. The axiom is stated

$$(i)(j)(i\varepsilon I\ \&\ j\varepsilon I\ .\supset .\ R_i = R_j)$$

The axiom means that not only must each individuals personal preferences for one social state over another be reflected in every individuals' ordering, but also that there must be agreement between all individuals

as to who is worst off in any given social state, who is second worst off, who is ..., etc. The axiom of complete identity can be seen as a reflection of Professor Rawls' idea, discussed in Section 10, about the superfluousness of any supposition that there must be more than one contractor in the original position; the axiom gives expression to his assumption of unanimity without bargaining. If the axiom of complete identity can be accepted, then the ranking of a single individual will suffice to define a social preference relation of maximin justice in the way described above.

Can the axiom of complete identity be accepted? In Professor Sen's discussion of the maximin rule in Collective Choice and Social Welfare, the axiom is simply assumed (v. Sen 1970, p.157); and in his other discussions of the rule seen to begin with the assumption of cardinal personal welfare functions with full interpersonal comparability, so that a ready-made scale is determined, eliminating the need to identify the welfare levels of persons in terms of the possible social states over which a social preference relation is defined, and eliminating as well the need for each individual to rank social states from any point of view other than his own, since interpersonal comparability is now achieved without reference to interpersonal comparisons made by the individuals themselves (v. Sen 1973, p.268; 1977b, p.1546). Professor Sen's reason for introducing these more powerful assumptions is his desire to explore the conflicts between maximin and utilitarianism; but the assumptions are extraneous to the intuitive interpretation of the maximin rule suggested by the idea of contractors setting up a social organization in ignorance of the positions they will occupy in the society that they agree upon, and extraneous, too, to the effective-

ness of maximin. And it is in connection with the intuitive interpretation that the question arises concerning a choice between the axiom of identity and the axiom of complete identity. A choice between these axioms is not without consequences for ORA. Moreover, the problem of providing a satisfactory intuitive interpretation of the maximin rule highlights the extraordinary difficulty of relying on social choice theory to define a precise notion of consistency for legal propositions.

An intuitive interpretation of the maximin rule can be found in Thomas Nagel's The Possibility of Altruism, and is due apparently to Professor Nagel and Professor Nozick jointly (v. Nagel, p.141f). The main idea is that each individual in a society can imagine himself as expecting to lead the lives of all of the individuals in his society, "not as a single super-life but as a set of distinct individual lives, each of them a complete set of experiences and activities". Just how much can be made of this idea I don't know, but at least it provides some imaginative content to the sort of ordering that each individual is supposed to construct so that the relation of maximin justice can be defined. The rationale for imagining the lives as led separately and not as part of a super-life, lies in the desire to impress upon the individual that each life is unique, that each individual life must be conceived as lived without the individual's "deriving any compensatory or supplementary experiences, good or bad, by seepage from other unique lives" (v. Nagel, p.141). This is the justification for rejecting utilitarianism and for regarding the situation of the potentially worst off in any choice as most urgently requiring direct and specific attention. In each choice situation the maximin relation singles out

an identifiable class of individuals - the potentially worst off - and makes the minimization of their plight mandatory, just because whoever is worst off in a certain situation is not going to be compensated by the comparative benefits enjoyed by other people in the same situation. (Since all possible options are ranked, the effects of all possible compensatory schemes are taken into account in the ranking, and in a given choice situation the option ranked as "most just" cannot - logically cannot - be bettered by devising modifications to accomodate further compensation schemes to benefit the worst off.) In any given choice situation, the individuals who will benefit, if maximin determines social choice, will be recognizable on the basis of inspection of the ranking over which maximin is defined as those individuals whose levels of welfare fall below the minimin level acceptable, according to maximum; in each choice situation, therefore, maximin will determine these individuals as right-holders, that is, as persons whose preference for one state over another must be respected if the maximin rule is to be honoured. In this way, it is true that a normative politico-legal "theory" determined by maximin is indeed a right-based theory. This is because each decision justified by the theory can be regarded as having been justified in terms of the rights of specifiable persons not to have their level of welfare set lower than the highest possible lowest, for the sake of benefits that they themselves are entirely incapable of sharing. Thus the idea of the separateness of individual lives can be seen to underlie a notion of special rights that can be assigned to specific individuals - rights which cannot be defined in terms of the aggregate benefits that a society as a whole may have in

hand. From the time of Bentham, it has been recognized that even if rights are defined in terms of benefits, benefits aggregated over whole societies must fail to give rise to rights precisely because aggregate benefits are not regarded as directly benefitting assignable (identifiable) individuals (v. Hart 1973, pp.184-188). In this respect, the maximin rule answers to an intuitive notion of what it is for a person to have a right.

This pleasant result, however, is not matched by any intuitive appeal exhibited by the axiom of complete identity, in the light of interpretation proposed by Professors Nagel and Nozick. Under that interpretation the axiom of complete identity requires each individual in a society, imagining himself as expecting to lead severally the lives of all of his contemporaries, to rank the experiences and activities whose occasion are the opportunities afforded by every possible social state; and each individual is required to do this in precisely the same way as every other member of the society does it when he imagines himself expecting to lead those same separate lives.(!) Perhaps this is not unintelligible; but it is surely in the highest degree implausible.

It may be possible to extract some vague idea of what is involved in this conception from a somewhat inadequate literary analogy:

Virginia Woolf's novel The Waves is virtually nothing but a sequence of interior monologues engaged in by six characters at various moments over the course of their lives. They are one another's contemporaries, and acquaintances from childhood. Three are men, three women. The society in which they live is the same for all of them, as of course, are the social states that are actualized in their society. If each of them had to imagine himself expecting to lead severally his life

and the lives of all five others in each of the social states possible for each of them, then each of them would have at least to imagine expecting to lead those lives in all of the social states actual for them. A very rough approximation of what each of them would have to expect in the actual social states can perhaps be conveyed in a metaphysical conceit which has each of the characters in the novel reading the novel, and in this way coming to appreciate the points of view adopted by each of the others vis à vis the broad social states in which they find themselves. (This metaphysical conceit was suggested to me by the narrative structure of Muriel Spark's The Comforters.) The weaker axiom of identity would require merely that in reading the novel, none of the characters might ignore or discount the preferences expressed by any of the other characters; this requirement seems to me "fair", and gives expression to a sentiment of mutual respect - indeed, a respect for the inviolable separateness of each character's life. The stronger axiom of identity requires that the characters unanimously agree about exactly what levels of well-being should be ascribed to each of them in each state; this requirement strikes me as naively, pathetically absurd - and indeed as a violation of the separateness of lives which maximin is supposed to insure. Are the characters to be imagined as getting together to discuss each other's welfare? "Certainly not" - one half-expects to be told, "the ranking of welfare levels should be thought of as a theoretical reconstruction of reasoning that the characters might carry out, if they were so inclined." And the assumption is then that each in isolation should arrive at the same ranking. But surely this is false to any imaginitive reality. Even in

connection with the ordinary reader, with you or me, whose lives are only fictively touched by the "social states" depicted in the novel, and whose capacity for "impersonal judgement" must be thought of as comparatively infinitely greater in this case than that which might imaginatively be attributed to the characters of the novel - even in connection with us, it is ridiculous to assume that we, in our own isolation booths, should arrive at identical assessments of the welfare of each character of the novel. In the great central scene of the novel itself, all the characters, reunited after long separation, exhibiting for the first time the fixedness and strength of adulthood, meet at a farewell dinner party in London. During the early part of the dinner, Mrs. Woolf shows them somewhat ill-at-ease, conscious of their differences, and thrown back upon themselves. At this point, each of them actually undertakes to make some assessment of the levels of well-being that each has achieved, and the poignant fact, of course, is that the assessments all conflict. And this is what the separateness of their lives consists in at the dinner party. It is not impossible to imagine each of the characters reading the novel, reading the brilliant description of the dinner party, and finding out that each of them has a different assessment of their comparative levels of well-being. It is not impossible to imagine them learning a great deal about each other in this way, and coming better to understand the difficulties that each of them faces. But nothing in any of this suggests that their differences might be eliminated in this imaginary process, and that in finding out that their mutual assessments are incompatible - they should come to see how every incompatibility might be eradicated. If someone were to suggest that some elements in their incompatible assessments might some-

how be mistaken, he would not necessarily be wrong; but if he were to suggest that there was nevertheless some assessment which they all would be right to adopt, then I think that that person would be guilty of the same sort of misconception which fetters the characters themselves - the misconception which makes each character assume that there is something non-subjective - a non-subjective "assessment" - which fixes the "position" of each character just as a pin fixes the positions of various specimen beetles in a glass display case.

How could anyone suppose that the axiom of strong identity is acceptable? I believe that the supposition can be traced to a mistake about counterfactuals and in particular about those counterfactuals sometimes called counter-identicals (v. Pollock, pp.6f,97-103). Both the weaker and stronger axioms of identity are supposed to be justified by the ethical requirement of "extended sympathy" which demands that when a person makes a judgement, then if the judgement is to carry moral weight, it must be made not only with regard to the point of view of the person making the judgement, but also with regard to the point of view of anyone liable to be affected by the judgement. This is the source of the need to imagine expecting to lead the life of <u>someone else</u>. A natural way of thinking about this is in terms of subjunctive conditionals of the, "If I were him" - type. But the requirement of extended sympathy is of course imposed on everyone equally, so that when I make my "If I were him" - judgements, I am free to suppose that "he" makes judgements which I might call "If he were me" judgements. But it may seem that if I suppose that I were him, and he supposes that he were me, then the consequence of our joint

suppositions is that the differences between us must collapse, so that the effect of our exercises in extended sympathy should be unanimity, and the axiom of complete identity should be satisfied.

This reasoning is fallacious, as is apparent from the fact that the sentence, "If I were him, then he would be me", has a reading which does not make it a tautology. In fact, as John Pollock has shown, the subjunctive antecedents suggested by the requirement of extended sympathy - the "If I were him" - type antecedents - do not have identity statements contained within them. If such antecedents characteristically expressed counter-identical conditions, they could be expanded into antecedents expressing such conditions as, "If he and I were the same person, who had been fooling you by maintaining two residences, wearing make-up, etc..." Subjunctive conditionals with such antecedents as this would indeed be counter-identicals, with identity-statements in the protasis; but these are not the subjunctive conditionals of extended sympathy. The subjunctive conditionals of extended sympathy are what Professor Pollock calls "preferred-subject" conditionals and they do not contain identity-statements in their antecedents. Rather their antecedents are to be understood as expandable into antecedents expressing such conditions as "If I possessed some of the properties that he does"; and the interpretation of these antecedents requires that "I" be taken as the preferred subject, and that some actual simple truths about me be held fixed in the counterfactual situation in which the consequent of any such conditional is supposed to hold. Thus "I" does not collapse into him in the conditionals of extended sympathy; and the transitivity of identity is barred from providing justification for the axiom of

complete identity. Since Professor Sen never explains why he thinks it appropriate to adopt that axiom, it may be wrong to impute to him the rather serious and clumsy error about subjunctive conditionals just described. But since I can think of no other reason for adopting the axiom, I shall assume that the axiom is unjustifiable. It will be urged that this assumption renders any legal theory based on maximin inadequate to preserve ORA.

First, however, I want to try to say how the axiom violates the postulated separateness of individual lives; I want to do this in order to illuminate some of the political implications of maximin as a rule of social choice. Now the transformation of maximin from an individual strategy into a rule of social choice depends for its plausibility on the ethical requirement of extended sympathy; the requirement of extended sympathy finds a natural expression in subjunctives of the "If I were him" - type; and the interpretation of the antecedents of such subjunctives requires that one subject be specified as the preferred subject, and that certain actual simple truths be held fixed in the counterfactual situation in which the consequent of such a subjunctive conditional is supposed to hold. Since it may not be plain, I should say that the conditionals relevant to the maximum ordering are of the form, "If I were him in state x, I'd be at least as well off as I am (now) in state y", "If I were her in state u, I'd be better off than if I were him in state v", etc. Now the question about these conditionals is on what basis I make the judgements they express about how things would be for <u>me</u> in certain social states, when I am forced by the requirement of extended sympathy to imagine

myself as having in those social states not my own preferences but the preferences of those whose welfare level I am trying to compare to mine! And this is just the question of what actual simple truths about me are held fixed so that, given the counterfactual situations described in the antecedents of the conditionals, the conditionals come out true. The reader might be tempted for a moment, as I was, to want to advert to the consequents of the conditionals and their coming out true in the counterfactual situations; but these conditionals are "counter comparatives" and, as such, counterfactuals de re, with a more complex structure than simple counterfactuals, so that, for example, the first conditional quoted above would have to be reconstrued somewhat as follows "There is some welfare level n which I now enjoy in state y, and if I were him in state x I'd be at least as well off as I am (now), enjoying welfare level n" (v. Lewis 1973, p.36f). Presumably I begin to construct the maximin ordering by ordering my own preferences, so that the de re component of the conditionals may be satisfied when I interpolate the preferences of others into my ordering, whose ordering is given by them, in accordance with the subjunctive conditionals of the type just described. But the question remains: what simple truths about me are held fixed so that the conditionals can be judged true? Now I suggest that the only possible answer to this question identifies the relevant truths to be truths about my second-order or even higher-order preferences. I have the preferences I have; when I imagine myself to be "him", I am forced to imagine myself as having "his" preferences; and so when my preferences are distinct from his, which is the crucial case on the assumption of "separateness", I cannot rank his level of welfare as

better than mine just because unsatisfied preferences would be satisfied if I were him-having-my-preferences, and I cannot rank his level of welfare as worse than mine just because my satisfied preferences would be unsatisfied if I were him-having-my-preferences, etc.; and so it is uncertain how I can rank his level of welfare at all, unless I have preferences for having certain preferences, or preferences for having certain patterns of preferences, or preferences for having certain preference-strengths, or preferences for having certain patterns of preference-satisfaction, etc. Since there undoubtedly are such things as higher-order preferences, the present suggestion is not empty. And it explains how a maximin ordering can be intuitively interpreted. But at the same time it shows how the axiom of complete identity violates the separateness of persons: for it shows that the axiom requires the assumption that everybody wants to have the same kinds of wants. And this simply is not so. And it would be tendentious in the extreme simply to reply here, without the most extended argument, that if it is not so, it ought to be so.

Moreover, the assumption would be mind-boggling. Suppose that the weaker axiom of identity is adopted, which requires that each maximin ordering respect the ordering of preferences expressed on his own behalf by each individual. If there are three people and two social states, then no less than ninety maximin orderings can be constructed without violating the preference orderings over the two states of any of the three people, assuming no indifferences. More generally, for n social states and m individuals the number of maximin orderings that can be constructed in conformity with the weaker axiom of identity is $\frac{(nm)!}{n^m}$. As the number of individuals and possible social states grows,

this number becomes very large indeed. In the case of the three individuals and the two social states, if for each of the individuals the construction of any one of the ninety possible maximum orderings were equiprobable, the chance of the individuals agreeing on a single specific ordering would be 1 in 729,000, yielding a probability of .0000013 - and this for a case so unrealistically simple as to be of no practical interest.

It is thus a virtual certainty that the axiom of complete identity is neither satisfiable, nor justifiable.

But if this is so then it is possible to argue that the maximin rule of social choice ceases to be a complete ordering. And if it is not complete, then it cannot guarantee the truth of ORA. Indeed, the improbability of maximin's being complete is exactly equal to the improbability of the satisfaction of the axiom of complete identity. Since this is overwhelmingly improbable; then if it is founded upon maximin, ORA, too, is overwhelmingly improbable.

If the axiom of complete identity is not satisfied, then it will be arbitrary and illegitimate to determine social preference on the basis of a unique maximin ordering. But maximin can still be used, on the basis of what Professor Sen has called "partial comparability". Professor Sen introduced the notion of partial comparability in order to cope with the difficulty created for utilitarianism by the multiplicity of scales of cardinal utility. Utilitarianism determines social choices according to particular measurements of cardinal utility. But given a multiplicity of scales of cardinal utility, measurement of a particular set of alternatives according to one scale may determine a

social choice different from one determined by measuring the same set of alternatives according to another scale (v. Sen, chs. 7, 7*; especially pp.99-102). Professor Sen has argued that this does not invalidate the use of cardinal scales, and that where more than one method of cardinalization is in use, choices may be regarded as generated by the utilitarian rule when all the methods of cardinalization in use determine the same choice. For choice situations where the methods of cardinalization determine different choices, however, the utilitarian rule is defined as incomplete, yielding no choice at all in those situations.

The application of the notion of partial comparability to the maximin rule under the weaker axiom of identity is obvious. In the simple case of the three persons and the two social states, although there are ninety possible maximin orderings, only three will be relevant, and there may well be agreement as to which of the options should be chosen even if obvious differences can be read off the orderings from which the agreement is derived. In fact, the mathematical probability that a choice would be determined by maximin under the weak axiom must be much higher than the probability that maximin is complete. In the simple situation under consideration it is approximately 200,000 times more probable that agreement will be reached than that maximin is complete; every ordering determines a choice of one or other option, and each of three arbitrarily chosen lists will make it .5 probable that one particular option will be chosen; the probability of their agreeing on one particular option will be .125; and the probability of agreement on either option will be .25. - I must admit that I find this result amusing, for it at least insinuates that Professor Dworkin may be quite properly regarded as having appealed to the overwhelmingly improbable

incompleteness of a normative rule in order to explain exactly what an incomplete rule explains far more plausibly - and that is the probability that legal decisions will be reached, if only a "theoretical" rule is used to reach them. It might be objected that whereas the incomplete rule may make this probably true, the complete rule entails necessarily that it is true, so that the complete rule may have some explanatory power that the incomplete rule does not have. Alas for Professor Dworkin, even this is wrong. For even the complete maximin, under the axiom of complete identity, allows for options to be socially indifferent to each other. Professor Sen gives the example of a two person society faced with two options, in which the potentially worse off person is equally badly off in both options, even though the better off person is much better off in one of the possible social states than in the other (v. Sen 1970, p.138). This violates the Pareto principle, and so Professor Sen proposes a lexicographic modification of the maximin rule called leximin, which preserves the "essence of the maximin rule" for a community of n individuals by requiring society to:

(1) Maximize the welfare of the worst-off individual.

(2) For equal welfare of the worst-off-individuals, maximize the welfare of the second worst-off individual.

.
.
.

(n) For equal welfare of the worst-off individuals, second-worst off individual, ... (n-1) the worst-off individuals, maximize the welfare of the best-off individual.

But leximin satisfies the Pareto principle, and if everyone is indifferent between two options, then society should also be indifferent,

according to leximin. Now, this situation may be irrelevant to legal concerns, because there would be no legal disputes of any kind if not even the supposed disputants failed to be indifferent between the possible outcomes of the dispute. But leximin will also make society indifferent in the case where each of the two potential outcomes of a legal dispute leaves one of the parties to the dispute just as badly off as the other would have been had the other option been chosen; and everybody else in the society is indifferent between the outcomes. Under the axiom of complete identity, leximin determines a complete ordering, but not a strict ordering (v. Sen 1970, p.9). The reasons for this are much easier to grasp than the reasons for the likelihood of incompleteness; but the framework of partial comparability can be used to eliminate indifference, by proliferating maximin (or leximin) orderings so that every case of indifference between a pair of options gives rise to a pair of orderings in which the options are arbitrarily permuted, so that each ordering is a strict one. This has the advantage that if the orderings are used to provide a semantic framework for propositions asserting legal obligations, then the law of the excluded middle will apply to those propositions, although bivalence will fail for them.

It is now a routine matter to use the maximin ordering to determine truth conditions for legal propositions in such a way that these provisions are satisfied.* The conditions which make the propositions true or false will be conceived as either holding or not holding despite the extraordinary improbability of anyone ever discovering or recognizing a maximin ordering or a set of such orderings appropriate

for a society. In consequence, the truth conditions for legal propositions determined for a society at a given moment by the maximin rule are realistic truth conditions, at least in Professor Putnam's sense. But before sketching the form of the truth conditions, I should like to make a final remark about the reliance on "theory" displayed in the present derivation of those truth conditions.

As I have indicated, there is no way of telling whether according to Professor Dworkin an ideal legal theory for a society at a given moment would consist of an ordering of logically available social options governed by the maximin rule. But certainly Professor Dworkin's argument presupposes some class of theories ideal at given moments, where, for consistency's sake, the theories must be capable of such specification as to guarantee a strict ordering of all social options, so that no matter what situations are determined to be "choice situations" by the legal system, the theories will determine in each choice situation a unique choice between pairs of options. It has just been shown how implausible this presupposition is; and what must give rise to wonder is how the implausibility has gone unrecognized. My own guess is that people are inclined to assume that if a sufficient degree of abstraction from practical reality is allowed, a completely general normative theory can be tailored to fit <u>any demands whatever</u>. Of course, much of the interest of social choice theory lies in the fact that this is just not so. But as Professor Sen has stressed, this particular interest derives from the <u>opacity</u> of the simple general conditions that may be imposed on a normative theory: the logical implications of simple general conditions are simply <u>not apparent</u>. Hence it is possible to be misled into a commitment to general theories.

Professor Dworkin is not the only legal philosopher to have been so misled. Professors Smith and Coval have argued transcendentally that a legal system must incorporate a set of ranked social goals, and that in hard cases solutions will be determined on the basis of the ranking. But the details of the ranking are left to sociologists and Professors Smith and Coval assert that "the sociology will have been done before the goals become incorporate to the law" (v. Smith 1976, p.170). On this basis, Professors Smith and Coval construct a causal theory of law, according to which the structure of systems of legal rules is determined by the causal roles those rules must play in bringing it about that the values are realized. Neither in Legal Obligation nor in "The Causal Theory of Law", however, do Professors Smith and Coval mention a single specific sociological theory about values; and they seem entirely unaware of the enormous difficulty of justifying any sociological theory about values - a difficulty discussed at length in Brian Barry's Sociologists, Economists and Democracy (v. Barry, pp.47-98, 168-175).

The question of ideal theories is especially pressing in relation to the idea of democracy itself. Both Professor Dworkin and Professor Sartorius have claimed that the non-existence of uniquely correct resolutions to legal disputes may be somehow contrary to democratic principles (v. Dworkin 1978a, pp.84-86; Sartorius 1977, p.1275). It seems to me very doubtful indeed that democratic principles are sufficiently precisely defined to make these claims intelligible. The maximin rule, for instance, is not equivalent to the method of majority decision: given the same set of social options and the same individual

preferences, the employment of one rule need not result in the same as the employment of the other would.

social choices. Does this mean that the maximim rule itself is incompatible with democratic principles? One assumes that the answer is, No; and that this is so not because there is an accepted, precise theory of democracy with which maximin is definitely compatible; but because there is no accepted precise theory of democracy with which maximin is definitely incompatible. But if this is so then it may be that the denial of ORA is quite compatible with democracy. For if the contrary is assumed, then if maximin with partial comparability violates ORA, then it must be defensible to claim that maximin is compatible with democratic principles but maximin with partial comparability is not. Such a claim, however, would be opaque in the extreme. Suppose that an ideal theory for legal system of the United States should incorporate maximin with partial comparability. Could the effect of this fact alone be that the United States should not be classed as a democracy? As Robert Dahl has suggested, democracy is a matter of degrees and dimensions of numerous criteria that have to be balanced (v. Dahl,p.1-9). Should the claim, then, that maximin with partial comparability is incompatible with democracy be reconstrued as a claim that maximin with partial comparability is ceteris paribus <u>to a degree</u> less compatible with democratic principle <u>along some dimension</u> than is maximin itself? If anything, this claim is even more opaque than the previous one. - My conclusion is that at the level of generality where social choice theory or sociology or empirical political theory are allowed to determine the content of an ideal legal theory, it is well-nigh impossible to maintain that, should ORA turn out to be false on an ideal legal theory, that

fact must speak against the democratic nature of the legal system for which that theory is ideal. For given the abstract character of an ideal theory, it would be just as reasonable to maintain that a democratic legal system might well be revealed by an ideal legal theory as not satisfying ORA. Pre-theoretic notions of what is democratic must be just as vulnerable to invalidation as any other pre-theoretic notions: when abstract theory is introduced, its application must not be artificially restricted by means of unargued assumption.

It is now time to show how the foregoing considerations about maximin can provide a framework for the truth-conditions of legal propositions which will make ORA false. I will divide the demonstration into four parts. In the last part it will be shown that all legal propositions will obey the law of the excluded middle, but for some of them a truth value will be undefined. Since there can be no question of any actual person being able to recognize a maximin ordering in terms of which the truth of legal propositions is defined, the truth conditions for legal propositions will be "realist" in Professor Putnam's sense; and the set of legal propositions true in virtue of a maximin ordering will constitute an ideal legal theory.

i. For the purpose of constructing the theory, it must be assumed that the set of legal propositions can be translated into a set of propositions ascribing conditional obligations to judges, as suggested in the second corollary to ORA in Section 1 of this essay. The propositions will specify in their antecedents, for every possible legal dispute, properties and relations of the parties to the dispute; and their consequents will determine the judicial obligation to resolve

the dispute in one way or another, conditional upon the parties having just those properties and relations predicated of them in the antecedent. For example, a simplified and elementary legal proposition of the required form might be

(a) For any persons x and y, if x has R to y, and x sues y, then it ought to be the case that the court decides in favour of x.

These conditionals are not to be understood as being truth-functional. In particular, given the truth of a proposition of conditional obligation whose antecedent is "A", the truth of a second proposition of conditional obligation whose antecedent is "A & B" will not follow: the truth or falsity of the second proposition is independent of the first. Thus it is clear that the obligations of courts and judges may be defeasible according to the representation of legal materials by means of propositions of conditional obligation - as, I take it, sound legal theory requires (v. Hart 1949, pp.155-163); and the idea of exceptions, excusing conditions, etc. need carry no suggestions of inconsistency in and of themselves. The conditionals are not to be regarded as obeying the rule of exportation: if "$\Box\!\!\rightarrow$" is a connective of conditional obligation (to be read as "if __, then it ought to be the case that (the court decides ... etc.)"), then $P \Box\!\!\rightarrow (Q \Box\!\!\rightarrow R)$ will not be equivalent to $(P \ \& \ Q) \Box\!\!\rightarrow R$. This departure from truth-functionality is reasonable, in any case, since it is assumed that for any legal dispute there are only two possible resolutions, one the negation of the other, so that a dispute that has $(Q \Box\!\!\rightarrow R)$ as a possible resolution, cannot have R as a possible resolution. The antecedents of the condi-

tionals may be thought of as unbounded in length, so that even if judicial decisions are restricted in the kinds of information that they take account of, they need not, theoretically at least, be restricted as to the amounts of information thay may properly be brought forward to determine them. If an actual judge is imagined as reasoning according to true conditionals of this kind, the rule of detachment he uses in inferring their obligations must require him to base his decisions on a theoretical judgement as to the precise, admissible totality of information which determines the condition on which his obligation rests according to some true proposition of conditional obligation. He will be able to justify his decision if he can correctly identify both the true conditional proposition and the relevant totality; his decision will itself be correct if it is one that could be justified. It should be noted that what is detached according to the rule of detachment suggested here, is not the consequent of a proposition of conditional obligation. The consequent is just an indicative sentence following a connective which reads "if __, then it ought to be the case that __". That is, the obligation-component of a proposition of conditional obligation is part of the connective. (On detachment, v. van Fraassen 1969, p.423.) Since, however, the rule of detachment yields apparently unconditionalized (not "unconditional") obligations, in a straightforward way, all interest must, therefore, form on the truth conditions for propositions of conditional obligation.

I hope it is clear that I am not maintaining that the truth of legal propositions may attach to them in virtue of their having a particular form, viz. the form of propositions of conditional obligation.

What I am maintaining is that the truth of legal propositions can attach to them in virtue of the maximin rule, if the propositions are construed as being propositions of conditional obligations. I do not even say "only if": perhaps legal propositions can be judged true or false in virtue of the maximin rule, even without reconstruction, or without this reconstruction. But no matter what particular regimentation of legal discourse is adopted, or if none is, still, if the maximin rule determines the truth-conditions of legal propositions at all, then the set of true legal propositions must be equivalent to the set of true propositions of conditional obligation, so long as translatability is preserved. Whether it can be preserved is another question, but among philosophers Jonathan Cohen has maintained for years that it can be (Cohen 1962, p.405f; 1971, p.169f); and it would appear from the formulae of the Praetorian Edicts of Roman law, for instance, that the true legal propositions of at least some legal systems can in fact be reduced to a set of propositions of conditional judicial obligation (v. Nicholas, p.23ff). I am aware of no explicit arguments against the possibility of extensional equivalence between sets of legal propositions and sets of propositions of conditional obligation. And so I am inclined to conclude for the limited purpose presently in question, a certain regimentation is permissible. The regimentation involved is to be thought of, then, as a dialectical device, and not as the result of a commitment to the choice of a particular canonical form in which legal materials must be represented. Logicians are no longer so inclined as they once were to suppose that any particular regimentation of logically unformalized discourse can convey even all the logically interesting

properties of the discourse (v. Castaneda 1975, p.68 ; Haack, pp.22-27); and academic lawyers like Professor Honore and Professor Dworkin himself have fulminated against the idea that there can be a uniquely eminent "normal form" in which to represent the laws of a legal system, as Dr. Raz has suggested (v. Honoré 1977,p.101f; Dworkin 1978a, p.75f; 1977, p.5; Raz 1970, p.145). No objection to these views is so much as contemplated in this essay; but a demurrer would be put in against any attempt to rely on these views in opposing the reconstruction of legal propositions as propositions of conditional judicial obligation.

ii. The semantic framework for propositions of conditional judicial obligation will be given by ordering of a set of possible worlds determined by the maximin rule. The possible worlds will take the place of the possible social states that have been frequently mentioned in the discussion of social choice rules. The set of possible world may be taken to be finite. A set of possible worlds may be generated from the notion of a choice situation. A choice situation is a moment in the social history of a world. Each choice situation is conceived as giving rise at least to two possible subsequent histories each of which would be punctuated by a finite number of "moments of action". At each moment of action there will be one or more agents in the world and at least one agent will have more than one action open to him. Each moment of action determines a choice situation. The n^{th} choice situation in a given possible social history gives rise to at least two possible patterns of action; each of these patterns would either lead to an $n + 1^{th}$ choice situation or would constitute a termination of world's history. Each possible social history is the social

history of a set of distinct possible worlds. The worlds are distinct because, of course, there must be more to the history of a world than its social history - its natural history, for instance. It is surely not the case that the set of all possible sequences of human actions could determine the set of all possible worlds, since there are surely possible worlds without any people in them. But this possibility may suggest that only social histories, that is, only a subset of sets of possible worlds can be relevant and not individual members of the set of possible world's to a social preference ordering. I think that this suggestion must be wrong. Preference orderings of social histories could be incompatible with preference orderings of possible worlds only if some social histories preferred over others according to the first ordering were not preferred over those others in the second ordering. But then choices preferred according to the first ordering might yield worse possible worlds than choices preferred according to the second ordering: and there seems to be no reason why a principle of ordering that may determine worse choices than its natural alternative should be preferred to that alternative. At least this is so, so long as a preference ordering over social histories is not taken to be a function of the probabilities of the various possible worlds in which each such history may be acted out. Since the preference ordering currently under discussion is the maximin ordering, which does not assign cardinal values to what it orders, there seems to be no way in which the ordering of social histories could reflect a probabilistic weighting of the set of possible worlds in which each such history is acted out. And if cardinal values or probabilistic

weightings were introduced, the problems of arbitrariness of metric and mathematical indifference would in any case arise in ways similar to those presently being investigated.

The social histories then that are possibly subsequent to a given choice situation only partially determine the possible worlds accessible from that choice situation. A legal theory ideal at a given time will determine an ordering of all the possible worlds and, consequently, an ordering for each choice situation of the set of possible worlds accessible from that situation. The ordering will be given by the maximin rule applied to the Cartesian product of the set of possible worlds and the set of human inhabitants of the possibles world. This may appear rather odd, but it doesn't seem that the domain of human inhabitants of possible worlds should be restricted to the inhabitants of the actual world, if such things as "the right of the unborn" or "justice to future generations" are to be considered.

On the other hand if, as I have recommended, the axiom of complete identity is not employed to determine a unique maximin ordering, only the maximin orderings of human inhabitants of the actual world should be allowed to figure in the maximin ordering for a society generated by partial comparability. (I will assume that John Pollock's amended version of David Lewis' counterpart theory will be sufficient to take care of problems of quantification and identity across possible worlds; v. Pollock, p.111f; Lewis 1968, p113-26.) The ordering of the Cartesian product of the set of possible worlds and the set of inhabitants of possible worlds is held fixed for a legal theory ideal at a given time; but since different legal theories may be ideally best at different times, the ordering of the Cartesian product is not fixed over

time, if only because human preferences are susceptible to change. In this way, a theory ideally best at a given time determines a preference ordering among alternatives at every "moment of action"; but it does not follow that a theory ideally best at a given time is ideally best at every time. Thus, the features of Professor Dworkin's legal philosophy discussed in Section 8.2 are preserved by the present reconstruction.

iii. Given a set of propositions of conditional judicial obligation and a set of possible worlds ordered according the maximin rule, it is now relatively simple, thanks to the work of clever people, to state the truth conditions of the propositions. The system followed will, very roughly, be that of David Lewis (v. Lewis 1973, pp.96-104). For the moment it will be assumed, unrealistically I believe, that the maximin ordering of possible worlds is complete and that the axiom of complete identity is satisfied. But it will also be assumed that the ordering will allow indifference between worlds. As David Lewis says:

> "By any reasonable standards of evaluation, there are respects of difference among worlds that are wholly irrelevant to their comparative goodness. Worlds differing only in such respects would be tied in the preference order. Further ties would occur if relevant differences balanced out. If any of the respects of comparison admit of continuous variation, ties by balancing seem inevitable."
>
> (Lewis 1973, p.98)

Let $ be a system of spheres of possible worlds evaluable from the actual world according to the maximin rule. The spheres of $ are rested so that if S and T belong to $, then either S is contained within T or T is contained within S. Any world contained in a sphere S_i is better or higher-ranked than any world outside S_i; a sphere S_i

contains all the worlds in the i^{th} position in the maximin ranking, and all higher-ranked worlds as well; and the best world, or worlds, are contained in the innermost sphere of $. Since the number of worlds is assumed to be finite, there must be at least one best world. A world j is better than a world k if and only if some sphere contains j but not k.

Now a proposition of conditional obligation will be true if its consequent is true in every world in the best sphere containing worlds in which its antecedent is true. Thus if "A $\Box\!\!\rightarrow$ B" is a propositional of conditional obligation, and the highest ranked worlds in which A is true are at the i^{th} level in the maximin ordering, or equivalently, are in no sphere smaller than S_i, then A $\Box\!\!\rightarrow$ B is true is B is true in all the A worlds in S_i. But the present assumption of the possibility of worlds being indifferently ranked entails that there may be more than one world contained in sphere S_i and in no sphere smaller than S_i; and there is nothing to prevent A from being true in all such worlds, while B may be true in some but not all of them. In that case, some (A & $\sim$B)-worlds would be as good as the best (A & B)-worlds; and vice versa; and so A $\Box\!\!\rightarrow$ B nor A $\Box\!\!\rightarrow \sim$B will be true. Then, if "A" describes properties and relations of the parties to a legal dispute, and "B" describes one possible judicial resolution of that particular dispute and "$\sim$B" the other possible resolution, then no judicial obligation to decide upon one resolution rather than the other will be determined. And it is logically possible that this situation should persist, no matter how "A" were altered, expanded, refined, and made precise; for the logical possibility is entailed merely by the fact that a maximin

ordering allows for indifferences. In fact for such cases the semantic framework for propositions of conditional obligations provides simple truth-conditions for propositions of conditional permission (v. Lewis 1973, p.100); which in the legal domain would have the effect of giving a judge permission to resolve some disputes in either of the two possible ways. It turns out, then, that maximin can provide "right-based" truth conditions for legal propositions, but not so as to satisfy ORA.

iv. The reader will have noted that according to the proposal just made, although there has been no suggestion that legal propositions in the form of propositions of conditional obligation may fail to be bivalent, there may nonetheless be legal propositions which fail to satisfy the relevant case of the law of the excluded, viz. the so-called "conditional excluded middle". The conditional excluded middle is expressed as "$(A \Box\!\!\rightarrow B) \vee (A \Box\!\!\rightarrow \sim B)$"; and in the legal domain it would express the proposition that in a legal dispute a judge's duty to decide must lie on one side or the other, no matter what the positions or conditions of the parties to the dispute might be.

The conditional excluded middle can be preserved as a logical law for judicial obligation, given truth conditions for legal propositions defined by the maximin ordering, if the highly objectionable axiom of complete identity is dropped, and the weaker axiom of identity is substituted for it. If this is done, it will be seen that the assumption of possible indifference, which poses a technical obstacle to the conditional excluded middle, may either be maintained covertly, or else discarded, whichever seems more desirable.

The assumption of the possibility of indifference must, however, be overtly suppressed. When this is done, then a maximin ordering will be a strict one, allowing no ties. For each proposition "A" there will be a unique highest ranked A-world. Consequently, for any proposition of conditional obligation "A $\Box\!\!\rightarrow$B" the unique highest ranked A-world will be such that either B is true in it or $\sim$B is true in it. If B is true in it, then conditional on A, it will be obligatory that B be the case; if B is not true then again conditional on A, it will be obligatory that $\sim$B be the case; and so for all conditions. Then on a complete strict maximin ordering, either A $\Box\!\!\rightarrow$B or A $\Box\!\!\rightarrow\sim$B.

But the current assumption is that a maximin ordering will not be complete, and that an incomplete social preference ordering according to maximin will have to be extracted from the partial comparability of a number of sets of complete strict maximin orderings. Can the conditional excluded middle be preserved for judicial obligation under this assumption? Yes it can - though at a cost - by means of Professor van Fraassen's method of supervaluations. Every complete strict maximin ordering provides an admissible assignment of truth values - an "admissible valuation" - for all propositions of conditional judicial obligation, and hence for all truth functions of such propositions. Since, however, the complete strict orderings will differ amongst themselves, the valuations that they provide for legal propositions will also differ. The method of supervaluations dictates that legal propositions and their truth functions should be assigned the (super-)value <u>True</u> if they are true on every admissible valuation; <u>False</u> if they are false on every admissible valuation; and truth-values

should be undefined for them otherwise. Since under partial comparability, a preference ordering is also undefined in just those cases where distinct admissible orderings conflict, the method of partial comparability and the method of supervaluations seem made for each other.

The price, then, of using supervaluations is the denial of bivalence. But since, as was urged in Part Two of this essay, bivalence is not required for realism, it is not clear that anyone should object to paying the price - so long, of course, as the conditional excluded middle is maintained. And it is of course; for since the conditional excluded middle is preserved by <u>each</u> complete strict maximin ordering, it is true on all of them, and so the method of supervaluations assigns it the value True. It is also clear that the method of supervaluations allows the surreptitious re-introduction of the assumption of possible indifference. For each pair of possibly indifferent worlds, produce a pair of strict maximin orderings by permuting them, and let the super-truth values of all those pairs of propositions of conditional obligations be undefined, which the indifference of the worlds in a complete ordering would have made false.

Is there any intuitive justification for the introduction of supervaluations in the way here described? I believe that there are features of Professor Dworkin's work which point analogically, as it were, toward the use of supervaluations. Professor Dworkin has often written of a distinction between concepts and conceptions (v. Dworkin 1978a, pp.134ff, 226; 1978b, p.127). The distinction comes originally from Professor Rawls, who says of the relation between the concept and the variety of particular conceptions of <u>justice</u>:

> "Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles of justice, about which men disagree, these different conceptions of justice have in common."
>
> (Rawls 1971, p.5)

I cannot find where Professor Dworkin acknowledges A Theory of Justice as the source of his distinction, but that is hardly surprising since Professor Rawls himself acknowledges the rationale for the distinction as coming from an argument in Professor Hart's The Concept of Law, in which it is urged that the law itself, while it may fix some features of legal justice as constant, cannot itself determine criteria for its own application, so that the concept of legal justice that the law embodies will remain subject to a variety of specifications in connection with the disposal of actual cases (v. Hart, p.156f). Just so, it might be said, each admissible strict maximin valuation constitutes a particular specification of the application of the general concept of maximin justice; each valuation embodies a conception of that concept. But now, given that the method of partial comparability and the use of supervaluations can give expression to the distinction between a concept and its various conceptions, the intention behind Professor Dworkin's use of the distinction is nevertheless not preserved; for Professor Dworkin uses the distinction in maintaining that the employment of a particular concept (in the sense of "concept" now being considered) in compatible with the optimality of one particular conception of that concept. This may not in itself be wrong, but Professor Dworkin proceeds to argue on this basis that when people use words that may without linguistic impropriety designate either a general concept or some particular conception of it, other

people to whom those words are addressed may without linguistic impropriety understand the words as having been used to designate a general concept, and for that reason interpret the words in the light of whatever particular conception of the concept designated is optimal. In this way, Professor Dworkin maintains that vague terms which occur in constitutional clauses are not really vague at all; rather they should be understood as expressing general concepts, optimal conceptions of which are left to the construction of the interpreter who has no responsibility to try to uncover any particular conception that may have determined the use of the terms (v. Dworkin 1978a, p.134ff). Any other position on this matter, Professor Dworkin implies, must be the consequence of a theory of meaning which is far too crude. But Professor Dworkin's own theory of language use seems to entail that although hearers know what is to ascribe a particular conception of a concept to people, since they may both ascribe such conceptions to themselves and assume that their conceptions are optimal yet they are never free to make such ascriptions to <u>speakers</u>; and this even though speakers and hearers do not generally belong to disjoint classes. This theory of language use seems to involve a principle of systematic equivocation, for it allows hearers to assign truth values to their own beliefs according to conceptions which they regard as optimal, but it also allows them to assign truth values to the assertions made by others without taking note of the conceptions those others may regard as optional. I conclude that Professor Dworkin's theory of language use is untenable.

By contrast the supervaluation approach adopts a uniform principle of what has been called "non-pedantry": truth is secured if it does not turn on what one means - be one speaker or hearer (v. Fine, p.278). A legal proposition is true if it is true on every conception of maximin justice: not if it is true according to someone's conception of maximin justice. The supervaluation approach will preserve the law of the excluded middle for conditional judicial obligation, even when both disjuncts are neither true nor false according to the supervaluation; and if maximin justice is brought to bear on a dispute where this is the case, a truth-value gap will have to be closed by a decision to extend the concept of maximin justice in a certain way; in accordance with some conception of maximin justice (v. Fine, p.278). But precisely which conception is not determined; if it were there would have been no work to be done by a general concept of maximin justice in the first place. In the theory of supervaluations each admissible maximin ordering may be thought of as an ordering constructed by an ideal judge, constructed with a view to satisfying the conditional judicial excluded middle - so that if he should have to decide a case, his ordering will determine a decision. His ordering, however, goes beyond what is determined by the set of true legal propositions - though it does not conflict with it, since legal propositions that are true to the supervaluation must be true according to his ordering as well. The upshot of all this is that the language which ideal judges use can be virtually perfectly precise; yet if there is more than one admissible maximin ordering, then at least the connective of conditional judicial obligation must be vague; and when an ideal judge resolves a particular dispute according to his ordering

but beyond the justification that could be provided by legal propositions true according to the supervaluation, then in making his decision it can be imagined that he makes the concept of maximin justice more precise by authoritatively ruling out those hitherto admissible orderings according to which the proposition of law which he pronounces in deciding the case would have been false. This corresponds to a more intuitive picture, I think, of what goes on in actual legal systems than is suggested by Professor Dworkin's account, and yet almost all of the features of the picture have been drawn from his account. In the end, even his insistence on bivalence for legal propositions can be accomodated. A proposition of conditional judicial obligation is true on a supervaluation according to the maximin rule iff it is true according to all admissible maximin orderings, just as a modal proposition is true in the modal system S_5 iff it is true in every possible world. Let the modal operator "L" of S_5 be read "Liquet" or "It is legally apparent to any ideal judge that"; and let $L(A \rightarrow B)$ be true iff $A \rightarrow B$ is a proposition of conditional judicial obligation true on every admissible maximin valuation; and let legal propositions be identified as propositions of the form $L(A \rightarrow B)$ and $L(A \rightarrow \sim B)$. Obviously these propositions will be bivalent; and the logic of legal propositions will be the modal logic S_5. The legal proposition "$L\{(A \rightarrow B) \vee L(A \rightarrow \sim B)\}$" will be logically true, but the truth function "$L(A \rightarrow B) \vee L(A \rightarrow \sim B)$" will not be logically true; and then, plainly, ORA will be untenable. For if propositions of the form $L(A \rightarrow B)$ and $L(A \rightarrow \sim B)$ are construed as conferring a right on one of the parties to a dispute whose outcome may be either B or $\sim B$, then in the case where a proposition of neiter form is true, then no right will have been conferred and ORA will be

false. Moreover, every admissible maximin ordering will identify one of the parties as the right holder, so that according to each ordering it will be quantificationally true that there is some right holder in every case, yet the natural extension of the use of the modal operator in combination with quantifiers will lead to the conclusion that its being legally the case in each dispute that there is a right holder will fail to entail that in each dispute there is someone such that it is legally the case that he is the right holder. (On the failure of this kind of entailment on the supervaluational theory, v. van Fraassen 1966, p.491f.) The existence of a right-holder is legally only de dicto, and not de re. All of this suggests that even a legal philosophy that presupposes an ideal political theory will not give rise the high-sounding ideal of justice apparently favoured by Professor Dworkin. For he argues that on his view:

> "Citizens are encouraged to suppose that each has rights and duties against other citizens and against their common government, even though these rights and duties are not all set out in black letter codes. They are therefore encouraged to frame and test hypotheses about what these rights are, and to treat one another, and demand to be treated by the state, under the beneficial and unifying assumption that justice is always relevant to their claims even when it is unclear what justice requires."
>
> (Dworkin 1978a, p.338)

I think it is quite clear that if the existence of right-holders may be legally only de dicto, the encouragement spoken of in this passage may fail to be persuasive and people may fail to be inspired by the ideal of judtice that Professor Dworkin describes, since legal theory may apparently generate ghostly right-holders, who cannot be identified with any kind of persons at all whether lay or legal.

But this failure of the ideal may not be such a bad thing: in a certain way, preoccupation with the ideal itself can seem to bespeak an obsessive and oppressive concern over normative requirements, perhaps not altogether surprising in one who cites R.D. Laing on the deleterious effects of too much liberty (v. Dworkin 1978a, p.272). The logical proposals suggested here have at least the virtue of stripping away some of the mystique that swaddles this concern.

Will these proposals accord with the linguistic habits of lawyers and judges? Does it capture the phenomenology of legal reasoning? I have few fears that non-academic lawyers and judges are likely to raise objections. What Professor Dworkin would be likely to say is another matter, and one of which I am in no position to make an assessment.

I have really nothing more to say. I have argued that a maximin social preference ordering is the only identifiably plausible candidate for an ideal political theory according to which ORA might be tested. But the improbability of a unique choice of a strict maximin social preference ordering is positively overwhelming, and since only a unique strict maximin social preference ordering will preserve ORA, I conclude that it is overwhelmingly probable that ORA is false.

This makes it more reasonable to believe that ORA is false than that it is true; makes it reasonable to believe that, since ORA demands of judges both a uniquely best theoretical justification for each decision they make and a decision in every case, normative quandaries are overwhelmingly probable on ORA, since a uniquely best theoretical justification may not be available; makes it reasonable to believe that

an argument for the existence of a unique correct resolution for every legal dispute must be unsound if, like ORA, it depends on the availability of such justifications. And the reasonableness of these attitudes is just what I set out to show when I began to write this essay. My argument is, therefore, at an end.

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