c. Nov '84

RIGHTS: ACTUAL, LEGAL, AND NATURAL.

OBJECTIVES OF THIS PAPER: 1. To explicate "x has a right..." as a a) descriptive, verifiable concept, which is b) morally neutral.

2. To argue against the use by judges of appeals to the existence of "moral" or "natural" rights not found in law or in customs.

3. To suggest kinds of grounds on which one can give moral arguments to support establishing, or maintaining, or abolishing, or preventing establishment of, rights.

4. To consider relation of this to law:

a) Distinguishing the existence of a legal right, i.e., a right in law (including statutes or arguments pro or con its existence in common law, or constitutional law) from whether it is actualized (enforced) in society.
b) Arguments of lawyers, or philosophers of law that (i) moral law or natural rights law is implicit in all (or in our Anglo-American) legal systems, or (ii) exists independently of, and above actual practice or established law.
c) Concepts of rights by (i) Bentham, (ii) Hohfield, (iii) Dworkin, (iv) Kelsen, (v) Hart.

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RIGHTS: ACTUAL, LEGAL, AND NATURAL

The word 'right' occurs in English both as an adjective and as a noun. As an adjective, it has several meanings ("right hand","right thing to do") one of which is a central, fundamental concept of ethics and moral philosophy. As a noun, it figures prominently in law, political science, history, sociology and anthropology. We are here concerned with the noun, 'a right'.

In history, anthropology and sociology 'a right' is (or should be) a purely descriptive concept with no moral overtones. In ordinary language and in the rhetoric of debate on political or international issues of "human rights", however, the term 'a right' has often carried with it a normative connotation: of people who do not have a certain right either by law or in actual fact, it is asserted that the very right which do not have in fact, is nevertheless a right which they do have and which is being "violated". In political philosophy, political theory, and law there has often been a tendency to appeal to this conjunction of ontological description and moral value expressed in terms of "a natural right" which is somehow also "a moral right". In this paper I argue that this latter tendency is inappropriate and should be avoided in contexts where the issue is either what the law is in fact, or what ought to be law.

I shall attempt to do three things: 1) present and defend a philosophical analysis of the concept of "a right", which distinguishes descriptive characteristics from modes of moral arguments for or against proposed or established rights; 2) relate the proposed analysis to concepts of 'a right' in Bentham, Hart and Hohfield; 3) argue against views, like Ronald Dworkin's, that judges should conduct their decision-making in "hard cases" under the assumption that their job is to discover the true answers to questions about whether certain rights exist.

I. THE ISSUE

Ronald Dworkin's book, Taking Rights Seriously, is directed against what he calls "the ruling theory of law" whose founder, he says, was Jeremy Bentham. The title of the book is misleading. It gives the impression that the issue is whether rights should be taken seriously or not. That is not the issue at all. I take rights very seriously. I believe, as did Bentham, that the construction of a system of law in a society consists in constructing a web of rights and obligations. I also believe that in various societies,including our own, certain individuals have had rights that they ought not to have had, and many individuals have not had rights that they ought to have had. Yet I disagree very profoundly with what seems to be Dworkin's thesis.

Bentham also took rights very seriously. In his A General View of a Complete Code of Laws (1802) he stated,

> "In a code of laws, everything turns upon offences, rights, obligations, services. Clear ideas of the meaning of these abstract terms are therefore desirable,..."[2]

Insisting that in law these four ideas are inseparably connected, Bentham lays out, in Chapter XIV (entitled, "Sixth General Title of the Civil Code. Of Rights."), a complex table of the division of rights, covering their sources, ends, subject-matter, extent, persons represented, divisibility and transmissibility, and listing with no less than 26 different categories of rights for incorporation in his code. In the same work, however, commenting upon customary divisions of law, he asks' "What are these natural laws, which nobody has made , and which everybody supposes at his fancy?"[3]

Perhaps more straightforward titles for Dworkin's book would have been "Taking Natural Rights Seriously", or "Taking Moral Rights Seriously". For here, it might seem, is the real issue. Bentham assuredly did not take the idea of natural, moral rights seriously, and in some sense this is exactly what Dworkin wants us to do. But even such a second title would be misleading. For I believe very strongly, as did Bentham, that questions of what rights individuals ought to have, and what rights they ought not to have, ought to be decided ultimately on moral grounds (rather than legal, historical, or sociological grounds alone). What, then, is the real issue?

As Dworkin points out, Bentham and much of the "ruling theory's" opposition to natural rights is based on empiricists' resistance to the supposed ontological or metaphysical sources which proponents of natural or moral law have traditionally appealed to. Dworkin himself, however, asserts that he does not presuppose any of these "ghostly entities" or "collective wills" or "national spirits"; instead, he says, his idea of individual rights is "parasitic on the dominant idea of utilitarianism, which is the idea of a collective goal of the community as a whole."[4] Thus Dworkin seeks to deflect charges that he is appealing to metaphysical grounds for natural rights.

The fact remains that Dworkin is talking about rights which are not to be found in written law or precedents, which in some sense are moral laws, which often admittedly do not exist in actual fact, and yet about the existence of which, he claims, there are objectively true and objectively false statements, whether we know which are which or not. Whether Dworkin's theory is free of "ghostly" entities is not so clear, but even this, in my opinion, is not the central issue that should be addressed.

The issue which I shall address is: which is the better way to view the judicial process, 1) Dworkin's way, which supposes that there are objective truths about what rights individuals ought to have and that the judges' job is to discover them, or 2) the way which Dworkin opposes, which involves discretion on the part of judges to introduce their personal moral judgments in the "hard cases" where written law and precedent give no clear answers. I shall argue for the latter.

II. ON CONCEPTS OF A RIGHTS'S ACTUAL EXISTENCE, LEGAL EXISTENCE, AND OF WHETHER IT OUGHT TO EXIST, ACTUALLY OR LEGALLY.

Let it not be supposed that I am opposing the search for truth with respect to existence or non-existence of rights. On the contrary, I am trying to preserve the rigor and integrity of just such truth searchs. Though I cannot claim that in its usages ordinary language always supports my proposals about how the phrase 'x has a right to ...' should be used in contexts where matters of law are in question, I will claim that there is an enormous and highly significant class of ordinary uses of expressions like, 'x has a right, R', 'x does not have a right, R', that does conform to the uses which, I propose, should be employed in such contexts. The truth or falsity of such expressions, used in these ways, depends upon the existence or non-existence of the described rights in a sense which is assertainable by ordinary straightforward empirical investigation.

In this class of usage one finds a very clear distinction among the concepts conveyed by the following four predications with respect to some right, R, as subject:

1) R exists in the law, or R legally exists, (in some specific principality during some specified time period)
2) R exists in fact, or R actually exists, (in some specified social group or institution, at some specified time)
3) R ought to exist in law, or R ought to legally exist, (in some specific principality at some specified time)
4) R ought to exist in fact, or, R ought to actually exist, (in specific social group at some specified time)

These concepts, in the intended usage, are logically independent; that is, given any pair of them, one could be accepted and the other rejected with respect to the same R as subject, without inconsistency. Since each of them could be accepted or rejected individually, this means there are sixteen mutually incompatible, but individually consistent possible cases.

The sixteen cases listed below illustrate the ordinary usage of these expressions which I have in mind. Questions of the existence of a right R, are matters of truth or falsehood. Thus in cases where I believe that the right described exists in the law of the principality mentioned at the time mentioned, I shall put 'T(L)'(for 'It is True that it exists Legally') before the description of that right. When I believe it is false that the right exists legally I shall put 'F(L)'. In similar fashion when I describe a right which I believe exists, or does not exist, in actuality I shall put 'T(A)' or 'F(A)'. On matters of what I think ought to be the case, either legally (whether there ought to be a law to establish the right), or actually (whether the right ought to be established , but not necessarily by law), I shall use the abbreviations, 'O(L)' for 'ought to exist as a legal right' and '-O(L)' for 'ought not to exist as a legal right' and correspondingly, 'O(A)' and '-O(A)' for cases where I think the right ought or ought not to exist actually.

RIGHTS, EXISTING OR NOT, WHICH OUGHT TO BE LEGAL AND ACTUAL

1) [T(L),T(A),O(L),O(A)] "The right of 18 yr old U.S.Citizens to vote in U.S. or state elections, 1972-1984, exists in law (XX-(XXVIth Amendment) and in actuality and it ought to exist both in law and in actuality."

2) [F(L),T(A),O(L),O(A)] "The right of unmarried male and femalecouples to cohabit in the State of Michigan does not exist in law, in 1984, (Michigan Penal Code, 750.335) though actually that right does exist, and that right ought to be a legal right as well as an actual right"

3) [T(L),F(A),O(L),O(A)] "The right of black U.S. citizens of Alabama to vote in U.S. and state elections, 1880-1960, existed in law (XVth Amendment) during the period 1880-1960, but did not exist in actuality, though it ought to have existed both in law and in actuality in that period."

4) [F(L),F(A),O(L),O(A)] "The right of 21-year old female U.S. citizens to vote in U.S. or State elections, did not exist either in law or in actuality during the period, 1783-1919, (prior to XIXth Amendment's ratification, in August, 1920) though it ought have existed both in law and in actuality during that period."

RIGHTS, EXISTING OR NOT, WHICH OUGHT TO BE ACTUAL, BUT NOT BY LAW

5) [T(L),T(A),-O(L),O(A)]

6) [F(L),T(A),-O(L),O(A)] "The right of the manager of an American League base ball team to use a designated hitter in place of the pitcher in his batting order, is not a legal right, but is an actual right, and ought not to be a legal right though it ought to continue to be an actual right."

7) [T(L),F(A),-O(L),O(A)]

8) [F(L),F(A),-O(L),O(A)] "The right of the manager of an National League naseball team manager to use a designated hitter in place of a pitcher in his batting order, is not a legal right and is not an actual right, but though it ought not to be a legal right, it ought to be an actual right."

RIGHTS, EXISTING OR NOT, WHICH OUGHT TO BE LEGAL, BUT OUGHT NOT TO BE ACTUAL RIGHTS (If realized, this subverts the force oflaw)

9) [T(L),T(A),O(L),-O(A)]

10) [F(L),T(A),O(L),-O(A)]

11) [T(L),F(A),O(L),-O(A)]

12) [F(L),F(A),O(L),-O(A)]

RIGHTS, EXISTING OR NOT, WHICH OUGHT NOT TO BE LEGAL RIGHTS AND OUGHT NOT TO BE ACTUAL RIGHTS.

13) [T(L),T(A),-O(L),-O(A)] (i) "The right of the President of the U.S., to launch a nuclear missile against a foreign city or country in times of war has existed legally and in actuality from 1945 on, and it ought not to exist or have existed either in law or in actuality at that time or hereafter."

(ii) "The rights of Plantation Owners in Virginia to buy and sell, own and control, slaves in the period from 1833-1865 was both a legal right and an actual right, and it ought not to have been either."

(iii) "The right of a Roman father, (under the Roman Law of Patria Potestas) to sell, offer in sacrifice, kill, or otherwise dispose of his offspring, was both

a legal right and an actual right in Rome, c.400 A.D., and it ought not to have been either a legal or an actual right."

14) [F(L),T(A),-O(L),-O(A)] (i) "The right of eskimo parents to put their infants outdoors to die if they judged that the food supply would be inadequate to take care of the whole family, did not exist as a legal right, but was an actual right (by custom) c.1880 among Eskimos, though it ought not to have been either a legal or an actual right."

(ii) "The right of the feudal lord to have sexual relations with a vassal's bride and her wedding night (droit du seigneur) is said, though no law existed granting it, to have actually existed, by custom, in some areas of France, c. 1700, though it ought not to have existed either in law or in actuality, by custom."

(iii) "The right of public school teachers in Michigan to strike does not exist under Michigan law in 1984, though in actuality this right is exercised and unimpaired. It ought to be neither legal or actual."

15) [T(L),F(A),-O(L),-O(A)] "The right of the Queen of England to veto a bill of parliament exists in the law of England, but it does not exist in actuality, as the British people would not stand for such an action; and in my opinion it ought not exist either in law, or in actual practice."

16) [F(L),F(A),-O(L),-O(A)] (i) "The right of a father to sell, kill or otherwise dispose of his offspring, does not exist either in the law or in actual practice in U.S., in 1984, and it ought not to exist in either."

(ii) "The right of an employer to fire an employee on grounds of union membership, does not exist either in law or in fact in U.S. in 1984, and it ought not to exist either in practice or in law."

(iii) "The right of a policeman to torture a non-suspect to gain information, does not exist either

This list is so arranged that the first eight categories of expressions involve assertion that a right ought to exist in actuality; the last eight assert that the right ought not to exist. The odd numbered categories cover cases in which the right is asserted to exist legally (to be legal rights at the time and for the group specified); the even numbered categories cover assertions that there is no legal right. The capitalised headings of groups of four stress the variations in whether a right ought to be actual or ought to be legal, regardless of its existential status. The sets of four cases n modulo 4, (e.g., {1,5,9,13}, {2,6,10,14}, etc) give, for any right whose existential status is fixed, the four possible options as to whether that right ought to exist actually or legally. Thus, let us assume that in some principality the right of individuals to buy and smoke marijuana is F(L) and T(A), i.e., legally proscribed, but actually exists,

	L	A	OL	OA
1)	T	T	+	+
2)	F	T	+	+
3)	T	F	+	+
4)	F	F	+	+
5)	T	T	-	+
6)	F	T	-	+
7)	T	F	-	+
8)	F	F	-	+
9)	T	T	+	-
10)	F	T	+	-
11)	T	F	+	-
12)	F	F	+	-
13)	T	T	-	-
14)	F	T	-	-
15)	T	F	-	-
16)	F	F	-	-

and supported by a population which would resist any attempt to enforce it. This situation is covered in cases 3),7),11) and 15). Such situations include persons who believe 3) smoking marijuana ought to be both a legal and an actual right, 7) smoking marijuana ought not to be a legal right, protected by government against any social penalties for doing it, but ought to be an actual right in some sub-group such as the Faculty Club, though not a right in University classrooms, 11) smoking marijuana ought to be a legal right, but not an actual right, i.e., social penalties of ostracism or expressions of disapproval ought to be developed so that individuals would in fact abstain to avoid such penalties; or, 15) smoking marijuana ought not to be either a legal right or an actual right - the whole force of society should be directed against it. Again the right of a three month old fetus to life is neither an existent legal right nor an actual right in U.S. today, i.e., F(L) and F(A), and the cases 4),8),12) and 16) cover the possible moral attitudes towards making that right legal or actual.

Examples above may or may not contain errors of fact either with respect to law or with respect to the actual existence of rights. But that is not the point. I maintain that 1) each individual ought to have the right to argue in support of his or her own opinion about what ought to be the case, regardless of what is legally or actually the case; but 2) with respect to questions of the existence or non-existence of rights there should be publicly agreed upon methods for ascertaining the truth or falsity of the matter, removing such questions as far as possible from matters of subjective opinion. The latter is important with respect to both the question of the existence of a right in the law, and with respect to questions of whether the right actually exists in social practice.

Thus if there is error in the list above with respect to existence or non-existence of a right either in law or in fact, this error should be capable of a publicly agreed-upon correction which is independent of what different parties believe ought to be the case. In other words there should be an empirical criterion equally usable by every observer, to distinguish truth form falsehood in such cases. To this we now turn.

III. EMPIRICIALLY TESTABLE CRITERIA OF THE LEGAL, OR ACTUAL, EXISTENCE OR NON-EXISTENCE OF A RIGHT.

How do we distinguish situations in which a right exists in fact, from situations in which that right does not exist? What does it mean to say that "x has right to..."? What are the conditions which would make such statements true or false of the facts?

In offering an answer to these questions, I shall refer later to Hohfield, Bentham and Hart - each of which had important things to say. But I shall go farther than they did. For each of these writers was concerned with law primarily, and thus was primarily concerned with whether a legal right existed. But we need a more basic notion, the notion of a societal state of affairs such that we would say a certain right did or did not

exist in a given social group at a given time, whether or not there was a law, or written precedents, which recognized such a right.

Categories 3), 6), 11) and 15) describe legal rights which are not actual rights. In a good legal system the primary function of judges, courts, and enforcement agencies is to see that rights that exist in the law (legal rights) also exist in actuality.

But the legislator and the citizen, concerned to maintain or improve a good society, must also be able to recognize rights they believe ought to exist that do not exist in actuality, (i.e., F(A) and O(A): {2),4),7),8)}) as well as rights they believe ought not exist, but do nevertheless exist in reality (i.e., T(A) and -O(A): {5),6),13),14)}). They need to make such distinctions in order to decide further whether such rights should be established, or abolished, by law, or left for non-governmental institutions and groupings of society to work out. Thus the concept of a right must first be clearly defined without reference to legal systems. One central purpose of legal systems is to bring it about that certain rights, which otherwise would not exist in fact, do exist in fact. Another is to abolish, or prevent the establishment of, rights which various components of the society think ought not to exist.

Sentences that begin, 'x has a right to...' look as if they were ascribing some property to an individual. The phrase 'x has a..." suggests possession, as in 'x has a nice way about him' or 'x has a good complexion'. But if this is the way to think of 'having a right' it is very mysterious just what sort of thing is being possessed by x. Is x "clothed" in a right, as when x has an overcoat on? Does x have a right as x might have an aura about him? Clearly the possessive 'has' is misleading us.

Perhaps we can get closer to the meaning if we schematize such statements as 'x has a right to do A', or 'x has the right not to do A'. But still, what does x possess here? Is it like having the ability to do A or not to do A? It is perfectly natural to speak of possessing an ability. Yet clearly having a right is not the same as having an ability; children have the ability to vote, but they do not have the right to vote. The possessive 'has' is still misleading us into thinking of a right as something inherent in the right-holder.

If we examine those situations in which we say that a right exists or does not exist in fact, we find that it always involves some sort of social relationship. In some sense the society or social group that x belongs to supports or protects x's doing A, or x's not doing A. The social group not only refrains from interfering, it protects x in doing A against interference by others. Thus, rather than thinking of the right which x "has" as inhering in x, we should think of x as being a member of a social group within which certain kinds of actions of x are not only permitted but protected and supported by the group.

Basically an individual can have a right in four ways, and each way involves the willingness of the social group within which x has that right, to back up the right. Thus we say,

1) x has <u>right to do A</u> (in social group G, during time t) if and only if the social group, G, during time t, is prepared to penalize any y who tries to prevent x from doing A

2) x has <u>a right not to do A</u> (in social group, G, during time t) if and only if: the social group, G, during time t, is prepared to penalize any y who makes, or tries to make, x to do A.

3) x has <u>a right to make y do A</u> (in social group, G, during time t) if and only if: the social group G, during time t, is prepared to penalize y if y does not do A on y's demand.

4) x has <u>a right to stop or prevent y from doing A</u> (in social group, G, during time t) if and only if: the social group, G, is prepared to penalize y if y persists in doing A or threatens to do A contrary to x's demand.

Without doubt this sort of analysis can be improved, but the central point here, is that for an individual or group to have a right is for that individual or group to be the beneficiary of a social arrangement, or set of social practices, which protects or supports a certain pattern of inter-group or inter-personal behavior. Having a right is not a property or disposition, like ability, which belongs to an individual or a group. Having a right is an triadic relation between (i))<u>the right-holder</u>, (ii) the right's <u>support group or institution</u>, and (iii) <u>the entity or entities against which the right is supported</u>.

The <u>right-holder</u> may be a single, named, individual, as when a king, a dictator, or a favorite child, is given special rights. Or, it may be any individual belonging to a specified class such as the class of males, or the class of 18 year-old U.S. citizens, or the class of citizens of Birmingham, Michigan who have registered to vote, or the class of persons who hold title to a piece of real estate, or the class of licensed optometrists, or the class of dues-paying members of the Association for Symbolic Logic, or members of the Faculty Club. Or the right-holder may be an institution or a corporation. Or the right-holder may be a governmental unit with the right to levy taxes, or an agent of a governmental unit, like a policeman with the right to arrest persons suspected of a crime.

The <u>support group</u> may be, first of all, a governmental organization; local, state, national or international. In speaking of laws and legal systems in this paper, we are focusing on governments which control all citizens within some geographical domain. We are talking about governments which make laws or rules, and which enforces these laws, or coerces compliance by its demonstrated capacity and willingness to enforce them through courts and enforcement agencies.

Secondly, the group which supports and coerces enforcement of a right may be a non-governmental group or institution which establishes rights for its members and penalizes those members

who obstruct rights of other members, or fail to satisfy conditions laid down for exercising those rights. These rights are not legal rights in the geographical domain of a government properly so-called, for these institutions are is not required to give any particular rights to their members; similar institutions may establish different sets of membership rights. Non-governmental institutions - churches, social clubs, corporations, colleges, - may have "by-laws" and "constitutions", which describe the rights of members or sub-classes of the membership, etc., but when we speak here of "legal rights", we do not refer to these.- Legal rights intrude here only where, for example, a dues-paying member is refused a right which under contract law comes with his membership, or where his legal rights under some other category are violated.

Finally, the social support group or institution may be simply a primitive group without written laws or records of precedents. It may be a family, or a tribe, or a group of fast friends which by its habits or practices insures that its members, or some subclass of its members will have certain rights which by habit or consensus the rest of the group protests and supports when the right is not being recognized.In such groups we may have actual rights which are not legal rights even though there are no laws, rules, or by-laws to appeal to. Or there may be an absence of rights in one such group that obtains in other similar groups.

Suppose I see that in my chicken yard there is one poor featherless chicken, and this chicken is the only chicken that feeds at a certain flowered trough though even when the other (unflowered) troughs are empty, and further that though all other chicken fight amongst themselves with respect to who shall feed at the other troughs, they act, individually or in groups,to fight off any chicken who tries to interfere with, or feed at, the featherless chicken's trough. Suppose this happens day in and day out over a considerable period of time. Then I should say that in that community of chickens through that period of time the featherless chicken clearly enjoyed the sole right to eat at the flowered trough.

The entity or entities against which the right holder has a claim may be (i) a single individual, as when a homeowner who has paid in advance has a right against the newsboy for delivery of the morning paper, or an employer has a right against an employee who has signed a year's contract to work at specified wages, or the Internal Revenue Department has a right to collect taxes from an individual wage-earner. Or it may be (ii) that the right is against all other members of the support group, as when each citizen has a right to free speech against interference with that right by any other person, or the right to prevent other persons from entering one's home without one's permission, or the right to refuse the use of one's car to any other person. Or, (iii) it may be that the right is against some sub-class of persons, e.g., the right of homeowners in a community for retired persons to exclude rentals to families with children. Or (iv) the right may be against some organized group or class of organized groups, e.g., states have rights against the invasion of these rights by

the federal government, the conscientious objector's right to not be drafted for military service against the federal government, the right of any citizen against any department store or restaurant, to not be refused goods or services offered for sale to the public.

The determination of whether a right actually exists within a given societal group at a given time depends upon evidence that members of that society or their chosen enforcement agents are accepted by all or most individuals who might not honor that right to be willing and able to invoke sufficient penalties to support or protect the right-holder in exercising that right. Such determinations can be made in many cases by ordinary common sense observation; in other cases special investigators - historians, investigative reporters, sociologists - may be required. The field of investigation is actual observable human and social behavior.

The determination of whether a right exists in the law - whether it legally exists - is a matter of examining law books, i.e., constitutional law, statutes and precedents. If the right does exist legally, and a plaintiff or defendant is found to satisfy the legally prescribed conditions for being the right-holder, then the duty of the judge is to do what he can to protect or support the exercise of the right.

The question of whether a right exists or not, either in actuality or in law, is not always determinable by the criteria of 'a right' given above. This in nothing new. It is frequently impossible to get all the relevant facts of a case, and there are borderline cases, gaps in the laws, areas of discretion left to executive and judicial officers, and outright contradictions which arise when opposing legal rules, designed for different situations, clash when those situation meet in conjunction.

But there are a great many cases where it is very clear that the right does exist, and a great many other cases where it is clear that the right does not exist. This is true both with respect to existence in the law, and with respect to actual existence in society. Where it is clear that the right exists in law, the judge's duty is to enforce the law. Where it is clear that a right exists or doesn't exist in actual fact, the legislature must decide whether it ought to be a legal right or not.

The existence of borderline cases, or of gaps in the law, or of social situations in which evidence is inconclusive as to the actual existence of right, is no argument at all against the criteria suggested. If there is no right, or it is not clear that there exists a right when we think there ought to be a right, the thing to do is to try to establish one: use persuasion, argumentation, organization, and mobilize attitudes and opinions and habits of behavior in the relevant support-group. If it is the sort of right that one believes ought to be legally enforced, then these activities advance to legislative or executive or judicial processes. If there appears to exist a right established in certain groups but which we think ought never to be established in any group, then the same processes can be applied to try to eradicate it, or prevent its being established.

IV. BENTHAM, HOHFIELD AND HART ON LEGAL RIGHTS.

The analysis of rights above differs from those of Bentham, Hohfield and Hart in some respects, but also shares certain points of agreement.

The analysis above differs from all three of these authors in defining 'a right' in terms of empirical sociological facts prior to defining 'a legal right'. As philosophers of law, these authors are concerned with analysis of 'a right' as that term is used or applied with respect to pre-existing constitutional law, statutes and precedents. This neglects the important uses of the term outside of the law, or when possible legislation to establish or abolish actual rights is under debate. But the descriptive idea of a right exists before it becomes (or fails to become) law, and persists long after it has been legally abolished (like rights of slave-owners). Laws and legal decisions express only the idea of a right, an idea which is spelled out by spelling out descriptions of what qualifies one party as a right-holder and indicating the kinds of penalties available to disuade rights violators. Making a legal right into an actual right is a matter of enforcement agencies, but also of social attitudes (respect for the law, etc), habits, and dispositions. Philosophers of law tend to define 'a right' in terms of analytic relationships to other terms like 'duty', 'obligation, 'claim' etc..

Nevertheless, the analysis above shares many points of agreement with authors, Bentham, Hohfield and Hart. Hart, in "Bentham on Legal Rights", holds that Bentham's analysis of the notion of a legal right is "a more thought-provoking guide" than the customary law student's reference on that subject in Hohfield's Fundamental Legal Conceptions. Bentham's approach, like mine, was not one of of trying to abstract a clear meaning from usage which he found often to be confused, arbitrary and vague; in defining 'a law', for example, he sought to construct "rather a meaning which I wish to see annexed to the term law than one which it has any settled and exclusive possession of already".

With respect to rights, Bentham distinguishs rights which result from absence of legal obligation from rights which result from the imposition of obligations by coercive laws. The first sort are rights of a person to do or not do some action A. (Cf. types of rights 1) and 2) on p. 9 above). Sometimes these are based on laws which explicitly declare that the action is permitted, but sometimes they rest on the silence of the law. In either case they leave the right-holder with liberty to do or not do the action. Hart calls these 'liberty-rights', and points out that liberty-rights which exist by the silence of the law exist by virtue of the existence of legal "obligations" indirectly correlative to the right. For example, Hart says, there is no law which explicitly permits a person to look over his garden fence at his neighbor - the law is silent on this right. His neighbor, on the other hand, has no obligation to let himself be looked at; he has the right to erect or not erect a screen, another right on which the law is silent. Nevertheless these two rights exist

legally by virtue of legal obligations, civil or criminal, which preclude certain forms of interference, including the right not to be assaulted, and the right to exclude others from coming onto one's property without one's consent.

Bentham calls rights like the right not to be assaulted, 'negative services', a term which derives from Bentham's effort to associate every right with a benefit to the right-holder in accordance with his utilitarian bias. But Hart describes this situation as "a liberty-right protected only by a normally adequate perimeter of general obligations" (132L) and considers that the hallmark of a legal right is the law's respect for the individual's choice.

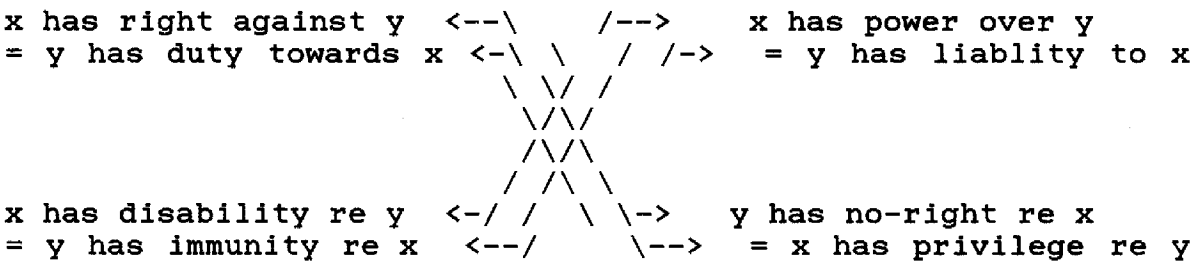
On my view what makes these liberty-rights legal, is the presence of legally prescribable penalties for the obvious forms of interference with them. Both Bentham and Hart try to define rights in terms of directly or indirectly correlative obligations. But this seems to me to be both uninformative for our present purpose, and ambiguous. It is uninformative because it gives us synonymous statements without laying down the truth conditions for either one. To say that "x has the right to do A, whether any y want him to or not" is correlative (equivalent) to saying "every y has an obligation to let x do A whether they want him to or not" tells us something about the use of words, but does not give us a criterion of application for either 'a right' or 'an obligation'. But also the word 'obligation' is subject to the same ambiguities as 'a right'. There is a moral use of 'x has an obligation' which both philosophers and lawyers are only too ready to read into 'obligation' as it occurs in legal documents. But there is a more prudential, non-moral coercive sense of obligation, as when I am obliged to do B under penalty of law. This latter kind of obligation is what makes Hart's 'perimeter of general obligations' capable of making a liberty-right actually exist. And this is in accord with Hart's distinction in The Concept of Law between habit and obedience to a rule; in the latter and not in the former deviations are open to criticism and "threatened deviations meet with pressure to conformity" (p.54). It is not the analytic relations between 'an obligation' and 'a right', which tell us what a right, even a legal right, is; it is the connection between descriptions of the right-holder, the type of behavior which is protected, and the rules in the law which provide for penalties to insure that protection.

Bentham's view that this first type of legal right is based on non-coercive law, thus seems to me superficial. The willingness of the government to permit x to do A joined with legal rules for penalizing attempts to prevent x's doing A, are what constitute x's having the legal right to do A.

Bentham's second kind of right, that resulting from obligations imposed by laws, includes what may be called "claim rights" and "powers". (They may be compared to types 3) and 4) of the rights on page 9 above). Hohfield held that the term 'a right' in its "strictest sense" has a narrower extension than Bentham or Hart; what he called rights were claim-rights essentially. Taken in this narrow sense, every claim-right has a correlative duty directly associated with it:

> "In other words, if X has a right against Y that he stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place." (Hohfield, p.38)

But this statement of equivalents is also no definition. It gives no clue as to what a would make either a claim-right or its correlative duty exist in fact. Hohfield's analysis is, like Aristotle's Square of Opposition, a logical exercise. In fact, he did present his analysis as a square of "Jural Correlatives" (equivalents) and "Jural Opposites", which may be represented as follows:



What was called 'liberty-rights' above, Hohfield called 'privileges', and distinct from both privileges and claim-rights, he listed 'powers' and 'immunities'. For Hohfield the correlative of a privilege, or liberty-right, is a "no-right"; that is, if x has the privilege, or liberty, to do A against any y's effort to stop him, then y has no-right to stop x from doing A.

By a "power", Hohfield meant an power to change a given legal relationship, for example, the power to extinguish one's legal rights in property one owns and create legal rights for another person by selling it, or the power to create contractual obligations. Bentham called powers of this sort "investive" and "divestitive" rights; the right to acquire, or transfer, one's ownership rights, or to establish contractual relationships which will be recognized by law as giving one party certain rights vis-a-vis another. Bentham also included under "powers" certain rights which Hart categorizes as liberty-rights, namely powers of physical control over things or persons, as an owner's right to use or destroy his own property, and a policeman's power to arrest or physically restrain a brawler (131L). We have dealt with liberty-rights above. In so far as the acts of buying or selling property are rights to do something, they are protected as liberty-rights are, and fall under my types 1) and 2). In so far as a claim-right is present in the process of buying and selling, the rights of the buyer against the seller, or vice versa, are covered under types 3) and 4) above. Once the transaction is over, the new owner has the same rights with respect to his new property as the previous owner did when he owned it. I do not see that there is any new higher level right which is not covered.

Hohfield's concept of an immunity was chiefly related to such things as exemption from taxation, or immunities from

legislative action. Bentham made little reference to immunities and Hart relates them chiefly to constitutional limitations which protect individuals by creating diabilities of the legislature, which brings us back to constitutional rights.

Whereas Bentham tended to reduce all legal relations to rights and obligations (i.e., duties, for Bentham), Hohfield considered such a reduction "one of the greatest hindrances to the clear understanding, the incisive statement and the true solution of legal problems" (p.35). He preferred to use 'right' in the narrow sense of 'claim-right'. Here I agree with Bentham and Hart in defining rights more broadly, because I believe the whole business of establishing a government by law, involves creating a structure of positive rules accompanied by rules for penalizing their violation. I see no need to claim, as Bentham did, that every law gives a right to some party, even if it is true. Perhaps it could also be said that every law gives a duty, a liberty, a power to some party. But attention to who is permitted by law to exercise which choices, coupled with attention to legal provisions for penalizing parties who obstruct the execution of those choices, are important aspects of legislative and judicial deliberations; and this, by my definitions, is equivalent to attending to legal rights.

These remarks have fallen far short of doing justice to the subtlety of the analyses of Bentham, Hohfield and Hart. But despite its deficiencies, I hope the central point has come through. The concept of a right is the concept of a triadic relationship, not of a property inherent in a right holder. An actual right is a general rule of behavior whereby parties (right-holders) are recognized by the social group within which this behavior is found, as being permitted to make certain types of choices, and the force of that society is brought to bear to protect or enforce the exercise of that choice; and this concept precedes the concept of a legal right. The term 'a legal right' is not defined by giving other legal terms as equivalents, synonyms or opposites. First 'a right' must be defined independently of law. Then a <u>legal</u> right becomes simply the idea of such a right expressed through words which have been enacted into law, or which have been expressed in judicial decisions interpreting previous law. Whether a legal right becomes an actual right is a matter for historical or sociological investigation, not legal pronouncement alone. Whether it ought to be a legal right, or indeed, an actual right are moral questions, quite distinct from questions of whether it <u>is</u> a legal right, or <u>is</u> an actual right.

V. DWORKIN AND THE NATURAL/MORAL RIGHTS TRADITION

The approach above contrasts sharply with the sort of approach Dworkin wishes us to take seriously. Although Dworkin disclaims appeals to God-given rights, natural rights and moral rights grounded in "ghostly" sources, it is well to recall some of his intellectual ancestry.

The idea of transcendent law was expressed by Cicero as follows:

"There is in fact a true law - namely, right reason - which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible."

(Cicero, Republic, Book III)

Aquinas, following Augustine, christianized eternal law and made natural law subordinate to it:

"Now it is evident, granted that the world is ruled by divine providence,...that the whole community of the universe is governed by the divine reason. Therefore the very notion of the government of things in God, the ruler of the universe, has the nature of a law. And since the divine reason's conception of things is not subject to time, but is eternal,...therefore it is that this kind of law must be called eternal."

(Aquinas, Summa Theologica, Question XCI, Art.1)

"...it is evident that all things partake in some way in the eternal law, in so far as, namely from its being imprinted upon them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to divine providence in a more excellent way.... Therefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and end; and this participation of the eternal law in the rational creature is called the natural law."

(Aquinas, Ibid., Art.2)

Grotius, the father of international law, also appealed to natural law, originating in God. Man, he insisted by nature "has a desire for society" as well as being impelled to seek his own advantage, and the former is the source of law. But also,

"... we find another origin of law, besides that natural source of which we have spoken; it is the free will of God, to which our reason indisputably tells us we must submit ourselves. But even natural law ... may be rightfully ascribed to God, though it proceed from man's inner nature; for it was in accordance with His will that such principles came to exist within us."

(Grotius, Hugo De Jure Belli et Pacis (1625), from Prolegomena, 1, 12)

Grotius attributed to Natural Law (which, he said, was "so immutable that it cannot be changed by God himself" [opus cit, Bk I, Ch. I, X,5]) both the right of self-defense and the unlimited

rights of the master to do what he wished to to his slaves, in cluding killing or selling them [Opus.cit., Bk III,Ch. VII,V.].

According to Hobbes in the absence of government, "every man has a Right to everything, even to one anothers body", by the Laws of Nature, which are "Immutable and Eternal"; but the Commonwealth is established by every man agreeing with others to give up their rights to govern themselves to a sovereign. Locke's first Treatise on Government was an attack on Robert Filmer's argument that the rights of kings were both divine rights and natural rights derivative from the natural Right of Fathers to govern his family by nothing other than his own will.

Locke's Second Treatise on Government, which was published anonymously shortly after William II signed the first English Bill of Rights, is much more compatible with the present-day American rhetoric on moral or natural rights that any previous work. Locke argues that each individual has God-given, natural rights to life, health, liberty and such property as "he hath mixed his labor with", and that no one had the right to govern without the consent of the governed, and thus that slavery was contrary to Natural Law.

The claim that these individual rights were Natural Rights and God-given rights, and that the non-existence of them in monarchical governments constituted violations of God's Laws and the Laws of Nature, became an effective battle-cry and mobilizer of revolutionary forces in America and in France:

> "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that these are Life, Liberty and the Pursuit of Happiness - That to secure these Rights, Governments are instituted among Men..."
> U.S.Declaration of Independence, 1776

> "The end in view of every political association is the preservation of the natural and imprescribable rights of man. These rights are liberty, property, security, and resistance to oppression."
> (Article II, The Declaration of Rights, French National Assembly, 1791)

It was the passage above from the French Declaration of Rights that provoked Bentham's famous remark:

> "Natural Rights is simple nonsense: natural and imprescribable rights, rhetorical nonsense; nonsense on stilts" - Jeremy Bentham

But the story of claims and counter claims about natural or God-given rights does not end there. Hegel, who asserted that "the state as an actual thing is pre-eminently individual, and what is more, particular", asserted that the "highest right of all" is that of the universal spirit (or world-spirit, or God) to realize its potentialities in natural reality, i.e., history, and that this world-spirit "exercises its rights on the lower

spirits in world history". That nation, in a given epoch, which is "the bearer of the current phase in the development of the world-spirit" has an absolute right to realize itself in laws and objective institutions, and the spirits of other nations are void of right; "... rights of mere herdsmen, hunters, and tillers of the soil are inferior, and their independence is merely formal". [Hegel, G.W.F., The Philosophy of Right, 1821, paragraphs 259, 340-351].

Mussolini, also insisting that the state is a spiritual and ethical entity with its own personality, wrote:

> "The Fascist conception of life is a religious one in which man is viewed in his immanent relation to a higher law, endowed with an objective will transcending the individual and raising him to conscious membership in spiritual society...
>
> "Anti-individualistic, the Fascist conception of life stresses the importance of the State and accepts the individual only in so far as his interests coincide with those of the State...It is opposed to classical liberalism which arose as a reaction to absolutism and exhausted its historical function when the State became the conscience and will of the people. Liberalism denied the state in the name of the individual: Fascism reasserts the rights of the State as expressing the real essence of the individual...
>
> "The Fascist State, as a higher and more powerful expression of personality, is a force, but a spiritual one. It sums up all the manifestations of the moral and intellectual life of man...It is no mere mechanical device for defining the sphere within which the individual may duly exercise his supposed rights."
>
> [Benito Mussolini, The Doctrine of Fascism, 1935]

Dogmatic assertions concerning the existence of moral rights in some non-empirical sense of existence, have thus been a regular feature of political rhetoric. Such assertions appeals continue today. 'Right-to-lifers' insist that fetuses from the moment of conception have a natural and moral right not to be aborted; for many of them such rights are grounded in God's eternal Law as well as Natural Law as described by Aquinas. Ardent feminists, on the other hand, insist with equal fervor that a woman has a right to control her own body and whatever takes place within its boundaries up to the moment of a baby's birth. The source of this extra-empirical moral right is not so clear, but it appears to involve truth-claims that certain individual moral rights exist whether or not they exist in fact or in law. The initial successes of the civil rights movement in the 1960's - successes which were first based on the discrepancy between legal rights guaranteed in the U.S.Constitution and the non-existence of those rights in actuality in the south, as well as widespread popular sentiment that these constitutional rights should be enforced (which led to the Voting Rights Act) - led to a revival of appeals to natural and moral rights in a variety of areas.

Dworkin's book, Taking Rights Seriously, was an attempt, by a liberal proponent of many of the rights which were at issue, to legitimize on theoretical grounds this throwback to an earlier mode of argumentation. The question at issue in this paper is not a matter or conservativism vs. liberalism, or radicalism vs. reaction. In general I have no quarrels with the sorts of rights which Dworkin seems to want to see actualized; if liberalism is measured by which rights one wants which individuals to have, I am a fellow liberal with Dworkin in almost all cases. Bentham was a radical reformer in his day, and so were the firebrands of the American and French Revolutions. On the other hand, as we have seen, appeals to natural and moral rights can also made by conservatives and reactionaries. The differences lie in the different kinds of rights, or the different beneficiaries of rights (right-holders), not in the modes of argumentation. The issue here is the modes of argumentation and inquiry which Dworkin proposes.

As we have said, Dworkin repudiates any appeals to "ghostly entities like collective wills or national spirits", and claims that his theory does not differ in metaphysical character from "the ruling theory" itself and is parasitic on utilitarianism's idea of a collective goal of the community as a whole. Presumably he is also free of theological grounding or reliance on Reason.

Having divested himself of these "ghostly" foundations, Dworkin's substantive proposals turn out to be remarkably weak. Where earlier moral and natural rights theorists asserted the existence of God-given and natural rights to life, liberty, property, the divine right of Kings, the rights of masters over slaves, the rights of the state, or of the species, over individual's rights, Dworkin comes up with only "the fundamental right of citizens to equal concern and respect"(TRS, 277), rejecting even the general right to liberty as a "misconceived concept" (TRS, 271). Just what this amounts is not clear. Under what conditions can a citizen ask the government to impose penalties on some specified kind of party for not showing equal concern and respect to that citizen? What are the criteria of showing equal concern? of showing equal respect? In what ways must we show equal concern and respect for the man who murders 29 young boys or the banker who embezzles millions of dollars from his depositors? No doubt Dworkin has subtle answers to such questions but they are unlikely to be much help in judicial decision making.

Further, Dworkin appears to agree that, no "mechanical" procedure exists for demonstrating what those rights are in such cases, and since reasonable lawyers and judges in "hard cases" often disagree and none have available any arguments which will necessarily convince the others, it may be impossible in principle to demonstrate that a given answer is the right one. It does not follow, he says, that because a proposition can not be demonstrated to be true, that it may not be true nevertheless. Let us grant this. But he holds, in spite of this, that the judge's duty is to try to discover (rather than invent) what those rights are (TRS, 81).

> "When men disagree about moral rights, there will be no way for either side to prove its case, and some decision must stand if there is not to be anarchy. But that piece of orthodox wisdom must be the beginning and not the end of a philosophy of legislation and enforcement. If we cannot insist that the government reach the right answers about the rights of its citizens, we can at least insist that it try. We can insist that it take rights seriously..."
> (TRS, 186)

No doubt the judgments of truth and falsity, as well as some of the value judgments, in this list are subject to question. But the point of the list has to do with ordinary usage, not with questions of law.

In the cases above, it is clear that what rights actually exist in the law or in actual fact (custom, folkways, social practices), is kept distinct from what rights ought or ought not to exist. Contradictions would arise if we allowed that any pair of these sixteen cases could both be true at once; for such pairs always entail either that some right both ought to exist and ought not to exist legally (or actually), or that they both do and do not exist legally (or actually). The disadvantage of contradictory results is that they give us no ground for decision; the factual contradiction leaves us without a clear statement about the factual grounds on which we can decide what to do, and the contradiction among ought-statements would leave us without guidance on what action to take under the given conditions.

We may assume that differences of opinion will arise among different individuals on all four of the questions at issue; i.e., whether a given right, R, exists in law or not? whether it exists in fact or not? whether it ought to exist in law? and whether it ought to exist in fact? It is the primary function of lawyers and judges to argue and try to decide the first question; the second is largely in the domain of sociology; the third question is the proper function of legislators and the citizens in a democracy; and the last question is left up to the decision of non-governmental social groupings. The well-being of a society, its structure and quality, depends on how well these decision-making processes are carried on. Differences of opinion always involve contradictory claims; to bar contradiction would be to bar differences of opinions. Yet the objective is to resolve this differences, to eliminate the contradictions, without limiting the possibility of honest and intelligent differences of opinion. Having differences of opinion is healthy; it leads to progress; the problem is to choose the best from among the different opinion offered.

Ought statements, on the view which underlies this critique, should be distinguished from assertions of existence. For, the central questions of moral and practical decision-making concern whether 1) what does exist ought to exist (or ought to be removed from existence), 2) what does not exist ought to be made to exist, or ought to kept from existing, and related questions. Judgments of truth and falsehood are most rigorously understood as questions of existence, e.g., questions of whether a description corresponds or applies to what actually exists or what is the actual state of affairs. To say that an ought statement is true suggests that it describes something that exists somewhere. And this creates confusion; for then a right which does not actually exist is asserted to exist somewhere. The very concept of existence becomes ambiguous, as does that of truth, and the distinction between what is and what ought to be, so central to moral judgment, is muddied up.

Since in the matters which are at issue for practical judgment it is often the case that the right which is described or the state of affairs involved does not exist in the actual world but is claimed that it ought to exist, (or that it does exist but ought not to exist in the actual world), to claim that an ought statement is true seems to entail that it describes something which exists in some realm other than the actual world recognized by common sense. What would this world be? God's mind perhaps, as Jefferson seemed to think? or Nature? or Reason? I do not go as far as Bentham, in calling concepts of realms of existence other than the actual world, "nonsense", much less "meaningless" as the logical positivists would have had it. Were the proponents of a given right (say the fetus' right to be born) to say that God believes that such entities ought to have the right, I would not accuse the sincere proponent of talking nonsense or making a meaningless statement; such a statement as a legitimate claim to be true or else false, and though I might believe it false either because I didn't think there is any God, or because I believed there was a God but that he did not hold this view of the moral right, I would not call it either nonsense or meaningless. But I might also not accept it as either true or false because I don't have any reason to believe one way or the other about its truth or falsity.

A very important principle of Anglo-American law is the principle of equality before the law. This means that in some sense the same law applies equality to every individual. The situations and persons of course are different in each case; but presumably it means that if and when conditions were exactly the same, two individuals would be subject to the same treatment. The fact that this ideal is seldom met in fact, does not alter the fact that its violations are deplored, it is always appealed to, and never rejected, as a basis for improving the legal system.

This concept lies behind the tendency of lawyers, or philosophers of law to hold that the law is impartial, justice is blind, etc. And this, to be supported, seems to require the assertion that an individual judge's decision is, and should be

ideally, based solely on what the law actually is. When we get to "hard cases", we have two ways to go 1) there is no law, and the judge's decision reflects his personal view of what is right (the judge's individual morality is the basis of his decision), or 2) that there is an objective natural or moral law that the judge is bound to base his decision on, so that his decision is correct or not according to whether it is in accordance with this natural or higher law. Dworkin argues that

> "The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects the inherent equality of men" p 93 Lyons
>
> "If we cannot insist that the Government reach the right answers about the rights of its citizens, we can at least insist that it try. We can insist that it take rights seriously, follow a coherent theory of what these rights are, and act consistently within its own professions." p 94 Lyons

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JOHN AUSTIN "The existence of law is one thing; its merit or demerit is another" John Austin, The Province of Jurisprudence Determined, London: Weidenfeld and Nicolson, 1954), p 184

H.L.A.HART "...there is no necessary connection between law and morals, or law as it is and law as it ought to be." The Concept of Law, (Oxford: Clarendon Press, 1961) p. 253 (See also "Positivism and the Separation of Law and Morals," Harvard Law Review 71 (1958) 601,n.25

JOSEPH RAZ, "A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behavior capable of be described in value-neutral terms, and applied without recourse to moral argument." The Authority of Law (Oxford: Clar. Press, 1979) p 39?

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[Says, D. challenges Hart's view of "choices" in hard cases which ammount to legistlative discretion.. Says D holds "existing legal materials are rich enough to provide a single correct answer for every legal issue," and explains in "Hard Cases" the methods by which judges do and try to discover that answer. Says D give "no persuasive argument ...for judicial abstinence from policy considerations, that is, considerations based on collective welfare. The arguments from dem,ocracy, retroactivity, and articulate consistency all fall fzr short of providing firm support for the these that judges should rely exclusively on principles"p 1033; "..The notion that judges

should give weight to rights [in law] does not lead to the conclusion [in Hard Cases] that when arguments about rights are nearly balanced the judges should try to decide a case without considering the general welfare at all." 1035. Hercules theory:- perfect judge constructs "a political theory that would best justify existing constitutive and regulative rules and, second, by applying that theory to each particular case."1035. D. says that there is one right answer in every or almost every legal case , suggested by institutional materials. Greenawalt's Questions: "A do Legal Materials Provide One Right Answer to All Legal Cases?", (2) Is it socially useful for judges to proceed as if there is one right answr to every legal issue? (3) is the way in which a judge resolves a legal issue in hard cases essentially different in theory and practice from the way in which a legislator resolves an issue? (4) When institutional materials do not? indicate a particular answer to a case, is it an aspect of the legal duty of judges always to reach an asnswer?" 1037 re (2) "Conceivably the search for one right answer in cases in which only a Hercules could discover it would simply exhaust and frustrate the judge; if he assumed he could pick between plausible alternatives, he might reach the same result he would otherwise reach at less psychic cost. Conceivably the assumption of one right answer ... he may be set adrift in abstractions he really cannot handle and end up rationalizaing his own preferences more than he would under some simpler process of decision"

1. Judges should decide on principles (not policy) - rights
2. Rights in hard cases, are derived from law (+ morals) (but also morality)
3. There is one right answer.

Hart's characterization

VI.

The issue: hard cases Hart.

Re: 1) Greenawalt, a) vs. The principle/policy division
b) vs. Selective attention to individual rights" or "State rights" ① [illegible]
c) no [illegible] argument for [illegible] arguing) Granting distinction from policy -
d) Seems wrong to exclude policy considerations, (Posner)
② Excluding them does not prevent legislation by judges, [illegible] existing law

2) Dworkin's method of investigation so far as it ~~applies~~ can
a) The "whole of Law" ~~may~~ is capable of being consistent with several interpretations - | No body grasps whole of law. Differences in interpretation of "gravitational force" due to sectional or class or ~~[illegible]~~ religious differences.
b) Some sets of decisions support one interpretation another supports another - Selection of cases to support the 'rule' is guided by objective (lawyers on one side, judges view)
c) Greenawalt - will frustrate Judges - abstracts

The residual appeal to objective ~~morality~~ laws - moral realism -

3) The one right answer, truth, - "The weakness of the one right answer to [be] found" 1) Meta physical question - are there objective moral laws 2) Is it good to encourage appeal to them when a) people differ on what they are b) there is no way to decide who is correct.

VII. Argument For 1) good systems: 1) Judges should decide cases by law, not moral ideology as far as possible
2) When there seems no clear legal decision, & he should use his moral views on what is good for society - These views should not be [illegible] but presented for further testing & [illegible].

Additional notes by R.B. Angell from the back of the paper:

the [structured] coercive rules of a [i.e., government by laws] ~~pervasive system of law~~
was to achieve the best society.

~~To achieve this it is in~~

The ~~best~~ way to work towards this end [within any system of government laws / any good]
is ~~for~~ to ~~use a~~ give the term 'a right'
an effective~~ly~~ ~~[illegible]~~ empirically-testable
but morally-neutral meaning, ~~and rely upon~~
~~those~~ and ~~[illegible]~~ ~~discuss~~ [freeing and letting arguments] ~~whether such~~
from various moral, ~~and~~ prudential ~~and~~ points of view
a right ought or ought not to exist in fact —
and, if ~~they~~ ought exist, whether they
ought to be legal ~~i.e.~~ rights, i.e., rights
supported or protected by [coercive powers of the political] government.

~~[illegible]~~ Once enacted into law, ~~given~~ [in] a
good-legal system, judges ought to

~~Views~~, either more or less well thought-out sets of moral convictions in the minds of judges – different visions of what they would like to see their country become – ~~Not utilitarian~~ different principles – utilitarian and rule-utilitarian, but organismic theories, ~~the~~ libertarian theories stressing maximum freedom to competitive individuals – theories stressing concern for others – the .. etc.

4. ~~The I~~ Holmes said truth wins in the market place – Better the best plan wins – In our system – If the judge's innovative decision can be ~~a~~ appealed, through the hierarchy of the court-system – there to be tested by other judges with, possibly, different moral systems ~~And finally, the legislature & the people~~ –

If not appealed, or if it stands up under appeal, it may serve as precedent and thus become part of the established law – If this is not to the liking of the legislature, or the people, there are ways to revise it.

5. ~~The~~ Questions of ~~types~~ ~~rights what rights ought to exist~~ who ought to have what rights and against whom, may indeed be central questions in many, if not all, hard cases – though I do not believe the presumed right-holders will always be individuals, or oppressed minorities, or the rights always rights to equal treatment, or right to liberties. ~~But The~~ Nevertheless, the question of which right ought to exist for whom and to do what, is a pervasive central question in shaping the
is an all-pervasive aspect of question how & shape

VII

1. In good legal system, where law is clear, judge should only apply law – never make it.
(But, if bad laws, conscientious judge ought not to enforce. I assume good legal system, with right of appeal, etc,
Dworkin assumes. – nonetheless.

2. Hard-cases – After appropriate research, no clear law. I assume hard cases even in system of law which is over-all a good one. Decision should be made
Here judge should not – ① decide on basis of his own interest only
② cast coin
③ not decide on the basis of solely on accepted social customs & attitudes (though these may be relevant later to consider)
④ not decide on basis of political pressures by political pressure groups
⑤ he should apply system's own best moral values, so far as it does not conflict with the established structure of the law, to interpret, & thus shape, the legal system of laws – to help fulfill, or fill in gaps, improve on, create an improvement or adjustment to new conditions – creative, makes laws, fleshes them out, supplements them to adjust to novel situations – try to keep them in line with cultural & political feelings (intrinsically consistent)

3. Presupposes 1) a variety of moral systems – some of which internally
2) a variety of cultural traditions
(No one right answer – but many.