Articles

DWORKIN AND THE LEGAL PROCESS TRADITION: THE LEGACY OF HART & SACKS

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Ronald Dworkin has been central to debates in legal theory over the past twenty years.[1] While commentators agree that Dworkin's contributions are of great significance,[2] there is frequently no consensus on exactly how to understand his arguments. This Article develops a particular view of Dworkin's place in the traditions of jurisprudence. It argues that Dworkin's approach to a number of problems in legal theory can be linked to what legal scholars sometimes call the Legal Process school. The important tenets of this school derive from views about the nature of law and the proper role of courts in Anglo-American legal systems expressed by Henry Hart and Albert Sacks in their influential manuscript, *The Legal Process*.[3] Their manuscript has engendered a tradition of legal scholarship: some contemporary legal theorists have acknowledged a profound debt to Hart and Sacks[4]; a number of others appear to have been influenced in important ways.[5] Dworkin, however, has not discussed their impact on his writings.[6] Nor have the

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1. Consider, for example, the recent comment by Jeffrie Murphy in a prominent philosophy of law text: "there can be no doubt that Dworkin's views dominate philosophical and legal discussion of the concept of law." J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 45-46 (1984).

2. *See, e.g.*, M. COHEN, RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE ix (M. Cohen ed. 1984).

3. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tentative edition, 1958).

4. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 87-90 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) (dedicating article to the memory of Henry Hart).

5. *See, e.g.*, G. CABBRESI, *supra* note 4, at 87; Wellington, *supra* note 4, at 249 n.20 (noting many legal scholars who, in his view, have followed the path of the Legal Process School); Vetter, *Postwar Legal Scholarship on Judicial Decision Making*, 33 J. LEGAL EDUC. 412, 417 (1983) (Legal Process approach became deeply entrenched among legal scholars).

6. In his three published books, his only citations to Hart and Sacks are in R. DWORKIN, TAKING RIGHTS SERIOUSLY (rev. ed. 1977), where he refers to the "influential" and "brilliant" teaching materials of Hart and "Sachs (sic)." *See id.* at ix n.1, 4. In his only remarks about Hart and Sacks' contribution to legal theory, he describes them, together with Lon Fuller, Myres McDou-

similarities between his views and those of the Legal Process school been traced in the literature of legal theory,[7] notwithstanding the minor industry of comment and criticism which has been triggered by Dworkin's writings. This Article demonstrates that many of Dworkin's views on law and judging are fundamentally the same as those outlined by Hart and Sacks and that some of his most important arguments were presaged in their manuscript.[8]

The discussion proceeds in the following stages. In the first section, Dworkin's views about the nature of law and adjudication are compared with the analysis in *The Legal Process*.[9] It is here that the similarity is most obvious. Dworkin is well known for his argument, advanced against H.L.A. Hart's[10] version of legal positivism, that *principles* and *policies* are proper parts of what we mean by law, comprising a substratum of values in terms of which courts can evaluate and perhaps change the existing doctrines.[11] The first section demonstrates that both the general idea of principles and policies as a substratum of values in the legal system, and the basic distinction between them that Dworkin initially employs, can be found in Hart and Sacks' manuscript.

In the second section I consider Dworkin's position and the Legal Process position on the proper function of judges in Anglo-American legal systems.[12] If Dworkin's argument is indeed similar to the Legal Process position on the nature of law, then his view of the proper role of judges should resemble Hart and Sacks' in important ways. There is, as I show in the second section, a striking convergence in their views of the judicial decision. Dworkin has added a dimension to the tenets he shares with Hart and Sacks by connecting the basic decisional obligations of judges with his rights thesis,[13] but the fundamental similarity remains. The thesis that Dworkin's views about the nature of law and the proper role of judges are best understood as following in the Legal Process tradition is supported in the third section by comparing Dworkin's contentions about statutory interpretation with the views outlined by Hart and Sacks in their manuscript.[14]

While comparing Dworkin and the Legal Process tradition is interest-

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gal and Harold Lasswell as offering an *instrumental* theory of law. *See id.* at ix, 4, and 6. *See also infra* text accompanying notes 187-89 for a discussion of this description of Hart and Sacks.

7. David A.J. Richards notes a "striking" similarity between Dworkin's account of principles and policies and that offered by Henry Wellington. *See* Wellington, *supra* note 4. *See also* Richards, *Taking* Taking Rights Seriously *Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265, 1307 (1977); Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1079-1082 (1977). Wellington avows his debt to Henry Hart. *See supra* note 4. A similarity between Dworkin and Wellington would therefore suggest that they share the Legal Process view. Richards, however, does not make the connection.

8. This Article, however, does not make any claims about a possible causal connection between Hart and Sacks' manuscript and the genesis of Dworkin's views. While the historical link between them is an interesting topic, the purpose of this essay is to articulate the conceptual similarities between their respective views.

9. *See infra* text accompanying notes 23-93.

10. H.L.A. Hart will hereinafter be referred to as H.L.A. Hart. Henry Hart will, at times, be referred to simply as Hart, not to be confused with H.L.A. Hart.

11. *See infra* text accompanying notes 61-71.

12. *See infra* text accompanying notes 94-98.

13. *See infra* text accompanying notes 151-60.

14. *See infra* text accompanying notes 199-269.

ing in its own right, recognizing the similarities of the two views can also benefit legal scholarship. The conclusion herein explores three benefits which might follow from this Article's argument. First, recognizing the similarity in the two views can help illuminate some of Dworkin's positions.[15] The thesis suggests links among Dworkin's arguments that are frequently not explicit. For example, scholars have argued about the extent to which Dworkin should be regarded as defending a natural law theory. Space does not permit a rigorous analysis of Dworkin's position on natural law, but, relying on the similarity between Dworkin and the Legal Process tradition, the conclusion suggests briefly how Dworkin's views on natural law might be re-evaluated.[16] Second, recognizing the similarities between Dworkin's views and those of the Legal Process manuscript may also help scholars evaluate the novelty of Dworkin's positions. The conclusion notes that, in light of the comparison offered in this Article, Dworkin appears to be considerably more in the mainstream of legal theory than might first appear.[17] Moreover, since many of Dworkin's arguments and emphases appear to have changed over time, tracing the ways in which he has come to reformulate positions which are also tenets of the Legal Process tradition may reveal the extent to which his position has evolved.[18]

Finally, and perhaps most interestingly, demonstrating the similarities between Dworkin and Hart and Sacks may occasion a reappraisal of the contributions and current vitality of the Legal Process tradition. Philosophers writing on current issues of legal theory seem generally unaware of *The Legal Process* and its importance in shaping a generation of legal scholarship.[19] While their tradition is well recognized by legal scholars, Hart and Sacks are frequently regarded as figures only of their time; what mention they now occasion has something of the quality of an obituary.[20] Detailing the connection between Dworkin, whose significance is inarguable, and the Legal Process tradition gives us the opportunity to reconsider Hart and Sacks' contemporary importance. Space does not permit a rigorous exami-

15. *See infra* text accompanying notes 270-71.

16. *See infra* text accompanying notes 273-94.

17. *See infra* text accompanying notes 296-305.

18. The task of understanding the apparent shifts and developments in Dworkin's positions is made all the more pertinent by the recent publication of his new book. *See* R. DWORKIN, LAW'S EMPIRE (1986). Although this new book draws on some of his previously published articles and refers to many of the same claims he has previously advanced, from some perspectives LAW'S EMPIRE appears to represent a significant turn in Dworkin's approach to the debates about adjudication. He suggests that the ideas there presented may in some respects differ from positions that he has articulated. *See, e.g., id.* at viii. But, Dworkin indicates that the new book is, in general, consistent with his previous scholarship. *Id.* This Article is not the place for a detailed discussion of the extent to which the arguments and themes pursued in LAW'S EMPIRE signal changes in Dworkin's view from earlier positions. As a result, this Article will assume that, for the most part, his new contentions are consistent with his old and will refer to LAW'S EMPIRE only sporadically, either to provide confirmation for some of my claims about Dworkin's general view, or to indicate what seems to be the latest stage in trends that are noted in his earlier writing. In any event, the success of the argument in this essay may help with the analysis of Dworkin's new forays.

19. *See, e.g.*, J. MURPHY & J. COLEMAN, *supra* note 1, at 92 (referring to legal principles and policies as using "Dworkin's terminology"). *Cf.* D. LYONS, ETHICS AND THE RULE OF LAW 93-104 (1984) (describing a theory of hard cases built on the significance of principles and policies of law as "first suggested by" Dworkin).

20. *See, e.g.*, White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 291-302 (1973); J. Vetter, *supra* note 5, at 415-18 (1983).

nation of the cogency of either the Legal Process tradition or Professor Dworkin's variations, and this Article can only note, as part of the effort to interpret their claims in a sensible manner, some of the deficiencies and strengths of their views.[21] But, even if on full analysis the arguments of *The Legal Process* are not cogent or persuasive, we can appreciate how Hart and Sacks may have influenced current developments of legal theory.

PRINCIPLES, POLICIES, AND THE NATURE OF LAW

Comparing Dworkin with Hart and Sacks is made more difficult by peculiarities of their respective bodies of work. Dworkin's scholarly output of the past two decades has ranged over such a diverse set of questions in legal and political philosophy that his work at times seems to defy generalization. Much of his writing has been episodic rather than systematic, addressing important topics in legal theory only in the context of his analysis of some particular legal or political dispute.[22] Moreover, some of his views have evolved significantly over the course of his writings. As a result, although some of the concepts and arguments appear to play the same role in later works as they played in earlier writings, on closer inspection they can be seen to have changed in important ways.[23] Certain of his arguments may be applicable only to specific legal controversies; other contentions may appear to be limited in their scope but are in fact related to disputes not immediately at issue. Frequently, to interpret Dworkin's positions requires that themes and connections be extracted from his diverse corpus. Finally, it should be noted that Dworkin has never been prone to voluminous citation;[24] sometimes we can only speculate about how his views relate to those of other scholars.

Hart and Sacks' views offer different interpretational problems. There is none of the diversity of works to be integrated that complicates exegesis of Dworkin's writing. Their manuscript was not only the foundation of their contribution, it was their only joint foray into the problems of law and judging.[25] By itself, however, the one manuscript offers formidable difficulties of

21. *See infra* text accompanying notes 73-93, 181-98.

22. *See, e.g., Liberty and Moralism*, in R. DWORKIN, *supra* note 6, at 240, 248-53 (developing the concept of a moral position in response to a debate about whether not voting for a candidate because he is a homosexual constitutes a "moral position"); *How to Read the Civil Rights Act*, in R. DWORKIN, A MATTER OF PRINCIPLE 316, 320-24 (1985) (expounding a theory of statutory interpretation as a basis for criticizing particular Supreme Court opinions).

23. On occasion, Dworkin frustrates his commentators by failing to acknowledge the extent to which his positions have changed. *See, e.g.*, R. DWORKIN, *supra* note 6, at 71-78 (responding to criticisms of the distinction between principles and policies); Dworkin, *A Reply*, in M. COHEN, RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 2, at 260-63. In Dworkin's most recent work, he states outright that he does not draw the connections between his formulation in that book and his prior writings. *See* R. DWORKIN, *supra* note 18, at viii.

24. It has been generally true of Dworkin's writings that his citations are sparse, especially in comparison with more traditional legal scholarship. He has recently acknowledged this feature of his writing in *Law's Empire*. *See* R. DWORKIN, *supra* note 18, at viii.

25. On one occasion Professor Hart addressed a topic within the traditional scope of jurisprudence. See Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951). In a diverse string of works about different legal topics, he speculated on the natute of law and judging within the confines of those specific legal areas. See, e.g., Hart, *Sentencing*, 23 LAW & CONTEMP. PROBS. 401 (1958); H. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 77-85, 312-40, and *passim* 1953.

exegesis. Perhaps as a result of the limitations of their chosen format—a proposed casebook—Hart and Sacks' views on the nature of law and the proper role of the judiciary are neither systematically expressed nor rigorously defended. In many respects, their argument follows the traditional methodology of the common law: they move from example to example, articulating their general propositions only in the context of particular problems.[26] The reader can discern the contours of their theory only after wrestling with the series of cases and questions which have been provided.[27] Moreover, the manuscript was, and still is, unfinished. We therefore cannot be sure that what is found in those pages represents the authors' final or even mature views. The "tentative" status of the manuscript also provokes a nagging uncertainty about *why* Hart and Sacks failed to finish their enterprise. We are left to wonder whether there are not demons and difficulties still at large but apparent only to the authors.

Nonetheless, there is an important similarity between Dworkin's views, on the one hand, and Hart and Sacks', on the other, about the nature of law and the obligations of judging. This similarity is shown in the fundamental kinship of their respective *theories of adjudication*. A theory of adjudication provides an explanation and justification of what occurs when judges decide cases properly. It should characterize the judiciary's obligations when deciding cases and offer criteria for evaluating whether, in any particular controversy, the judge has met those obligations. Further, if, as seems expectable, a theory of adjudication describes at least some judicial decisions as involving an obligation to decide "according to law," then the theory must include as one component a perspective on the nature of law. Dworkin's theory of adjudication can be seen as a variation, with some significant additions and qualifications, of the theory suggested by Hart and Sacks in their manuscript.

Advancing a theory of adjudication is a central aim of *The Legal Process*.[28] The primary focus of the manuscript is its discussion of judging. It offers a somewhat enigmatic characterization of the nature of law as judges could apprehend it[29] and investigates a series of classic cases in which courts were confronted with difficulties in deciding the controversy before them. Subtitled "Basic Problems in the Making and Application of Law," its chief concern is the making and application of law *by judges*; lessons for legislatures and practicing lawyers are but corrolaries of the main argument regarding judicial decision-making.[30]

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26. *Cf.* G. CALBRESI, *supra* note 4, at 189-190 n.31 (describing the methodology of his book as following the structure of a typical common law opinion).

27. *See* H. HART & A. SACKS, *supra* note 3, at 164:

> The technique of reasoned elaboration which courts pursue or ought to pursue in the effort to arrive at decisions according to law defies any facile generalization which will convey in itself a working understanding. These materials seek mainly to arrive at such an understanding by grappling with a series of concrete problems of decision. . . .

Id.

28. *See id.* at 366-68. It is worth noting that while *The Legal Process* purports to investigate judicial decision-making as merely one facet of the legal system, *see id.* at iii-vi, the vehicle by which the manuscript pursues its investigations is built around a sequence of judicial cases.

29. *See id.* at 154-71.

30. *See, e.g., id.* at 186-89, 798-817.

A theory of adjudication is equally important to Dworkin's work. On various occasions he emphasizes the importance as he sees it of a theory of adjudication.[31] Further, notwithstanding the diversity of his focus and the shifts in some of his arguments, there are certain common themes which both spark Dworkin's interest in particular controversies and also inform his approach to general topics in jurisprudence. One salient theme is the defense of the political vision of individual and state that Dworkin calls *liberalism*.[32] Another is his concern with what he labels the *rights thesis*.[33] A third preoccupation has been the rejection of legal positivism as a theory of law.[34] These themes can be seen to revolve around his theory of adjudication.

There is great continuity across Dworkin's writings on the second and third of these themes. Throughout, he aims to articulate and justify a theory of adjudication. His theory offers a particular conceptualization of the disputed question in a case: it is a dispute over the *rights* of the litigants.[35] From this, he derives a characterization of the nature of advocates' arguments—they are efforts to establish what rights a litigant *has*.[36] The judicial opinion therefore takes the character of a demonstration that, on the best understanding of the law, plaintiff (or defendant) has a right to win the action.[37] He derives a standard for evaluating judicial decisions: the judge makes the right decision when he enforces the litigant's pre-existing rights.[38] Thus, Dworkin's theory of adjudication both generates the rights thesis that he hopes to defend and also grounds his arguments against legal positivism. Positivism, as he characterizes it, asserts that judges may, in an important sense, exercise discretion and hence make law when they decide novel cases.[39] Dworkin's theory of adjudication aims to rebut positivism: a correct judicial decision does not derive from authoritative fiat, but rather from the enforcement of the pre-existing rights of litigants.[40]

The theory of adjudication is also an important pillar of Dworkin's defense of liberalism. Whatever else liberalism may be concerned with, it has classically addressed two issues: an understanding of what defines the individual vis-a-vis the state or the society, and an understanding of the individual's properly private sphere of thought and action, free from the claims of the group. The rights thesis serves to define the individual's private domain: an individual's rights involve those special realms where the state cannot, without great justification, properly intrude.[41] It follows that rights must be cognizable in a way that, first, cannot be overridden by a mere claim of social utility and, second, can be respected and enforced by the legal system.

31. *See, e.g.*, R. DWORKIN, *supra* note 6, at vii-viii; Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165-66 (1982); R. DWORKIN, *supra* note 18, at viii.

32. *See, e.g.*, R. DWORKIN, *supra* note 22, at 181-233; R. DWORKIN, *supra* note 6, at 274-75 and *passim*.

33. *See, e.g.*, R. DWORKIN, *supra* note 6, at 82-90, 171-73, and 184-205.

34. *See id.* at 14-45, 46-64.

35. *See, e.g., id.* at 115-18.

36. *Id.* at 101.

37. *Cf. id.* at 81.

38. *Id.*

39. *Id.* at 17.

40. *Id.* at 81.

41. *Id.* at 94-101.

The distinction betwen principles and policies of law, central to Dworkin's theory of adjudication,[42] helps bolster this defense of liberalism. Claims of right are supported by legal principles and not by policies, and this means that claims of right cannot be overridden by mere appeals to social utility.[43] Moreover, principles underlie the legal system generally and are commonly appealed to by judges in deciding cases; principles are determinable therefore by judges in deciding the rights of individuals against the state.

For both Dworkin and the Legal Process tradition, a theory of adjudication is central. In what follows, the important tenets of Hart and Sacks' view are described (subsection A) and compared with the claims that Dworkin made his early writings on these questions (subsection B). The comparison demonstrates that Dworkin's view of adjudication is built on a claim about the nature of law that is fundamentally the same as Hart and Sacks' claim. Finally, subsection C notes some of the ways in which Dworkin's views have developed over time.

A. *Principles, Policies, and Hart and Sacks*

There are three main features to the picture of law advanced in *The Legal Process.* First, the law consists of what Hart and Sacks call "general directive arrangements."[44] Second, the set of general directive arrangements can be divided into two subsets, and each subset, further subdivided. One subset consists of *rules* and *standards.* "Rule," they note, is generally not well-defined and in legal discussions has been used to refer to just about any general legal proposition.[45] They suggest "a narrow and technical sense" of the term.[46] A rule, narrowly and technically understood, "may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events—that is, determinations of *fact.*"[47] A *standard* is said to be similar to a rule, differing in one important respect. A standard requires for its application "a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations."[48] General directions that use criteria such as "due care" or "reasonableness" are examples of standards.[49]

Third, in addition to rules and standards, there are also *principles* and *policies*, which together comprise the other subset of general directive arrangements.[50] Prior to *The Legal Process*, lawyers, judges and scholars had referred both to policies at work in the law and also to "legal principles". These references were not systematic; indeed, "principle" was used almost as promiscuously as "rule," referring to almost any authoritative proposition of

42. *See infra* text accompanying notes 66-67 and 72-79.
43. R. DWORKIN, *supra* note 6, at 82.
44. See H. HART & A. SACKS, *supra* note 3, at 124-25.
45. *Id.* at 155.
46. *Id.*
47. *Id.*
48. *Id.* at 157.
49. *Id.* at 157-58.
50. *Id.* at 158-60.

law.[51] Hart and Sacks sought to articulate both the nature of principles and policies and also the significant differences between them.[52]

A policy, in their view, is the statement of an objective that, all other things being equal, should be sought.[53] Examples of policies include objectives like full employment, conservation of natural resources, and a regime of collective bargaining.[54] "A *principle* also describes a result to be achieved. But it differs in that it asserts that the result *ought* to be achieved and includes, either expressly or by reference to well understood bodies of thought, a statement of *the reasons* why it should be achieved."[55] Examples that Hart and Sacks give of legal principles are *pacta sunt servanda*—agreements should be observed—and *no person should be unjustly enriched*.[56] Their discussion of the distinction between principles and policies suggests a distinction along the lines of the difference between teleological and deontological moral arguments, but Hart and Sacks did not pursue this aspect of their account.[57]

What is salient about the Legal Process view of the law is their understanding of how these various kinds of general directive arrangements are integrated into the body of the law. "Underlying every rule and standard . . . is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning."[58] In short, principles and policies of law comprise a background or, to follow the manuscript's spatial metaphor, a substratum of values which inform and rationalize the rules and standards of the law.

By looking to the principles and policies which are at work in any given area of the law, the sensitive observer can assess the justification for existing rules of law. If the rule (or standard) serves the relevant principles and policies of that area of the law, and if no other values are disserved in any significant way by the same rule, then the rule is justified. Moreover, understanding the values that underlie the system's rules enables a judge or lawyer to work with those rules. Appraising the policies and principles that justify the rule allows the judge to apply the rule in a useful way: the rule's application is warranted if applying that rule to the case at hand serves the values that underlie the rule.[59] Conversely, if in some types of controversies the relevant values are badly served by the rule, then the court may need to distinguish the rule, or limit its application, or, in the rare case, overrule it. The principles and policies at issue can then indicate what is needed in the

51. *See, e.g.*, the opinon of Cardozo, J. in MacPherson v. Buick Motors, 217 N.Y. 382, 111 N.E. 1050 (1916).

52. Hart and Sacks are not alone in describing principles and policies of law along these lines. *See* E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 280-281 (1952). Patterson, however, does not develop the idea of a substratum of values which, in the present argument, is distinctive of the Legal Process view. *See infra* text accompanying notes 57-58.

53. H. HART & A. SACKS, *supra* note 3, at 159.

54. *Id.*

55. *Id.* (Emphasis in original).

56. *Id.*

57. Patterson was more sensitive to the correlation. *See* E. PATTERSON, *supra* note 52, at 280-81.

58. H. HART & A. SACKS, *supra* note 3, at 166-67.

59. *Id.* at 166.

way of a new rule. Put briefly, and perhaps too simplistically, the craft of the legal community requires not only a knowledge of the legal system's rules and standards but also the principles and policies that render those rules and standards useful and coherent.

B. *Dworkin on Principles and Policies*

Dworkin's theory of the nature of the law has shifted somewhat over time. The present discussion focuses first on the version advanced in his seminal early article, *The Model of Rules*,[60] in which the similarity with the Legal Process tradition is most apparent.[61] *The Model of Rules* was an important article because of its challenge to the theory of legal positivism that H.L.A. Hart had presented in his book, *The Concept of Law*.[62] Dworkin's challenge to Hart's positivistic theory of law took the following form:

> My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards.[63]

In other words, principles and policies, as the legal community uses them, are properly to be regarded as norms of *law*. We can see that they are legal norms because the legal community acknowledges in its practices that they can, in some cases at least, justify judicial decisions.[64] But, he contends, principles and policies are not adequately cognized by H.L.A. Hart's criteria for the existence of a legal rule.[65] Therefore, because it is built on the contention that the legal system is the union of primary and secondary rules, Hart's theory is deficient.

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60. R. DWORKIN, *supra* note 6, at 14.

61. For an examination of subsequent expansions and revisions of these ideas, *see infra* text accompanying notes 72-88.

62. H.L.A. HART, THE CONCEPT OF LAW (1961). This version of positivism focuses on the idea of a legal *rule* and proceeds from the claim that law, properly understood as a social phenomenon, is the union, as Hart put it, of primary and secondary rules. *Id.* at 91. Primary rules, according to Hart, are rules that impose obligations on the citizens, *id.* at 89, and secondary rules, if we ignore a number of complications, are rules about other rules. *Id.* at 92. *See also* HACKER, *H.L.A. Hart's Philosophy of Law* in LAW, MORALITY, AND SOCIETY 18-22 (P. Hacker and J. Raz eds., 1977). There are three important types of secondary rules: rules of *change*, which specify how the set of primary rules can be altered by authoritative processes; rules of *adjudication*, which provide for judicial resolution of disputes; and, most importantly, a rule of *recognition*, which allows officials and others to distinguish the rules of law from other social rules. *See* H.L.A. HART, THE CONCEPT OF LAW, at 92-95.

63. R. DWORKIN, *supra* note 6, at 22. Some comments on terminology are needed in order to avoid a confusion that might otherwise obtain when comparing Dworkin's discussion with the analysis of the Legal Process manuscript. This Article will use "norm" to stand generally for what Hart and Sacks refer to as a general directive arrangement—that is, rules, standards, principles and policies. Dworkin diverges from Hart and Sacks' terminology in two important respects. First, he uses "standard" where Hart and Sacks would use "general directive arrangement" and where this Article will use "norm." Dworkin does not provide an alternative label for the kind of norms which Hart and Sacks label "standard," apparently preferring to regard standards as a subspecies of rules. (He recognizes the category inasmuch as he refers to the use in some rules of qualitative terms like "reasonable" and "unjust". *See id.* at 27-28.) Second, Dworkin states that in most of his analysis, he will lump principles and policies together and refer to them both as "principles." *Id.* at 22. This Article will follow Hart and Sacks' practice and distinguish the two.

64. *See, e.g., id.* at 22, 40-41.

65. *Id.* at 39-45.

In short, Dworkin's challenge to positivism depends on the claim, central to the Legal Process tradition's view of the nature of law, that law includes values such as principles and policies. His description of principles and policies and the distinction between them should seem familiar.

> I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . . I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle.[66]

His conception of a legal policy is fundamentally the same as that expressed in The Legal Process manuscript—a goal, usually economic or political, that should be sought. His understanding of a principle, at least as expressed in *The Model of Rules*, also parallels Hart and Sacks' understanding, except that where Hart and Sacks connect principles only with "well understood bodies of thought," Dworkin explicitly identifies principles with justice, fairness, or some other dimension of *morality*.[67]

For the Legal Process tradition, principles and policies serve to rationalize the set of general directive arrangements and help the observer assess the justification for rules and standards. For Dworkin, the role of principles and policies is much the same. One of Dworkin's rejoinders to H.L.A. Hart comes under the rubric of a debate over the nature of judicial *discretion*. As Hart describes the matter, law (as identified by the rule of recognition) sometimes "runs out."[68] That is, there is no rule that governs the case at hand. In that situation, it would seem to follow that the judge is not bound *by the law* when he makes his decision. Rather, he has discretion to decide as he sees fit. Dworkin's view, briefly stated, is that when the rules run out, the judge does not have any interesting form of discretion.[69] The principles and policies of the law provide the deciding judge with standards by which to recognize a valid answer; they are a proper part of the law and the judge is bound by them in his decisions.

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66. *Id.* at 22.

67. *Id.* There is an overlap in the examples cited by each. Dworkin's favorite example of a principle—the principle that no man should profit from his own wrongdoing—was recognized by Hart and Sacks in their manuscript. *See* H. HART & A. SACKS, *supra* note 3, at 159. One of the two cases Dworkin cites in *The Model of Rules* is the famous case of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), in which the New York Court of Appeals refused to follow the generally established rules for distribution of an estate when to do so would have given the bulk of the estate to the decedent's grandson, who had murdered decedent in the hopes of inheriting. *See* R. DWORKIN, *supra* note 6, at 23. *See also* R. DWORKIN, *supra* note 18, at 15-20 and *passim* (discussing *Riggs*). In the *Riggs* case, the New York court justified its refusal to follow the statutory scheme because to do so would have violated the "maxim" of the law that no man should profit from his own wrongdoing. *Riggs* is one of the early cases that Hart and Sacks, in the Legal Process manuscript, contrast with an Ohio decision that allowed the nefarious inheritor to collect. *See* H. HART & A. SACKS, *supra* note 3, at 93-4. The other example Dworkin uses in *The Model of Rules*, Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960), was decided four years after the "tentative" publication date for Hart and Sacks' manuscript.

68. *See* H.L.A. HART, *supra* note 62, at 127.

69. R. DWORKIN, *supra* note 6, at 31-9.

In short, Dworkin parallels *The Legal Process* in understanding principles and policies as a substratum of values which, as part of the law, inform and rationalize other legal norms. He also mirrors the manuscript's description of the role of legal norms in changing the law. In *The Model of Rules*, Dworkin focuses on what he terms "hard" cases,[70] and he does not in that essay remark on how principles and policies might explain judicial reasoning in more routine cases. His comments about the justificatory role of principles and policies are limited to remarks about how such norms can justify dramatic judicial developments of the law. But he converges on the idea, central to the Legal Process school, that the criteria for valid change in a given part of the law depend on the principles and policies that underlie that part.[71] Thus, not only does Dworkin's description of principles and policies of law parallel the description offered by the Legal Process manuscript, he further describes the justificatory role of norms in terms similar to those offered by Hart and Sacks. For each theory of adjudication, principles and policies provide a substratum of values by which we can assess the justification of various parts of the existing and developing law.

C. *Comparisons and Contrasts*

Comparing Dworkin's early description of principles and policies with the description in the Legal Process manuscript shows that he shares Hart and Sacks' view of the nature of law. He not only describes legal norms in similar ways, he attributes to those norms the same role in the evaluation of rules as does the Legal Process tradition. This is not to say that Dworkin's ideas are exactly the same as Hart and Sacks'. To the contrary, Dworkin's claims in *The Model of Rules* differ in some important respects from the Legal Process view. Moreover, in subsequent writings he has revised his formulation of the difference between principles and policies and extended his argument about the significance of that distinction. This subsection highlights two ways in which Dworkin's early understanding of principles and policies diverged from that of Hart and Sacks and notes an important respect in which Dworkin's description of legal norms has changed over time. These developments show that, while Dworkin is working with the same view of law as that advanced by the Legal Process tradition view, he is articulating his own variant of that view.

In *The Model of Rules*, Dworkin's distinctions among the various kinds of norms diverges from Hart and Sacks'. He differs both as to the distinction between the two subsets of legal norms—how it is that principles and policies differ from rules and standards—and in the distinction between principles and policies. These divergences indicate that Dworkin has different

70. *See e.g., id.* at 22. The distinction between hard and easy cases as Dworkin envisions it has proven elusive, and has engendered a significant literature. *See e.g.*, Parent, *Interpretation and Justification in Hard Cases*, 15 GA. L. REV. 99 (1980); Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20 (1977). In Dworkin's most recent comment on the topic, he seems to undercut any distinction between hard and easy cases: "So easy cases are, for [Dworkin's theory of] law as integrity, only special cases of hard ones." R. DWORKIN, *supra* note 18, at 266.

71. R. DWORKIN, *supra* note 6, at 37.

theoretical ambitions than did Hart and Sacks in their appeal to the idea of a substratum of values to the legal system.

Policies are described in *The Model of Rules* in fundamentally the same way as they are presented in *The Legal Process*. But Dworkin's characterization of principles is richer than the manuscript's: principles, on his view, are standards to be observed because that is required by "justice, fairness, or some other dimension of *morality*."[72] Identifying some essential feature of the legal system with a requirement of morality is, of course, a centerpiece of most natural law theories, and Dworkin's claim that legal principles are somehow moral in nature confirms that his criticism of H.L.A. Hart's theory of law is not just a quibble over details of one version of positivism. Rather, Dworkin hopes to uproot positivism's dominant position in jurisprudence; his contention that legal principles are essentially connected to morality suggests an attempt to supplant positivism with something like a natural law vision instead.[73] Hart and Sacks' characterization of principles is considerably less aggressive in this regard. In their view, a principle points to a result that ought to be achieved and includes, by reference to some body of thought, a statement of the reasons why. They do not contend, however, that those reasons are necessarily *moral* reasons.

The precise distinction between principles and policies has proven elusive for Dworkin. He has offered a variety of apparently different accounts of that distinction,[74] and he has been criticized at some length for certain of these accounts.[75] Generally speaking, he has not described the different accounts as attempts to reformulate the distinction, but one of the formulations is different enough in his own mind to warrant notice: in *Hard Cases*, he recasts his distinction into one between kinds of arguments that might be made within a political community about a question of significance.[76] Arguments of policy retain a familiar flavor: they "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."[77] Arguments of principle, however, are reshaped dramatically from his description in *The Model of Rules*. They "justify a political decision by showing that the decision respects or secures some individual or group right."[78] In short, the distinction between principles and policies has been recast so as to accord with the rights thesis. Moreover, in *Hard Cases* Dworkin urges that judges' common practice of appealing to principles to justify their decisions supports that thesis.[79]

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72. *Id.* at 22 (emphasis added).

73. *See infra* text accompanying notes 269-311.

74. *Compare* R. DWORKIN, *supra* note 6, at 22 with Dworkin, *A Reply*, *supra* note 23, at 265-67.

75. *See* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977).

76. Other accounts differ in certain details, but in Dworkin's most recent comments he indicates his satisfaction with the account proffered in *Hard Cases*. *See* R. DWORKIN, *supra* note 18, at 438 n.30.

77. R. DWORKIN, *supra* note 6, at 82.

78. *Id.*

79. "Since judicial practice in [Hercules'] community assumes that earlier cases have a *general* gravitational force, then he can justify that judicial practice only by supposing that the rights thesis holds in his community." *Id.* at 115. "[Hercules] now sees that the familiar concept used by judges to explain their reasoning from precedent, the concept of certain principles that underlie or are

Dworkin's discussion is also richer than *The Legal Process* in its characterization of the difference between the two different classes of norms. According to Dworkin, rules (and standards) are logically different from principles and policies, and this difference has two aspects. "Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[80] Rules, then, do not admit of counter-instances; if a decision does not accord with the applicable rule then either the case was wrongly decided or else the rule is not valid. Principles and policies, however, do tolerate counter-instances without difficulty, and this points to the second aspect of the difference. Principles and policies have a dimension of *weight* that rules and standards supposedly lack. When principles and policies "intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each."[81] Not so for rules: if two rules conflict, Dworkin asserts, then one of the rules cannot be a valid rule as it stands and must be abandoned or recast.[82]

This is, for Hart and Sacks, uncharted territory. Their manuscript gives little indication that they explored these issues in any systematic fashion. They offer, in one passage, a brief remark about the logical form of a rule that is consistent with Dworkin's claim that rules apply in an all-or-nothing fashion.[83] But they have little to say directly about the form of a principle or policy, or how these norms might interact.[84]

Dworkin's view of the nature of principles and policies thus differs in these respects from the Legal Process tradition's, but a number of uncertainties must attach to these differences from the position advanced in *The Legal Process*. Dworkin's distinction between principles and policies is more elegant than that offered by Hart and Sacks. So, too, is his account of the logical differences between rules and principles. In each instance, however, the added elegance makes Dworkin's account more problematic. Under the Legal Process tradition one demonstrates that legal norms are diverse by

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embedded in the common law, is itself only a metaphorical statement of the rights thesis." *Id.* at 115-16.

80. *Id.* at 24.

81. *Id.* at 26.

82. *Id.* at 27.

83. Hart and Sacks describe a rule as attaching a legal consequence to a set of facts. H. HART & A. SACKS, *supra* note 3, at 155-56. This feature is consistent with the claim that a rule applies in an all-or-nothing fashion. For, either the facts obtain or they do not, and if they do then, in the picture suggested, the legal consequences should follow. *Accord* N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 53-54 (1978). However, this feature, by itself does not mean that rules cannot conflict. *See* Winston, *Treating Like Cases Alike*, 62 CAL. L. REV. 1, 17-18 (1974).

84. The only direct comment in *The Legal Process* about the structure of principles and policies asserts that: "[U]nlike rules and standards they are not expressed in terms of the happening or non-happening of physical and mental events or of qualitative appraisals of such happenings drawn from ordinary human experience. They are on a much higher level of abstraction. . . . A policy leaves to the addressee the entire job of figuring out how the stated objective is to be achieved, save only as the policy may be limited by rules and standards which mark the outer bound of permissible choice. A principle gives the addressee only the additional help of a reason for what he is trying to do." H. HART & A. SACKS, *supra* note 3, at 159.

appealing to the practice of the legal community.[85] That is, we should acknowledge that law includes principles and policies as well as rules and standards because the legal community acknowledges that principles and policies figure in and justify judicial decisions. But, because Dworkin's claims are more elaborate and, ultimately, more theory-laden than Hart and Sacks', Dworkin calls into question whether lawyers and judges really recognize as nice a set of distinctions as he posits. It is not at all clear that the sharp distinctions to which he appeals could be demonstrated as inhering in the legal community's practice.[86] It is doubtful, in particular, that principles and policies as the legal community uses them could be divided according to their normative features as he urges. In any event, Dworkin has not attempted an exhaustive canvas of the legal community's usage. Nor has he offered a systematic analysis of the legal community's practice to support his later version of the principle-policy division in terms of the connection between principles and individual or group rights. The advantage of his formulation would therefore seem to be theoretical rather than descriptive.

That Dworkin's discussion of legal norms is more theory-laden than Hart and Sacks' is confirmed by another difference between the respective accounts. Dworkin's discussion of principles and policies is restricted for the most part to what could be called principles and policies of *substantive* law. He does not discuss the traditional and significant judicial concern for remedies[87] and has little to say regarding the judicial decision about when and how to acknowledge a new legal right. In this respect, Hart and Sacks' account is more complete, for they point to another set of principles and policies that could be called *procedural.* These norms bear on decisions by

85. *See supra* text accompanying note 64.

86. *See, e.g.*, Wellington, *supra* note 4, at 223-25 (discussing principles and policies and recognizing the "fragility" of the distinction). Dworkin himself indicates early in the development of his formulation that the distinction could be collapsed. *See* R. DWORKIN, *supra* note 6, at 22-23. He urges that it should be retained, but does not in that essay defend it as required in any way by legal practice.

87. Using Dworkin's terminology for a moment, let us suppose that a judicial decision in favor of one party or another is a decision about that party's rights. The decision about a party's rights does not exhaust the scope of possible deliberations. For, the court can also concern itself with the question, What remedy should be accorded to protect this party's rights? For some kinds of cases, at least, the choice of remedy can be a central feature of the judicial decision and can, in the appropriate case, determined the efficacy of the right that is claimed. Consider, for example, the remedial questions surrounding the doctrine of promissory estoppel. Traditional contract doctrine holds that the dominant remedy for breach of a contract is the "expectation interest" of the injured party. *See e.g.*, Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 53-57 (1936). But when the basis for recovery is an injured party's detrimental reliance on a promise, there is substantial sentiment in favor of compensating only the extent of the injured party's reliance rather than the full extent of the promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d. (partial enforcement). *Accord id.* § 86 comment i. (partial enforcement of promise to pay for benefit previously received). Against this background of legal development, the choice of remedy can, in effect, determine the nature of the right protected. In the context of promissory estoppel, it remains an as yet unresolved issue whether detrimental reliance is a remedy for a contract, *see id.* § 90 comment d ("A promise binding under this Section is a contract. . . .") or something else. *See, e.g.*, Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). Students of common law history have noted that decisions about remedies have often been critical to the development of substantive rights. *See, e.g.*, S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW, (1969).

judges whether to recognize the particular claims at issue.[88]

These procedural norms appear to undermine important features of Dworkin's account. Consider, for example, the claim raised at the turn of the century in *Roberson v. Rochester Folding Box Co.*[89] A flour manufacturer was alleged to have used the plaintiff's likeness in its advertising without her consent. The New York Court of Appeals held that her suit to recover damages and to enjoin further invasion of what she asserted to be her right to privacy failed to state a cause of action, concluding that "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence."[90] In reaching its decision, the New York court reviewed at some length the then-recent and provocative article by Warren and Brandeis[91] urging that a right of privacy should be recognized as part of the law. The court rejected the suggestion at least partly because acknowledging the purported right would lead to undesirable consequences in the administration of justice.

> If such a principle be incorporated into the body of the law . . . the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, one established as a legal doctrine, cannot be confined to restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits.[92]

In short, the court appears to decide the case on the strength of concerns of how the recognition of the right would hinder the future processes of the court.

The prospect that, in any given case, the judicial decision may turn on more than just the recognition of an individual's "right" to triumph is no surprise. It seems patent that courts will, at least on occasion, employ a substantial array of doctrines and techniques to avoid the substantive merits of a case. A court might, as in *Roberson*, point to the parade of horribles that would follow from a particular decision. It might also, more obliquely, refer to its traditional power to control its own jurisdiction. Some aspects of the doctrine of stare decisis have the same virtue: courts are allowed to treat certain questions as effectively decided, and the litigant's attempts to re-examine those issues will be regarded as inept and unworthy of attention. In other words, what an individual may at any given moment claim validly might well depend on how troublesome his case appears to be for the administration of the court's business.

Hart and Sacks suggest that underlying these standards of when and how to recognize a particular claim are a collection of norms to which courts can refer in assessing a particular decision not only for its substantive merits,

88. *See* H. HART & A. SACKS, *supra* note 3, at 478-500 (discussing "remedial policy"), 515-46 (discussing the judicial refusal to decide).

89. 171 N.Y. 538, 64 N.E. 442 (1902). This case is the focus of one of the problems in *The Legal Process* manuscript. *See* H. HART & A. SACKS, *supra* note 3, at 457-78. Dworkin discusses the issues presented in that case in R. DWORKIN, *supra* note 6, at 119.

90. *Roberson*, 171 N.Y. at 556, 64 N.E. at 447.

91. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

92. *Roberson*, 171 N.Y. at 544-45, 64 N.E. at 443.

but for its procedural benefits as well. Dworkin has little to say about these norms,[93] but their presence is inconvenient for his theoretical ambitions. In general, the prospect that judges might tailor their recognition of an individual's rights for the sake of efficient court processes seems to undercut the force of the rights thesis, or at least that portion of the thesis that describes judicial decisions as decisions about what rights individuals have. Moreover, these norms challenge his related claim that judges do not generally decide hard cases on the strength of arguments of policy. For, these decisions appear to turn on questions of judicial policy; they are decisions about how to satisfy objectives such as the efficient administration of justice. If some of these procedural norms are policies, as they seem to be, then a judge's decision on the strength of such policies means that the litigant's rights are compromised because of this special set of policies, and not because of principles as the rights thesis requires.

THE PROPER ROLE OF THE JUDICIARY

Traditional discussions of the proper role of the judiciary have revolved around the unsatisfactory distinction presupposed by the question; Should judges make law or merely apply it?[94] Hidden behind this scholarly chestnut are a number of related questions. Are judicial decisions properly mechanical, or is there a creative quality to them? In what circumstances, and to what extent should judges defer to other branches of the government in decisions on matters of public significance? Are there "gaps" in the law, or is there, at least in principle, one right answer for every potential legal controversy?

Both Dworkin and the Legal Process school derive their views about the proper role of the judiciary from their view of the nature of law. Since they share the same view of law, we should expect their views about judging to converge. At least as a matter of general approach, Dworkin shares Hart and Sacks' analysis of questions about the legitimacy of judicial creativity and the extent of proper judicial deference. Each posits an obligation of judges to decide controversies in terms of the whole of the law which, given their shared picture of the nature of law, requires that the decision refer to the full array of legal norms. Moreover, their respective descriptions of the proper role of judges converge on an obligation of judges to integrate the set of norms into something like a coherent whole. To demonstrate the convergence of their views about judging, this section compares Dworkin's answers to the three questions noted above with the answers to be gleaned from *The Legal Process.*

Dworkin's answers to the questions of creativity and deference are fun-

93. In *The Model of Rules,* Dworkin does not discuss these features of the judicial opinion, except to note certain "standards" that can be used to argue against departures from established doctrine, and to assert that these standards are, "for the most part principles." R. DWORKIN, *supra* note 6, at 37. In *Hard Cases,* Dworkin discusses the practice of following precedent and he urges that the practice can be explained by the principle of fairness that is expressed in the requirement to treat like cases alike. *Id.* at 111-15.

94. This formulation dates at least as far back as the contributions of Hale and Blackstone. *See generally* R. CROSS, PRECEDENT IN ENGLISH LAW 23-25 (2d ed. 1968) (discussing Hale, Blackstone, and others).

damentally similar to those provided by Hart and Sacks, but they also differ in some interesting respects from the approach suggested in *The Legal Process*. Dworkin's treatment of these questions has evolved over time, and his later statements regarding the criteria by which judges and scholars should assess the law's integration into a whole are more detailed than Hart and Sacks' manuscript. Dworkin's discussions are also more tendentious. In particular, his analyses of the judicial role emphasize the distinction he sees between principles and policies, and advance a corresponding judicial obligation to rely on principles rather than policies in those decisions that exercise an especially creative function. In turn, the notion that judges should decide "hard" cases in terms of principles and not on the strength of policy is used to support his controversial rights thesis. This section argues that these differences are best understood as respects in which Dworkin has *added* to the basic structure of the Legal Process tradition's theory of adjudication; they do not indicate that his theory is fundamentally different from Hart and Sacks'. On the question of the law's lack of gaps, Dworkin's position is particularly notorious. Hart and Sacks do not seem to have addressed the question at all, and one can only speculate about their position on the issue of right answers to legal controversies. Nonetheless, Dworkin's position about right answers should be understood as if it were an extension of the Legal Process view, rather than as evidence of a different theory.

The roots of the Legal Process tradition are best traced by examining Hart and Sacks' treatment of the issues of judicial creativity and judicial deference.[95] Their positions can then be compared with Dworkin's answers to these same questions.[96] This comparison provides a basis for demonstrating the respects in which Dworkin has altered or advanced the Legal Process tradition's approach to the role of the judiciary.[97] In connection with this comparison between their analyses, the problem of the law's gaps and Dworkin's arguments about the prospect of a single right answer is addressed.

A. *The Problem of Institutional Competence*

The structure of the *The Legal Process* complicates any discussion of Hart and Sacks' view about judging. The manuscript is relatively direct in its discussions about both the nature of law[98] and the requirements of statutory interpretation.[99] But there is no section that explicitly states Hart and Sacks' criteria for correct judicial decisions. The manuscript presents selected decisions for discussion and poses questions about their correctness. Hart and Sacks do occasionally advance comments about those decisions, but one cannot necessarily take those comments at face value. Sometimes their discussion has the quality of dialectic;[100] hence, the remarks that one finds may be intended more to provoke the reader's thought than to report the authors' own views. Other points seem applicable only in a limited

95. *See infra* text accompanying notes 97-144.
96. *See infra* text accompanying notes 146-80.
97. *See infra* text accompanying notes 182-98.
98. See H.HART & A. SACKS, *supra* note 3, at 110-206.
99. *Id.* at 97-102, 1200, at 1410-17.
100. *Id.* at 416-21, 485-89, 585-89.

context.[101]

Nonetheless, we can derive the basic structure of Hart and Sacks' position. *The Legal Process* was written with obvious care and planning. The order in which cases are presented and the manner in which the issues are examined indicate the authors' perspectives: the manuscript is designed to lead the reader, without direct argument, to their views about the cases presented for examination. If we assume that this structure is purposeful, as it seems to be, and that its aim is to enable the reader to see the role of the judge in a different (and more sophisticated) way than he might otherwise, then the important features of Hart and Sacks' position emerge.

In quick outline, Hart and Sacks contend that the proper role of a court is to decide cases as best it can *according to law*. Since the Legal Process view of law includes principles and policies, it follows that the validity of a given decision could turn on the force of relevant principles and policies. As will emerge, these are not isolated norms, but rather part of a whole body of law.[102] To decide controversies in terms of the relevant norms therefore requires that the various principles and policies stand in some coherent relationship to each other. Judges must be capable of reviewing the coherence and integration of the relevant norms in order to decide the full range of cases that might arise. Since this capacity cannot be reduced to mechanical manipulation, it is Hart and Sacks' view that judging is necessarily creative in at least the above respect. They also view this ability to integrate the set of legal norms as an appropriate and necessary judicial function. Accordingly, judges should not necessarily defer to other lawmaking institutions for the fulfillment of that function.

1. *Judicial creativity*[103]

In twentieth century legal theory, discussions of the judicial decision have frequently examined the problem of "mechanical" or "formalistic" decision making.[104] The debates about formalism have sometimes been more heated than productive,[105] and it is uncertain whether any judge or legal theorist has ever actually advanced mechanical jurisprudence as a normative theory.[106] But some judges, most saliently in certain politically significant cases around the turn of the century, described their decisions as if they lacked any proper capacity to examine or revise the state of the law as it bore

101. *Id.* at 427-37.

102. *See infra* text accompanying notes 115-18.

103. For ease of analysis, the discussion in this section will focus on decisions within the court's traditional common law jurisdiction; analysis of the role of judges in interpreting statutes will be reserved for the next section. If a theory of adjudication holds that the judiciary's proper rule is mechanical when deciding cases at common law, then it is unlikely that, on that same theory, courts should be more creative when interpreting legislation. *See infra* text accompanying notes 199-269.

104. The source for this label seems to be Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). The crusade against formalism has been waged on a number of fronts. *See, e.g.*, M. COHEN, LAW AND THE SOCIAL ORDER 165-183 (1933); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 565-66 (1983).

105. For an insightful discussion of formalism and its significance, see S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 169-215 (1985).

106. *See, e.g.*, R. DWORKIN, *supra* note 6, at 15-16: "So far [critics of formalism] have had little luck in caging and exhibiting mechanical jurisprudents (all specimens captured—even Blackstone and Joseph Beale—have had to be released after careful reading of their texts)." *Id.*

on the case at hand.[107] That is, they described the judicial process as if their proper role consisted merely in discovering the law and applying it in rote fashion. Their characterizations of their role have been read as resting on a model of the judicial decision that denies any creativity or originality to proper decision-making, no matter how controversial the legal issues might be.[108]

What, for the Legal Process tradition, belies any simple formalistic description of judicial decision-making is the tradition's picture of the nature of law. Underlying any rule or standard is the substratum of policies and principles that rationalize that area of the law. In the unproblematic case the judge can render a proper decision by applying the relevant rules (or standards) to the case at hand. In such a situation we can say, without serious risk of error, that the law on the matter is clear and the judge need merely apply it to the case. Judges need neither originality nor creativity to fulfill their decision-making obligations and, in terms of the sort of argument that might be offered in justification of the conclusion, the decision looks mechanical.[109] In other cases, however, the rule's justification may be problematic; hence, deciding the case in terms of the rule will likely require more than mere "mechanical" subsumption. Even when the decision properly follows from the established rule, accepting that conclusion may require the judge to review the principles and policies that support the rule and to re-evaluate the rule's justification.[110]

If justifying a decision by reference to a valid, applicable rule can require creativity, then we should expect creativity all the more when the legal issue is more complex. But, the cases which may arise can become complex in several different ways. In addition to simply applying a rule to a case, a judge may also need to extend a rule to a novel context,[111] reformulate an

107. *See, e.g.*, Gluck v. Mayor, etc., of City of Baltimore, 81 Md. 315, 32 A. 515 (1895). Legal realists, in particular, made much of judges' unwillingness to acknowledge their capacity to change legal doctrine. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 23-29 (rev. ed. 1970). However, as Richard Wasserstrom has noted, "explicit assertions of [mechanical jurisprudence] are far less prevalent than would be supposed." R. WASSERSTROM, THE JUDICIAL DECISIONS 177 n.3 (1961). *Accord* R. DWORKIN, *supra* note 6, at 15-16.

108. *See, e.g.*, J. FRANK, *supra* note 107.

109. It is important to observe, in discussions of the judicial decision, the distinction between the judge's processes of discovery, that is the psychological processes by which the judge comes to a hypothesis about the correct resolution of the case, and his processes of justification, whereby he demonstrates according to accepted canons of argument, that the hypothesis is acceptable. *See* R. WASSERSTROM, *supra* note 107, at 25-30. Many of the challenges to "mechanical jurisprudence" ignore this distinction, arguing, in effect, that the judge's written opinion must reflect the cognitive processes that led to his accepting one conclusion or another as justified. One upshot of this distinction is that the judge's agonies of conscience may go unreported and therefore the justification for the conclusion he reached will appear simple and straightforward. If a case is plainly and unproblematically subsumed under a rule, if the rule is valid within the system of law, and if it is warranted to apply the rule to that case, then citing the rule and its application to the case at hand should count as an adequate justification of the judge's decision. *See* K. Winston, *Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 17-18, 22-23 (1974) (distinguishing between the applicability of a rule and its warranted application).

110. The manuscript suggests this feature of the judicial role in its treatment of Crowley v. Lewis, 239 N.Y. 264 (1925) and Georgi v. Texas Co., 225 N.Y. 410 (1919). See H. HART & A. SACKS, *supra* note 3, at 596-606.

111. *See* the discussion of Norway Plains Co. v. Boston & Maine R.R., 1 Gray 263 (Mass. 1854), in H. HART & A. SACKS, *supra* note 3, at 386-406.

old rule,[112] or, in some cases, replace an old rule with a new one.[113] Creativity in decisions with these characteristics seems therefore the essence of the judicial role.

The heart of the Legal Process response to the question of judicial creativity is the account of principles and policies. To decide a problematic case requires, on this approach, an understanding of the relevant norms, for without that understanding the court cannot sensibly evaluate the justification of rules and standards that might bear on the controversy. Even to recognize that a particular case is problematic requires the observer to assess the force and application of principles and policies: one must understand the substratum in order to identify the respects in which a case or doctrine is challenged by new developments or by other doctrines.[114] As Hart and Sacks see it, one cannot hope to articulate the force of the various norms of law, recognize their scope of application, and assess their relative strength or importance in anything like a mechanical process.

Hart and Sacks specify neither the origin of legal norms nor the source of their authority.[115] Indeed, the Legal Process account is notably incomplete in important respects. What is it about principles and policies of law that makes them authoritative? How is a judge supposed to know that some particular principle (or policy) is at work in the law, that *it* and not some other value lies behind some specific rule? More particularly, how do individual norms bear on a given case? How do norms interact? Do some principles count more than others? More than policies? These questions are not answered in the manuscript, and there is no clear picture about how a court should work with the body of law to identify the best answer according to law.

Although there is no explicit resolution of these issues in the manuscript, some of its features suggest an answer. What is salient about Hart and Sacks' analysis is that they regard the law's principles and policies as constituting a *body* of norms.[116] As they conceive it, the set of norms is

112. *See* H. HART & A. SACKS, *supra* note 3, at 407-26 (discussing Berenson. v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610 (1950)).

113. *See* H. HART & A. SACKS, *supra* note 3, at 565-89 (discussing MacPherson v. Buick Motors, 217 N.Y. 382, 111 N.E. 1050 (1916)).

114. *See* H. HART & A. SACKS, *supra* note 3, at 597-616 (discussing Crowley v. Lewis, 239 N.Y. 264 (1925)).

115. There are a few remarks about the status of norms scattered throughout the manuscript. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 101:

> . . . the law rests upon a body of hard-won and deeply-embedded principles and policies—such, precisely, as the principle that one should not be allowed to profit by his own wrong; that this body of thought about the problems of social living is a precious inheritance and possession of the whole society.

Although *The Legal Process* is unsatisfying in this respect, it must be recognized that its discussion was far ahead of other scholarship of its time. The distinctiveness of the Legal Process view can be seen by contrasting the approach taken by Hart and Sacks with the nearly contemporaneous comments about legal reasoning offered in Edward Levi's famous monograph about legal reasoning. *See* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949). Levi is content to use metaphorical characterizations such as "the concept moves in and out of the law," to describe the process whereby judges evaluate and justify changes of legal doctrine. However unsatisfying Hart and Sacks' treatment may ultimately prove to be, it must be recognized as an attempt to at least articulate criteria for evaluating judicial justification. *See infra* text accompanying notes 181-82.

116. *See* H. HART & A. SACKS, *supra* note 3, at 101: "[T]he law rests upon a body of hard-won and deeply-embedded principles, and policies." (emphasis added). Calabresi uses more material

organized into something like a coherent whole. This aspect of their view is underscored by certain features of legal norms. First, a given principle or policy can play a role in the understanding and justification of legal developments in a variety of areas of the law.[117] Second, principles and policies can, in a variety of instances, intersect one another.[118] Third, principles and policies are found in some kind of a hierarchy, with more general norms rationalizing less general ones.[119] To apply any given principle or policy correctly will thus require that one understand the role played by that particular norm in other legal developments and how it interacts with other norms.

In sum, the Legal Process approach indicates that one understands and appreciates the various norms only when one recognizes the role that each plays in the law as a whole. The test of any given norm's force and authority, under this view, is its explanatory power. If the best explanation for a collection of juducial decisions indicates that judges were responding in those cases to some particular value, then we are warranted in including that norm in our picture of the legal system.[120] Does counting this norm as part of the law provide a better account of this development in areas where the norm might be thought to figure?[121] Does this statement of the norm, and its force vis-a-vis other norms, explain why the law has taken the direction that it has?[122] It follows that when a decision requires an assessment of the current state of the law, the role of the judge is to fashion a picture of the law where the norm's place and importance is recognized. The obligation to decide therefore becomes an obligation to decide in terms of the best account of the body of norms as a whole.

These features of the Legal Process view lead to the conclusion that for Hart and Sacks there is no mechanical process for weighing the impact of legal norms on any particular controversy. Instead, to decide cases according to law requires the court to review and evaluate, on its own best understanding, how the relevant norms are integrated into the law. In Hart and

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metaphors to express the idea of an integrated law; he argues that the law comprises a "landscape" or "topography," or, sometimes, a "fabric" that lawyers and judges can see as a whole, and thereby discern the role and cogency of particular parts. G. CALABRESI, *supra* note 4, at 92-100.

117. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 97: "The principle that no one should be allowed to profit by his own wrong has deep roots in the law—roots not only in Ango-American law but in Roman and continental law. . . The principle has a myriad of other applications [besides those involved in *Riggs*, *supra* note 66] in the day to day operation of contemporary law." *See also* H. HART & A. SACKS, *supra* note 3, at 487-96 (commenting on the status of various claims by family members against each other and pertaining to the security of the marriage and the family unit).

118. *See, e.g., id.* at 574-89 (commenting on the issues involved in MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1916)).

119. *See* H. HART & A. SACKS, *supra* note 3, at 167:

> Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies. The organizing and rationalizing power of this idea is inestimable.

120. *Cf.* H. HART & A. SACKS, *supra* note 3, at 574-89 (commenting on Cardozo's review of precedent in *MacPherson*).

121. *Cf.* H. HART & A. SACKS, *supra* note 3, at 472-73 (commenting on Roberson v. Rochester Folding Box Co., 171 N.Y. 556, 64 N.E. 442 (1902), and the right to privacy.)

122. *Cf.* H. HART & A. SACKS, *supra* note 3, at 574-89 (commenting on *MacPherson*).

Sacks' view, judicial decisions are properly mechanical only in a derivative sense—when the decision is uncontroversial and the state of the law that bears on the dispute is settled, then no particular creativity is required. But, there is, generally, a creative quality to the judicial decision, and a judge needs both intellectual subtlety and legal sensitivity to appreciate the force or proper application of a norm.

2. *Judicial deference*

Hart and Sacks' answer to the question of proper deference depends, in an important way, on their answer to the issue of judicial creativity. It is part of the Legal Process view that law-making, whoever the lawmaker might be, is a matter of formulating and applying general directive arrangements.[123] The propriety of judicial deference, therefore reduces, in this view, to a question of *comparative institutional competence*. Under what circumstances is the judiciary—a body of judges trained in the Anglo-American tradition of law—better equipped to formulate general directive arrangements than some other institution of the government? More particularly, the question of comparative competence becomes: Under what circumstances is the judiciary better equipped than the legislature?

In general, the answer of the Legal Process school is simple. There is no *a priori* reason why judges should not formulate general directive arrangements. Indeed, Hart and Sacks would want to emphasize that in the common law this has been the judiciary's accustomed responsibility: courts have a long and viable tradition of law-making as part of their common law responsibilities.[124] The contrary rhetoric of legal formalism at the turn of the century notwithstanding, it is clear that both here and in England, judges have historically been the primary institution for both formulating and applying general directive arrangements. Courts have developed the skills necessary for making law. Their sensitivity to the existence and force of legal principles and policies has equipped judges with the experience and procedures both to resolve disputes where no statute applies and to respond to the purposes behind legislatively promulgated laws.

In short, judges clearly make law; the only relevant issue is: When should they? Hart and Sacks were not alone in drawing upon the idea of the comparative competence of the judiciary. Indeed, they are part of a generation of scholars that tended to assume that idea as a basis for discussing questions of legal theory.[125] Others have used the same idea for comparing the relative skills of courts and of legislatures, but have concluded instead that courts ought to defer to legislatures.

There is a trio of predictable arguments that could be raised, using this idea of comparative competence, against the propriety of judicial law-making. First, one might object to judicial law-making on the strength of the legislature's superior capacity and resources. Legislatures, this objection

123. *See supra* text accompanying note 44.

124. *See* H. HART & A. SACKS, *supra* note 3, at 366-68.

125. *See, e.g.*, Vetter, *supra* note 5, at 415-17; Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1575 (1985).

would run, have the resources in time and staff to gather information and develop expertise so as to decide issues that require sophisticated information collection or empirical analysis. Judges, however, do not; their only relative advantage comes from their training in arguments of law. So, this objection continues, judges ought to defer to legislatures on questions of law-making because legislatures are likely to be better at it.[126]

Second, one might urge judicial deference to the legislature because of the legislature's closer ties to the electorate. Even if the legislature weren't better staffed and equipped to formulate general directive arrangements, law-making should nonetheless be left to the legislature because, from the standpoint of our government's majoritarian underpinnings, legislative responses to questions of law, even if inept, would be more legitimate. So, again, the legislature is the better body for formulating general directive arrangements, and the judiciary ought to defer.[127]

A third challenge to the judiciary's competence to make law focuses on the retroactive quality of judicial decisions. If the court makes new law, then the parties' respective rights and obligations will be altered by that newly pronounced rule. The party that loses, under the new doctrine, will have had no notice of the change in law, and will be "penalized" retroactively even though they may have been relying in good faith on his understanding of the prior law.[128] Legislatures, however, are governed by constitutional prohibitions against retroactive legislation; any changes made by that branch of government are available, at least in principle, for examination by interested parties before the new law takes effect. So, once again, the legislature, not the judiciary, should be the agency for changing the law.

Hart and Sacks deviate significantly from the mainstream to reject what is here termed the classic objection.[129] Their answer to this argument takes the following form.[130] Courts might be handicapped, on occasion, by their lack of technical expertise and investigative resources,[131] but to emphasize those features of the judiciary is to miss other important aspects of judges' contribution to law.

Let us suppose, to begin with, a clear division between making and ap-

126. *See, e.g.*, Breitel, *The Law Makers*, 65 COLUM. L. REV. 749, 770 (1965). For convenience, this will be referred to as the "classic" objection to judicial law-making.

127. *See, e.g., Id.* at 771-72. This argument will be referred to as the "majoritarian" approach. It is important to note that, on the majoritarian approach, what makes the legislature "better" is measured by a different criterion than what makes the legislature "better" on the classic approach.

128. *See, e.g.*, Reimann v. Monmouth Consolidated Water Co., 9 N.J. 134, 87 A.2d 325 (1952), discussed in H. HART & A. SACKS, *supra* note 3, at 581-85.

129. *See supra* note 126.

130. This is not the structure in which the points are made in the manuscript itself, but, rather, a reconstruction—hopefully faithful—of the main contentions of the Legal Process view.

131. In various places the manuscript suggests that the supposed advantage of the legislature must be qualified according to the particularities of each case. In some controversies, the court may well have a rich and detailed factual record provided by the respective parties' advocacy on which to rely in making its decision. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 397-98, 432-37, and 541-46. In such a situation, the court's factual basis on which to formulate a general directive may be, in at least some respects, superior to anything that a legislature may bother to develop. The most that can be said is that the court does not have the power or resources to develop on its own initiative a sophisticated picture of the world or the expertise to evaluate trends and developments. *See id.* at 541-46. *See also* Wellington, *supra* note 4, at 240.

plying law. On the strength of the classic objection, an advocate of judicial deference would urge that where law has been made by other institutions, judges should merely apply that law because it represents the decision of a more skillful or insightful decision maker. But, even with respect to laws made by the legislature, another institution of government will be needed to apply those laws.[132] Applying general directive arrangements, whatever their provenance, will require at least two skills. First, the application will need to be sensitive to the purposes or values that lie behind the general directives; otherwise, the directives, as applied, could turn out to be incoherent or self-defeating.[133] In Hart and Sacks' view of the nature of law, those purposes are to be understood in terms of principles and policies.[134] Second, the agency that applies those directives will need to be sensitive to the particularities of individual disputes which will arise under the ambit of those directives.[135] In sum, even assuming a reliable distinction between making and applying law, it follows from Hart and Sacks' conception of the nature of law that applying the law will be an important, and distinct, function of some agency of the legal system,[136] and that application will require many of the same skills as would decisional law-making.[137]

In other words, even if there is a reliable distinction between making and applying law, to apply the law courts will need the skills that would be required to make law. If the legislature has failed to make law on some question courts are therefore qualified, from the standpoint of the classic objection's concerns over comparative judicial competence, to supplement the law made by other institutions. Finally, relax the initial assumption of a distinction between making and applying law. If we assume no sharp division between the tasks,[138] it seems plausible that we would want the institution which is responsible for deciding cases to be competent at both law-making and law-application. The lack of a sharp distinction means that it

132. *See* H. HART & A. SACKS, *supra* note 3, at 140.

133. *Id.* at 160-61.

134. *Id.*

135. *Id.* at 140.

136. *Id.* at 141: "The enactment as a form of law, in other words, will need to be supplemented by a body of decisional law."

137. As is argued in the third section of this Article, the Legal Process view is even more aggressive than this formulation, holding that when judges "apply" statutes they should employ the same skills and fulfill essentially the same function as is required for deciding cases at common law. *See infra* text accompanying notes 234-40.

138. Two facets of Hart and Sacks' views suggest the inadequacy of this distinction, at least as it is supposed to map onto the division of roles between courts and legislatures. First, as will be discussed *infra* text accompanying notes 233-39, the Legal Process view of statutory interpretation holds that to apply a statute properly requires that its significance within the whole of the law be assessed. That is, any general directive arrangement, whether enacted or decided, must be fit into the larger set of arrangements. Second, Hart and Sacks' manuscript includes reference to a number of doctrines that undercut any sense of a stable border between common and statutory law. For example, they refer to the doctrine of the equity of a statute and to James Landis' brilliant article, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934), discussing that doctrine. A decision in the statute's equity involves the application by the court of the fundamental purpose of a statute to a situation not subsumed by the statute. *See* H. HART & A. SACKS, *supra* note 3, at 491 n.45. They also discuss, in the context of considering theories of statutory interpretation, the traditional maxims of statutory interpretation—that statutes in derogation of the common law and that penal statutes should be construed narrowly—that impose judicially created limits on how the legislature can enact changes in the set of legal norms. *See* H. HART & A. SACKS, *supra* note 3, at 99-101.

would be difficult to segregate issues of law-making from those of law-application. Absent such a segregation, however, the body called on to apply the law will likely need to decide questions of law-making as well. Consequently, courts of general jurisdiction look like better candidates for the job of applying legislatively formulated laws, for those courts' traditional experience of common law decision-making involves both making and applying law. In sum, judges have a special set of skills which make them prime candidates for law-making and there is no valid general argument for judicial deference on the grounds of competence.

Where the Legal Process answer to the classic objection emphasizes overlooked features of judges' competence, Hart and Sacks' response to the majoritarian objection emphasizes the legitimacy of the judiciary as an institution.[139] To think usefully about the majoritarian response requires a reformulation of the issue. Properly understood, the majoritarian approach does not argue against judicial law-making. Rather, it argues against the judiciary's *displacing* legislative law making. For example, nothing about the majoritarian approach to relative institutional competence speaks against a system of law in which the legislature explicitly delegates to the judiciary some proper part of the law-making task. So long as the decision to delegate proceeds in a fashion appropriate to majoritarian decision-making, one would be hard-pressed to argue that the delegation was improper. Further, objections to judicial law-making would be reduced, if not obviated, so long as the legislature retains an adequate power to review judicially-made laws.[140] The legislature's power to revise or purge rules made by the judiciary would also seem to undermine majoritarian objections to judicial law-making. There mere fact that the law in question was initiated by the judiciary does not deprive that law of its majoritarian legitimacy, and the majoritarian response to the problem of relative institutional advantage, properly understood, suggests only that courts should not displace legislative law-making.

It is easy, with this reformulation in hand, to suggest Hart and Sacks' response to the majoritarian approach. Nothing about the traditional, common law role of courts in making law denies in any way the premise of legislative supremacy. Indeed, the history of the common law is replete with instances in which the legislature has either changed a particular common law rule[141] or else has replaced common law doctrines with codifications,[142] in the occasional exercise of wholesale law reform.[143] So, judicial law-mak-

139. What follows is, again, what seems to be a plausible extrapolation of Hart and Sacks' views, derived from a collection of sources. Hart and Sacks' response to the majoritarian argument about comparative institutional competence is not explicit in the Legal Process manuscript but can be derived from their treatment of statutory interpretation. Further, it is possible to take back-bearings—that is, to infer Hart and Sacks' views from the views of scholars like Calabresi and Wellington, more recent legal theorists who have explicitly admitted their debt to the Legal Process school.

140. *See* G. CALABRESI, *supra* note 4, at 92-101.

141. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 402-404 (legislative reform of common carrier liability following the decision in the Norway Plains case), 430-31 (reform of admiralty liability rules), 474-77 and 798-817 (change of law in New York following the *Roberson* case).

142. *See, e.g., id.* at 10-74 (discussing Congressional imposition of quality standards for produce).

143. *See, e.g.*, G. CALABRESI, *supra* note 4, at 59-80. *But see* G. GILMORE, AGES OF AMERICAN

ing of the traditional kind, within the context of legislative review of common law doctrines, is not rendered illegitimate by the majoritarian objection alone.

No extrapolation is necessary to divine Hart and Sacks' rejection of the retroactivity challenge; that argument is addressed directly in the manuscript.[144] Their treatment derives from their view that the law includes principles and policies that ground and justify the rules and cases. Broadly speaking, the unfairness of a retroactive change of law depends on the extent to which that change is imposed on private parties who had no notice of the potential change; Hart and Sacks urge, in effect, that parties have notice of possible future changes by observing the fit between existing doctrine and the underlying legal norms. Since a rule should be understood and evaluated in terms of the principles and policies of that area of the law, it follows for Hart and Sacks that a rule's authority can be diminished by changes in the rest of the law. Changes in other aspects of the law may signal a forthcoming change in some previously settled rule or case.[145] The actual decision that announces the change in doctrine is therefore not without notice, for the past changes in the law have signaled the change to those who should be watching. Conversely, if some change in doctrine is not heralded by an emerging lack of fit between the rule and the underlying principles and policies, then either the prior rule was never justifiable, or else the court has no business changing the law.

In sum, judges have their own proper realm of expertise which they can, and indeed, have used to make law. It is consistent with our basic sense of judicial capacity and legitimacy for courts to make law, where the legislature has not. Following the analysis of comparative institutional expertise, Hart and Sacks' answer to the question; "When should judges defer?" would be, "Not so very often."

B. *Hercules and the Best Theory of Law*

Although the Legal Process manuscript represents an unfinished work, it is nonetheless unitary. Dworkin's work, on the other hand, while significantly more straightforward in its style of argument and in its development of his version of the theory of adjudication, is episodic.[146] Dworkin's early essays outlined his views about the nature of law. These writings suggested his position about the proper role of the judiciary, but they did not present his views explicitly. He did not advance anything like a full-fledged theory of the judge's proper role until his article, *Hard Cases.*[147]

Hard Cases is a complex and provocative essay. It expounds the basic structure of his views about the judiciary's proper role; it also expounds

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LAW 83-86 (1977), on the question whether those statutory schemes represent anything like majoritarian legitimacy.

144. *See* Hart and Sacks' discussion of Justice Cardozo's masterful opinion in MacPherson v. Buick Motors, 217 N.Y. 382, 111 N.E. 1050 (1916), in H. HART & A. SACKS, *supra* note 3, at 574-89.

145. *See* Hart and Sacks' discussion of Crowley v. Lewis, *id.* at 596-609. *See also supra* note 114 and accompanying text.

146. *See supra* text accompanying notes 23-4.

147. R. DWORKIN, *supra* note 6, at 81.

and defends his rights thesis. There are two central tenets to this exposition. First, judges are obligated to decide cases, and to decide them according to law. Since, on the rights thesis, law involves pre-existing legal rights, Dworkin argues that judicial decisions should discover and enforce the pre-existing rights of the litigants.[148] The task of discovering and enforcing the parties' rights will require analysis of precedent and, most importantly, of legal principles.[149] Second, "[j]udges, like all political officials, are subject to the doctrine of political responsibility."[150] Generally, this doctrine means that judges "must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make."[151] The doctrine of political responsibility, Dworkin maintains, requires *articulate consistency*.[152] Judges are expected to offer justifications for their decisions, and their justifications should demonstrate the consistency of the instant decision with past decisions. Thus, the doctrine of articulate consistency should accommodate the awareness of precedent and institutional history that judges acknowledge in expounding their decisions.

The centerpiece of his analysis in *Hard Cases* is the construct of Hercules, the ideal judge—"a lawyer of superhuman skill, learning, patience and acumen."[153] Dworkin advances Hercules as an exemplar of how an ideal judge would decide cases. This involves several labors. First, Hercules will use his extraordinary capacities to craft a *theory* for all of the law of his jurisdiction—constitutional, statutory, and common.[154] There are, of course, several different theories that could account for legal developments in the relevant jurisdiction, and Dworkin describes some of the criteria for identifying the best of the candidates. Among other things, Dworkin argues that the best theory of law will need the rights thesis as one of its components in order to explain adequately the important features of the jurisdiction's legal system.[155] Second, Hercules will decide cases in terms of his theory. The proper conclusion for any dispute that comes before Hercules for decision will be the answer that follows from the best theory of law for his jurisdiction.[156] By integrating the whole of his law into a single coherent theory, Hercules can satisfy the requirement of articulate consistency. Finally, this picture of the ideal judge introduces Dworkin's infamous "right answer thesis"—the claim that we should expect there to be a single right answer to every legal controversy. The right answer will flow from the best theory for the jurisdiction's legal system.[157]

From the Hercules story, we can extract several important features of Dworkin's view of the role of a judge. Although Hercules is described as superhuman, Dworkin clearly feels constrained to develop a picture of a

148. *Id.* at 81 and *passim*.
149. *Id.* at 115-18.
150. *Id.* at 87.
151. *Id.*
152. *Id.* at 88.
153. *Id.* at 105.
154. *Id.* at 106-23.
155. *Id.* at 116-17.
156. *Id.*
157. *Id.*

judge that nonetheless satisfies our basic expectations of judges. Dworkin recognizes, of course, that Hercules is the ideal judge and that we could not reasonably expect any actual judge to produce a full-fledged theory of the kind that he envisages. In a later piece where he returns to the task of judicial theory-construction, he indicates that judges of less than superhuman skills could be expected to produce no more than a *partial justification*. That is, real judges

> . . . can try to justify, under some set of principles, those parts of the legal background which seem to them immediately relevant, like, for example, the prior judicial decisions for various sorts of damage in automobile accidents. Nevertheless it is useful to describe this as a partial justification—as a part of what Hercules himself would do—in order to emphasize that, according to this picture, a judge should regard the law he mines and studies as embedded in a much larger system, so that it is always relevant for him to expand his investigation by asking whether the conclusions he reaches are consistent with what he would have discovered had his study been wider.[158]

Finally, the rights thesis, according to Dworkin, is also tied to the sense we have that judicial decisions should be justified according to *principle*:

> An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy. They would be free to say that some policy might be adequately served by serving it in the case at bar, providing, for example, just the right subsidy to some troubled industry, so that neither earlier decisions nor hypothetical future decisions need be understood as serving the same policy.[159]

As was true for Hart and Sacks, Dworkin's view of the nature of law generates his analysis of the issues noted above—the law's lack of gaps, the judge's proper creativity, and the judge's proper deference to other law-making parts of the government. In particular, it is his understanding of principles of law that informs his views on these questions. Moreover, Dworkin's contention that judges should decide cases according to principle provides answers to the problems of the classic and the majoritarian response to judicial law making articulated above.

1. *Judicial creativity*

Dworkin joins Hart and Sacks in rejecting as fundamentally misguided any mechanical or formalistic model of judicial reasoning. It follows from the picture of Hercules, the ideal judge, that the judiciary's proper role is necessarily creative.[160]

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158. Dworkin, *supra* note 31, at 166.

159. R. DWORKIN, *supra* note 6, at 88.

160. *Id.* As with the discussion of Hart and Sacks' analysis of these questions, it will be assumed in this discussion that the judicial decisions at issue are within the court's common law jurisdiction.

In his decisions, Hercules must satisfy the doctrine of political accountability as it bears on judges, and that requires articulate consistency.[161] He meets the requirement of consistency by deciding the controversies that come before him in terms of the best theory of law for his jurisdiction. On some occasions, Dworkin indicates, the theory can be regarded as well-settled, at least in so far as it bears on some particular case,[162] and the right answer follows in a straightforward fashion.[163] On other occasions, however, Hercules must construct the theory that best accounts for the state of the law in his jurisdiction—its history, its past cases, and its trends.

In this respect, Hercules must exercise a creative function, just as is required of judges in Hart and Sacks' view. Hercules must articulate the theory that best justifies the decisions that judges are called on to make in his jurisdiction; he must integrate into a single theory an enormous and underdetermined range of data. The best theory must account for the constitutional foundations of his jurisdiction, the statutes and the political machinery for enacting them, and the full range of common law decisions which have been made. Most importantly for purposes of comparison, the best theory of law must integrate the legal norms of Hercules' law, for these norms play an important role in explaining the prcedents of Hercules' jurisdiction and in organizing the precedents into an explanatory whole.

Dworkin's picture of Hercules' role expresses a claim that is only implicit in the Legal Process manuscript. Hercules must identify the best theory for his jurisdiction, but there is no mechanical process for this determination.[164] The answer must flow from the judge's own intellectual processes.[165] For Dworkin, the judge's proper role requires creativity in that the court must exercise judgement—drawing on its sensitivity and discernment—about how the relevant pieces fit together into the best explanation for the law of the judge's jurisdiction. Dworkin's account therefore recapitulates the important features of the Legal Process tradition's view of the

161. *See supra* text accompanying notes 150-52.

162. Dworkin does not explicitly discuss the proper resolution of easy cases. But, in discussing Hercules' decisions at common law, he describes the labor as requiring a coherent set of principles that justifies the past precedents and as deriving the answer in any particular case from that set of principles. *See* R. DWORKIN, *supra* note 6, at 116-17. Dworkin suggests, in that description, that when the decision is unproblematic, the set of principles generates its answer to that case in an uncontroversial way. In later comments, he claims that easy decisions are just a special case of hard ones suggesting that easy cases are ones in which building the theory for the law of Hercules' jurisdiction is unproblematic, at least as it bears on that case. R. DWORKIN, *supra* note 18, at 266.

163. He notes: "In easy cases legal rights can be deduced, in something close to a syllogistic fashion, from propositions reported in books that are available to the public, and even more readily available to lawyers the public can hire." R. DWORKIN, *supra* note 6, at 337.

164. *See id.* at 117 (commenting on the possibility that another judge will reach a different construction); Dworkin, *supra* note 31, at 169. It seems clear that, by describing Hercules' task as that of building the best theory for the law of his jurisdiction, Dworkin means to invoke the enormous literature in the philosophy of science that bears on the construction and choice of theories. Suffice it to say that the upshot of this literature is that theory choice is hardly a mechanical process. *See generally* C. GLYMOUR, THEORY AND EVIDENCE (1980). Moreover, his description in *Hard Cases* of Hercules' task as theory builder seems consistent, for the most part, with the idea that the validity of statements of law within the legal system could be tested on something like what philosophers term a coherence theory, hardly a mechanical process. *See* Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions*, 72 CALIF. L. REV. 369 (1984).

165. *See* R. DWORKIN, *supra* note 6, at 117; Dworkin, *supra* note 31, at 169-73.

proper role of the judge. The judge must decide the case at hand in terms of the best understanding of the relevant law, an understanding that can be gleaned only from some sense of how the law as a whole fits together into a coherent picture. The law as a whole will include, for Dworkin as for Hart and Sacks, the full range of legal norms, and integrating those norms into a coherent whole is a distinctly creative task.

Prior to Dworkin's entry into the field, legal scholars would have been inclined to say that the Legal Process school posits judicial *discretion* to decide cases when the decision is problematic.[166] Dworkin has made us cautious in our use of that term, and more precise in its attributions, through his challenge to H.L.A. Hart's version of positivism. Dworkin distinguished several different senses of discretion. Following his distinctions we can say that the Legal Process school posits judicial discretion in what Dworkin calls the weak sense of that term: "to say that for some reason the standards [a judge] must apply cannot be applied mechanically but demand the use of judgement."[167] Dworkin clearly concurs with Hart and Sacks on this point. He rejects mechanical models of the judicial decision,[168] and his sketch of Hercules' decision processes plainly requires judgement on Hercules' part. It is in this respect that Dworkin's account posits judicial creativity.

When one asks if the judicial role properly involves creativity, one might be asking, instead, if the judicial decision ever creates new legal rights or responsibilities *ex nihilo*. Although Hercules' decisions will, at least in hard cases, be creative, it is important for Dworkin's position that the judge's decisions are not *original*. Under Dworkin's analysis, this involves what he calls discretion in the strong sense.[169] Of course, if one accepted formalism as a norm for judicial decision-making then one would have to reject any form of creativity, but one can reject the idea that judges have discretion in the strong sense without embracing formalism. Hart and Sacks clearly reject mechanical jurisprudence, but in their manuscript they take no clear position about the possibility of any far-reaching judicial creativity. Dworkin is unequivocal in rejecting the propriety of judges creating rights *de novo*. Rather, he contends that legal rights pre-exist the judicial decision and that the judge enforces those rights that a litigant *has*.[170]

2. *Judicial deference*

In *Hard Cases*, Dworkin is quick to stake out his response to the problem of judicial deference to the legislature. His response turns on his reformulation of what he takes to be the received view on the matter:

> Theories of adjudication have become more sophisticated, but the most popular still put judging in the shade of legislation. The main outlines of this story are familiar. Judges should apply the law that

166. Hart and Sacks anticipated Dworkin's analysis: they expressed some reservations about the idea of discretion and about the extent to which judges in well-developed legal systems could be said to have it. *See* H. HART & A. SACKS, *supra* note 3, at 167-71.

167. R. DWORKIN, *supra* note 6, at 31.

168. R. DWORKIN, *supra* note 22, at 9-12 (rejecting "rule-book" conception of law).

169. *See* R. DWORKIN, *supra* note 6, at 32-33.

170. *Id.* at 81.

> other institutions have made; they should not make new law. That is the ideal, but for different reasons it cannot be realized fully in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly. But when they do, they should act as deputy to the legislature, enacting the law that they suppose the legislature would enact if seized of the problem.[171]

He recurs to the conception of judges as deputies to explain the distinctiveness of the rights thesis. The above picture, he continues, "is perfectly familiar, but there is buried in this common story a further level of subordination not always noticed. When judges make law, so the expectation runs, they will act not only as deputy to the legislature but as a deputy legislature. . . ."[172] Using this notion of a deputized judiciary, we can restate both the majoritarian and the classic argument for judicial deference: on the majoritarian argument, courts should think of themselves as deputies to the legislature and should make law only in as much as that furthers the legislature's aims; on the classic argument, courts should make law only in so far as they can do so as deputy legislatures, that is, only when they can make law in the same manner and on the same terms as the legislature would. Dworkin rejects both arguments and relies in each case on the idea of the judiciary's obligation to decide cases according to the best understanding of a law that includes legal norms. Ultimately, his answer depends on his distinction between principles and policies: judges are not deputies, because they decide cases on arguments of principle, and not policy.[173]

Dworkin explicitly rejects the majoritarian argument for judicial deference,[174] citing the nature of principles as support. Arguments of principle, he urges, are based on some right of the proponent, and the nature of rights, as he describes them, "makes irrelevant the fine discriminations of any argument of policy that might oppose it."[175] That is, rights are a kind of political trump and, except in extreme cases, should not be overcome by considerations of policy. The judiciary's impoverished ties to the will of the electorate are therefore no disadvantage when the dispute in question must be decided by reference to principle. Indeed, as Dworkin sees it, the judiciary's distance

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171. *Id.* at 82.

172. *Id.*

173. *See id.*

> In fact, however, judges neither should be nor are deputy legislators and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading. It misses the importance of a fundamental distinction within political theory, which I shall now introduce in a crude form. This is the distinction between arguments of principle on the one hand and arguments of policy on the other.

174. *Id.* at 84.

> The familiar story, that adjudication must be subordinated to legislation, is supported by two objections to judicial originality. The first argues that a community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law.

175. *See* R. DWORKIN, *supra* note 6, at 85.

from the whims of the electorate is an advantage: "A judge who is insulated from the demands of the political majority whose interests the right would trump is, therefore, in a better position to evaluate the argument."[176] It is a consequence of Dworkin's rights thesis that judges should enforce the litigant's rights and that judicial decisions should, therefore, be decisions of principle. So, the majoritarian approach is blunted in one respect. When decisions of principle are required, Dworkin argues, judges are not obligated on grounds of legitimacy to defer to other decision-makers, although he agrees with this objection when decisions of policy are called for instead.[177]

Dworkin's response to the classic argument is similar, although less explicit. The claim that the legislature's skills or resources are superior to those of the judiciary is persuasive only when arguments of policy are at issue. When arguments of principle are involved, however, the judiciary's skills are more valuable. Judges are bound by the doctrine of articulate consistency, and, within the context of decisions at common law, consistency requires arguments of principle.[178] Since deciding cases on the strength of the demands of principle is the special province of the judiciary, and not likely a strong suit of the legislature, courts should not defer law making when the law that is to be made is justified by arguments of principle. Arguments of policy, on the other hand, demand only a minimal consistency and are more properly reserved to the legislature. Finally, it is the skills of judging, the capacity to integrate the set of legal principles into a coherent whole that makes consistency of principle possible. At least so long as courts are limited to decisions of principle, they are more competent than we could reasonably expect legislatures to be.

The heart of Dworkin's response to the objection from retroactivity[179] is his claim that a judicial decision based on arguments of principle discovers, and does not create, novel rights.

> If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him. Even if the duty had not been imposed upon him by explicit prior legislation, there is, but for one difference, no more injustice in enforcing the duty than if it had been."[180]

The exact force of this argument is unclear. Dworkin cannot plausibly be contending that the defendant likely had notice of his duty just because the

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176. *Id.*

177. *See id.* at 84-85: "The first objection, that law should be made by elected and responsible officials, seem unexceptionable when we think of law as policy."

178. *Id.* at 88:

> An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy.

179. *See* R. DWORKIN, *supra* note 6, at 84: "The second [objection to judicial law-making] argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event." *Id.*

180. R. DWORKIN, *supra* note 6, at 85.

duty was discovered rather than created. The thrust of his account of judicial creativity is that sincere and well-intentioned observers of the law might well disagree about the best theory of the law as a whole. It follows that litigants cannot, in advance of a decision, know with any surety the new developments of law that might result.

C. *The Right Answer Thesis and Other Comparisons*

Dworkin's theory of adjudication is built on the same fundamental tenets that support Hart and Sack's theory. When considering the proper role of the court, these shared tenets lead to fundamentally similar positions about the proper creativity and deference to be employed by judges in developing decisional law. Dworkin's account does differ in several respects from the account offered in *The Legal Process*. Indeed, because Hart and Sacks' analysis is incomplete,[181] it would be possible to accept their basic tenets and yet differ as regards particular facets of the judiciary's proper role. For that same reason, this Article refers to the Legal Process *tradition*: Hart and Sacks' ideas have provided the skeleton of the tradition, but that skeleton might be fleshed out differently by different successors to the tradition.

The present discussion will examine three issues on which Dworkin's account differs from Hart and Sacks': the propriety of decisions based on legal policies, the rights thesis, and the question of gaps in the law. Noting these particular differences will highlight the overall convergence of views.

Hart and Sacks' manuscript does not offer a polished, fully articulated theory of adjudication. Despite the richness and complexity of *The Legal Process* there are significant weaknesses to the theory so far as Hart and Sacks have developed it. One salient weakness, for example, emerges when we try to derive from their account the criteria by which the validity of a particular judicial decision should be assessed.[182] The central tenet of the Legal Process analysis is that judges should examine the substratum of legal norms. It follows from this tenet that in order to assess the validity of a problematic judicial decision courts must be able to weigh and compare the various norms. In short, the adequacy of Hart and Sacks' theory of adjudication ultimately depends on the prospect of measuring and comparing the force of the relevant principles and policies. Unfortunately, they are vague where precision would be most useful—namely, in describing how a judge should recognize and weigh the appropriate force of the various legal norms that might bear on any particular decision. Consequently, without some elaboration of how particular norms might justify one or another conclusion, we are hard pressed to evaluate any given holding as rightly or wrongly decided.

A lack of precision on this question means that the account provided in the manuscript is left open to insinuations that judicial reasoning is somehow indeterminate, and therefore that the judiciary lacks political accountability—that is, to charges that judges might decide according to whim or prejudice and not according to law. To be sure, the manuscript suggests

181. *See supra* text accompanying notes 25-27.
182. *See supra* text accompanying notes 115-16.

Hart and Sacks' reply to this problem: the force and weight of any particular norm at a given moment in legal development depends on the role that the norm might play in the best understanding of the law.[183] But, this reply leaves many questions unresolved. This feature of the Legal Process tradition should be troubling to its adherents, and should stimulate them to augment the theory. Any theory that bases the judicial decision on a weighing of norms should seek to specify how a judge could correctly make that assessment.

Dworkin's account of how the judiciary should respond to the substratum of norms is distinctive in his insistence that judicial decisions should be predicated on arguments of principle and not claims of policy. This feature of his account might help defuse objections to judicial lawmaking. Similarly, he has broken new ground with his construct of Hercules, the theory-building judge, together with his invocation of the idea, common to the philosophy of science, that there are criteria relevant to choosing among rival theories.[184]

These distinctive features of Dworkin's account seem aimed at providing some standards for assessing the correctness of a judge's decision. Notwithstanding these differences, however, Dworkin's theory is prey to many of the same objections that plague Hart and Sacks' theory. His account in *Hard Cases* divides principles from policies and makes clear that principles count for more—much more—than policies. Dworkin's answer, even more explicitly than Hart and Sacks', depends on the force or weight that would be assigned to any given norm by Hercules' theory of law. Dworkin is more specific than is *The Legal Process* about the proper criteria for choosing among rival theories of law for Hercules' jurisdiction. But his response, as well, is far from determinate.[185] In this regard, at least, Dworkin's account of the proper role of the judiciary not only shares the same fundamental tenets as the Legal Process tradition, it also suffers some of its salient weaknesses.

In his few references to Hart and Sacks' contributions, Dworkin distinguishes his own position from theirs, describing them as offering an "instrumental" approach to law.[186] It is not at all clear what he means by that description, for he has used "instrumental" in different senses at other

183. *See supra* text accompanying notes 120-22.

184. *See supra* note 164 and accompanying text.

185. *See, e.g.*, Dworkin, *supra* note 31, at 170-71. The criteria that Dworkin advances in that essay for selection among possible theories are more refined than his suggestions in *Hard Cases*. In *Hard Cases* he simply indicates that the best theory is the one that fits best with the law in Hercules' jurisdiction. But, in the later article on natural law he adds an additional criterion to that of fit—that the theory should show the data in "its best light." *See id.* at 170. In his new exposition of the theory of 'law as integrity," where legal reasoning is fundamentally a matter of interpretation, Dworkin describes the idea of interpretation on which he relies but does not argue that interpretation will necessarily provide determinate answers. *See* R. DWORKIN, *supra* note 18, at 49-53.

186. *See* R. DWORKIN, *supra* note 6, at 4:

> Scholars like Myres McDougal and Harold Lasswell at Yale, and Lon L. Fuller, Henry Hart, and Albert Sachs[sic] at Harvard, though different from one another, all insisted on the importance of regarding the law as an instrument for moving society toward certain large goals, and they tried to settle questions about the legal process instrumentally, by asking which solutions best advanced these goals.

See also id. at 6.

places.[187] But this much is clear: Dworkin's theory of adjudication diverges from Hart and Sacks' in that he pursues, as a related inquiry, the rights thesis, and they do not. This thesis is wide-ranging in its implications for political philosophy and legal theory, and, at least so far as Dworkin sees it, requires that a correct judicial decision in favor of one party be understood as entailing that the winning party have a concrete legal right to that decision. It is doubtful whether the rights thesis requires that we understand the litigant to be claiming that he has a right to a decision.[188] It is patent, however, that if Dworkin is committed to the idea that one party or another has a right to a decision then he cannot easily follow Hart and Sacks' lead and include among the set of correct legal decisions those based on policies. If judicial decisions enforce legal rights and if judges properly decide cases based on arguments of policy, then it follows that some rights, at least, could be legitimately compromised on the strength of the desires of some collective of citizens of the community. Rights would lose, on that line of reasoning, their special status as "trump," and the power of the rights thesis would therefore be diminished. So, Dworkin must be inclined, if he wishes to describe judicial decisions as enforcing concrete legal rights, to separate arguments of principle from those of policy and to constrain the judiciary to decide hard cases only on principle.

The Legal Process manuscript does not discuss anything comparable to the rights thesis, and Hart and Sacks are comfortable with the idea that judges should decide cases according to both principle and policy. In this regard, if in no other, Dworkin's theory of adjudication diverges from that of *The Legal Process* manuscript. But, this divergence is best understood as an addition to the basic model of how judges should decide cases that Dworkin shares with Hart and Sacks. It does not, in other words, undermine the essential similarity of their theories of adjudication.

Dworkin's view of the proper role of the judiciary differs from Hart and Sacks' inasmuch as he places additional constraints on the judicial decision. One constraint is political: Dworkin argues that for judges to decide cases on arguments of policy is politically illegitimate. His other constraint is conceptual: he claims that arguments of policy cannot, by themselves, account for the judicial practice of adhering to precedent. Adding these constraints to the basic Legal Process view of the proper role of courts, leads Dworkin to diverge from Hart and Sacks on the propriety of policy-based judicial decisions. But, added constraints on the proper judicial use of policy arguments do not mean that Dworkin differs fundamentally from the Legal Process view of adjudication; rather, it confirms his fundamental agreement. They each posit the basic obligation of judges to decide cases according to law. They each describe a decision according to law as one following from the best understanding of law, an understanding that integrates the various

187. *See, e.g.*, DWORKIN, *supra* note 31, at 181: "An instrumentalist judge will see himself or herself as an officer of government charged with contributing to the good society according to his or her conception of what that is." *Id.*

188. David A.J. Richards describes as "obscure and unexamined" the connection between the rights thesis' general commitments and the claim about a litigant's concrete right to a decision in his favor. *See* Richards, *Taking* Taking Rights Seriously *Seriously*, *supra* note 7, at 1315-16.

legal norms into a coherent whole. Finally, they each describe as the proper task of the judiciary the construction of that integration of the law. Moreover, Dworkin's distinctive claims about the rights thesis and about the propriety of judges' recourse to arguments of policy are particularly controversial; it appears that Dworkin has provided his own problematic extension of the Legal Process tradition's theory of adjudication.

We reach the same perspective on Dworkin's fundamental acceptance of the Legal Process view of adjudication if we examine their differences on the issue of the law's lack of gaps. At first blush, it would seem that Dworkin has forged an entirely different position than that provided by Hart and Sacks. His rejection of gaps in a mature legal system is notorious, while Hart and Sacks hardly address this question at all. Nonetheless, it can be seen that Dworkin's claims about the right answer question reflect his acceptance of the same view as the Legal Process tradition about how courts should decide.

Both the distinctiveness of Dworkin's position and the respects in which he accepts the same views as the Legal Process tradition will emerge if we distinguish three different but related claims about gaps in the law. First, one could assert directly that in a properly developed legal system there is, at least in principle, a right answer to every legal controversy. Dworkin has, in a variety of arguments, challenged what he sees as the possible competing hypotheses, criticizing the cogency of arguments in support of what he sees as the "no right-answer" thesis—the claim that there are gaps in the law.[189] Second, one might accept the thesis that there is a *unique* right answer to each legal question, which is based upon the best possible hypothesis about the legal system. Dworkin has been a vigorous advocate of the claim that if settled law in a given jurisdiction is sufficiently detailed and complex, only one legal answer will be tenable for any given controversy.[190] Third, in addition to this claim that there is a right answer to every legal controversy, Dworkin has advanced a related claim about the obligations of a judge in a well-developed system of law. He argues, in effect, that judges should approach hard cases with the *expectation* that a single right answer can be derived for each dispute and that they should undertake to find it.[191] This third claim is different from Dworkin's contentions regarding the nature of law or the logic of judicial theory-construction; it is, rather, a claim about the obligations which judges should feel.[192] In other words, this third argu-

189. In two related essays Dworkin has sought to demonstrate that certain arguments in favor of the no-right-answer thesis are logically incoherent. *See* R. DWORKIN, *supra* note 6, at 279-90, 331; Dworkin, *No Right Answer?* in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58, 62-65 (P. Hacker & J. Raz, eds. 1977). Moreover, his challenge to H.L.A. Hart's idea of judicial discretion, *see supra* text accompanying notes 166-68, can be seen as a rejection of the idea that a deciding judge is ever without law in terms of which the court might assess the respective positions. *See* R. DWORKIN, *supra* note 6, at 14-80.

190. *See* R. DWORKIN, *supra* note 6, at 81, 105-23, 283-86.

191. *See* R. DWORKIN, *supra* note 6, at 286; Dworkin, *supra* note 189, at 84; R. DWORKIN, *supra* note 31, at 165-66 and *passim*.

192. Dworkin does not, when he makes this claim, emphasize how this argument is distinguished from his other contentions about the right answer thesis. *See* R. DWORKIN, *supra* note 6, at 286. But later, he acknowledges the possibility that the right answer thesis had this other aspect. *See* R. DWORKIN, *supra* note 18, at viii: "in *Taking Rights Seriously* I offered arguments against legal positivism that emphasized the phenomenology of adjudication: I said that judges characteris-

ment commends the right answer thesis as a prophylactic: even if, in fact, no single right answer is forthcoming as regards a particular controversy, judges should assume that there is a unique right answer to every legal controversy, so they work diligently to discover just what that right answer is in the case before them. They will craft their partial justifications of law with greater care, and will be able to sort out most, if not all, hard cases.

If we recognize the distinctiveness of this phenomenological version of the right-answer thesis, we can see that Hart and Sacks' account of the judicial obligation is, to a great extent, similar to Dworkin's. On one occasion, Hart and Sacks recognize the distinction between the logical and the phenomenological version of the right answer thesis,[193] and in several other places they reject the idea that the judge should refuse to provide an answer to a controversy.[194] Judges of general jurisdiction, they argue, have an obligation to provide a resolution for the disputes that come before them. Moreover, in advancing this obligation of the judiciary, they suggest that as part of the general structure of law there will be enough material so that a court could judge the "justice of any novel claim."[195] Hart and Sacks' manuscript, in short, indicates that, as they conceive of it, the body of legal norms is rich enough to provide grounds on which a judge can decide any controversy that might arise.

Nothing in this feature of the Legal Process view entails a conclusion about the existence of a *unique* right answer to each legal dispute. To the contrary, so far as Hart and Sacks have indicated, there is no reason to suppose that the available body of norms will preclude the prospect of more than one correct conclusion. But, their scattered remarks against the spectre of judges abdicating the responsibility to make a decision suggest that Hart and Sacks' account of the judicial decision is consistent with the Dworkinian argument that judges should assume that there is a unique answer. These remarks confirm, in short, that Dworkin's account of the proper role of the judiciary is substantially the same as Hart and Sacks'.

Hart and Sacks scarcely discuss the right-answer thesis,[196] and there is no suggestion in the manuscript that they even concerned themselves with

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tically feel an obligation to give what I call 'gravitational force' to past decisions, and this felt obligation contradicts the positivist's doctrine of judicial discretion."

193. *See* H. HART & A. SACKS, *supra* note 3, at 168:

> In these circumstances there may be thought to be a justification for describing the act of interpretation as one of discretion, even within the definition which has been given. But this would be to obscure what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding officer to reach what *he* thinks is *the* right answer.

(emphasis in the original).

194. *See id.* at 396-97, 492-95, 519-23, and 543-46.

195. *Id.* at 396-97.

196. Their only mention of the prospect of a single right answer comes in discussing the "Reasoned Elaboration of Purportedly Determinate Directions" where they assert:

> Obviously, more than one solution of a problem which bristles with uncertainties like these is possible and different magistrates are likely to come out with different solutions. It may even be said that more than one answer is permissible, in the sense that if one answer had been conscientiously reached and generally accepted a reviewing court might well think it ought not to be upset, even though its own answer would have been different as an original matter.

Id. at 168.

its more technical ramifications. Moreover, nothing in *The Legal Process* resembles Dworkin's intricate and sophisticated analysis of the arguments in favor of the no-right-answer thesis. In these respects, Dworkin's scholarship takes a dramatically different tack than did Hart and Sacks' analysis of the role of the judiciary. By the same token, however, these features of Dworkin's scholarship are commonly regarded as among the most problematic and least persuasive. In particular, the most controversial feature of Dworkin's contentions in favor of the right answer thesis is his claim that there will be a single right answer for Hercules to enforce in his decisions. What is especially doubtful is Dworkin's claim that in each legal controversy one and only one party will have an antecedent right to win the suit, which Hercules must enforce.[197] Why should we assume that for each possible legal controversy one conclusion will be more consistent with the best theory of law than any rival decision? What in the Hercules story precludes the possibility of a tie, all things considered, between different possible legal resolutions of the case in issue?[198]

This is a sore point for Dworkin's picture of the judicial decision and a facet of this argument that needs substantial support. Nothing in the present analysis shows in any way that such support could not be provided; what is important, for the present purposes, is that this aspect of Dworkin's view does not follow from the tenets that he shares with Hart and Sacks. This aspect of his theory in other words, involves problematic claims over and above those that he shares with the Legal Process tradition.

THE PROBLEM OF STATUTORY INTERPRETATION

Hart and Sacks' analysis of how courts should decide cases involving statutes is, in many ways, the capstone of *The Legal Process*, for their analysis of statutory interpretation proceeds from their analysis of the nature of law and judging. Indeed, some commentators seem to regard the analysis of statutory interpretation as the manuscript's most significant contribution.[199] Given that Dworkin shares the Legal Process view of law and the proper role of courts, his discussion of statutory interpretation should parallel Hart and Sacks'. This section compares their respective views on statutory interpretation to confirm the convergence of their theories of adjudication.

The Legal Process asserts that "American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[200] This privation, if there is one, results from neither scholarly inat-

197. *See, e.g.*, Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 9 (1977).

198. Professor Mackie proposes the following analogy:

> Consider the analogous question about three brothers: Is Peter more like James than he is like John? There may be an objectively right and determinable answer to this question, but again there may not. It may be that the only correct reply is that Peter is more like James in some ways and more like John in others, and that there is no objective reason for putting more weight on the former points of resemblance than on the latter or vice versa.

Id. at 9.

199. *See, e.g.*, G. CALABRESI, *supra* note 4, at 31, 87-90; Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, in M. COHEN, *supra* note 2, at 3, 5-7.

200. H. HART & A. SACKS, *supra* note 3, at 1201. *See also* R. DWORKIN, *supra* note 22, at 318-19: "There is no agreement about theories of legislation among American judges, or indeed among judges of any developed legal system."

tention nor judicial disinterest in the special problems posed by cases involving statutes. To the contrary, statutory interpretation is commonly recognized as a crucial part of the legal process,[201] and there are some notable attempts to render sensible the task of understanding and applying legislation.[202] Traditional analyses of statutory interpretation have focused on two venerable theories.[203] One focuses on the "intent" of the legislature.[204] It posits an obligation of the judiciary to ensure in its decisions that the legislature's intent is carried out. The rival theory focuses on the "meaning" of the statute,[205] and would require the court to enforce the legislation according to its meaning. Most often, the statute's meaning is analyzed in terms of how the audience might understand the statutory language, as opposed to what the legislature might have intended. A salient verison of this second theory distinguishes "plain" statutory language from vague or ambiguous legislative provisions;[206] others focus on the "literal" or "natural" meaning of statutory language.[207] Dworkin and Hart and Sacks reject both these theories for many of the same reasons. What underlies their common rejection is their shared conception of the proper role of the court in deciding cases that involve legislation.[208]

Discussions of the judicial decision have classically divided the realm of legal controversies into three parts: questions of common law, problems of statutory interpretation, and difficulties of constitutional law.[209] This division might be taken to indicate some important distinctions—suggesting, perhaps, that a proper decision in one type of case should be different in kind from a decision in another. Dworkin shares with Hart and Sacks the conviction that such a suggestion would be wrongheaded. Rather, it follows from each of their views of adjudication that the proper role of the deciding judge is fundamentally the same for each type of controversy.[210] That is, decisions in cases that involve statutes should have the same basic structure and justification as should decisions in the court's common law jurisdiction.[211]

Finally, the convictions that Dworkin shares with Hart and Sacks about the proper role of the judiciary in statutory interpretation and about the inadequacy of the legislative intent and plain meaning theories also lead them to propound convergent accounts of how statutes should be read.[212]

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201. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 523-40 (1948).

202. *See, e.g.*, R. DICKINSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

203. *See, e.g.*, N. SINGER, 2A SUTHERLAND ON STATUTORY CONSTRUCTION 20-33 (4th ed. 1984).

204. *See infra* text accompanying notes 216-23. For a review of the intent theory, see N. SINGER, *supra* note 203, at 20-29; R. DICKINSON, *supra* note 202, at 67-88 and *passim*.

205. *See infra* text accompanying notes 224-33; N. SINGER, *supra* note 203, at 29-30.

206. *Id.* at 73-74.

207. *Id.* at 80-82.

208. *See infra* text accompanying notes 234-43.

209. *See, e.g.*, Levi, *supra* note 201, *passim*.

210. Both *Hard Cases* and *The Legal Process* reflect, in their organization, the traditional tripartite division. *See, e.g.*, R. DWORKIN, *supra* note 6, at 105-123. But, nothing in the respective texts indicates that this organization indicates a claim about some underlying distinction among the different cases or some other significance of the division. It is more likely, instead, that for ease of exposition the authors were merely following standard practice.

211. *See infra* text accompanying notes 234-43.

212. *See infra* text accompanying notes 225-70.

In each case their accounts build on the idea of a body of legal norms and on a judicial obligation to decide statutory cases in terms of the law as an integrated whole.[213] Moreover, their respective accounts of statutory interpretation rely on similar models of judges assessing what might properly lead a legislature to enact the statute in question.[214]

A. *The Rejected Theories*

Lawyers and judges look to a theory of statutory interpretation to resolve controversies that arise concerning the significance of some statutory provision. In generating its answers to such controversies, the theory should meet various desiderata.[215] It should relate the answers to the language of the statute in some meaningful way. The theory, that is, should indicate what features of the statute justify the court in deciding one way rather than another. The resulting justification must also be consistent with our basic understanding of the processes of drafting and enacting legislation. Further, at least in Anglo-American systems of law, the theory of interpretation should provide answers in a way that is consistent with a commitment to legislative supremacy. It should acknowledge that legislative decisions are special and are, moreover, superior in crucial ways to other sorts of legal decisions. A theory of statutory interpretation must therefore include some description of the legislative decision; the theory, in other words, must describe just what the legislature has done when it legislates. The way in which the theory meets these desiderata will implicate the proper role of courts in deciding cases that involve statutes.

Since both Dworkin's and Hart and Sacks' rejection of the legislative intent and the statutory meaning theories provides the foundation of their approaches to the problem of statutory interpretation, it is worthwhile examining these theories in some detail.

1. *The Legislative Intent Theory*

The legislative intent theory's basic claims are straightforward. The court should ascertain the legislature's intent that led to the enactment so that it can carry out that intent in its decisions. This theory proceeds from a premise of legislative supremacy and leads to a characterization of the legislative decision: a statute indicates a set of desires by the legislature about how cases of a certain type ought to be resolved. The court's decision in a controversy involving a statute is correct if the answer reached is the same as what the legislature wanted. For an intent theory the language of the statute is, in one respect, secondary. The enactment's words are evidence of the legislature's intent, but what is authoritative is the intent that lies behind the statutory language rather than the words.

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213. *See infra* text accompanying notes 239-40 (Hart and Sacks), 242-43 (Dworkin).

214. *See infra* text accompanying notes 248-49 (Hart and Sacks), 265-67 (Dworkin).

215. The criteria for formulating an adequate theory of some aspect of the law and the bases for choosing among rival candidates has long been a neglected topic in jurisprudence. I have addressed this issue in other writings. *See* Wellman, *Practical Reasoning and Judicial Justification: Toward An Adequate Theory*, 57 U. COLO. L. REV. 45 (1985); Wellman, *Conceptions of the Common Law*, 41 U. MIAMI L. REV. 925, 928-32, 970-72 (1987).

A Massachusetts statute provided, in pertinent part, that "A person qualified to vote for representatives to the general court shall be liable to serve as a juror."[216] At the time when that provision was enacted, women were denied the franchise and hence could not serve as jurors. The statute's constitutionality was challenged by a criminal defendant who was indicated after ratification of the 19th Amendment to the Constitution of the United States, perforce giving women the right to vote.[217] Once women become qualified to vote in Massachusetts, how should juror lists be constituted?

The legislative intent theory suggests that the court should treat the statute as a communication from the legislature and ask, in response: What was the legislature trying to command? The enactment is analogized to the attempt by a superior to instruct an underling, and the court's attempt to understand the legislature's communication should therefore be modeled on the servant's effort to derive guidance from his master's remarks.[218] In a case like *Commonwealth v. Welosky*,[219] the court's deliberations would focus on the phrase "qualified to vote." On one reading of this phrase, the legislature intended an open-ended general provision: when jurors are summoned, whoever is eligible to vote is subject to jury service. All-male juror lists, therefore should be regarded as incomplete if women have become eligible to vote. Alternatively, the legislature might have sought to limit the lists according to the circumstances true at the statute's initial enactment. Since only men were eligible to vote when that provision was made law, this second reading of legislative intent would preclude female jurors. Whichever reading is adopted, on an intent theory of interpretation the court's role is simple. Once the enactment is decoded, all that is left is to apply the legislature's amibitions to the case at hand. No special competence is needed; understanding the intent behind the enactment requires only some basic linguistic and psychological skills.

The intent theory's picture of statutory interpretation is beguiling. Even when master and servant are individuals, it can be difficult for a servant to divine his master's wishes.[220] More importantly, there are special

216. Mass. Gen. L. Ch. 234 § 1 (1920).

217. Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 6565 (1931). This case is the subject of Problem No. 46 of *The Legal Process* manuscript. *See* H. HART & A. SACKS, *supra* note 3, at 1203-26.

218. It is common in discussion of legislative intent to analogize a statute to a communication from speaker to audience. For an especially sophisticated extension of this analogy, see Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 374-75, 385-90 (1985). *See also* R. DWORKIN, *supra* note 18, at 315, 317-27. For two reasons, however, this analogy is inadequate. First, what is salient about the legislative intent theory is its claim of the judicial obligation to enforce the legislature's will, and no comparable obligation can be assumed to obtain for the normal case of speaker and hearer. Second, the judiciary is denied the audience's usual privilege of asking, in cases of confusion, just what the speaker meant. The legislature's "remarks" are both more formal and also more stylized than we would normally understand a speaker's remarks to be. The judiciary could be understood as an audience only in the sense in which those who listen to oracular pronouncements, or those who receive orders from a distant and unapproachable commander, could be said to be an audience.

219. *See supra* note 217.

220. Attributing intent to a particular individual's words and actions can be complex. We should expect that divining the intent of a legislature will be at least as tricky, even granting the analogy between the legislature and a single person. An individual's direct statements are the most salient and frequently the most important evidence of his intentions, and we would assume that the

complications in conjuring a notion of group intent that could be applied to a deliberative body such as a legislature. If the idea of legislative intent is supposed to represent somehow an amalgamation of the individual intents of the legislators who voted for the statute, then there are two problems. One is epistemological: we may not know what actually motivated the various individuals who voted on a bill. Another is conceptual: even if we were somehow to acquire that information about the legislators' various desires, it is far from clear that we have a useful concept of collective psychology that would permit us to derive some coherent form of group intent from the aggregate of individual motivations. Nor do the problems end there. It is uncertain, further, how any such aggregate intention derived from the mind of legislators voting on a current issue could be said to apply to the full range of cases that may require judicial decision. Controversies may arise that the legislature simply did not contemplate, and we will need some way of projecting the more settled group intentions onto the facts of unanticipated situations. In sum, ascertaining a collective intent that can guide the court in applying some particular statutory provision can be a dicey proposition—to the point, some might fear, of indeterminacy.[221]

Finally, even if the difficulties involved in attributing intent to a corporate body could be overcome, and even if the resulting corporate intent could be meaningfully projected onto an unanticipated controversy, there is a further objection to using that intent as the basis for a legal decision. In our system of government, to enact legislation involves more than just agreement by a collection of legislators. The statutory language must be duly passed by the appropriate chambers and signed by the executive. If the intent of the legislature is not explicit in the language of the statute, then that intent was not signed by the executive and, arguably, was not made law. For courts to enforce some intent which is not explicitly stated, but which lies somehow behind the statute, threatens to enshrine as law something which was not duly enacted.

These are trenchant objections to a theory based on legislative intent,[222]

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language of the enactment would, generally speaking, be the best single clue to the legislative intent. But, any inference that might be drawn from the individual's statements is defeasible if there is other, sufficiently powerful evidence to the contrary. Similarly, other remarks about the legislature's hopes and ambitions—legislative history, floor debates, even remarks by the drafters of chief sponsors—can confirm or undermine hypotheses about the intent behind that statutory provision. Similarly, for evidence about the prior state of the law when the legislature addressed the problem (in terms of which a deliberative body is likely to have evaluated its various alternatives) or subsequent enactments on related issues. Even the failure to enact some proposed related legislation is potentially relevant to the attribution of intent. Facts about all of these details might have to be considered in concluding what the legislature intended.

221. *See, e.g.*, Frankfurter, *supra* note 201.

222. There are, of course, other objections which could be and have been raised against the intent theory. There is an undercurrent of resistance to the idea of legislative intent which is derived from political concerns. Appealing to legislative intent in order to attribute meaning to the statute in question commonly leads to investigations of indeterminate sources or inferences. Intent, even when thought of for a single individual, is a slippery notion and some may fear that intent's slipperiness means that one cannot ensure that any given attribution of intent is entirely impossible. In the context of statutory interpretation, the indeterminancy of intent attributions gives rise to concerns that the judiciary might somehow defeat legislative intent; since there is no way to rule out any proferred attribution of intent, the court, it is feared, could substitute what is in effect its own preference for the intent of the legislature. In short, it is sometimes suggested that judicial appeals to the

and they present great difficulties for the theory's proponents. It may be that they can be overcome in a satisfactory way. The idea of legislative intent, although tricky, is not conceptually incoherent, and it is possible that the problems of epistemology, aggregation, and projection could be resolved.[223] Indeed, advocates of the legislative intent theory must propose some way out of these thickets. That is, *if* the judiciary's obligation in interpreting statutes is to ascertain and then fulfill the legislature's desires, then judges will *require* some model of collective intent that can be applied meaningfully to a legislature's decisions. Otherwise judges could not begin to fulfill their decisional obligations.

Comparing a court, as it tries to apply a statute, to an underling trying to understand instructions is beguiling in that it suggests that statutory interpretation is just a set of routine exercises in group psychology. However, the theory's fundamental commitment is *political*—the idea that the proper role of the judiciary in deciding cases that involve statutes is to ascertain and carry out the legislature's will. If one does not accept the political assumptions of the legislative intent theory, then the problems of statutory interpretation might well take on a different cast.

2. *Theories of Statutory Meaning*

Theories of statutory meaning have had a curious persistence. They have enjoyed a recurrent popularity with American courts,[224] and, at least to the extent that they bar judicial consideration of materials extrinsic to the statute itself, they are relied on in English courts as well.[225]

In some respects, the idea of the "meaning" of a statutory provision seems less tricky than the idea of legislative intent. The legislature's decision, on a statutory meaning theory, is simply the enactment of the statute—that is, the words which were voted on and then signed by the executive. Courts should inspect the statute's language, attribute to it the appropriate significance, and resolve the dispute at hand in terms of that meaning. The basic question for the court on a meaning theory is one of semantics rather than the psychological question posed by intent theories.

The Federal Escape Act at one time provided that the sentence imposed for escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape."[226] What does this provision mean? More pertinently

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idea of legislative intent can cover over instantiation of the judge's desire, rather than the legislature's desire. This argument becomes, in the hands of some, a ground for a plain meaning theory of statutory interpretation. Neither Dworkin nor *The Legal Process* manuscript pay much attention to this particular challenge to the legislative intent theory, although they reflect, in their suggestions about how properly to interpret statutes, a sensitivity to this difficulty. *See infra* text accompanying notes 250-53.

223. *See* MacCallum, *Legislative Intent*, in ESSAYS IN LEGAL PHILOSOPHY 254-73 (R. Summers, ed. 1968).

224. *See* Murray, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

225. *See generally* R. CROSS, STATUTORY INTERPRETATION 122-41 (1975).

226. Act of May 14, 1930, ch. 274, § 9, 46 Stat. 327 (current version at 18 U.S.C. § 751 (1976 & Supp. 1987).

for one case,[227] what meaning does this provision carry for the case of a prisoner who has been sentenced to consecutive sentences and, at the time of escape, is not yet serving the last of his sentences? One prisoner was serving the first of three consecutive sentences when he escaped and was caught and convicted. He argued, understandably enough, that "any sentence under which such person is held at the time" of escape meant his first prison term. Although the court of appeals recognized that on this reading the escapee would receive no extra punishment for the escape attempt,[228] it agreed with his interpretation.

On closer inspection, the semantic difficulties that must be overcome by a statutory meaning theory are formidable. The court must fashion its conclusion from just the meaning that is found in the language of the statute. But language, even in statutes, can be unruly and disrespectful of the niceties of legal argumentation. Trying to constrain judicial decisions by some notion of statutory meaning may, therefore, require judges to ignore subtleties and complications that may arise. Versions of the meaning theory that emphasize the literal meaning of the statute seem to suppose that statutory language cannot be equivocal. The plain meaning version, on the other hand, acknowledges what it calls "ambiguous" language. But, it requires the courts to divide complicated statutory language into two mutually exclusive categories—the plain and the ambiguous—thereby ignoring the many grey areas that call for recognition.[229]

These theories suppose uncritically that the meaning to be found in the statutory language will in fact resolve the controversy. But the statute might not address the problem at hand, or might address it only obliquely. It might well be argued, for instance, that the Escape Act simply fails to address the case of a prisoner under consecutive sentences. To alleviate this strain on the statute's language, courts might refer to maxims of construction, which countenance certain inferences from statutory language.[230] For

227. Brown v. United States, 160 F.2d 310 (8th Cir. 1947), rev'd 333 U.S. 18, 68 S. Ct. 376, 92 L. Ed. 442 (1948). This opinion and the Supreme Court decision reversing the court of appeals decision are reviewed in Problems No. 44 and 45 of Hart and Sacks' manuscript. *See* H. HART & A. SACKS, *supra* note 3, at 1175-78, 1186-92.

228. *Brown*, 160 F.2d at 313.

229. This version of the meaning theory, in particular, makes a number of aggressive, if not heroic, assumptions about language. First, judges must be able to decide, simply by looking at the language of a statutory provision, whether the provision's meaning is plain. By hypothesis, the statutory language which the court must interpret is the subject of dispute, but doubtful classifications—that is, language that is largely plain or unambiguous for the most part—are an embarrassment for the theory. Second, the court must be able to determine the language's plainness without the aid of any extrinsic evidence. So, the provision's plain meaning must be determinable without reference to any information about the context in which the problematic language appears. Carried to its extreme, this picture of language seems to embrace the naive assumption that individual words have meaning independent of the context in which they are used. This extreme version of the plain meaning theory seems, in fact, to vitiate many of the traditional maxims of statutory construction—such as the maxim against a construction that renders enacted language superfluous—for it appears that a plain provision of the statute could not be read against any background whatsoever, not even the background of other provisions of the same act. A less extreme version of the plain meaning theory would embrace something like the old chestnut of contract interpretation: that the bill should be read in terms of the four corners of the act, but without recourse to any other information. Finally, if the language is plain, then whatever it plainly says should be the decision; if it is not plain, then "extrinsic" evidence can be considered.

230. *See, e.g.*, N. SINGER, *supra* note 203, at 118-216.

example, the fact that the Federal Escape Act is a "penal" statute is said by one of these maxims to warrant "strict construction," presumably meaning that in cases of doubt no penalty should be applied.[231] Use of interpretive maxims allows the court to derive from the statutory language the answer needed in a greater range of controversies than could sensibly be extracted from the statute's words alone. But the fact that the legislature has neither enacted the maxims nor, in most cases, even countenanced their use poses difficulties for the meaning theory. Some of the maxims, in particular, plainly undermine legislative supremacy. In other words, the maxims of interpretation enhance the meaning of the statutory language but, at the same time, distance the judicial resolution of the dispute from the legislature's decision.

Whatever the version, a statutory meaning theory posits that the semantic content of some linguistic unit—word, phrase, sentence or paragraph—should be determined without reference to the context in which it occurs. However, there are abundant examples which illustrate that meaning can change radically according to how language is used. The advocate of a meaning theory must, therefore, demonstrate why the deciding court should be *precluded* from considering the context in which the statutory language appears. The quest for such a demonstration has led to a gaggle of different versions of the theory. The meaning of the statute is sometimes advanced as the obvious or the presumed intent of the legislature: "The legal presumption is that the legislative body expressed its intention, intended what it expressed and intended nothing more than what it expressed."[232] Of course, this form of the theory is prey to the same conceptual objections as is the legislative intent theory, for it relies on the same concept of collective intent. Moreover, appealing to an idea of legislative intent raises the spectre that the legislature was artless in communicating its intent, and hence, that enforcing the statute's meaning will, in at least some cases, frustrate the legislature's actual will.[233] In the case of the Escape Act, for example, is it plausible that the legislature meant to distinguish those prisoners serving

231. *Brown*, 160 F.2d at 312.

232. Johnson v. Southern Pacific Co., 117 F. 462 (8th Cir. 1902). This argument proceeds, as does the legislative intent theory, from a premise of legislative supremacy. The court should decide the case so as to carry out the legislature's will, and enforcing the statute's meaning is offered as a mechanism towards that end. Limiting the court to the statute's meaning should appeal to those who worry that, since attributing intent can be so indeterminate, courts could substitute their own desires for those of the legislature merely by purporting to find as the legislature's intent what the judges prefer. Enforcing the statute's meaning is offered, in other words, as sort of second-best mechanism for carrying out the legislative will: deciding according to the plain meaning will lead more often to the legislature's will being enforced than will any other rule of interpretation.

233. To meet this difficulty, one variant of the plain meaning theory—commonly referred to as "the golden rule," *see, e.g.*, R. CROSS, *supra* note 225, at 14-16 and *passim* distinguishes between the absurd and the less-than-absurd consequences of enforcing the enactment's plain meaning. The deciding court, on this variant, should enforce the statute's plain meaning unless that would lead to be an absurd result. A salient problem with this variant is the difficulty of providing criteria for a potential decision's absurdity. If the absurdity of the result consists in its frustrating the likely legislative will, then this variant simply exposes the problem with any plain meaning theory that is supposed to thereby help carry out the legislature's intent. *See supra* text accompanying note 232. If absurdity is to be measured by some other criterion, then that criterion must be specified, its use must be justified in a way that is consistent with whatever argument grounds the appeal to a plain meaning rule, and the alternative rule for interpreting the statute must be articulated.

consecutive sentences from the rest in the way countenanced by the court of appeals, penalizing only the latter for their escape attempts? When the legislature fails to say what it means, enforcing the statute's meaning may lead to unattractive results.

Another claim for the statutory meaning theory avoids explicit reference to legislative intent: the court should enforce the statute's meaning without concern about the legislature's desires. It is, of course, a consequence of this version that enforcing the purported meaning could also lead to results that the legislature had intended to avoid (assuming that the legislature's desires in this regard could be meaningfully discerned). But, a consistent rule that the statute will be applied according to its meaning might rehabilitate both sloppy legislatures and overly active judges. The legislature would know to draft its provisions clearly so that what was intended would be enforced; it could also rely on the courts to enforce what was clearly stated, without judicial second-guessing. Further, the populace could know that what the statute appears to mean will be its meaning in court; private parties could rely on their (or, at least, their lawyer's) understanding of the statute without having to worry that the courts might change the law in some later decision.

The legislative intent and statutory meaning theories coincide on one central point. They both offer a picture of statutory interpretation where judges are supposed to be essentially passive when applying a statute. Under each theory, the judiciary should regard controversies about a statute as already decided; the courts' proper role is to illuminate that pre-existing decision and tailor the actual situation to conform with the previously established dictates. Under the legislative intent theory, those dictates are to be found in the legislature's desires. The statutory meaning theory locates them in the meaning of the enacted statute. Each theory conceives of courts as mere conduits for decisions already made.

B. *The Proper Role of the Court*

What distinguishes both Dworkin and the Legal Process tradition's approach to statutory interpretation is that they reject the picture of a properly passive judiciary. They repeat, in various places, many of the standard challenges to the idea of legislative intent and the difficulties involved in developing a useful model of group intent.[234] But, they also reject the intent theory because it is a mistake to conceive of the judge as merely the caretaker of the legislature's whims.[235] Having rejected the idea of judicial subservience, they can then dispense with appeals to legislative intent: since the proper role of the judiciary is not that of serving the legislature's will, judges do not need to engage in controversial searches for that will. Similarly, they note, in a collection of remarks, many of the difficulties attendant on the idea of

234. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 97-98, 1150-53, 1162-64, 1211-14, 1218-20, 1410; R. DWORKIN, *supra* note 22, at 14-15, 19-22, 320-26. *See also* R. DWORKIN, *supra* note 18, at 314-37.

235. Taking advantage of Dworkin's prose we can say that in the Legal Process tradition it is misguided to think of courts as merely deputies to the Legislature. *See supra* note 171.

statutory meaning are independent of the legislature's intent.[236] When they shun the characterization of judges as passive, they can avoid the arbitrary limits imposed on judges' readings of legislative provisions by the statutory meaning theory.

Both the legislative intent and the statutory meaning theories posit that cases involving statutes pose a different kind of problem for judicial resolution than do other types of cases. The legislative intent theory suggsets that the political significance of a statute on the horizon requires a different kind of response by the court. This is also true for theories of statutory meaning which imply that the presence of legislation converts judges into mere compilers of semantic data. Indeed, for both theories, the distinctiveness of the decision involving statutes is indicated by the very phrase, "statutory interpretation." Represented as describing the nature of the problem, this phrase suggests that the statute stands by itself—full of authority—waiting to be interpreted by the court, and that once properly understood, the statute will resolve the controversy at hand. Both Dworkin and the Legal Process tradition reject the contention that cases involving statutes are different in kind from other cases.

1. *Hart and Sacks' View*

For Hart and Sacks the court's task in any type of controversy is to decide the case according to law; the fact that the controversy involves a statute does not alter that basic obligation. For cases within the court's common law jurisdiction, we have seen, the relevant law consists of norms which have been recognized in prior decisions and are subject to review and reconstruction by future courts.[237] What distinguishes cases involving statutes is that the relevant law *includes* a statutory provision. In such a case, we might want, in the name of majority rule, to limit the judiciary's power to reconsider or reformulate statutes—that is, to deny judges the power over enactments that they traditionally exercise over norms of the common law.[238] Still, in the Legal Process view the basic features of the judicial decision are the same. Whether the relevant norms include enactments or are limited to those of the common law, the judge is still obligated to integrate the applicable norms into a coherent whole and then extract the proper decision from that coherent set of norms.

Neither the statute's applicability nor our majoritarian commitments should obscure what, in the Legal Process view, are more fundamental features of the situation. One fundamental feature is that our underlying criteria for the proper judicial role are the same, regardless of the statute's relevance. Even when the controversy concerns enacted and not just common law, the court is still obligated to decide the controversy according to law. At least at this level of generality, the court's proper role is no different where a statute bears on the disputed issue than it would be if only the

236. *See, e.g.*, H. HART & A. SACKS, *supra* note 3, at 98-100, 1156-58, 1162-64, 1173-74, 1177-78; R. DWORKIN, *supra* note 22, at 14, 19.

237. *See supra* text accompanying notes 106-23.

238. *But cf.* G. CALABRESI, *supra* note 4 (arguing that courts should have the power to revise or reject anachronistic statutes).

norms of the common law applied.[239] If one of the relevant norms is a statute, then it derives its authority from the fact of its enactment (rather than from its past judicial recognition) and can retain that authority in circumstances where a norm of the common law would have lost its force.[240]

The second fundamental feature of the judicial decision is implied by the first. Except in the unlikely event that the legislature has passed a statute which somehow sets forth all and only the legal norms which are relevant to a given controversy, it follows from the Legal Process view that the enactment constitutes only one part of the law. Put differently, the statute should be regarded as working a change in the body of the law. The change might be substantial or trivial, depending on the proper understanding of both the enactment and the state of the law prior to the legislative act, but other legal norms, not altered or supplanted by the legislative decision, remain in force. It follows from this view of an enactment that the significance of a statute cannot be sensibly derived from the enactment by itself. Rather, the statute's force is a function of, at the least, the state of the existing law. In particular, given the Legal Process tradition's emphasis on including principles and policies as part of the law, it follows that the court will understand a statute's importance in terms of those principles and policies of law which bear on the type of controversy addressed by the statute.

Consistent with Hart and Sacks' approach, we could say that the phrase "statutory interpretation" is misleading; something like "statutory integration" would be a more accurate description of the judge's proper role. For, the task for the deciding judge is much more a problem of integrating the enactment into the existing body of law and then deciding in terms of that revised body of law, than it is a problem of deciding what the legislature said.

2. *Dworkin's View*

Dworkin's picture of Hercules, the superhuman judge,[241] also implies that judicial decisions, where statutes are involved, are fundamentally the same as decisions when only the common law is relevant. Recall that in the

239. In some respects, the Legal Process tradition's approach to statutory interpretation reverses the received approach's idea of the proper relationship between courts and legislatures. That approach has tended to treat courts as deputies to the legislature. *See supra* note 235. In effect, the Legal Process tradition regards enactments as comparable to pronouncements on some particular issue by some higher court. The enacted legislation must be fitted into the existing body of law, in much the same way as an inferior court would have to integrate into the existing law a recent pronouncement by the highest court of the jurisdiction on a potentially relevant topic.

240. This difference can, on occasion, pose substantial difficulties for the deciding court as it may be that to rationalize adequately the applicable norms would require that the enactment be purged from the law, or substantially limited in effect. But, because of its legislative origin, the enacted norm is immune from revision. So, to decide the case according to law, the court must include the enacted norm, but it cannot strictly speaking rationalize the applicable norms in the same way it would if the norms all derived from the common law. Instead, the court's obligation is to make the best decision according to law that can be made, given that the enacted norm forces an inconsistency in the law. *See generally* G. CALABRESI, *supra* note 4. One of Hart and Sacks' statutory problems focuses on an issue of this sort. *See* H. HART & A. SACKS, *supra* note 3, at 1243-86 (discussing Schwegman v. Calvert Distillery, 341 U.S. 384 (1952), where the court was prevented by legislative intervention from treating like cases alike and had to try to make sense out of an incompatible set of norms regarding a problem of vertical and horizontal integration in the liquor distributing industry).

241. *See supra* note 154 and accompanying text.

view expressed in *Hard Cases*, Hercules must labor to produce the best theory of law for his jurisdiction.[242] The resulting theory must, if it is to qualify as the best, explain the law *as a whole*. That is, it must integrate constitutional, statutory, and common law into one theory. The correct decision in a legal controversy follows from this integrated account of law. Hercules will, therefore, decide cases which involve legislative enactments in the same way as he would decide cases at common law—namely, by deriving the answer in each case from the best theory of law for his jurisdiction. What distinguishes judicial opinions regarding enacted law is, under this account the fact that in a form of government in which the legislature is supreme, the legislature may place certain norms beyond judicial revision. Enactment puts the canonical form of the legal norm beyond judicial rewriting and, moreover, restricts the occasions when the judiciary could properly eliminate the statute from the set of norms. That is, enactment of some norm constrains the judge's interpretation of what the law is, but it does not change the fundamental nature of the judicial role.

The Hercules story makes clear that the law in each type of decision consists of *all* the legal norms. The judge should, in this story, derive the answer to each controversy from the best theory, and the best theory explains the full set of authorities for the jurisdiction, not just the one statute. The story also highlights that for Dworkin, as for Hart and Sacks, a statute is not law in isolation, not some pronouncement by the legislature that, once deciphered, will dispose of the controversies to which it applies. Rather, the statute takes its significance in that jurisdiction's law from the place assigned to it by the best theory of law for that locale. Finally, just as was true for Hart and Sacks, Dworkin's commitment to the tenets he shares with the Legal Process vision of law means that the best theory must explain not only rules but also principles and policies.[243] The proper understanding of a law's significance will require reading the statute against a background of other legal norms.

So, from Dworkin's as well as Hart and Sacks' picture of the proper judicial role in statutory interpretation it follows that the judicial decision in cases involving statutes is not fundamentally different from the proper role in deciding common law cases. Hence, subordinating the judiciary to the legislative will in such cases is misguided; courts should abandon the quest for chimeras such as legislative intent or statutory meaning.

C. *How to Interpret a Statute*

Neither Dworkin nor *The Legal Process* manuscript offers a fully articulated theory of statutory interpretation. Nonetheless, it can be seen that Dworkin's suggestions overlap Hart and Sacks' in important ways. Each view obligates the deciding court to attribute legal significance to the statute as a part of the law and to decide controversies in terms of the law as an integrated whole, including the statute. The court must play a creative role in deciding statutory questions, just as it must, on their respective views,

242. *See supra* text accompanying notes 155-56.
243. *See supra* text accompanying notes 164-65.

play a creative role in deciding cases at common law. Although they disagree about the propriety of judicial decisions on policy grounds, neither Dworkin nor the Legal Process school accepts as desirable limitations placed on judicial decision making by the legislative intent or statutory meaning theories.

Dworkin joins Hart and Sacks in accepting the statutory meaning theory's characterization of the legislative decision. What the legislature did was to enact *those words*; the judge's proper role in deciding cases that involve a statute is to attribute legal significance to the enactment, so understood. Moreover, they each hold, as would a legislative intent theory, that courts can properly examine the context in which the statute was enacted—its legislative history, the apparent motivations of key legislators, and most importantly any enacted statement of purpose. For, in the proper case, the statute's context can help the court answer the key question: What norm, that can be integrated into the rest of the law, would plausibly be expressed by those words?

1. *The Legal Process Approach*

In the Legal Process approach to statutory interpretation, the principal analytic device is the idea of a statute's *purpose*.[244] In some discussions, it is hard to distinguish the statute's alleged purpose from the idea of legislative intent.[245] Hart and Sacks take pains to emphasize that the purpose to which they refer is *not* a psychological concept.[246] Most importantly, the purpose of a statute, as they see it, is *not* something which pre-exists the judicial decision, carried somehow by the statutory language and needing only to be uncovered by the judiciary in order to settle the controversy. Rather, a statute's purpose must be *attributed* to it by the deciding court; it is a matter of inference and not archeology.[247]

As Hart and Sacks use the concept, the purpose of a statute is, roughly

244. "In interpreting a statute a court should: 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved. . . ." H. HART & A. SACKS, *supra* note 3, at 1200, 1411 (a "concise statement" of the task of statutory interpretation).

245. *See, e.g.*, Frankfurter, *supra* note 201.

246. *See* H. HART & A. SACKS, *supra* note 3, at 1410 ("The General Nature of the Task of Interpretation"). There are occasions where the manuscript, in considering the various arguments that might be made about one of the illustrative cases, slips into a style of referring to the legislature's purpose. *See, e.g., id.* at 1162-64. It is perhaps arguable that this occasional usage implies either that Hart and Sacks' idea of purpose is fundamentally psychological or that they were unsettled about this idea in their own minds. This argument misses the point. First, the manuscript's unfinished state means that we cannot attach too much significance to any occasional stylistic peculiarities. The overwhelming pattern of usage on this point, whatever may the occasional lapse, clearly emphasizes their focus on the purpose of the *statute*, and not on purposes the legislature might have had in enacting the bill. Second, the manuscript, while unfinished, is also cumulative. It leads the reader through to a number of puzzles and debates so that he can understand the significance of the answer that Hart and Sacks want to suggest. In this respect, it is important that in the manuscript's most considered statement of the proper approach to interpretation they refer consistently to the statute's purpose. *See id.* at 1410-17 (Note on the Rudiments of Statutory Interpretation).

247. *Id.* at 1413-16. The manuscript notes an exception, of sorts, to this feature of purpose: "A formally enacted statement of purpose in a statute should be accepted by the court *if* it appears to have been designed to serve as a guide to interpretation, is consistent with the words and context of the statute, and is relevant to the question of meaning at issue." *Id. But see infra* text accompanying note 253.

speaking, the best justification that can be attributed to that statute in terms of how it fits with the set of legal norms operating at the time of the decision. The idea is built on three key claims: a characterization of the legislative decision together with two features of the Legal Process approach to law and adjudication. First, under the Legal Process approach, to legislate is to enact certain language.[248] That is, a statute consists in the provision and any statement of purpose which was passed by the legislature and signed by the executive. Consequently, the statute's purpose must be understood in terms of the purpose that can be attributed to those words. Second, Hart and Sacks conceive of a statute as working a change in the relevant law: the law is a body of norms and the statute can sensibly be supposed to have changed only some part of that body.

With these features of the Legal Process view in hand, we can explicate the idea of purpose. A statute's purpose consists of the set of reasons for making those words a fixed part of the body of the law. Moreover, law includes principles and policies which rationalize the rules and standards at issue in any given case. Since any legal norm is justified in terms of principles and policies of law, a statute's purpose should be understood as the principles and policies that can make the best sense of those words as part of the law. The purpose of a statute is not what any actual person may have intended or hoped to accomplish by enacting that statute. Instead, it is the best justification that could be offered for the legislation, as measured by the deciding court at the time of its decision.

As a rough and ready guide to ascertaining a statute's purpose, the court should put itself in the position of a hypothetical legislature enacting the statute in question and ask: Why would that hypothetical legislature enact those words? It is important to emphasize that the legislature in question is hypothetical: as it is phrased in the manuscript, the court should assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[249] The idea of statutory purpose is psychological only in the way that the manuscript presents the idea—in terms of the aims of the hypothetical legislature. The purpose of the statute is the purpose of that hypothetical legislature, the ambitions that would properly have led such a body to enact that bill.

No sensible purpose, under this conception, could be attributed to the Federal Escape Act as the court of appeals construed it in *Brown v. United States*.[250] Reasonable legislators when drafting a statute to punish escaped prisoners would not reasonably have distinguished between prisoners who are serving the last of their sentences and those who are not. A distinction along those lines would serve neither principle nor policy. To the contrary, it seems sensible as a matter of policy to punish such prisoners with further incarceration, for the prospect of extra sentencing may deter at least some of those contemplating escape. And, so long as the escapees are sentenced in a fair trial, where they were adequately represented and could raise all the

248. H. HART & A. SACKS, *supra* note 3, at 1225.

249. *Id.* at 1415. *See also id.* at 1157: "The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably."

250. *See supra* note 226.

appropriate defenses, extra punishment seems consistent with relevant principles of criminal law as well. So, "any sentence under which such person is held" should be understood to mean the last of those terms to which he was sentenced; the escapee who had two more sentences to serve after the one he was serving when he escaped should have extra punishment added on after the third sentence.

Similarly, it is hard to envision why a reasonable Massachusetts legislature pursuing reasonable purposes reasonably would have sought, when specifying its juror qualifications, to freeze juror lists to their composition as of the first enactment of that statute. Although women were denied the right to vote at the time the statute was first passed, the principle of equality had, in the meantime, made its influence felt in the realm of constitutional law. To attribute reasonably to the enacting legislature a purpose of denying later-enfranchised groups from jury service would require some more specific statement of that ambition than accompanied the Massachusetts law. "A person qualified to vote" should therefore be read along the lines of "whoever is eligible to vote at the time when juror lists are to be drawn, is eligible to serve as a juror."

Although Hart and Sacks reject the idea that courts should be passive when interpreting statutes, their manuscript reflects a sensitivity on their part to the prospect of an unbridled judiciary. Passages in *The Legal Process* point to important constraints on the attribution of purpose. First, and foremost, the attribution of purpose is limited by an emphasis on the language of the statute. No attribution is proper if it burdens the statutory language too greatly.[251] The purpose of a statute is the justification for including *that* language in the law, not some other set of words. The basic idea is this: the purpose that should be attributed to a statute is a function of its integration with the rest of the law that bears on the issue. In this respect, determining the integration of the statute is similar to integrating a common law norm into the law. In each case, the integration is assessed in terms of how well that norm squares with the relevant principles and policies of law. What distinguishes the statutory case is that the statutory language, unlike some past expression of a common law norm, is beyond significant judicial revision. At common law, it would always be open for the court to conclude that the best integration of the law might require overruling or replacing the norm at issue. The power to replace or overrule a statute, however, is reserved to the legislature. The court's task, therefore, is to integrate, as best it can, the enacted statute (i.e. those words), into the rest of the law. The task is constrained in that the judiciary must work within the limit of those words.

Second, since the statute amounts to a change in the law, its purpose must be assessed in terms of the rest of the legal norms that comprise the law under the Legal Process conception. That is, the statute's purpose is, in part, a function of the principles and policies that make up the law at the time of the decision. This means that the court, in attributing a purpose to a statute, must be able to relate that purpose to the existing set of principles and poli-

251. *See id.* at 1412 ("The Meaning the Words Will Bear").

cies of law; relating the purpose to the court's own preferences would clearly not meet this requirement. A similar constraint derives from their proposed test for statutory purpose, namely, the reasonable legislature hypothesis. They could should assume that the enacting legislature was made up of reasonable persons pursuing reasonable purposes reasonably and should ask: Why would reasonable legislators, confronted with the law as it was, have enacted the new law to modify or supplant the old? This exercise will test the cogency of the court's attribution. Does it make sense for a reasonable legislature to have enacted those words in order to achieve the hypothesized purposes?[252] It is not for the court to fashion arguments about the purposes of the statute in terms of the court's own legislative desires, but rather to integrate into the whole of the law the statute which the legislature enacted.

Finally, Hart and Sacks' manuscript emphasizes that, in attributing purpose to a particular statute, the court should respect any statements of purpose that are part of the enactment.[253] Preambles and the like that attempt to express the purpose of the legislature in enacting the bill are, unlike occult legislative intents, part of the enactment. When duly passed and signed, statements of purpose become a proper part of the legislation, and the interpreting court is therefore obligated to attribute a purpose to those words as well as the rest of the statute. The legislature, therefore, may constrain the court's attribution of purpose both by the language that it uses in forming the statutory command and also by the prefatory language that helps explain the enactment. It is clear that, in Hart and Sacks' view, the court is not bound to treat such statements of purpose as dispositive, for that would contradict the basic notion of purpose as attributed to the statute by the court at the time of decision. The legislature's purpose could conceivably become out of date as the role played by the statute in the set of legal norms changes over time. The court, in that situation, would be obligated to discount the prefatory statement. But a statement of purpose would constrain judicial interpretations, for the best attribution of purpose is the one that makes sense out of all the words that the legislature made part of the law.

2. *Dworkin's Convergence with Hart and Sacks*

Dworkin's convergence with Hart and Sacks' ideas about statutory interpretation is revealed in a collection of remarks. In both *Hard Cases*,[254] and *How to Read the Civil Rights Act*,[255] Dworkin argues that statutory interpretation requires the deciding court to construct a justification for the statute in terms of the relevant principles and policies of law. Moreover, as a test for this version of interpretation, Dworkin articulates a counterfactual inquiry about what a properly acting legislature might have done that is

252. *Id.* at 1411: "In interpreting a statute a court should . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can."

253. *Id.* at 1412-23. *See* Wellington, *supra* note 4, at 263-64.

254. R. DWORKIN, *supra* note 6, at 80.

255. R. DWORKIN, *supra* note 22, at 316. This essay was first printed in the NEW YORK REVIEW OF BOOKS (December 20, 1979). There are also scattered remarks about statutory interpretation in Dworkin's *The Forum of Principle* in R. DWORKIN, *supra* note 22, at 33.

similar to Hart and Sacks' reasonable legislature. Most recently, in *Law's Empire*, Dworkin has described statutory interpretation as an extension of his general theory of interpretation.[256] As a result, he characterizes statutory interpretation as attributing to the disputed statutory language a purpose that parallels Hart and Sacks' idea of statutory purpose.

When the resolution of a case requires interpretation of a statute, the issue, as Dworkin puts it, is not what the legislature might have intended but, rather, what the legislature has *done*.[257] Since legal controversies, of whatever kind, are disputes about legal rights, it follows that the proper interpretation of a statute leads to conclusions about what rights were created or altered by the enactment.[258] In short, interpreting a statute is fundamentally a matter, as Dworkin sees it, of attributing legal significance to the statute, and legal significance, according to the rights thesis, is a question of the parties' legal rights. Since the rights thesis is tied analytically to the idea of principles and policies, the statute's significance is, at bottom, properly understood in terms of the principles and policies of law that together provide a justification for the legislation's inclusion in the law.

Dworkin provides an example of this idea of statutory interpretation in his essay on the Civil Rights Act. Dworkin focuses, in that article, on the interpretations of certain provisions of Title VII of the Civil Rights Act offered by Justice Rehnquist and by Justice Brennan in their opinions in *Steelworkers v. Weber*.[259] Section 703(a) of Title VII made it unlawful for an employer to discriminate in matters of hiring, firing and classification of an employee "because of such individual's race, color, religion, sex or national origin."[260] Kaiser Aluminum established a training program for skilled jobs, for which current employees would be admitted in order of seniority, but provided for two seniority tracks—one for blacks and another for whites.[261] Plaintiff Weber was less senior than the other whites who filled up the spots allotted to his track, but was more senior than blacks who were admitted on the other track. Was Weber discriminated against because of his race or color? The Supreme Court held that Kaiser's plan did not violate the Civil Rights Act.[262] Dissenting, Rehnquist argued that Congress had intended to prevent voluntary affirmative action programs in industry.[263] Writing for the majority, Brennan countered with an argument to show that

256. *See supra* note 18, at 327-42.

257. *See* R. DWORKIN, *supra* note 6, at 109: "Hercules constructs his political theory as an argument about what the legislature has, on this occasion, done."

258. R. DWORKIN, *supra* note 22, at 319. In his essay on the Civil Rights Act Dworkin distinguishes between the

> statute, which is a canonical set of sentences enacted by Congress, and the legislation created by that statute, that is the set of legal rights, duties, powers, permissions, or prohibitions the statute brings into existence or confirms.

Id. at 316. He does not appear to have pursued this particular distinction in his other discussions of statutory interpretation, but he has consistently emphasized that the important question in statutory interpretation is the legal rights, etc. which are created by the act of the legislature.

259. United Steelworkers of America v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979).

260. 42 U.S.C. §§ 2000e-2(a)(d) (1982).

261. *United Steelworkers*, 443 U.S. at 197-200.

262. *Id.* at 208.

263. *Id.* at 219-55.

Congress had in fact intended to allow such plans.[264]

Dworkin criticizes both opinions for their reliance on unsupportable notions of legislative intent.[265] But he notes that Brennan's opinion suggests another, more tenable argument, that does not rely on some idea of Congressional intent. This other argument, he claims, rests on something that could be called the *coherence theory* of statutory interpretation: "This supposes that a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute."[266] Since the Civil Rights Act advances certain policies of ameliorating the economic inferiority of blacks, and since parts of Title VII also rely on a principle of not interfering with traditional management decisions, the sound decision, under the coherence theory, is to leave in place an affirmative action plan that was installed by management.

Dworkin's basic approach parallels Hart and Sacks'. His characterization of the statute is similar to theirs: the statute is what was enacted, and not what the enacting body intended. The fundamental question in statutory interpretation, for Dworkin as for the Legal Process tradition, is what significance the court should attribute to the statute. And, while the significance of the statute, on the rights thesis, becomes a matter of what legal rights were created or altered by the statute, the attribution of rights is a function of the principles and policies which underlie the area of the law which has been addressed by the statute.

The similarity of Dworkin's view to the Legal Process view is underscored by Dworkin's reference, on occasion, to the statute's purpose. The "calculations judges make about the purposes of statutes are calculations about political rights."[267] The metaphor of purpose is far less central to his analysis of statutory interpretation than it is to Hart and Sacks', and his use of it is less consistent,[268] but the upshot of his argument is that statutory interpretation is a subspecies of interpretation and that interpretation, as he sees it, "is by nature the report of a purpose; it proposes a way of seeing what is interpreted . . . as if this were the product of a decision to pursue one set of themes or visions or purposes."[269] In light of this new emphasis on purpose in interpretation, it seems likely that future developments will emphasize the idea even more.

CONCLUSION

The similarity between Dworkin's theory of adjudication and that of Hart and Sacks is important in its own right. It also suggests a number of ways in which we might profitably re-examine both Dworkin and the Legal

264. *Id.* at 200-207.
265. R. DWORKIN, *supra* note 22, at 318-27.
266. *Id.* at 326-31.
267. R. DWORKIN, *supra* note 6, at 109.
268. In *How to Read the Civil Rights Act*, *supra* note 254, Dworkin, avoids it altogether. In *Law's Empire*, he confuses the issue by referring on occasion to the legislature's purposes, but he may mean by that reference the kind of purpose that he posits as a feature of interpretation. *See* R. DWORKIN, *supra* note 18, at 58-59.
269. *Id.*

Process tradition. In concluding, I note three topics in Legal theory where the similarities between Dworkin and the Legal Process school might have important implications. First, we should expect the similarity to illuminate other, related claims by Dworking. In the first part of this conclusion I point to one area where the similarity may help in interpreting Dworkin's arguments: the debate whether he is properly understood as advocating a natural law theory.[270] Second, and more generally, the kinship of Dworkin's theory with Hart and Sacks' suggests that we should reconsider the apparent idiosyncracy of Dworkin's views. As demonstrated in the second subsection,[271] the kinship indicates that his views are not, at bottom, as extreme or unusual as they might appear to be at first glance. It is suggested instead that Dworkin is better understood as working within the mainstream of American legal thought. Finally, recognizing the similarity makes it clear that legal philosophers should reconsider the importance of the Legal Process school. If Dworkin can be understood as articulating views similar to those Hart and Sacks expressed thirty years ago, the importance of his views suggests that their manuscript may still be a fertile field for scholarly harvest. This prospect is considered in the final subsection.[272]

A. *Dworkin and Natural Law*

Scholars have debated whether Dworkin is properly classified as a natural lawyer.[273] Natural law theories are traditionally contrasted with theories of legal positivism. The distinction turns on the question of a *necessary* connection between law and morality;[274] positivism denies such a connection, and natural lawyers try to establish it.[275] So, for example, H.L.A. Hart's theory of law is standardly regarded as a version of positivism. In H.L.A. Hart's view, a social rule is a legal rule by virtue of its being picked out by the rule of recognition for that legal system, but the rule of recognition need not include a moral criterion.[276] In contrast, the American lawyer Lon Fuller advanced a version of a natural law theory. He argues that a group of laws lacking an "internal morality" would fail to be a legal system.[277] For Fuller, therefore, the characteristics of a legal system necessarily include certain moral predicates.[278]

Interpreting Dworkin as a natural lawyer is consistent with certain facets of his work. His early writings on the nature of law attacked H.L.A. Hart's version of positivism.[279] So, if one assumes that the natural law-

270. *See infra* text accompanying notes 272-293.
271. *See infra* text accompanying notes 294-303.
272. *See infra* text accompanying notes 304-309.
273. *Compare, e.g.*, J. MURPHY & J. COLEMAN, *supra* note 1, at 46-60 with Mackie, *The Third Theory of Law*, *supra* note 199, and Alexander and Bayles, *Hercules or Proteus?, The Many Theses of Ronald Dworkin*, 5 SOCIAL THEORY AND PRACTICE 267 (1980).
274. *See e.g.*, J. MURPHY & J. COLEMAN, *supra* note 1, at 13.
275. Sometimes the distinction is phrased in terms of what is called the separation thesis, which asserts a logical separation of law from morality. Positivists affirm this thesis, and moral lawyers deny it. *See* Coleman, *Negative and Positive Positivism* 11 J. OF LEGAL STUD. 139 (1982).
276. *See supra* text accompanying notes 46-68.
277. *See* L. FULLER, THE MORALITY OF LAW (1964).
278. *Id.* at 33-41.
279. *See supra* text accompanying notes 46-68.

positivism division exhausts the range of possible views,[280] one might be tempted to infer Dworkin's allegiance to natural law. Dworkin has abetted this inference. His challenge to positivism has consistently emphasized that certain values which he has described as having moral characteristics are important to a theory of law.[281] Moreover, in a later essay, *"Natural" Law Revisited*,[282] he rechristened his theory of adjudication as *naturalism*, which holds that

> . . . judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best *justification* they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.[283]

To the extent that naturalism requires the judge to justify the structure of his community in terms of principles of political *morality*, this theory acquires at least the appearance of natural law. His choice of title strengthens this impression, and one statement in the article sounds very much like an avowal.[284] In sum, there is much to what Dworkin says and does that might incline a reader toward the natural law interpretation.[285]

Notwithstanding the tide of commentary[286] and the drift of Dworkin's own writing, Dworkin's proper classification is at least arguable. A number of respectable commentators have disputed the claim that Dworkin is a natural lawyer.[287] And, while Dworkin seems at times to have expressed allegiance to a natural law theory, he has also sown the seeds of uncertainty about his proper classification. He does *not* say that he is a natural lawyer, although he has had ample opportunity to do so. What seem to be expressions of allegiance to natural law turn out, on deeper examination, to be equivocal and unreliable indicators of his position. Consider, for example, his apparent avowal in *"Natural" Law Revisited*—

> If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.[288]

Now, his "crude description" of natural law is plainly not correct, at least not as a statement of the debate with positivism. As any reader of H.L.A. Hart would be quick to point out, it is perfectly consistent with positivism that the content of law should sometimes depend on the correct answer to

280. For a review of several different types of natural law theories, and a discussion of how the various types might relate to positivism and the separability thesis, see Richards, *Taking* Taking Rights Seriously *Seriously, supra* note 8.

281. *See* R. DWORKIN, *supra* note 6, at 18. *See also supra* text accompanying notes 50-51.

282. Dworkin, *supra* note 31, at 165.

283. *Id.* (Emphasis in original).

284. See *infra* text accompanying note 287.

285. In particular, the philosopher Kenneth Winston has argued that Dworkin should be understood as the latter day descendent of the approach to legal theory engendered by Lon Fuller. *See* Winston, *Taking Dworkin Seriously* (Book Review), 13 HARV. C.R.-C.L. L. REV. 202 (1978).

286. *See* J. MURPHY & J. COLEMAN, *supra* note 1.

287. *See supra* note 273.

288. Dworkin, supra note 31, at 165.

some moral question. This will be the case, positivists would remind us, for any legal system that by positive political act has made the content of law dependent on some moral question. Nothing about positivism precludes the legal system from incorporating certain moral tests among the criteria for recognizing law.[289] Dworkin seems to acknowledge this fact for, in his next breath, he adds, "I am not now interested, I should add, in whether this crude characterization is historically correct, *or whether it succeeds in distinguishing natural law from positivism.*"[290] In short, the drift in favor of the natural law interpretation is not at all irresistable.

Space does not permit anything like a detailed examination of Dworkin's views regarding the separation thesis. But, the similarity of Dworkin's theory of adjudication with Hart and Sacks' theory casts doubt on the interpretation of Dworkin as the recent American natural lawyer. To begin with, Hart and Sacks did not themselves advocate anything like a natural law theory. Their manuscript is largely free of this sort of jurisprudential speculation, and what can be gleaned from their views about the nature of law suggests a positivistic orientation instead. *The Legal Process* traces the set of general directive arrangements—the basic constituents of law—back to the acts of various officials or branches of the government—legislators, administrative agencies, courts and the executive. There are, to be sure, values at work in the legal system, but Hart and Sacks avoided the claim that legal principles and policies are necessarily moral in nature.[291] And, their account of the origin and legitimacy of those norms belies any implication that the values of the legal system are somehow necessary. Rather, the values at work in our legal system are the result of a history of judicial decisions, values that constitute a set of norms which can be used to rationalize the legal decisions that have been and will be made.[292] That Dworkin shares the tenets articulated by Hart and Sacks about the nature of law and the proper judicial role suggests that we should doubt Dworkin's allegiance to a natural law theory.

The kinship of Dworkin's theory of adjudication with the apparently positivistic theory of the Legal Process school does not, by itself, dispose of the prospect that Dworkin is advancing a kind of natural law theory. However similar the theories might be, it is, of course, always open to Dworkin to develop that theory in ways of his own. Indeed, we have already noted some of the many ways in which Dworkin's theory diverges from Hart and Sacks' theory.[293] He could add natural law features to the Legal Process theory of law. Or, he might argue that there is something inherently moral about judging: that judges, when fulfilling their proper role in deciding cases, necessarily incorporate moral values into their decisions.[294] The apparent positivistic quality of Hart and Sacks' theory, therefore, hardly resolves the

289. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601-621 (1958).

290. Dworkin, *supra* note 31, at 165.

291. *See supra* text accompanying notes 52-55, 65-66, 71-72.

292. See *supra* note 114 and text accompanying notes 114-119.

293. *See supra* text accompanying notes 50-68, 150-62.

294. *See* M. MURPHY & J. COLEMAN, *supra* note 1, at 50-54; Soper, *supra* note 198, at 4-7.

question of Dworkin's proper interpretation. Even an avowed disciple of Hart and Sacks could try to craft a natural law variant of the Legal Process view.

But there is another feature to Hart and Sacks' account which at least makes it less plausible that Dworkin is offering the natural law variant. The Legal Process theory of adjudication is plainly *parochial*. Hart and Sacks' analysis of the nature of law and the proper role of the judiciary is limited to Anglo-American or other similar legal systems. They do not offer a general account of the logical character of law, judging, or the proper role of courts that should be assumed to apply to every legal system. They account, rather, only for the character of law and the role of courts in legal systems that are fundamentally similar to our own.

In short, the similarity of Dworkin's theory of adjudication to Hart and Sacks' theory casts doubt upon the natural lawyer interpretation by emphasizing the arguments that Dworkin must offer in order to escape the parochialism of the Legal Process account. While Dworkin's theory diverges in some important ways from Hart and Sacks' theory, he shares the same fundamental focus, a focus on legal systems that look like ours.[295] Nor has he ever discussed the ways in which his theory might be modified in order to account for legal systems with a different character. His examples, like those in *The Legal Process* manuscript, are examples from common law judges. The arguments that Dworkin has advanced for the proper role of the judiciary depend, as do Hart and Sacks', on our sense of what common law judges ought to be doing. And Dworkin's claims about the substratum of values in the law depend, as do Hart and Sacks' claims, on a fundamentally decisional legal system. Dworkin's theory, just like Hart and Sacks' theory, is a fundamentally parochial one. Even if Dworkin is right that the proper role of the judge is to strive to make the law as it ought to be, he has established that point only for Anglo-American or similar legal systems. It is not, so far as he has provided the argument, a logically necessary feature of every system of law, or of judging generally. His insistence on the moral nature of legal justification is, instead, a feature that is part of our legal system, and, in the absence of argument to the contrary, we may very well suppose that this feature is true of our system because of some positive act of law or politics and not because of some morality inherent to judging or law.

B. *Dworkin's Proper Place*

The tasks of interpreting Dworkin's arguments and assessing the significance of his contributions are each complicated by some peculiar features of his writing. One problem, already noted,[296] is the episodic manner in which he has developed his positions. The thematic connections among his different, apparently self-contained, essays are sometimes hard to discern. As a result his readers must struggle to interpret some of the individual essays by fitting them into a larger, implicit pattern. Another difficulty stems from the dramatic devices on which he relies for his exposition, such as his appeal to

295. *Accord* J. MURPHY & J. COLEMAN, *supra* note 1, at 54 and n.59.
296. *See supra* text accompanying notes 23-24.

the figure of Hercules, the superhuman judge,[297] or his comparison of common law judging with the effort by a collection of authors to write a "chain novel."[298] These devices can capture our imagination, but they can also distract us from the fundamental thrust of his argument. A third problem stems from his advocacy of some extreme or idiosyncratic positions: his right answer thesis,[299] for example, or his contention that judges cannot legitimately rely on arguments of policy.[300] These claims can easily overshadow the deeper, more enduring contributions he has made to the literature of jurisprudence. The cummulative effect of these features of his writing has been to leave some readers divided about how to classify or understand him, and others perplexed about why he has captured so much attention.

Recognizing how Dworkin's theory of adjudication resembles that offered by Hart and Sacks can help place him in his proper place in the field of jurisprudence. Regardless of his extreme positions and his occasionally confounding expository devices, this Article confirms that Dworkin should be understood as working squarely in the mainstream of contemporary legal theory.

Hart and Sacks' manuscript propounded a way of thinking about legal problems that proved to be both influential and powerful. Their analysis of law and judging served to define a tradition of legal scholarship, a tradition marked not only by its acknowledged adherents but also by the extent to which many current scholars work to answer Hart and Sacks' questions.[301] In many ways, their contributions inform mainstream legal scholarship. The fact that Dworkin shares their approach to important questions about the nature of law and judging means that his analyses, as well, lie in the mainstream. The tenets Dworkin shares with the Legal Process tradition are the core of his approach to questions of legal theory—the idea of the substratum of values that can be used to rationalize judicial decisions,[302] the judicial obligation to integrate the set of legal norms,[303] and the corresponding obligation to decide cases, including those involving statutes, in terms of that integrated set.[304] These ideas were articulated, although with different details, in *The Legal Process*, and have continued to define the tradition which the manuscript engendered.[305] Neither the problematic ways in which Dworkin has attempted to extend these tenets, nor the nature of the devices he has used to expound the tenets' significance should obscure the more fundamental structure of Dworkin's analysis. In many ways, we may regard Dworkin as working alongside, if not within, the Legal Process tradition.

297. *See* R. DWORKIN, *supra* note 6, at 152.
298. *See* R. DWORKIN, *supra* note 22, at 158-62; Dworkin, *supra* note 31, at 166-68.
299. *See supra* text accompanying notes 188-94.
300. *See supra* text accompanying notes 173-79.
301. *See supra* notes 4 and 20.
302. *See supra* text accompanying notes 44-70.
303. *See supra* text accompanying notes 115-18 and 160-64.
304. *See supra* text accompanying notes 233-42.
305. *See supra* notes 4, 5, and 20.

C. *The Continuing Significance of* The Legal Process

Dworkin shares the Legal Process tradition's theory of adjudication. He has extended the theory's basic tenets to serve theoretical goals that, so far as *The Legal Process* manuscript bears witness, were not important concerns of Hart and Sacks.[306] And he has connected the theory's components—its claims about the nature of law and its position about the proper role of the judiciary—to issues in legal theory that Hart and Sacks did not pursue.[307] But, the connections and extensions seen only confirm that his theory of adjudication is fundamentally the same as Hart and Sacks' theory.

To demonstrate that Dworkin shares with the Legal Process tradition important tenets about law and judging is not, of course, to demonstrate that the tradition's theory of adjudication, or any of its parts, is well-supported. Nor does the fact that they share tenets establish the superiority of those shared tenets over rival approaches. Indeed, this Article has noted respects in which the Legal Process view of law and judging seems inadequate or in need of further development. Many of these deficiencies also trouble Dworkin's version; he does not seem to have escaped the difficulties that plague the tradition.

This is not the occasion for a rigorous examination of the strengths and weakness of the Legal Process theory of adjudication. Dworkin's version is the subject of ongoing scholarly debate. Moreover, the fact that Dworkin's approach to law and judging diverges in some respects from Hart and Sacks' approach demonstrates that the basic theory is rich and complex enough to support different versions. Some of these different versions may prove stronger or more insightful than others, or they may prove more satisfactory as regards particular issues in legal theory. To examine the prospects for future development of the Legal Process tradition would require a separate essay; to assess the strengths of each development, even more.

The adequacy of the Legal Process tradition's theory of adjudication is an important topic. The tradition's vitality is a separate topic, and equally important. How fruitful has the tradition been? How much of current scholarship in legal theory reflects or can be traced to the tradition? How viable is the tradition in the current paradigms of legal research? Dworkin's kinship with the Legal Process tradition suggests some answers.

Current assessments of the Legal Process school frequently describe the school's influence as limited to a particular historical period.[308] The tenets of the Legal Process tradition are described, in one version of this assessment, as engendering a conservative view of the proper role of the judiciary, especially as regards constitutional adjudication.[309] The tradition's vitality was therefore supposed to have been sapped, if not altogether drained, by the social activism of the courts during the 1960s and early 1970s.[310] Whether or not the Legal Process school's importance should be measured by the

306. *See supra* text accompanying notes 50-68.
307. *See supra* text accompanying notes 151-64.
308. *See, e.g.*, White, *supra* note 20, at 281-82, 293-305.
309. *See id.*; Vetter, *supra* note 5.
310. *See* White, *supra* note 20.

twists and turns of Warren Court decisions, it is clear that the tradition's influence is no longer an active topic of discussion in legal scholarship. Its theoretical commitments are not explicitly examined; its practical suggestions are seldom pursued, except in the context of debates about statutory interpretation.[311]

The acknowledged importance of Ronald Dworkin's views to the current debates in legal theory means that theorists should re-examine the tenets of the Legal Process tradition. Dworkin's kinship with Hart and Sacks implies that the Legal Process tradition is more vital than has commonly been supposed. Hart and Sacks' views are still important in at least two ways: they have influenced how a number of current legal scholars and theorists approach the basic issues of law and judging, and they articulate the theory of adjudication that seems to underlie much of the current discussion. The similarity between Dworkin's theory and theirs highlights the fact that the views they expressed almost thirty years ago continue to set the terms of current debates in legal theory. In other words, their unfinished and unpublished manuscript may still provide a rich source of insight and stimuli for the study of our legal system.

311. *See, e.g.*, G. CALABRESI, *supra* note 4.