

5-1-1992

## Dworkin and the Doctrine of Judicial Discretion

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### Recommended Citation

David Jennex, "Dworkin and the Doctrine of Judicial Discretion" (1992) 14:3 Dal LJ 473.

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In a series of books and articles published over the last thirty years, Ronald Dworkin has relentlessly attacked the positivist view according to which law is a species of empirically verifiable fact.<sup>1</sup> A position closely associated with this view, and with which Dworkin also takes issue, is the doctrine of judicial discretion. This doctrine asserts that in hard cases – cases in which it is unclear what the law requires – there is no legally required dispensation, so that judges are entitled to use discretion in making their decision. Dworkin disagrees, maintaining that in many such cases a thorough investigation into the implications of legal standards bearing on the issue in question will reveal a unique solution. His critics almost uniformly portray this claim as entailing that there is a single right answer for every case, and subsequently dismiss it as requiring too much of the language in which law is expressed and the judges who must interpret it. This is ironic, since Dworkin's objection focusses on what he takes to be an unrealistically strong demand by positivists concerning the verifiability of legal standards. In what follows I examine Dworkin's arguments so as to show that his detractors have largely misunderstood his position regarding the resolvability of hard cases. I argue that he is correct in maintaining that judges may sometimes be required to reach controversial decisions, but that this is compatible with a criterion of verifiability commonly encountered in the empirical sciences.

### *I. Hart, Dworkin, and the Doctrine of Judicial Discretion*

In *The Concept of Law*<sup>2</sup>, H. L. A. Hart defends the traditional positivist claim that law is a matter of observable social fact: conceptually distinct from questions of moral or political philosophy. However, he departs from the traditional understanding of that claim according to which law

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1. R. Dworkin, "Judicial Discretion" (1963), 60 *J. of Philosophy* 624-638; R. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co., 1977); R. Dworkin, "No Right Answer", in P.M. Hacker & J. Raz, eds., *Law, Morality and Society* (Oxford: Clarendon Press, 1977); R. Dworkin, "A Reply by Ronald Dworkin", in M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (New Jersey: Rowman and Allanheld, 1983); R. Dworkin, *Law's Empire* (Massachusetts: Harvard University Press, 1986); R. Dworkin, "The Bork Nomination", *New York Review of Books*, Aug. 13, 1987.

2. H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

is constituted by the commands of a sovereign, contending instead that law is better conceived of as a system of *rules* that are accepted by at least the judiciary of a community. A consequence of his identification of law with a set of institutionally recognized rules is his commitment to a certain strong form of the doctrine of judicial discretion. Isolating precedents and statutes as the preeminent sources of law, he argues that in both cases there is an inevitable area of uncertainty regarding how they are to be applied to certain specific states of affairs. With precedents this point is obvious. Although judges sometimes cite rules to justify their decisions in particular cases, they are fundamentally concerned with rendering a judgment only for the case at hand. It may therefore be largely indeterminate what general maxims are to be extracted from past decisions, so that judges are given considerable latitude in establishing the latter's gravitational force. In the case of statutes, the indeterminacy is less obvious, but is there all the same. So as to cover a wide variety of relevantly similar situations, statutes are expressed in general terms. However, general terms are subject to a penumbra of vagueness that makes it difficult to discern their applicability to states of affairs not anticipated by the authors of the statutes in question.<sup>3</sup> It is this "open texture" of language that ensures that although the vast majority of cases brought before the courts uncontroversially fall either within or without the purview of established law, there will remain a number of cases in which judges must go outside authoritative *legal* sources in making their pronouncements. This is not to say that judges have license to decide arbitrarily, or are exempt from criticism. Apart from their legal obligations they are expected to employ commonly understood standards of fairness and rationality in reaching their decisions. What Hart claims is that when the indeterminacy of law, whether the result of the absence of clearly identifiable rules or the vagueness of institutionally acknowledged ones, renders it questionable as to which one of a number of possible case decisions is correct, the judge cannot be criticized on *legal* grounds for choosing one of the alternatives. It is this sense in which judges can be said to have discretion in deciding hard cases.<sup>4</sup>

In "Hard Cases"<sup>5</sup>, Dworkin develops a comprehensive theory of legal interpretation that contradicts the Hartian doctrine of judicial discretion. According to this theory judges must apply a principle of "articulate consistency" in determining the applicability of statutes and precedents to controversial cases. To illustrate, Dworkin postulates an ideal judge,

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3. Hart cites the example of a law prohibiting "vehicles" from a park. Does "vehicles" include bicycles, airplanes and roller skates? Or is it primarily meant to refer to automobiles? Hart, *The Concept of Law*, *ibid.*, at 123-125.

4. R. Dworkin, "Hard Cases", in his *Taking Rights Seriously*, *supra*, note 1, at 81-130.

5. H.L.A. Hart, *The Concept of Law*, *supra*, note 2.

called Hercules, who presides over a representative American jurisdiction. Faced, for example, with a hard constitutional case, Hercules constructs a number of political theories that might serve as justifications for the body of constitutional rules that are directly relevant to the issue at hand. In the event that two or more theories provide equally plausible interpretations of these rules, and yet prescribe different results for the hard case, he must turn to the remaining body of constitutional rules and practices in an effort to construct a political theory for the constitution as a whole. The successful candidate will “fit” all or most of the established rules of the constitution in a manner that represents it as a unified and coherent body of prescriptions for civic behaviour. Hercules will then apply this extraordinarily comprehensive theory to the hard case. The same process is to be used to account for statutes and the common law. Hercules must “construct a scheme of abstract and concrete principles that provide 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.”<sup>6</sup>

Dworkin’s claim is that, as far as is possible, actual judges should emulate the behaviour of Hercules in dealing with hard cases. His primary justification for this claim rests on the normative implications of the principle of articulate consistency. This principle, he notes, is actually an instantiation of a more general standard:

Judges, like all political officials, are subject to the doctrine of political responsibility. This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make. The doctrine seems innocuous in this general form; but it does, even in this form, condemn a style of political administration that might be called, following Rawls, intuitionistic. It condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.<sup>7</sup>

Regarding the obligations of judges, the doctrine of political responsibility requires that they (a) render decisions that enforce already existing law (b) in a manner that represents the latter as an internally consistent political theory. Dworkin contends that (a), at least in American law, is supported by the principle of democracy. According to this principle, the

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6. *Taking Rights Seriously*, *supra*, note 1, at 116-117. Hercules must also develop a theory of legal mistakes. That is, assuming that the legal system in question is not entirely coherent, he must describe some of its statutes and precedents as historical anomalies to be granted no gravitational force in later decisions. For this and other aspects of Dworkin’s coherentist theory, see *ibid.*, at 105-123.

7. *Ibid.*, at 87.

community should be governed by a group of elected officials who are directly responsible to the majority. Judges are not elected, and so are not responsible to the public in the same way. Therefore, they should not engage in the production of new law, but should only apply the standards officially enacted by the legislature. On the other hand, (b) is offered as the most plausible explanation of the special consideration given by American judges to precedents and hypothetical examples in their deliberations. For, as Dworkin notes, they cite political principles in support of certain decisions only if they can show that the same principles underlie earlier results, and can be extended to decisions that they would be prepared to make in the future. Taken together, (a) and (b) constitute the principle of articulate consistency. Dworkin's claim is that judges who accept this principle are committed to applying it in the form of his coherentist strategy to the resolution of hard cases.<sup>8</sup> Further, since such an interpretative strategy will reveal a much richer array of legal standards than the settled law contained in articulable rules, there will be, contrary to what the Hartian positivist contends, many hard cases for which judges can in principle find the uniquely required answer.<sup>9</sup>

At this point, Dworkin's theory takes a turn for the obscure. For he claims that Hercules' constitutional theory "would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about the complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make."<sup>10</sup> This statement suggests that there is a distinction to be made between the purely descriptive task of providing a political theory that most coherently accounts for established legal practices and the normative one of deciding which of a number of competing theories is morally or politically preferable. And, indeed, in his most recent work Dworkin describes considerations of fit as providing only a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.<sup>11</sup> When two or more interpretations meet

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8. *Ibid.*, at 86-90, 101-123.

9. *Ibid.*, at 125. Dworkin also appeals to the fact that American judges typically act *as if* their decisions in hard cases are required by principles that, although perhaps not explicitly acknowledged in statutes or past decisions, are nonetheless contained within the fabric of established law. Claiming that such principles are "imminent in the law" or implied by "the general fabric of the law", judges convey the impression that they feel constrained by legal standards that can only be revealed through a holistic interpretation of settled law. Dworkin contends that such reports offer *prima facie* evidence that at least American judges do characteristically engage in something like his coherentist approach to legal interpretation in hard cases: *ibid.*, at 112.

10. *Ibid.*, at 117.

11. Dworkin, *Law's Empire*, *supra*. note 1, at 256.

this requirement equally well, Hercules must choose between them on the basis of which shows the legal practices of the community as a whole in the best light from the standpoint of moral and political philosophy.

This aspect of Dworkin's theory is perplexing, given what appears to be his motivation for constructing an alternative to Hartian positivism in the first place. As his coherentist or "constructivist" approach indicates, he is attempting to demonstrate that the number of hard cases for which there is no unique legal resolution is much smaller than the Hartian positivist would have us believe. It is unclear, however, how requiring judges to engage in normative evaluations so as to identify valid law furthers this aim. In the absence of wide-spread agreement on moral and political matters, there seems no way of discriminating between two or more accounts of a legal system that depend on normative judgments beyond those engendered in coherence considerations. Including such judgments among the *legal* factors judges must consider, therefore, offers little hope of reducing indeterminacy in law. Moreover, in arguing that law is fundamentally tied to questions of moral truth, Dworkin appears to commit himself to an impossibly strong claim. For all that is required to refute it is the existence of a conceivable legal system in which the truth of a moral principle is not among the truth conditions for any proposition of law.<sup>12</sup>

Whether or not Dworkin can answer these objections to the extra-institutionally normative requirements of his theory, I consider in the rest of this essay his arguments concerning judicial discretion only in the context of his coherentist approach to hard cases. I believe that the crux of his dissatisfaction with the Hartian doctrine of judicial discretion can be supported on these grounds only. If this is so, his arguments will be of wider interest, since there is in principle no reason why coherentist considerations cannot be incorporated within a positivist theory of law.

## II. *Dworkin and His Critics*

Assuming the viability of the principle of articulate consistency as a model for resolving hard cases, it would seem that Dworkin has provided a strong argument that at least American judges are obligated to embrace his coherentist theory in this context. It is this assumption, however, with which many of his critics take issue. For no matter how convincing are his arguments concerning the dedication of American law to the principle of articulate consistency, he is open to the charge that as a methodological precept the latter is an *ideal* that cannot be realized in the context of hard

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12. For an elaboration of this point, See J.L. Coleman, "Negative and Positive Positivism" in *Ronald Dworkin and Contemporary Jurisprudence*, *supra*, note 1, at 30.

cases. Joseph Raz, for example, argues that Dworkin's theory merely pushes the problem of linguistic vagueness back to the level of the standards and principles that judges, inspired by Hercules example, will find embedded within the fabric of settled law. Even if such principles entail results for some cases in which rules do not, claims Raz, there will still, because of the open texture of the language in which they must be expressed, be instances in which judges are given no clear guidance as to what the law requires. In such instances, he concludes, the Hartian claim that judges may use discretion in reaching a decision holds."<sup>13</sup>

Raz's objection presupposes, as does its Hartian counterpart, that the binding effects of legal standards are exhausted by the abstract meanings of the terms in which they are expressed. On this view, if the relevant terms are vague, the legal force of the standards in question is indeterminate. This fails to appreciate, however, Dworkin's contention that the meaning of a legal principle, however firmly established, may vary according to which political theory is postulated by a judge as the best account of the legal system as a whole. This process is inherently dynamic, as the judge is required to continually reconsider the current best theory in light of novel considerations suggested by hard cases. If this theory, or any of its composite principles, is vague in its prescription for an unanticipated state-of-affairs, then it, like the settled law it is meant to explain, must be reinterpreted so as to include the anomalous circumstances within its domain. On Dworkin's view, then, the apparent vagueness of a legal standard is an indication that more interpretation is called for; it does not by itself preclude there being a right answer for a hard case.<sup>14</sup>

A different yet related objection could perhaps be erected without denying the premises of Dworkin's coherentist theory. Stephen R. Munzer, for example, argues that it is consistent with this approach that two political accounts of a legal system, each with a different implication for a hard case, could be equally well supported by institutional considerations.<sup>15</sup> In such a case there would be a tie between the two accounts, and therefore no uniquely right answer to be found. Dworkin acknowledges this possibility, and admits that in such a case the judge might be justified in using discretion. He points out, however, that a judgment that such a case is at hand would have to be made *within* the interpretive enterprise described in his coherentist strategy. To illustrate, he postu-

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13. J. Raz, "Legal Principles and the Limits of Law" in *Ronald Dworkin and Contemporary Jurisprudence*, *supra*, note 1.

14. For Dworkin's more detailed reply to this argument from vagueness, see "No Right Answer", *supra*, note 1, at 67-69.

15. S.R. Muzner, "Right Answers, Preexisting Rights, and Fairness" (1977), 11 *Georgia L. R.* 1055-68 at 1057.

lates for the judge a scale of confidence, with the right side gradating toward the position in which she is absolutely sure that the law supports the plaintiff's claim, and the left toward the position in which she is absolutely sure that it supports the defendant's claim:

We may now return to the philosopher's claim that ... judges [make] a profound mistake by assuming that there can be a right answer in a hard case. If we take his claim to be a claim within the enterprise, then the claim is almost certainly false. It comes to this: the tie judgment is necessarily the right judgment in every single controversial case, that is, in every case in which one answer cannot be proved in a way that can only be challenged by the irrational. Now (unless special instruction to ignore ties is part of the enterprise) every judge will concede that some hard cases may in fact be ties, but no judge will suppose that they are all ties. The philosopher, to support his claim against their opinion, would have to provide arguments affirmatively establishing that all hard cases will lie at the exact center of the scale we imagined, and that claim is so implausible that it can be set aside at once.<sup>16</sup>

I have quoted this lengthy passage because it clearly articulates Dworkin's general complaint with the Hartian doctrine of judicial discretion. Dworkin is not claiming that there is necessarily a right answer for every hard case.<sup>17</sup> Rather, he argues that the question of whether there is a right answer for a hard case can only be decided *after* the judge has, to the best of her ability, exhausted the institutional application of his coherence model to the relevant system of law. Conversely, the Hartian thesis claims that on the basis of philosophical considerations external to interpretive claims about actual legal systems, there is never a uniquely correct answer for a hard case. It is, of course, possible that, despite Dworkin's polemics, such a claim could be made of a *particular* legal system, as would be the system were to contain a requirement that legal solutions be deduced directly from settled law. But, again, such a claim would have to be defended according to considerations internal to a reading of the system in question, and could not support the much stronger Hartian contention.

### III. *Controversiality and Hard Cases*

Unless the Hartian doctrine of judicial discretion, then, is to be taken as merely a claim about a particular legal system, it must show, on the basis of general philosophical argument, that hard cases are in principle incapable of unique legal resolution. Hart's and Raz's arguments con-

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16. Dworkin, *Taking Rights Seriously*, *supra*, note 1, at 287.

17. Although he does maintain that the more complex a legal system that accepts the principle of articulate consistency the more likely it is that there will be a right answer for every case: *ibid.*, at 286.



cerning the vagueness of legal standards are two failed such attempts. They are instructive, however, in that they suggest a central motivation behind positivist legal theories, namely, the desire to identify precise standards for the identification of valid law. The original positivist theories of Bentham and Austin were largely reactions to the natural law tradition, whose basic tenet is that any valid proposition of law must also be a true proposition of morality. Bentham and Austin pointed out that since there is no general agreement as to what exactly are the true propositions of morality, the precise identification of legal norms would, on this account, be inherently problematic. Their solution was to stipulate that law is a species of observable, and therefore verifiable, fact, specifically, the commands of a sovereign. Hart's rule of recognition is also, in part, an attempt to bring law within the domain of demonstrable fact. This is implied, for example, by his remarks concerning the evolution of a pre-legal society into one that has a legal system. The process is complete, claims Hart, upon the community's adoption of a rule of recognition, because the features of valid law made explicit in this secondary rule serve to cure the uncertainty latent in the application of what were formerly imprecise community standards.<sup>18</sup>

If the Hartian doctrine of judicial discretion is viewed as an extension of the positivistic drive for precision in law, it perhaps can be recast in terms of the *controversiality* of hard cases.<sup>19</sup> For it is a salient feature of such cases that there is often disagreement among jurists as to how they should be resolved. A Hartian might argue that disagreement of this sort undermines the contention that judges are always obligated to find right answers. Kent Greenawalt, for example, claims that

We do not usually speak of someone as being under a duty to reach a particular decision when we think the grounds of testing the correctness of that decision so complex that we cannot say with confidence if a decision is correct, when we do not even know practically how to test correctness and when we do not think the actor himself has a solid basis for choosing one decision rather than another ... [W]e should not [therefore] describe a Supreme Court Justice as under a "duty" to decide a case one way or the other, if authoritative materials give no clear guidance and lawyers equal in intelligence, moral understanding and social concern divide on which decision is sounder.<sup>20</sup>

There are two separate claims made in this passage. One is that there is in practice no method of determining the correctness of answers to hard

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18. Hart, *The Concept of Law*, *supra*, note 2, at 89-90. Dworkin makes this observation in "A Reply by Ronald Dworkin", *supra*, note 1, at 248.

19. Dworkin contends that this is the rationale behind most arguments for the legitimacy of judicial discretion: See "No Right Answer", *supra*, note 1, at 69, 76.

20. K. Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges" (1975), 7 *Columbia L.R.* 359-399 at 374.

cases, and that therefore judges cannot have a duty to decide them in a particular way. If Dworkin's arguments concerning the commitment of American law to the principle of articulate consistency are correct, then, at least locally, this claim is false. Lawyers and legal scholars recognize arguments of institutional support as decisive in settling questions of law. In any case, therefore, be it easy or hard, the answer that is entailed by principles that together provide the best explanation of settled law must be judged as the correct one. This is not to say that there will not be cases in which a judge will be unable to decide between two competing answers. Such cases, however, imply only that the accepted method of settling questions of law does not always indicate a single right answer, and not that in general no such method exists.

Greenwalt's second claim is that since competent jurists do not agree over what are the right answers in hard cases, judges cannot be held responsible for finding what the law uniquely requires. The hidden premise in this argument is that since competent jurists disagree over right answers, none can conclusively be shown to exist. Before this premise is accepted, however, it should be observed that disagreement over the solutions to difficult problems is encountered in many disciplines. Historians and natural scientists, for example, present empirical hypotheses on the basis of a systematic appeal to the facts, and yet sometimes experience reluctance, or even refusal, on the part of some of their colleagues to accept their findings. This in itself is not generally viewed as proof that their positions are false or nonsensical. Of course, if the evidence they cite is viewed by the community at large as utterly unrelated to the issue at hand, it will rightly be dismissed. If, however, it is granted initial plausibility, the hypothesis being argued will subsequently be tested against other propositions accepted by the community. If the hypothesis survives such testing, it will over a period of time become established as part of the collective body of knowledge of the discipline. If it does not, it will be considered falsified, and either modified or replaced. It is important to stress, however, that nothing concerning the truth of the claim is established solely on the basis of its initial controversiality. Indeed, such controversiality is expected as part of the process of verification. Moreover, supposing that the practitioners of the discipline are dedicated to discovering the truth about the world, be it historical or physical truth, they are obligated to pursue, on the basis of what they take to be the best available evidence, even the most unpopular hypotheses.<sup>21</sup>

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21. For this account of objectivity as it applies to science, see K. Popper, *The Logic of Scientific Discovery* (London: Hutchinson Press, 1959) at 44-48.

Analogously, one way to look at proffered answers in case law is as the implications of *legal* hypotheses, whose truth is to be established through a public process of verification. Like historical and scientific claims, they are to be made on the grounds of what their advocates take to be the best available evidence. In routine cases, judges need do little more than determine what the established theory or paradigm of law requires in particular circumstances. However, new social problems occasionally produce hard cases which cannot be resolved by the prevailing theory. In such cases judges must either revise the theory so that it provides an answer for the hard case, or replace it with one that does and in addition offers at least as coherent an explanation of settled law as the original. Assuming that the alternative explanation is initially plausible, its truth or falsity will be determined only after it has been thoroughly tested in subsequent case law and through argumentation on the part of legal scholars. On this account, judges, like their historical and scientific counterparts, are obligated even in the face of controversy to render the judgement that they believe is most clearly supported by the institutional facts.<sup>22</sup>

If my analogy is sound, then judicial opinions are *corrigible* hypotheses subject to falsification by the legal community. This clashes, however, with the popular belief among lawyers that a much higher degree of certainty must be exhibited before a proposition of law can be verified as true. Such lawyers typically view abstract arguments of institutional fit as appeals to a fictional realm of transcendental legal norms, whose existence can never finally be proven. In their view, unless an assertion of law can be demonstrated by reference to observable "hard" facts, such as a clearly worded statute or an institutional recognition of an assertion by a judge, then it is nothing more than an expression of opinion that they are free to accept or reject. Although this is a familiar argument,<sup>23</sup>

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22. A similar proposal is made by N. B. Reynolds, "The Concept of Objectivity in Judicial Reasoning" (1975), 14 *Western Ont. L.R.* 1, at 21-29. Reynolds claims that the notion of objectivity contained in this model is an advance on Dworkin's views, as Dworkin appears to admit only coherence considerations as indicative of right answers. Such a theory, suggests Reynolds, does not portray judges as testing their hypotheses in the real world of future legal experience, after they have performed the coherence test. See Reynolds, at 26-27. It is true that Dworkin nowhere explicitly endorses the model of community testing outlined above. However, such a model is consistent with his theory of judicial mistakes, in which he contends that judges must fasten on the forward-looking, rather than the backward-looking, implications of precedent. According to this theory, judges are required to treat decisions that are "widely regretted" by jurists as vulnerable. See *Taking Rights Seriously*, *supra* note 1 at 122, also at 88, where the relevance of hypothetical examples is mentioned.

23. For example, see A.D. Woosley "No Right Answer", at 173-181, and Coleman, "Negative and Positive Positivism", at *supra*, note 9, at 31-35, both in *Ronald Dworkin and Contemporary Jurisprudence*, *supra*, note 1.

it is fundamentally misguided. It depends, first of all on a distinction between two kinds of facts: the "hard" observable kind investigated by the empirical sciences and the "soft" interpretive sort appealed to in, for example, literary criticism. But this distinction is not helpful in a legal context. Although the actions of legislators and judges may be hard observable facts,<sup>24</sup> the statutes and opinions they establish are not. For statements of law, even of this concrete sort, are expressed in language, and as such are subject to interpretation. This may not seem to be the case, since the meaning of many legal pronouncements appears clear and indisputable. But this is a result of the general interpretive strategy accepted by the community that isolates certain propositions as fixed points of reference. Such propositions are stratified in law schools and precedents to the point that a judge who denies them is considered corrupt or incompetent. But it is not inconceivable that at some later date the social climate might change to the point that a radical reinterpretation that is otherwise explanatorily complete might persuade the community to abandon what was formerly a legal "fact". To insist otherwise is to subscribe to a theory of language in which isolatable statements have a single indisputable meaning in virtue of their direct correspondence to reality, a view long since fallen into philosophical disrepute.<sup>25</sup>

Secondly, even if there were hard legal facts, the objection being considered misconceives the role of interpretation, or, perhaps better put, theory-building, in law. In science, where hard facts exist if they do anywhere, theories constructed so as to explain the relevant data are no less interpretations than their legal counterparts. They are more characteristically referred to as inductive inferences to the best explanation, but there is no reason in principle why this description could not also be applied to legal interpretations. If there are hard facts, in science or in law, they can only be made sense of through coherently constructed understandings of how they together constitute the world in which people live.

#### IV. Conclusion

I have argued in this paper that Dworkin is correct in rejecting the Hartian doctrine of judicial discretion. The claim that judges are in principle never

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24. The assertion that there are hard observable facts of even this sort if challenged in W.V.O. Quine, *Word and Object*, (Massachusetts: M.I.T. Press, 1959), c. 1.

25. See Dworkin, *Law's Empire*, *supra*, note 1, at 88-92 for Dworkin's account of how certain legal propositions, which he refers to as "paradigms" of interpretation, became established in a legal community. For an exposure of the shortcomings of the theory of language according to which isolatable words have inherent meanings, see Quine, *supra*, note 21, c. 2.

obligated to find right answers in hard cases is dependent on a Cartesian demand for certainty that cannot be met in any discipline where descriptive hypotheses are subject to public testing and argumentation. However, this leaves it open as to whether the strong doctrine of discretion holds for any actual, as opposed to hypothetical, legal systems. Dworkin claims that in American law there is a presumption in favour of there being right answers for hard cases, but this is an interpretive assertion that can be contested. Some opponents argue, for example, that American law is inconsistent because of its commitment to certain incompatible political principles.<sup>26</sup> Others claim that law should be understood only in terms of the intentions of its original authors, and not according to holistic interpretations.<sup>27</sup> Either of these claims, if correct, would refute Dworkin's contention that the American legal system incorporates a coherent scheme of rights that specifies a single right answer for virtually every case brought before the courts. This would be a significant result, since the American system, with its strong doctrine of precedent, is arguably more deeply committed to the principle of articulate consistency than any other currently in existence. However, even if such claims are true, Dworkin would still have made an important contribution to legal philosophy. For his point stands that such arguments must be made on the basis of falsifiable interpretations of actual legal systems, and not on the general philosophical claim that hard cases are inherently incapable of a unique legal resolution.

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26. Such is the contention, for example, of certain members of the critical legal studies movement. See Dworkin, *Law's Empire*, *supra*, note 1, at 274-275, and accompanying note 20.

27. This is, for example, the contention of Judge Robert Bork. See Dworkin, "The Bork Nomination", *supra*, note 1.