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JUDICIAL RIGHT ANSWERS IN THE COMMON LAW

by

Brian Donohue

Department of Philosophy

Submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

Faculty of Graduate Studies
The University of Western Ontario
London, Ontario
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ABSTRACT

This thesis takes a fresh approach to the problem of whether common law judges have a duty to search for right answers. It begins with Dworkin's basic distinction between judgements (weak discretion) and choices (strong discretion). However, I go beyond Dworkin's distinction by arguing that the imposition of a duty to make a judgement as to a right answer or to make a choice functions within institutional settings as an eminently useful social practice. The first two chapters construct a model for this practice which I label the paradigm of institutional decision making. It is claimed that a study of the paradigm will give us new insight into common law decision making.

To make the case, the purpose of imposing decision-making duties within institutional hierarchies is explained. The explanation is used to argue that the assignment and performance of decision-making tasks can be derived from a shared sense of purpose. I then use this framework to derive the common law judicial duty to search for right answers. The point is made by comparing the purposes which delineate the institutional role of the judge in the common law with the purposes that animate the paradigm of institutional decision making. It is principally Fuller's work, in concert with Dworkin's, that

is used to mount the argument for the judicial role within the common law.

My thesis localizes the question of whether judges always have a duty to find right answers to the question of the common law and I reject any attempt to derive such a duty from the concept of law. In making these points, the thesis follows Philip Soper's recent theory of law at two levels. First, I endorse his highly original argument that law, through the account of the citizen's obligation to obey it, must be understand as a normative, not coercive, enterprise. Second, and this constitutes an attempt to complete his work with my own analysis, I incorporate my study of common law adjudication into his theory of law. Finally, the foil of the dissertation is legal positivism. I try to show that the positivist conception of law commits one to claim that a judicial duty to search for right answers would necessarily be frustrated and that this commitment constitutes a serious deficiency in their theory.

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INTRODUCTION

With the publication of H.L.A. Hart's The Concept of Law in 1961, a new era in legal theory was begun. Ronald Dworkin's critique of Hart in 1967 in "A Model of Rules" staked out a place for an official opposition. Much argumentative water has passed under the bridge since then.

By the time of Dworkin's response, Hart's statement of legal positivism had come to be accepted as definitive. My thesis begins with the basic worry that Dworkin raised. As an adjunct to his theory of law, Hart used the idea of judicial discretion in the sense of 'judicial choice' and while Dworkin conceded that the idea was crucial to any variety of legal positivism, he saw it as a serious conceptual deficiency of the theory. The positivist need to invoke the idea of judicial discretion follows from the most fundamental claim of the theory: law is a system of rules. These rules are open-textured and sometimes require judges to make choices as to their meanings before the rules can be applied. Further, the exercise of this discretion is equivalent to a legislative function; when he uses it, the judge is no longer finding law but making it.

Dworkin launched his criticism of the position with a

conceptual point. He notes that there is a sense of discretion which is inconsistent with the sense the positivist needs. Discretion can be used to characterize judgements (Dworkin calls this weak discretion) as well as choices (Dworkin calls this strong discretion) and accordingly the positivist must be precise in his use of the term. Over a number of articles Dworkin also developed an empirical criticism. When judges justify their decisions they always argue as if they are making a judgement as to a right answer. They never claim they are making a legislative choice and yet that is precisely what the positivist says they must sometimes do. According to Dworkin, this empirical inadequacy of legal positivism exposes a devastating error in the theory. Judges always make judgements as to right answers because law is not a system of open-textured legal rules.

My thesis initially returns to the conceptual point Dworkin raised in the essay which launched his long running battle with legal positivism. I propose to rehabilitate Dworkin's distinction between weak and strong discretion as the starting point for a study of duty-imposed decision making within institutional settings. I expand on it to describe an institutional social practice of imposing a duty to make a judgement as to a right answer or to make a choice within a prescribed range. It is argued that the practice serves important purposes and

a primary objective of the first two chapters of the dissertation is to construct a model of it which I label the paradigm of institutional decision making.

My strategy is to explore a new avenue of explanation for why common law judges, at least, conceive their task as one that requires them to make a judgement as to a right answer. Following Dworkin, I take this to be a feature of common law reasoning that must be taken very seriously: it cannot be explained away on the basis of other theoretical commitments. As Rolf Sartorius has noted, dismissing or explaining away the fact that judges argue in this way forces one to make the unpalatable charge that they are stupid, ignorant or hypocritical.

> It would seem that if the prevailing view that judges are legislators is correct, we must conclude that they are either stupid, ignorant of the jurisprudential issues involved or hypocritical. None of these conclusions is very appealing.[1]

Through my study of duty-imposed decision making I try to show that the activity of making a judgement as to a right answer can be based on the pursuit of a shared sense of purpose. Further, the imposition and execution of a duty to perform such a task is a prevalent institutional social practice. Once this claim has been established, it is ultimately linked to an account of the common law that is also based on the pursuit of a shared sense of purpose.

I use the link to develop the main line of argument that common law judges have a duty to search for right answers (I shall hereafter call this the right answer thesis). Judges recognize such a requirement in their perception, even if unstated, of the purposes of common law adjudication and they acquire the duty to satisfy it through taking up office.

Much terrain is covered between the initial purpose account of institutional decision-making duties and the final destination. After I introduce and argue for the paradigm of institutional decision making in chapter one, I try to show the relevance of such an approach to the problem of judicial duty. I also offer an extended explanation as to why the right answer thesis I advance is belief-based and why such a belief can be rationally sustained even when decisions cannot be verified as uniquely correct.

Chapter two extends the analysis to show how a purpose theory of duty-imposed decision making harmonizes with Philip Soper's purpose theory of law. Further, I also try to demonstrate how decisions made within the paradigm of institutional decision making are affected by the duties imposed on the decision-maker.

Chapter three confronts the most powerful adversary to my argument, legal positivism. I try to show that, as a negative reaction to the right answer thesis, legal

positivists would be universally hostile to it. I find the locus of their hostility in the doctrine of frustration. Because the positivist use of the doctrine of frustration will inevitably lead them back to their own theory of law, I am able to directly engage them with a counter-attack on their theory of law.

Chapter four uses Philip Soper's recent work to criticize legal positivism as a theory of law. Chapter four also incorporates my right answer thesis into a comprehensive picture of law. Using Philip Soper's theory of law, two basic points are made. First, the judicial duty to search for right answers is not derivable from the concept of law. Second, and more importantly, Soper is used as preliminary support for the claim made in the following chapter that the institutional role of a judge in a common law system requires a search for right answers.

Chapter five develops the main line of argument for the right answer thesis. I claim that the common law cannot be fully comprehended without an understanding of the way judicial decision making functions within it. Through a synthesis of the work of Lon Fuller, Paul Weiler and Ronald Dworkin I try to show why the common law most fundamentally must be explained as a purposeful endeavour. I then connect this pursuit of purpose to the right answer thesis by showing that the judicial search for right

answers is integral to it. Because of a commitment to 'institutional right answers' (an idea I introduce in chapter one), the judicial search for these answers is an essential vehicle for the promotion of the purposes we associate with the 'rational core' of the common law, i.e., its dispute-settling function. Judges understand that they are required to search for right answers by perceiving the shared sense of purpose at the core of common law adjudication. It is here that I use the preceding study of the paradigm of institutional decision making to corroborate my analysis. All of this leads to what may be the most significant ramification of the present study. If the purposes commensurate with the very idea of common law can be found embodied in common law judicial decision-making duties, then, such a construal of judicial duty may be required to preserve the institution the judicial role is designed to serve.

Finally, I should note that there are two other contemporary philosophic positions on these issues. These are legal realism and critical legal studies. In the course of the thesis I shall argue against legal realism as a viable theory on two fronts. First, I shall explicate the critique of legal realism developed by H.L.A. Hart (his scorer's discretion argument). Second, I shall extrapolate an argument from Lon Fuller that I find to be an even more powerful rejection of legal realism. The main

target of the critical legal studies movement is Ronald Dworkin. Since my version of the right answer thesis seeks to significantly distance itself from Dworkin's version, I shall not consider this philosophic position.[2]

I

RIGHT ANSWERS AND JUDICIAL DUTY

Section 1 - Dworkin on Discretion

Ronald Dworkin's "The Model of Rules I" is a reprinted version of one of the most famous and influential articles in modern legal theory.[1] In it he contends that a precise understanding of the concept of discretion is a necessary propadeutic to an accurate portrayal of judicial decision making. To this end, Dworkin introduces the distinction between weak and strong discretion. The distinction has been adopted in the subsequent literature and accordingly, a brief statement of it shall serve as the point of departure for my discussion of the assignment of decision-making duties within an institutional hierarchy.

Although Dworkin's analysis breaks the meaning of discretion into three senses,[2] for my concerns, what can be distilled from the approach is the basic distinction between weak and strong discretion[3]: a weak discretionary decision is a judgement and a strong discretionary decision is the making of a choice. It should be noted that the distinction is not intended to exhaust the legitimate usage of the term 'discretion'. For example, 'discretion' can also be a synonym for 'prudence'.

Dworkin's concern is to distinguish between two different types of discretion that could be used by a decision-maker to reach a decision.

The clearest example Dworkin uses in his discussion of discretion illustrates the point. He depicts two different commands a lieutenant could issue to his sergeant. According to Dworkin, a sergeant who is instructed by the lieutenant to pick his five most experienced men for patrol would be exercising judgement - he must decide who are the five most experienced men.

> Sometimes we use 'discretion' in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgement... Thus we might say, "The sergeant's orders left him a great deal of discretion", to those who do not know what the sergeant's orders were or who do not know something that make those orders vague or hard to carry out. It would make perfect sense to add, by way of amplification, that the lieutenant had ordered the sergeant to take his five most experienced men on patrol but that it was hard to determine which were the most experienced.[4]

If the sergeant is instructed to pick any five men then he is to exercise choice, by which one means

> His decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion.[5]

In Dworkin's view the question of who are the

sergeant's five most experienced men controls the decision in a categorically different way from the case where the sergeant is invited to choose any five men. It is this feature of control which is intended to distinguish weak from strong discretion. In the weak case, the decision is controlled by the standard 'most experienced' and in the strong case, where the sergeant may choose any five men, the sergeant's decision is not controlled in the same way. In the latter case, all the standards do is stipulate that the sergeant may choose, to a total of five, any of the men from his platoon. Thus, one can distinguish discretionary judgements (weak discretion) from discretionary choices (strong discretion).

Section 2 - A Paradigm of Institutional Decision Making

Because of their respective positions in an institutional hierarchy, superiors can assign to subordinates responsibilities and duties that they do not personally possess (e.g., committee chairmen) or they can delegate responsibilities to subordinates for which they are personally accountable. Organizational charts (the senior vice-president is subordinate to the executive vice-president) and job descriptions (the secretarial staff will report to the operations manager) thus exemplify more than a "pecking order". They establish a

system whereby responsibilities are distributed throughout the organization. Thus, one may acquire responsibilities by taking up a position within the hierarchy or one may be assigned responsibilities by one's superior. Given one's position in the hierarchy, one has a duty to discharge the responsibilities either acquired or assigned. In this study, I propose to focus on the assignment of duties that require the making of a decision. The decision may be all that is required (e.g., Determine our profits for this quarter) or it may be the precursor to further activity (e.g., Determine our profits for this quarter and reinvest them).

As a result of Dworkin's analysis of discretion, we can see that there are two very different types of decisions that could be assigned within institutional hierarchies. The phrase 'weak discretion' can be used as a short-hand way to describe a decision where the decision-maker is required to make a judgement as to a right answer and the phrase 'strong discretion' can be used as a short-hand way to describe a decision where the decision maker is required to make a free or personal choice within the bounds of a prescribed set of options.

I shall call the institutional social practice of imposing a duty to make one of these two types of decisions a paradigm of institutional decision making (PID).[6] An important objective of the first two chapters

is both to describe how this practice functions as well as to explain why it has been devised: Before doing so, I shall first describe the constellation of authority and duties that are involved in the use of the practice. Dworkin's military examples will prove quite useful to develop the exposition and accordingly I shall make extensive use of them even though my analysis may radically depart from that conducted by Dworkin. Further, I shall retain Dworkin's weak/strong nomenclature to distinguish the two forms of decisions under study.[7]

AUTHORITY AND DUTY

When the sergeant is instructed "to take his five most experienced men on patrol", he is assigned the duty to make a certain kind of decision; one that requires him to make a judgement as to the correct application of the standard 'most experienced'. Further, presuming that he did not already possess the authority to decide who goes on patrol, he is also being authorized to make this determination. The permission to act upon the authorization necessarily follows from his assigned duty in that it is always implied that one is permitted to do what is required for the performance of one's duties. However, although the sergeant can claim to have acquired authority by virtue of his duty to make the judgement,

this authority does not function as a privilege, i.e., in order to satisfy his duty to decide he must exercise his right to decide. Suppose though that the sergeant had the authority to make the decision as to who goes on patrol prior to receiving the directive. In such a case, the sergeant does not acquire an authority through the directive although the issuance of the directive may limit that authority (he must take his five most experienced men) and obligates him to exercise it.

In any case, within institutional settings, subordinates can be assigned the duty to make a judgement as to a right answer and in this section and the next, a great deal of effort will be expended clarifying the nature of the assignment via a description of the purposes associated with it. I shall hereafter use the phrase "the employment of the weak variant of PID" to describe the imposition of a duty to make a judgement as to a right answer when it also includes the granting of an authorization not previously possessed by the decision maker to make the decision. It should also be reiterated that the authority is non-optional in that the decision-maker must exercise the authority to perform the duty. I will ignore those cases where a pre-existing authority has been included in the assignment. I do so because the cases where an authority to decide is granted when the duty to make the judgement is imposed represent the weak variant

in its most complete form.

Dworkin's example of strong discretion, "Take any five men on patrol", can be used to illustrate the assignment of the duty to make another kind of decision: one that requires a choice from a set of prescribed options. Here I shall also stipulate that the discretionary decision-maker is granted the authority to make the decision (again ignoring the case where he already possessed it). Further, the dynamics of his duty to exercise that authority is exactly the same as in the weak mode. What distinguishes the strong mode from the weak one within the paradigm is that in the former the decision-maker is authorized to make a personal or free choice. However, since the duty to make the decision is presumed to require him to exercise that choice, i.e., to perform the duty he must make a choice, the authority to choose is logically entailed in the duty to decide. I shall hereafter use the phrase 'the employment of the strong variant of PID' solely to describe the imposition on the subordinate of 1) the duty to make a decision when 2) there is also an authorization to make a choice out of a set of prescribed options and 3) by way of implication, the subordinate has a duty to exercise that choice. As in the weak mode, it is also stipulated that the subordinate is granted the authority to make the decision and he must exercise it.

It should be noted that the idea of choice is being used here in a technical way. In a point I shall elaborate on in section three of chapter two, any choice is subject to the constraints of rationality, fairness and effectiveness. Further, even when one makes a judgement as to a right answer one may well have to choose in the sense of selecting. For example, when the sergeant is commanded "Take your five most experienced men", an informal way of describing the decision would be to say that the sergeant must select those men who are 'most experienced'. More formally, though, he does not have the power to select any men he wishes; he must base his selection on the judgement as to who are the 'most experienced men'. Hence I shall reserve the idea of choice to describe 'free or personal choices', i.e., those acts of selecting from a range of prescribed options where the decision-maker chooses according to his own wishes subject only to the constraints of rationality, fairness and effectiveness.

METHODOLOGY

The principle preoccupation of the first two chapters is to explain why the social practice I have labelled the paradigm of institutional decision making has been created. My strategy is to explain the need for the paradigm in terms of the purposes the paradigm has been

devised to serve. However, following Adam Smith and David Hume, my description of the social practice as a rational creation does not commit me to find a rational creator. Rather, I need only isolate dilemmas inevitably encountered within institutions which the practice surmounts. Thus, one accounts for the way in which the practice functions as a rational activity by describing the way in which it constitutes a rational response to these dilemmas. In Anarchy, State and Utopia, Robert Nozick approvingly cites the Adam Smith invisible-hand argument as an illustration of this method of explanation.

> An invisible-hand explanation explains what looks to be the product of someone's intentional design, as not being brought about by anyone's intentions.[8]

The Humean version of this methodological approach is used by Hart in The Concept of Law to explain the origin of the law of contract. Hart argues that contract law is founded on the social convention of promising. This practice in turn was devised as the response to the scarcity of resources.

> The same inescapable division of labour, and perennial need for co-operation, are also factors which make other forms of dynamic or obligation-creating rule necessary in social life. These secure the recognition of promises as a source of obligation.[9]

Following Hart, I shall begin by explaining how PID is a

response to contingent necessities encountered in social life. Once the point of the practice is understood, we are far better equipped to clarify how it is used.

The way in which I argue for the emergence of the paradigm as a rational solution to institutional necessities is also inspired by Hart. Although Hart's objectives are different, and his focus is restricted to judicial decision making, he also makes an argument which comes close to my approach. According to Hart, the interpretation and hence application of rules will always have an area of uncertainty because of the very nature of both language and social life. Not all situations where a legal rule may have application can be anticipated when the rule is drafted. Further, there is always the possibility of calling into question the meaning of the key terms in the rule (this standing possibility is labelled the rule's open-texture).

An example that Hart uses to illustrate the analysis is the rule "No vehicles in the park'. Many circumstances can be generated where the application of this rule is unclear. Are children's bicycles to be allowed? Are ambulances in an emergency to be prohibited? For Hart, when the judge decides the application of the rule in answer to these questions, we will (as a legal group) obtain (a) a more settled meaning for the term and (b) we will have further articulated what we were trying to

achieve through the introduction of the rule.

> When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interest in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule of a general word.[10]

Hart characterizes this process of decision making in a novel way; he describes the mandate of the courts as analogous to the function of an administrative body which has been empowered by a legislature to regulate a certain area of social or commercial life.

> This function of the courts is very much like the exercise of delegated rule-making powers by an administrative body.[11]

Admittedly, I vary from Hart in that I advocate an analysis of a duty-imposing paradigm within non-legal institutional life as a necessary precursor to a thorough assessment of judicial decision making. Nevertheless, even though the domain of the enquiry is altered and broadened, much is borrowed from Hart's perspective. For Hart, judges sometimes must make choices in applying legal standards because of two exigencies: (1) most language is open-textured, and (2) the many circumstances in which decisions must be made cannot be fully anticipated in advance. My argument exploits this theme to the extent that it seeks to explain the purpose of the paradigm of

institutional decision making in terms of the needs that the two variants of the paradigm are believed capable of serving.

I shall conclude this section with some remarks intended to clarify the relationship between the explanation of the paradigm and the specific instances where the duties that fall within the paradigm are imposed. In so doing I shall restate the main line of argument to be developed in this thesis.

One must distinguish between the imposition on a person of decision-making duties and the explanation of why such an imposition can take place. Whenever I use the phrase the employment of (strong or weak) PID I am referring to the discrete act whereby one person uses the paradigm to impose a duty on another person. The assignment entails three things: the duty to decide, the authorization to decide and the duty to make a judgment as to a right answer or make a choice. However, explaining why these decision-making tasks exist and can therefore be assigned is a separate question. This distinction is critical to my thesis because within institutional hierarchies there is a sub-set of weak PID that exists because of a shared sense of purpose. I shall conduct a protracted analysis of this mode of weak PID to corroborate my claim that the judicial search for right answers within common law can also be derived from a

shared sense of purpose.[12]

Finally, I should note that I do not intend to find a congruence between the paradigm I am about to develop and the common law judicial role. Rather, my overall strategy is in line with that employed by Philip Soper in A Theory of Law. Soper cites a social practice that has been reified in the common law (the unjust enrichment model)[13] as empirical corroboration for his explanation of why the citizen's obligation to obey the law can be derived from a shared sense of purpose. For both Soper and myself, the plausibility of our analysis of specific situations in which humans construe themselves to have duties is bolstered by finding analogous duties arising from ongoing social practices. I shall circumscribe the limits to the analogy, and thereby delineate its explanatory power, in the last section of this chapter.

In sum, I support my analysis of the common law judicial role by finding that other institutions are capable of a similar formulation of decision-making tasks. Hence, the social practice analysis constitutes the empirical data to corroborate my forthcoming description of the judicial search for right answers within the common law. However, in neither the discrete case nor the institutional role case is the existence of the task of searching for a right answer explained in terms of an act of assignment; in both cases, it is explained in terms of

a shared sense of purpose. It is just that the discrete case provides us with a more perspicuous appreciation of what this shared sense of purpose is.

Section 3 - Assignment and Purpose

I shall now examine five salient features of PID. The first three and the fifth all describe ways in which PID functions as a rational response to problems encountered within institutions. Once these problems are seen to be an inevitable feature of institutional life, one can appreciate why the social practice has emerged as the rational response. The fourth feature of PID describes an essential requirement necessary for the successful employment of the practice.

This section shall discuss the following four:

1) Pragmatic Problem-solving
2) Expertise
3) Difficult Situations
4) Joint Understanding

The fifth feature of the social practice is most typically allied with sub-set of the weak variant of PID that I have already referred to. The next section shall focus on weak PID, and therefore the following feature of PID will be integrated into that discussion:

5) Controversy and Right Answers

For the sake of thematic unity, the problem of frustration will also be introduced in the next section but only insofar as it pertains to weak PID. A more comprehensive study of the idea of frustration will be conducted in chapters two and three. It will become apparent as the argument unfolds that the idea of frustration is critical to the legal positivist rejection of the right answer thesis. The topic will thus be accorded an elaborate treatment.

(1) **PRAGMATIC PROBLEM SOLVING**

Put broadly, PID exists as a pragmatic problem solving strategy. Through the use of it, the duty to make a decision can be imposed as part of an assigned task. This enables the assigner to simplify the instructions given to perform the task. To this end, the employment of the strong variant can be quite handy in an organizational hierarchy (corporation, government, military, etc.); it enables a superior quickly and easily to get something done by formulating an assignment. All he has to do is issue a directive that provides standards that circumscribe a range of prescribed options from which the decision maker can make a choice as a precursor to the performance of the task. In this way the lieutenant can restrict the sergeant to a patrol of only five men while simultaneously obligating the sergeant to make the

decision and authorizing him to make a choice. All of this follows from issuing the directive "Take any five men on patrol". The weak variant of PID can also be used to serve this same task of simplification. Consider the case within the business realm when a vice-president instructs his marketing manager to conduct a marketing campaign using the standard "least expensive communications medium". The vice-president can quickly divorce himself from the execution of the campaign by leaving it to the manager both to determine the least expensive medium and to supervise the campaign.

As already stated, the theme I will seek to exploit is that purposes for which PID has been devised are revealed in the institutional needs it is designed to serve. Once these needs are isolated, we can understand better the nature and function of the social practice. Dworkin's example of the lieutenant/sergeant relationship provides a useful case study to pursue the point because the institutional needs the practice serves are exemplified in the strategic considerations entertained by the lieutenant. Of particular importance from the vantage point of the lieutenant is whether it is a sound rational strategy to employ either the weak or strong variant of the paradigm. He must envisage both the circumstances in which the directive would be applied as well as the result he wishes to obtain. For example, if he knows that a

unique result does not exist ("pick the tallest man" when three are tied) then it would be irrational or sinister to demand that the sergeant find one. Further, it would also be superfluous to direct the sergeant to make a choice when he knows the circumstances do not support one (unless he wishes to patronize the sergeant). The type of situations in which the practice would be used reveals its operation as a rational activity. It will be claimed that both modes of PID are employed to manage or resolve concrete problems and that this activity can be understood through examining strategic considerations that compel superiors to use it. There the purposes of the social practice are most perspicuous.

Let us begin by considering the point of the lieutenant's use of PID when he instructs the sergeant to choose his five most experienced men for patrol. The lieutenant's position in the institutional hierarchy enables him to impose duties. Through this means he can delegate responsibility as a way to get on in a complicated world. This allows the lieutenant to manage his responsibilities by obligating his subordinates to perform certain tasks. In the case of the use of PID, the lieutenant solves two problems. First, he circumvents the bother of making the decision himself; after all he could have picked the men. Without the capacity, a busy lieutenant forced to perform personally all his duties

could be quickly overwhelmed by them, and unable to do his job.[14] A second connected problem he solves is that he can use the imposition of decision-making duties as substitutes for more detailed directives. For example, instead of doing it himself, the lieutenant could also have issued a highly detailed directive specifying in painstaking clarity what he wanted done. Using either weak or strong PID serves as effective substitutes for such a time-consuming and generally unnecessary process. However, and this is significant, they are not just a short-form for detailed orders; they transfer the responsibility to the subordinate of making a decision (typically as a precursor to the performance of another assigned task).

The assigning of decision-making duties is useful within an institutional setting because a superior can ensure that the decision made by the subordinate is non-optional. So long as the subordinate maintains his position in the hierarchy, he has a duty to decide as directed. Of course, in a military setting the refusal of the sergeant to execute a decision might have far more dire consequences than in a business or government setting where one can just leave the job. Battlefield commissions may be rare but battlefield resignations are even rarer. Common to all institutional hierarchies though is that the subordinate has the duty to perform the assigned task by virtue of his relationship to the superior issuing the

directive. This relationship enables the superior both to assign and transfer responsibilities whereby the subordinate has a duty to perform certain tasks.

(2) **EXPERTISE**

Not only can PID simplify the assignment of responsibilities, it also supplies an efficient vehicle to rely on the expertise of subordinates. Suppose the lieutenant contemplates that the determination of who are the five most experienced men will be easy, i.e., it is known to the lieutenant that the sergeant's platoon is comprised mainly of green recruits. In this case, the lieutenant can use the social practice to simplify the instructions to perform an easy task.

Besides being an eminently practical way to make the assignment of a task easier, it can also be used in those cases where the anticipated facts or project to be accomplished are complicated enough that it would be difficult for the assignor to specify in great detail what kind of decision he wishes made. The standards to be applied may be sophisticated (i.e., describing the project requires abstract language) or the facts of the case may make their application arduous. One, or both, of these obstacles can be anticipated when PID is used. Further, if the superior is not sufficiently articulate, he may have no option other than to make the decision himself, thereby

embroiling himself in the task at hand, or use PID. Alternatively, even if he is eloquent, he faces great disutilities if he attempts to issue a straight directive (i.e., one that does not require the subordinate to make a decision). Unless there are other pressing considerations, it would be an unnecessary waste of precious time to do so. The superior need only employ the paradigm as a means to rely on the expertise of the subordinate. For example, a city mayor may empower the pollution control expert to determine whether a smog is a health hazard and then direct the expert to announce his findings to the press. The mayor may be aware that the task is easy for an expert but it is nonetheless impossible for the mayor to assign the task in any way other than the use of the weak mode of the paradigm.

Once again, it can be seen that the imposition of the duty to make one of the two types of decisions to simplify the assignment of responsibilities is an inherently pragmatic activity, i.e., it is an attempt to find workable solutions to practical problems. Further, and this will be important in the study of judicial decision making, the use of the social practice as a managerial tactic extends beyond its value as a time-saving substitute for direct orders when these prove to be inconvenient. In some cases, it may simply be impossible for the assignor to anticipate all of the facts that enter

into the decision thereby making him incapable of formulating a straight order. Moreover, he may also be incapable of issuing a straight order where he does not possess the expertise of the subordinate. Here the use of PID is a useful way to direct the subordinate to use his expertise in the performance of a task. Of course, it could also be a combination of both inconvenience and incapacity, but in any event it is generally a pragmatic affair. As a corollary, and again this will be important when we come to judicial decision making, people are not likely (if at all) to have decision-making duties imposed on them to make either hypothetical or abstract decisions in situations divorced from concrete problems.

(3) **DIFFICULT SITUATIONS**

Within the weak variant of the social practice, the assignor could anticipate that the judgement as to the right answer will be difficult to make. Although Dworkin does not dwell on this point, he too recognizes it. In his description of weak discretion, Dwerkin asserts that a sergeant who is told to pick his five most experienced men could have difficulty in doing so.

> It would make perfect sense to add, by way of amplification, that the lieutenant had ordered the sergeant to take his five most experienced men on patrol but that it <u>was hard to determine</u> which were the most experienced (my italics).[15]

Dworkin thus insists that discretionary judgements can be

difficult. Indeed, this is the very point of his introduction of the idea of weak discretion in the first place. The possibility had been camouflaged because it had been assumed, prior to Dworkin's analysis, that discretionary decisions necessarily entail a choice. Dworkin tried to show that this assumption was wrong.

From my perspective, cases where the assignor anticipates the designated task to be difficult illustrates the parameters on the use of the paradigm to deal with the intricacies of social life. The more complicated the anticipated task, the more likely the weak mode will only be employed if the task is thought to be serious, i.e., important. When the assignor knows the task is not serious or trivial and that the making of the judgement would be difficult, he cannot use the social practice without contradicting the justification he would otherwise make for employing it. Just as the assignor can argue that PID is justifiable as an efficient way to problem-solve, so too the executor of the decision could argue that it is inefficient and therefore, contradictory to demand he expend the effort to make a judgement as to a right answer when the task is difficult but unimportant. Since the need to rationally manage the complications encountered in daily life justifies the use of the social practice, this also constrains the assignor to impose such duties only for serious tasks.[16] Hence, aside from abuses

by the assignor (e.g., to harass the assignee) or the failure of the assignor to anticipate the facts correctly, the use of the weak variant of PID for the performance of difficult tasks signals that the task is also deemed to be serious. I will return to this point in the next section where I connect it to the idea of 'institutional right answers'.

(4) **JOINT UNDERSTANDING**

The emphasis I placed on the seriousness of difficult judgements within the paradigm of institutional decision making anticipates the discussion of the context in which the assignment takes place that I shall discuss in the next chapter. But it also lays the groundwork for circumventing objections to a purpose approach to duty imposed decision making. One could question the reliability of assuming that a joint understanding exists between superior and subordinate of the duties that have been assigned. If the imposition of duties is uncertain, this undermines the relevance of PID to the problem of judicial decision-making duties.

In the case of the strong mode, such a possibility can be considered with a variation on the military examples I have been using. Suppose the lieutenant directs the sergeant to "Take five men on patrol" but gives no thought to the need of the sergeant to select the

men. In this case (as in Dworkin's example: "Take any five men"), it is necessary for the sergeant to choose the men in order that he perform an assigned task but it could be argued that the duty that is assigned to the sergeant is restricted to his duty to go on patrol. One claims that the need to make a decision here will merely arise as the result of assigned duties because neither the superior nor the subordinate contemplates the need to exercise a choice or make a decision. When such a case arises, the most that could be said is that the subordinate took on the responsibility for making the decision by exercising a choice but that he had no duty to do so.

Even if the above argument is correct, as it stands it is inapplicable to the situations where a duty to decide is imposed. Once this modification is introduced into the example, it no longer undermines the comparison of the social practice to common law judicial decision making. If there is a duty on the part of the decision-maker to decide, and the language of the directive is such that it cannot be implemented without a choice, then the authorization to make the choice is necessarily implied by the duty to decide. One can always infer from the assignment of a duty that one is permitted to perform that duty. Herein lies the joint understanding that must obtain between the superior and subordinate as to the authorization to make a choice; for, the assignment of the

duty to decide would not be rational without it. Their joint familiarity with the social practice enables the decision-maker to infer a tacit authorization to make a choice when the language of the directive makes this necessary.

One might attack the weak variant using the same tack. One could argue that the need to make a judgement as to a right answer could result as a consequence of assigned duties when the issuer of the directive has given no thought to the need to make such a judgement. It might be useful to refute this objection as a way to reinforce the joint awareness of the obligations and authorizations that occur within institutional decision making. In so doing, a potential objection to the weak variant of PID can also be preempted.

Again, the point can be analyzed by varying an example I have already used. A marketing vice-president wants to launch an ad campaign and he assigns the task to the marketing manager with the instructions "Use the least expensive medium". He does not ask the manager to determine the least expensive medium because he mistakenly thinks the marketing manager possesses, as part of his repertoire, the knowledge as to the least expensive medium. Here the vice-president mistakenly has assumed that there is no need to make a judgement. Thus, he has not imposed a duty to make a judgement as to a right

answer. Further, it is possible that the subordinate is aware of the superior's error and yet he proceeds to take on the responsibility of making the judgement as to the correct medium. In such a case, one could say that the subordinate made the judgement but had no duty to do so.

Even though such a case is perfectly conceivable, it always leaves subordinates vulnerable to the charge that they have arrogated responsibilities to themselves. In some cases, the decision-maker's superior may respond to this arrogation with indifference or a mild rebuke. Suppose though that the decision is a serious one (there is a lot of money at stake) and a difficult one (it will take a lot of time and manpower to determine the least expensive medium). In such cases, subordinates typically will seek clarification as to their authority. In serious and difficult cases, decision-makers are galvanized to be clear as to what they have a duty to do and what they are authorized to do. In sum, possible confusions as to the scope of the subordinate's duties are far more plausible in hypothetical, abstract examples than they are in real, concrete cases where superiors and subordinates struggle to reach a joint understanding as to the assigned duties and authority. In particular, as the examples one cites come closer to approximating serious and difficult cases, the uncertainty insisted on evaporates.

Section 4 - Right Answers and Purpose

CHOICES

The quickest way to delegate responsibilities in PID is to impose a duty to make a choice; the superior avoids the need to formulate specific standards by stipulating a range of decisions that the decision-maker can make. The subordinate has the authority to make any decision that falls within that prescribed range. Such is the case where the lieutenant directs the sergeant to "Take any five of your men on patrol". Here the duty that is imposed on the sergeant permits him to choose any men he wishes from the range comprised of all the men in the platoon. Perhaps it is because this is the most obvious way to delegate that Dworkin felt it necessary to insist that free choice is not the only discretion that can be exercised.

The availability of weak PID extends the options available to the superior and broadens the usage of the social practice. This section will describe the sub-set of weak PID which exists exclusively because of a shared sense of purpose. I have already noted the importance of this mode of weak PID to my thesis and I shall now examine it in some detail. The same shared sense of purpose that sustains its existence can also be exposed through a description of the objectives the superior intends to accomplish by using the social practice. Since my thesis will ultimately argue that the broadly construed

objectives of common law adjudication are compatible with the purposes associated with this mode of weak PID, the present section heralds important arguments to come. The next section will draw on the present discussion to point the way to these conceptual consequences for legal theory.

INSTITUTIONAL RIGHT ANSWERS

The last section made much of the fact that the use of the paradigm of institutional decision making can short-circuit detailed instructions for the achievement of specific objectives. Given the problems and structures of institutional hierarchies, this makes it a particularly attractive way to assign duties. I shall now argue that PID's usefulness for institutions is further enhanced because the weak mode can be used by superiors to perpetuate the basic values of the institution. Employing the weak mode enables a superior, in an economic way, to direct a subordinate to perform a task while simultaneously promoting and sustaining the values and objectives that are indigenous to the institution. The social practice effectively does this without requiring an explicit invocation of the institutional values and objectives.

This feature of institutional life is most overtly manifest in the conception of what counts as a right answer for that institution. Since different institutions

can have different basic objectives, on this point alone, what will count as a right answer can vary with the institution. This further exemplifies the concrete, practical nature of the paradigm and why it is particularly apt in institutional activity. To give an obvious example, suppose a church wishes to invest its liquid assets in the stablest currency available as a hedge against inflation. The cleric assigned the responsibility of making the investment discovers that South African Kruggerands are the most immune to inflation with Swiss Francs a distant second. Given the church's policy on apartheid, the cleric opts for the Francs.

A more subtle way the search for right institutional answers occurs is when specific institutions have a commitment to specific, generally unstated, values. Suppose a cleric is directed to streamline the administration of the head office of a large church organization. He is told to limit drastically the number of personnel while maintaining the same head office functions. The assigned quota makes the cleric hard pressed to meet all the administrative demands the organization must fulfill. Thus, he realizes he should retain only personnel who can sustain a heavy workload and withstand enormous pressure. However, in conducting the paring down the cleric must, because of the nature of the institution, make the decision with compassion. This may

force him to retain staff who cannot do the job but who would be emotionally crushed by dismissal. Contrast this selection process with that done by a business executive who is mandated to perform the same task within a ruthless corporation where profit is the only motive. Contrast further both of these cases with an executive in a corporation that places a great deal of emphasis on the development of its junior employees. The right decision for each of these three institutions would not be the same. After the personnel reshuffling, one is likely to find quite different rosters in each of these institutions ranging from dead wood to hard wood to young wood.

Thus, for institutional decision making, what counts as a right answer may require a reference to the nature of the institutional enterprise. Such a reference is a natural extension of the purposeful nature of imposing a duty to make a judgement as to a right answer and therefore enhances the usefulness of this variant of the paradigm within an institutional setting. The social practice spans the vast divergence of values and objectives within different institutions by providing a means for each to obtain "institutionally right answers". Such answers are justified as correct because they best embody the values and objectives of the institution; it is not necessary that these answers be justified as morally right.

(5) **CONTROVERSY AND RIGHT ANSWERS**

When the assigned decision has serious ramifications, the use of weak PID by the superior is especially useful because it ensures that such decisions preserve institutional values. In this regard, it provides an efficient vehicle to circumscribe the meaning of the assigned standards in a comprehensive way. Weak PID also performs another important function. It ensures a high level of competence on the part of the decision-maker when the decision is expected to be difficult, i.e., it is assumed that it will be an arduous task to apply the standards to the anticipated facts of the case. Because of this difficulty, whatever decision that is made is susceptible to controversy as to whether it is in fact the correct one.

In such cases, the availability of weak PID mitigates any reluctance superiors might have of assigning tasks that require decisions that will be inherently controversial. Without the social practice, there is always the danger that the decision-maker will have a lapse in conscientiousness because the decision he is making is a difficult one. Further, there would be no way of effectively sanctioning such lapses because the decision-maker could respond to any criticism of his performance with the lament that the decision was too hard. Fortunately, using the paradigm to assign the duty

to search for a right answer has the result of requiring the decision-maker, even in difficult cases, to use as much skill or expertise as possible. It must be stressed that the duty remains the duty to make the judgement as to the right answer, but what happens in the circumstances is that to satisfy the duty the subordinate must do his best. In sum, the social practice becomes a device to guarantee that the subordinate will do his best even when the decision is difficult and could produce controversy. This proves especially handy when the subordinate possesses a particular skill or expertise which the superior wants to ensure is utilized in the performance of a task.

The point can be illustrated with the following example. A land developer contracts to construct a large scale apartment complex. He instructs his landscaper to plant twenty-five trees on the land in the quadrant where the water table is at the highest. Suppose though that the cost of definitively establishing the water table drastically exceeds any benefits from making such a conclusive determination. In this case, the contractor will not permit the landscaper to make a thorough scientific investigation thereby forcing a decision under uncertainty. However, it would be perfectly reasonable for the contractor to insist that the landscaper as best he can, select the quadrant, which on the evidence available, is most probably the one with the highest water table.

The process in which the landscaper is engaged when he has the duty to make such a judgement will be reflected in the justification of his decision. He will organize the available information in such a way that he can appeal to it to substantiate his conclusion as the correct one. Given the restrictions on his scientific inquiry, his decision could potentially be controversial. Nevertheless, the use of weak PID is an effective way to call the landscaper to account for this solution to the controversy: he must be prepared to justify his judgement. Without the availability of weak PID, this burden of justification would not be nearly as onerous. More generally, all institutions would suffer because they would be deprived of a means to guarantee competent performance when they undertook projects that required controversial decisions. As a result, the scope of institutional activity would be significantly impoverished.

Finally, it should be noted that controversial decisions will typically be difficult; Accordingly, subordinates will likely be assigned the task of making such a decision only when it is thought to be a serious endeavour.

FRUSTRATION AND RIGHT ANSWERS

Of course, there is the standing practical possibility that the landscaper may simply be frustrated, i.e., he is unable to use the information he has available to make even an educated guess as to the correct quadrant and he must simply choose one of them at random. Indeed, there are important ramifications to be extracted from the possibility or frustration and later on I will attempt to deal with them. Nevertheless, it remains a sound strategy to demand a search for a right answer as a way to obligate the decision-maker to strive for an optimum performance in serious tasks. What is essential to the successful demonstration that the strategy is sound is the presumption that both the superior and subordinate understand the purposes associated with the use of weak PID.

If the focus of the analysis of institutional decision making ignores its purposeful nature, the limits of the appeal to the certainty of a right answer to justify imposing a duty to make a judgement as to a right answer will be missed. As I have argued, weak PID can be employed as a way to guarantee an optimum effort on the part of the decision-maker. A superior can appeal to this calculation to justify using the social practice instead of being required to show conclusively that a right answer exists. But, and this is the crux, it remains eminently sensible as a pragmatic, problem-solving convention to use

weak PID even in situations where the decision reached is controversial.

RIGHT ANSWERS AND PURPOSE

The conclusion I wish to draw from the analysis is that the mode of weak PID under study has been devised to facilitate the application of standards to concrete cases.[17] In particular, to this point, I have tried to show that the use of it does at least two things. First, it makes possible the promotion of institutional values and objectives by obligating decision-makers to search for institutionally right answers. Secondly, it provides a useful means for people within the hierarchy to ensure that subordinates perform the task of promoting institutional values and objectives to the best of their ability. On the basis of these findings, the most important lesson to be drawn is this: the weak variant of PID can be used as a vehicle to attach purposes to the application of assigned standards.

Puzzling over the way in which purposes are at work in duty-imposed institutional decision making lays the groundwork for a powerful argument that judges perceive themselves as having a duty to search for right answers within the common law. Further, it also enables one to explain why the right answer thesis has received such an

unfavourable reading from legal positivists. They have a fundamental aversion to an explanation of legal activity which invokes the idea of purpose.[18] This aversion blinds them to the potential role of purpose in judicial decision making and thus prejudices their account of it. Thus, worrying over the problem of purpose in institutional decision making provides a productive perspective from which to examine the perennial problem of judicial decision making.

The last point in this section entails a feature of the social practice I have deliberately skirted until now. If the decision-maker is called upon to demonstrate that he has satisfactorily discharged his duty of making a judgement as to a right answer, he must justify his decision. Such a justification requires him to construct an argument to show that the decision is the correct one. The need for the giving of reasons examines the purposes associated with weak PID from the perspective of the person who has the duty to make the decision. This interesting feature of decision making which falls within the umbrella of the social practice is a revealing expression of the normative nature of the activity; one can be called upon to demonstrate that the decision fell within the mandate given. Therefore, by attending to the structure of argument embodied in the reasons given by the decision-maker, it is possible for an observer to certify

that the decision-making duties have been properly executed. The last section of the chapter will take up this point and try to show why it has important ramifications for legal theory.

Section 5 - Purpose and Belief

Before proceeding further, it might be useful to clarify the direction the argument has taken. What I have appealed to is a consensus that exists within institutions as to the possibility of making judgements as to institutional right answers. The thrust of my argument is to claim that there is a variant of a social practice which directs decision-makers to find right answers. The practice is based on a shared belief that it is possible to obtain such an answer. The participants in the institution believe that, for the task at hand (not all tasks), a right answer can be arrived at given the overall values and objectives of the institution. Further, this belief can be presumed and not stated.

Once the paradigm of institutional decision making is seen to exist as a response to some of the intractable dilemmas of institutional life, one can account for the extension of the paradigm to include a shared belief in the possibility of arriving at institutional right answers. Admittedly, accounting for the formulation of

such a belief in terms of the purposes the practice is designed to serve collapses the distinction between a justification and an explanation. Indeed, such a contraction makes the analysis turn on the efficacy of the shared belief in institutional right answers. But that should not be surprising since the social practice functions as a pragmatic response to practical problems and the belief based nature of the right answer thesis is a natural extension of this purposeful activity. Thus, we can account for the phenomenon of institutional right answers by explaining why the belief has been formulated. To that end, perhaps the most important function of the shared belief in the capacity to arrive at right answers is the following: it enables superiors to obligate subordinates to use their expertise to sustain institutional values and objectives when these subordinates must make institutional decisions. Thus, the existence of the shared belief in right answers enables institutions to engage in a broader scope of activities than might otherwise be possible while simultaneously preserving the integrity of the institution. Obviously, then, the belief will only be retained if there is a collective institutional perception that maintaining it sustains the objectives the belief was originally formulated to serve.

The methodology I use here is similar to that used by

Philip Soper. He too insists that it is possible to develop an explanation of at least some human endeavours in terms of shared beliefs. I take this to be what Soper means when he characterizes his project as a transcendental deduction.[19] Soper uses the fact of belief to forge a conceptual connection between law and justice[20] and I use the fact of belief to forge a pragmatic connection between the search for right answers and duty-imposed decision making.

In ensuing chapters I will try to show that the compatibility between my thesis and Soper's theory of law is quite deep. For the moment, I wish only to make one final point. Both Soper and I agree that the fact of shared belief is fundamental to the explanation of law. My commitment to this position will be made explicit when I connect the study of PID to judicial decision making. According to Soper, there are significant methodological ramifications for such an approach. In my case, it will have the following result: those who insist that the fact of right answers (a reality based account) must be severed from the shared belief in the possibility of arriving at right answers are resisting the very first step of the enquiry. Such a methodological log jam is the result of a fundamental aversion to the inevitable uncertainty associated with the purpose approach to law. Any theorist who is committed to certainty and clarity in explanation

will be unwilling to accept such a methodology.

> The epistemological approach in contrast shuns uncertainty, not because of the consequences for obligation but because of the consequences for the task of identifying particular laws and legal systems.[21]

I shall elaborate on these elements in my subsequent discussion of Soper. Ultimately, my common law right answer thesis is at the Soperian end of the log jam. I insist that the most accurate representation of the process of common law judicial decision making in the pursuit of right answers must appeal to belief. Otherwise, we will misrepresent the phenomenon under study. Soper finds the same dilemma in his inquiry.

> No theory that insists on completely eliminating uncertainty can provide a coherent account of the phenomenon under investigation.[22]

In this regard, both Soper and I endorse Aristotle's opening remarks in Book I of the Nichomachean Ethics:

> Our discussion will be adequate if its degree of clarity fits the subject matter.[23]

Section 6 - The Paradigm and Judicial Duty

All five of the salient features of the paradigm of institutional decision making obtain in common law adjudication. Taken as a unit, they provide prima facie evidence that the purposes associated with the weak variant of PID are also at work in common law judicial decision making. I shall now apply the findings of the last two sections to make this point. Then I shall consider the implications of it for legal theory.

Even when it is controversial, a common law judicial decision is justified as the required one, i.e., the decision-maker claims that the application of the relevant standards has produced a right answer. This same fact is also evident in the pleas made by lawyers on behalf of plaintiffs and defendants and in the decisions of appellant courts. Since the weak variant of PID is quite adaptable to this type of situation (cf. (5) Controversy and Right Answers), this should alert us to ask whether common law judges perceive themselves as having a duty to search for right answers. Other factors also encourage such an investigation. When a sergeant makes a decision under the weak variant of PID, he is probably required to justify his decision only when his decision is unsuccessful, i.e., it does not achieve the intended result. In the common law, on the other hand, the giving of reasons is a traditional part of the process of

decision making. This raises the suspicion that giving of reasons in common law is expected and desirable because judges believe they are required to search for right answers. Fortunately, the shift from examples where the process of justification is an adjunct to decision making to examples of judicial decision making will supply helpful data to assess this question.

There are many additional similarities between the typical problems a decision-maker confronts when he is working within the paradigm and problems encountered in common law judicial decisions. Most particularly manifest in the 'hard cases' where Dworkin first posed the question, 'Does the judge possess weak or strong discretion?' these similarities are essential to the portrayal of the activity of the judge. Judicial decision making is a real (not hypothetical) affair where the decision-maker is charged with the practical responsibility of resolving a problem by making a decision (cf. (1) Pragmatic Problem-solving). Judicial decisions are practical applications of legal standards to specific facts. Judges are not required to make judgements on hypothetical litigants and causes of action which might potentially exist sometime in the future.[24] The concrete nature of the decision disciplines the use of legal standards by framing their application with actual factual circumstances. This is precisely the kind of situation

that the weak variant of PID - functioning as a purposeful endeavour - is designed to serve. Further, decision making within the law is a formal, serious and often difficult process (cf. (3) Difficult Situations). Thus, considering how decision making undertaken within the weak mode of PID functions as a pragmatic, rational activity to surmount practical difficulties provides a fruitful vantage point to examine judicial decision making. At the very least, the difficulty of many judicial decisions can be seen to be typical of the cases where PID is used to impose a duty to search for a right answer.

There is prima facie evidence, then, that the judicial setting exemplifies the kind of situation in which decision-making activities are based on a shared sense of purpose. For example, the demand that the decision-maker expend the effort to apply correctly the standards is only appropriate if the assigned task justifies such an effort; it must be a serious task that makes such a requirement reasonable. Otherwise, the reasons for insisting that the decision-maker search for a right answer inevitably will contradict the purposes the social practice is understood to serve. The judicial setting exemplifies this situation. It is a contemplative forum within which decisions are made carefully and deliberately. Moreover, legal decisions can have momentous consequences both for the litigants and society at large.

The graveness is reinforced by the quality of the professional training of judges and the august nature of the proceedings.

On this basis, two ideas can be extrapolated from the general analysis of the paradigm of institutional decision making and applied to the problem of common law judicial decisions. First, although this legal decision making is a rational affair, there is no way precisely to prescribe in advance what the judge should do in each case. The idea of the search for right answers derived from a shared sense of purpose may thus be essential at least to a common legal system because it produces an acquired decision-making duty that enables one to accurately describe the way common law judges are expected to rationally resolve, in a pragmatic way, the type of problems they frequently encounter (cf. (4) Joint Understanding and (2) Expertise). This is perhaps the most compelling reason to construct a purpose account of common law judicial activity. The point can be made by recalling one of the conclusions drawn from the study of PID. In many cases, a superior may find it conceptually impossible to formulate a straight directive - he must let the subordinate make a decision. Should the superior wish to impose decision-making duties on the subordinate he must employ either variant of PID. A variation on this problem is encountered in delineating the judicial role. Without the invocation of a shared

sense of purpose, it might be impossible to give a comprehensive account of judicial activity that is capable of describing the perception the judiciary have of their decision-making duties. Obviously, such an explanatory deficiency should be vigorously resisted.

A second lesson can also be drawn. The empirical evidence found in the reported case law will not by itself necessarily settle the matter whether the judge is making one of these two types of decisions. As argued in the previous section, it is possible to assign a duty to make a judgement as to a right answer as a means to ensure that the decision-maker will do his best (cf. (2) Expertise and (5) Controversy and Right Answers). If this constitutes the proper construal of the way in which judicial expertise is employed, and I will argue that it does, an analysis of the circumstances in which the decision is made cannot settle the question of the judge's decision making duties. I will now try to elaborate on this second observation because it constitutes one of the key themes of my thesis.

If taking on the common law judicial role entails the acquisition of a duty to search for right answers, then, the legal positivist cannot merely claim that the 'open-texture' of legal standards sometimes requires judges in any legal system to make choices. Provided that argument can be given to substantiate my claim that judges have a

duty to search for right answers, positivists must reply. The luxury of claiming, without argument, that judicial choices are sometimes necessary in any legal system is precluded if a persuasive case can be made on the following three points: (1) a common law judge persists in searching for a right answer even when the task is not amenable to absolute certainty and the result is controversial, (2) such a pursuit of purpose will many times result in a conclusion that differs significantly from the conclusion he would have reached if he had perceived either a need or a duty to make a choice, and (3) it is not only possible but eminently rational for him to proceed in this way.

In sum, providing a plausible account of how legal standards are used in the common law even when they cannot be readily applied, throws doubt on the positivist claim that judges in all legal systems sometimes cannot avoid making choices. This shifts the burden back to the positivist on the question of judicial decision-making duties; he cannot just say that the application of legal standards sometimes requires judges to make choices. He must justify this claim by invoking his own theory of law. Should this theory be found to be unsatisfactory, and a conception of the common law based on a purpose approach substituted in its place, then, the explanation of the common law judicial duty to search for right answers

constructed on the basis of a shared sense of purpose gains in credibility.

Thus, it is evident that an analysis of the paradigm of institutional decision making stimulates new avenues of investigation in legal theory. The analysis forces one to realize that the accurate portrayal of common law reasoning may require an appeal to purpose. At that point, the determination of whether purpose must be invoked can only be made by shifting the discussion to more abstract questions of legal theory. To what extent does common law in particular (the subject of this dissertation) and law in general require an invocation of purpose to explain the nature of judicial decision making? Besides forcing the discussion of judicial decision making to this abstract level, the comprehensive analysis of PID also provides us with conceptual tools to resolve the problem at that level with arguments that support the purpose approach. For legal theory, then, the protracted analysis of PID both stimulates inquiry and contributes to the attempt to resolve the issue.

II

INSTITUTIONAL DECISION MAKING AND LEGAL THEORY

Section 1 - The Judicial Role and Purpose

It is a commonplace observation to say that the taking on of a role within an institution can entail the assumption of authority and duties one would otherwise not possess. The authority and duties of the hangman are a graphic, if somewhat distasteful, illustration of the point. I am proposing here that the judicial institutional role, within the common law, is designed to achieve the purposes associated with the search for right answers. Accordingly, the decision-making function of the judiciary requires such a search. Particular judges acquire the duty to search for right answers by assuming the role. The analogy with the decision-making tasks assigned via weak PID is found in the way in which the decision-maker comes to understand that a search for a right answer is required. In the case of the judge, he perceives the need to search for right answers through understanding the purposes the role is designed to serve. Through the understanding of the proper performance of the role, in conjunction with his assumption it, the judge acquires a duty to so proceed when he makes a decision.

Of course, in the case of PID, the decision-making

duties are modelled on a discrete relationship between a superior and subordinate that takes place within an institutional setting. For example, the sergeant has decision-making duties imposed through the explicit, personal action of the lieutenant, whereas in the case of the judicial role, the acquisition of decision-making duties occurs with the assumption of the position. Further, unlike PID, within the judicial role, the duty to decide and the authorization to make a decision do not have the same conceptual link to the duty to search for right answers. Nonetheless, even though the existence and acquisition of the duties and authority of a judge do not arise in the same way, it is still illuminating to focus on obvious cases within PID.

Esssentially, the similarity between weak PID and the common law judicial role is that in both cases the understood task of searching for right answers is founded on a shared sense of purpose. Further, even though the decision-making duties do not arise through a specific act from a superior to a subordinate, there is no need to presume that the duties are different merely because they are acquired rather than imposed, i.e., in the taking on of an institutional role. Moreover, it is possible to conceive of the duty to search for right answers for a multiplicity of tasks over a protracted period of time. Such a portrayal also need not alter the nature of the

duty. This conceptual consistency bridges the gap between the continuous performance of an institutional role over time and the specific decision of the sergeant; the duty is not affected by the length of time one is required to exercise it.

A great advantage to the purpose account is that it explains the 'oral culture' of law. After all, in many institutional and non-institutional settings one takes on a role without being provided with an explicit statement of all the dimensions of that role. This is a quite unremarkable part of social life which likely has its roots in the way in which social conventions are acquired, understood, and adhered to. Even if a role is sophisticated and important, one can come to understand the role by observing others perform it and in performing it oneself.[1] The judge's situation may well be similar. Thus, if the description of his role is able to identify his decision-making activity with the pursuit of purpose, one can readily draw on other institutional hierarchies where the discrete, personal assignment of decision-making tasks also entails the pursuit of purpose.

In sum, the duty of a judge to search for right answers need not be overtly imposed if it can be shown that a commitment to the search for right answers is constitutive of his institutional role. What must be preserved in this analysis is the judge's recognition,

even if unstated, that this constitutes the proper performance of his role. Such a portrayal is plausible in the light of the paradigm of institutional decision making. By first attending to non-legal social life, we can come to see the same phenomenon at work in judicial decision making. When there is a specific act which unquestionably imposes on a subordinate the duty to make a judgement as to a right answer within an institutional hierarchy, one can confidently isolate discernible features that would have to obtain in an institutional role for that role to satisfy the same decision-making function. The framework of the first chapter sought to lay the groundwork for this approach.

Beginning with the discrete case enables one to appeal to ascertainable actions of superiors and subordinates. In essence, it is easier to appreciate the nature and function of purposed based decision making by first assessing it in the clear cases of discrete delegation. A subsequent shift of the analysis to the legal institutional setting enables one to draw on the findings of the discrete case to understand the role of the common law judge; for, even though many of the dimensions of the judicial role can be accounted for via statute (e.g., a specific rule or set of rules establishing the ambit of judicial authority) not all of the duties associated with the role can be explained in

this way. What can be drawn from PID is the realization that the decision-making tasks within institutions may require the commitment to certain purposs. One accounts for the commitment by showing that the overall construction of the institution can only be understood by perceiving these purposes. In chapter V, I shall argue that the common law, and by extension the judicial role within it, must be explained in this way.

Section 2 - Law and Purpose

Philip Soper's recent, and highly original, theory of law argues that law must be conceived to be a purposeful enterprise.[2] In this section I shall briefly sketch the main outline of Soper's claim. In so doing, I hope to bolster the credibility of my forthcoming thesis that the portrayal of the common law judicial role must incorporate an account of decision-making activities that is derived from shared sense of purpose.

The focal point of Soper's argument is the question of why law has a tendency to obligate. Clearly, the taxman has a moral credibility not possessed by the mugger; we seriously misrepresent the law if we ignore this difference. Soper's way of putting the point is in terms of a reciprocal respect between legal officials and citizens.

> The common response to the tax collector's demand I described as one of respectful attention. It is a fact of everyday experience that most people concede to the law a moral legitimacy, however weak, that is wholly absent in the case of the gunman. It is this contrast that provides the question that guides this inquiry: what is it about law that justifies any degree of moral respect at all, however slight?[3]

Although Soper considers and rejects the most frequently cited strategies that seek to explain the obligatory nature of the law, he does find one theme worthy of preservation. Soper maintains that it is patently false to think that a legal system is threatened with collapse because of the breach of any particular rule. Accordingly, he rejects any idea of a symmetrical relationship between the benefits of the system and the benefits to be accrued from any particular law. In other words, the loss of the benefits resulting from a breach of the latter does not necessarily threaten the maintenance of the system and the attendant benefits resulting from its existence.[4] While rejecting this connection, Soper retains the idea of law as creating benefits. Thus, the obligation to obey the law begins with the appeal to the benefits which one drives from its existence.

Soper constructs a two-premise argument for the existence of a legal system with a variation on the above point as the first premise. After the fashion of Hobbes,

he concludes that the existence of any legal system is preferable to any situation without one. Given that each individual is aware of the benefits one obtains from this fact, the claim that one has an obligation to obey the law can be connected to one's own interests. As limited as this demand is, it does at least lay the groundwork for obligation, although the counter-balance of individual autonomy which the premise appeals to can undermine the foundation. The right to dissent also exists and legal obligations are not absolute.

> If the first premise is acknowledged, and if that premise can be connected to the situation that confronts the individual in a legal system... then a connection will have been made between the demand for compliance and the acknowledgement of minimal legitimacy derived from an individual's own values and reason.[5]

The second premise of Soper's argument fills out the existence of an obligation in terms of respect for individuals. The law is not just a fortuitous entity from which we derive benefits but a specific, rational enterprise humans consciously create and perpetuate. Law is structured in terms of a reciprocal respect between the values promoted by legal institutions and our own personal values and interests. The legal process creates and sustains an obligation to obey the law because the way the process is structured both serves and pays homage to our dignity as individuals. We owe the law a reciprocal

obligation because we know that the enterprise seeks to balance competing individual interests in a way which best acknowledges our moral autonomy. Accordingly, even when the law refuses to uphold the plea of a plaintiff or defendant, the participants are brought into the process and are seriously heard before their claims are rejected. Thus, the process reinforces the respect for rational self-interest in victory or defeat.

> The forced submission to the opposing views of those in charge loses some of its sting if my views and arguments are considered and in good faith rejected.[6]

With the idea of benefits produced through an institutional arrangement modelled on a paradigm of respect, Soper is able to sketch out how the good faith belief in justice by officials distinguishes a legal system from a coercive regime. The former is a normative endeavour which is capable of generating an obligation and the latter is not.

According to Soper, it is the shared belief in the good faith of the officials of a regime to do justice, in addition to the recognition of the benefits commensurate with social order, that generates an obligation to obey the law for all. Thus, even if our collective perception that the system promotes justice is mistaken, the obligation still exists. Further, the obligation is not undermined by our inability to provide a sophisticated and

final argument for the reality of values.

> The point is simply that beliefs and attitudes of concerned people can be recognized as yielding valid obligations, while questions about the epistemological or ontological status of moral judgements continue to be debated.[7]

To construct his thesis, Soper uses the same methodological device that I employ. Soper cites the common law doctrine of unjust enrichment as a paradigm of obligation that he claims to be the reification of a consensus within the social group as to a unique way in which people can acquire obligations.[8] According to Soper, unjust enrichment enforces at law the collectively shared belief that in certain cases when one person confers unsolicited benefits on another an obligation can nonetheless fall to the massive recipient of the benefits. Soper argues that this social practice, which has been legally entranched, constitutes verification that a human moral conceptual scheme is capable of producing obligations in the way required by his purpose account of law.

> I shall construct an argument by directly appealing to the beliefs and attitudes of rational individuals in situations analogous to the situation confronted in the case of law.[9]

The most important result to follow from this approach is that it captures Soper's view of the way law functions as a purposeful enterprise. The legality of

actual institutions is determined by our conception of the project in that claims about legal reality will be determined by group belief that it is an instance of the concept. Put another way, there are certain purposes we associate with law that we must perceive to be expressed in social institutions for them to eclipse the coercive realm. We share an understanding of law as a way of organizing social affairs and it is sufficient for our purposes to claim that law exists when we find ongoing social institutions expressing this shared understanding.

> This chapter in contrast connects belief and reality by showing that the former is part of the latter: real obligations arise from the beliefs of others, regardless of the ultimate correctness of those beliefs or the ultimate correctness of various meta-ethical theories about the nature of value judgements.[10]

The lesson to be drawn from Soper's analysis here concerns the way in which some institutional enterprises can be explained and legitimized. Unless it is obviously implausible or impossible to execute the construed task, in some cases one both understands and justifies the institution by appealing to the purposes the enterprise seeks to promote. The burden this explanation and justification must satisfy is not that it can be said with absolute certainty that the enterprise has successfully fulfilled its purpose. Rather, one need only show that the purposes that define the enterprise have to be a

significant degree been pursued.

The fourth chapter of this dissertation will try to show that one can cite Soper's theory of law as a more abstract justification for my more narrow explanation of why common law judges search for right answers. My construal of the common law judicial role captures the purposes associated with Soper's idea of law and this helps to clarify the more parochial objectives associated with my idea of the common law. The integration of the two perspectives provides my most comprehensive explanation as to why the common law enterprise is committed to the idea of institutional right answers. If Soper is correct that law is fundamentally an enterprise in pursuit of certain purposes, it should not be surprising that common law judicial decision-making duties must ultimately be explained in the light of these purposes.

Section 3 - The Context of Assignment

These last sections of the chapter will attempt to round out the picture of the way the paradigm of institutional decision making functions as a purposeful endeavour, with particular emphasis on the weak variant. I shall do so by examining in some detail particular decision-making situations that fall within the paradigm. This section will elaborate on the context in which the

duty to make a decision is imposed.

There are three specific aspects to the context of assignment that will be delineated and all of them will be cross-referenced to the conclusions of chapter one as to the purposeful nature of institutional decision making.[11] The first aspect asserts that the criteria that the decision-maker must employ to apply the assigned standards are initially derived by referring the language of the directive to the context of assignment. This non-linguistic reference is necessary to understand the assigned task. The second aspect introduces the idea of 'background information'. Institutions have agreed upon ways of proceeding and out of this can be derived an understanding as to background information shared by superiors and subordinates. Although this information is used in both the context of assignment and the context of implementation, in the former context, the conception of the assigned task is coloured by this institutional understanding. Finally, I develop the idea of the 'setting' in which the imposition of the duty to make the decision takes place. Roughly stated, by 'setting' I mean the resources that are provided to the decision-maker when he is assigned the duty to make the decision. This point needs to be made because I shall argue that, when the task is serious and difficult, there are features of setting that must obtain when weak PID is employed by the

superior. Further, these same features are found in the judicial role. Thus, the idea of setting is helpful for the comparison between the social practice and the institutional activity of a common law judge. This will be explained more fully in due course.

Basically, the analysis of this section elaborates on an idea which was briefly acknowledged by Dworkin and then dropped. He recognized the importance of context when he stated that both the standards to be applied and the relevant background information must be placed within the proper context to be correctly understood.

> Discretion, like the hole in a donut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'. Generally the context will make the answer to this plain, but in some cases the official may have discretion from one stand-point though not from another. Like almost all terms, the precise meaning of 'discretion' is affected by features of the context. The term is always conjured by the background of understood information against which it is used.[12]

One of Dworkin's examples can be used to demonstrate the claim. Let us suppose that the direction 'Pick your five most experienced men to go on patrol' is given to a sergeant in anticipation that the patrol will be in a combat situation and he is charged with the task of going

on night reconnaissance over treacherous terrain. In issuing this order the sergeant's superior is directing him to select those men with the most experience in the type of mission at hand. Consequently, the nature of the activity, i.e., the type of mission, constitutes an indispensible part of the assignment of the standard because it supplies criteria for what will count as 'experienced'. Accordingly, the most eligible candidates would be those men in the platoon who had been on previous night patrols and are familiar with the terrain to be covered. The sergeant must use these two criteria to determine what will count as experience. Therefore, the meaning of the assigned standards can only be grasped by referring the language of the directive to the context of assignment. Without this reference the sergeant will be unable to derive the criteria necessary for the application of the standards he is to apply. In the next section I shall elaborate on the way in which criteria can be varied because of the concrete, factual circumstances the decision-maker has encountered. For the moment, I wish only to stress that the performance of the sergeant's decision-making duties requires him first to fix the meaning of the standard to be applied by referring to the objectives he knows he is expected to achieve by applying the directive.

The closest Dworkin comes to making the point I have

just argued is his idea of 'background information'. There is indeed a vast amount of this type of information at work within PID. For example, within viable, ongoing institutions, there is a general understanding of agreed upon ways of proceeding that is shared by all participants within an institution. The idea of an identifiable general type of activity engaged in over time is nicely captured by the term 'enterprise'. Actions performed within an institutional environment such as military life (or even judicial decision making) are readily amenable to being described in this way. Institutions possess practices and conventions that are presumed to contribute to the context of assignment unless they are specifically overridden. Hence, the nature of the enterprise is a kind of the background information jointly understood by both the assignor and recipient of the decision-making duties. This too can contribute to fixing the meaning of the standards to be applied. In addition, one can refer to this information to determine whether the task is serious when it is difficult. This helps to determine whether the use of the paradigm of institutional decision making is appropriate. Finally, it should be stressed that the background information the subordinate must consider is presumed and hence left unstated. This is part of the efficacy of PID; it facilitates an economy of conversation in the formulation of the assignment.

To see the first of these points, consider a combat situation where the sergeant is directed to take his "five best men" on a reconnaissance patrol. Here reference to the objectives of the assignment, to locate the enemy and map out the terrain, need not exhaust the derivation of the criteria for what will count as the meaning of 'best men'. Given the martial nature of military life, coupled with the likelihood that the patrol will engage the enemy, fighting skills may well be considered a paramount criterion for what counts as 'best men'. Of course, the lieutenant could override the criterion in the directive he issues but unless he does so, the background information for what counts as 'best men' will prevail.

Another way that institutional life provides background information is in the justification of the use of the social practice. Recall my argument that the superior's use of PID is only justified for a difficult decision when it is also a serious one. The nature of the institutional activity can stipulate whether the task is a serious and difficult one, thereby, justifying the superior in insisting that the subordinate expend great effort in making the judgement.

The point can be illustrated by considering two radically different cases where the sergeant is ordered to pick his 'five most experienced men': (A) to go on maneuvres with live ammunition, or (B) to dig ditches

throughout a bivouack. Directive A refers to a serious activity which therefore justifies the lieutenant in insisting that the sergeant, if necessary, expend great effort in selecting the men. Directive B, on the other hand, would likely not refer to a serious activity unless there were military conventions and practices that stipulated otherwise. For example, if the ditches cannot impede motor vehicle movement but nonetheless must provide emergency protection during an air raid, then, the task is a serious one. Thus, the lieutenant could justify his insistence that the sergeant expend the effort to make the correct determination even if the decision is a difficult one. Without such an invocation of background information, the lieutenant could not maintain, without argument, that his assignment was consistent with the reasons considered appropriate for using the social practice to obligate subordinates. If ditch digging is not a serious military priority, the burden is on the lieutenant to explain why he anointed the activity with a more noble status.

Finally, the 'setting' of the context of assignment, independent from background information, can also embellish the directive to underwrite the seriousness and anticipated difficulty of the task. It can do so by providing resources to the decision-maker to facilitate the making of the decision. An obvious way this could underscore the seriousness of the activity is the time

allocated to make the decision. Suppose that the sergeant is given Directive A one week before the maneuvres and Directive B fifteen minutes before the job is to be commenced. The ramifications of decision A are much more serious than B. Moreover, a deliberative process is built into the decision-making framework in A, whereas in B, the sergeant is expected to make a hurried decision. In sum, A is a deliberative decision on an important task and B is a quick decision on a trivial task. The denial of the time to decide in B underscores this difference.

Section 4 - The Context of Execution

Now that the overall purposes associated with the use of PID have been investigated, I shall examine how these purposes function vis-a-vis the actual factual circumstances within which the decision is made. I label this the context of execution. Again, the principal focus will be weak PID. I attempt to show how the decision-maker can satisfy his duty to make a judgement as to a right answer even when the facts he encounters make this exceedingly difficult.

FACTUAL CRITERIA

The most obvious dimension to the context of execution is that the criteria the decision-maker is required to use to apply the standards must be connected to the facts he confronts. Just as the specific context of assignment supplies the subordinate with unmolded criteria to apply the assigned standards, so too, the specific context of execution requires a molding of the criteria to the facts at hand. Nothing better reveals the pragmatic nature of decision making within PID and it can be easily sh[redacted] using the example discussed in the last section. Recall there I made the point that if a sergeant is directed to take his five most experienced men on a night patrol over rough terrain, the demands of the activity supply the criteria for what will count as 'most experienced'. But this does not end the matter. The criteria must be referred to the concrete factual circumstances because the particular situation in which the decision-maker must employ them can affect the way they are to be applied. For instance, different compositions of the sergeant's platoon could require a different use of the criteria. Consider for example that the sergeant has five men in his platoon who have <u>only</u> night patrol experience and five men who are <u>only</u> familiar with the terrain; moreover, no other member of the platoon meets either criteria. In this case, the sergeant must

decide which criterion will take priority. Whatever the appropriate result in the example (which would require a long winded story) the point I presently wish to make concerns the importance of the two contexts to determining the appropriate criteria for the assigned standards. In the example at hand, the criteria to be applied to fulfill the standard 'most experienced' can only be fixed by considering, (1) the nature of the patrol, and (2) contingencies such as the composition of the sergeant's platoon. The more the concrete circumstances in the context of execution do not accord with the criteria derived from the context of assignment, the more the decision-maker has to reflect on the background information drawn from other institutional considerations in order to apply the standard. For example, the idea of a 'team' concept may be integral to military patrols. Thus, if the sergeant confronts a concrete case where the two criteria conflict (five men have night patrol experience and five possess terrain familiarity) instead of deciding that one of the two criteria predominates, the sergeant mixes the candidates from both groups in the service of the team concept.

CRITERIA VARIATION

All of this takes us to an important feature of the weak mode of the paradigm. One of the functions of PID is to ensure that decision-makers will vary the criteria to apply the assigned standards when the concrete circumstances do not permit the employment of the criteria derived from the context of assignment. To develop this point, I shall draw on my discussion of the use of the social practice to promote institutional right answers. Nothing better illustrates the pragmatic nature of PID.

Consider the order where the sergeant must take his five most experienced men on a night patrol over treacherous terrain. Suppose though that the sergeant's entire platoon is composed of newly arrived men whose military experience is limited to basic training. In this case, neither of the obvious criteria of what is to count as experienced can be applied (none of the men have been on a dangerous patrol or a night patrol). Would one say that the sergeant must make a choice and not a judgement in selecting the five men? The standards the sergeant has been directed to use (initially delineated by referring the language of the directive to the specific activity) appear to be completely inapplicable to the circumstances the sergeant faces. Thus, because of the circumstances, one might conclude that it is impossible to find a correct implementation of the standard. Following this line of

thought, the situation the sergeant confronts in the context of execution forces him to make a choice not governed by the assigned standards. In the next chapter, I will show that such an outcome is eagerly endorsed by legal positivists because it could be used to make the claim that decision-makers may need to make choices but have no duty to do so. Because it was not imposed, but is nonetheless necessary (the sergeant must still go on patrol and this requires a choice), the sergeant is forced to assume the responsibility of making a choice - no one gives it to him. However, I shall now argue that the sergeant is not necessarily forced to make such a choice even in this case.

Although the men do not meet either of the criteria used to determine what will count as experienced, in this situation the sergeant is expected to vary the criteria to apply the standard. For instance, the sergeant may examine the personal histories of the members of the platoon to determine whether some of the men have reconnaissance training or other relevant experience acquired prior to military service (e.g., boy scout training). While this would radically alter the criteria used to make the decision, it is still an attempt to be governed by the standard entailed in the directive 'pick your five most experienced men for patrol'. The refusal of the sergeant to jettison the standard 'most experienced' is a result of

is acknowledgement that he has a duty to implement the standards, as best he can, so that these standards yield a right answer. Even in the most arduous of circumstances, when a decision-maker is directed to find a right answer, he knows he is expected to apply the assigned standards to the concrete circumstances in the light of institutional values and objectives. This awareness is shared by all institutional members as to the point of employing the mode of PID. In the case of the beleaguered sergeant, if he has no men directly experienced in the task at hand, he is required to vary the criteria for what counts as 'most experienced'.[13] Indeed, this is one of the dilemmas the social practice is intended to overcome. PID eliminates what would otherwise be an impossible requirement: that the instructions issued in the context of assignment always precisely anticipate the specific circumstances the decision-maker will confront when the decision is made. Perhaps nothing better reveals the pragmatic nature of the paradigm. It is a viable institutional response to the practical problems that are inevitable given the vicissitudes of institutional life.

The point I am now making constitutes only a partial response to a legal positivist who might try to argue that judicial choices are sometimes necessary even if common law judges do have a duty to search for right answers. In the next chapter, I shall, in some detail, directly engage

the legal positivist on this question. For the moment I wish only to stress that criteria variation is an essential feature of the weak mode of PID. It is one of the ways institutions respond to the flux of changing conditions while simultaneously maintaining a coherence in the decisions of institutional agents. For the sergeant, there is an umbrella of values and objectives, indigenous to the institutional enterprise, that are expected to control his decision when all else fails.

PID's capacity to facilitate criteria variation is one of the reasons it is most particularly useful in institutional hierarchies. Whenever the paradigm is used to assign standards, there is a vast amount of information that can be presumed. This information makes available criteria for the application of the assigned standards that are expected to be used when the facts encountered within the context of execution do not enable the decision-maker to use the criteria derived from the context of assignment. In such cases, the decision-maker must use his knowledge of the institutional enterprise to first articulate and then employ other available criteria.[14]

The main lesson to be extrapolated from this claim is that an observer of decisions made within the paradigm of institutional decision making will misunderstand the process of such decision making if he does not appreciate

the way the social practice functions as a pragmatic response to practical problems. Even where the facts apparently frustrate the application of an assigned standard, we must review the reasons the decision-maker uses to justify his decision in order to ensure that the standard has in fact been totally abandoned. Such decision-makers are expected to go to great lengths to meet their duties and the reasons they give for such a decision express their effort to satisfy the duty. An observer who ignores the purposeful nature of the activity runs the risk of grossly misrepresenting the process by which the decision was reached. I shall elaborate on this point in the conclusion to the section.

It is far easier to describe the way the strong variant of PID of PID within the context of execution. Here the decision-maker need only cite his authority to make the choice in order to justify his decision as falling within the ambit of his assigned duties. His decision does not require him to apply a standard to exercise the authority. Rather, he is only required to make his own choice from an assigned set. In the case of the directive "Take any of your five men on patrol" the sergeant need only show that he selected five men from his platoon to meet his assigned duties.

FRUSTRATION

I have been arguing that weak PID functions as a pragmatic response to practical problems encountered in institutional activity. This section has tried to show how this pragmatism is manifest in the interaction between concrete facts, assigned standards and varied criteria in the context of execution. Nevertheless, the legal positivist, among others, would be quite correct to insist that it may be impossible for the decision-maker to perform his assigned task in the way contemplated by both the superior and subordinate when such a duty is imposed. What I now want to stress is that this holds for both forms of PID and is simply a feature of human life generally. Dworkin's reminder that virtually any human activity is subject to the constraints of rationality, fairness and effectiveness is one of many ways to see this.

> Almost any situation in which a person acts (including those in which there is no question of decision under special authority, and so no question of discretion) makes relevant certain standards of rationality, fairness and effectiveness.[15]

To illustrate, consider the case where a sergeant receives the directive 'Pick any five men for patrol'. Suppose that the sergeant receives the directive and returns to his platoon to find all but five men have contracted dysentery and are too weak to walk. In this

case the sergeant is guided by the rational presumption that he will choose men who are capable of carrying out the order. Here the sergeant's choice (pick any five men) is limited to two rather pedestrian judgements; he must discern which of his men are healthy and he must be able to count to five. Alternatively, if all the sergeant's men were sick and unable to walk, then, he cannot execute the directive at all, i.e., the sergeant cannot make a choice. This inability of the sergeant to satisfy the duty of making a choice is not perplexing because of the two distinct contexts of PID. Assumptions formulated to impose the decision-making duties within the context of assignment can prove to be false when the directive is applied in the context of execution.

In the next chapter I shall argue that the legal positivist must ultimately invoke his own theoretical commitments to avail himself of the claim that the judge assumes the task of making a choice as a consequence of a 'frustrated' attempt to find a right answer. The legal positivist can counter to institutional picture I will develop by arguing from his own picture of law. In sum, he can try to prove that common law judges must inevitably be frustrated in their attempt to make judgements as to right common law answers. As the rejoinder, my last chapter will try to portray the common law as institutionally committed to molding legal standards to concrete facts when these

facts do not facilitate a ready application of the appropriate discretion. Further, I shall argue that any success the positivist has in invoking the idea of frustration to undermine the claim of a judicial duty to search for right answers within the common law must ignore an intractable fact of the human condition; institutions can have a certain characteristic aim and flourish even in the face of sporadic failure.

OBSERVATION VERSUS EXECUTION

I want to conclude with another argument to show why the findings of this section are important. I will attempt to explain what a commentator on duty imposed decision-making will miss if he observes these decisions within an institutional environment but does not consider the social practice I have been describing.

There are three distinct ways that the circumstances encountered in the context of implementation can affect the duty to search for a right answer. In analyzing duty-imposed decision making one can rely on one of these ways depending on the point one wishes to make. One can place great importance on the fact that circumstances can frustrte the search. Alternatively, one can assume that the context of execution readily facilitates it. Finally, I have emphasized instances where the circumstances force

the decision-maker to use a great deal of ingenuity to faithfully discharge the duty.

It is this last case that the observer will miss if he fails to appreciate the social practice. As I argued in section four of chapter one, by using the paradigm, a superior can obligate the decision-maker to do his best even when the decision is difficult. It does so by enabling him to impose a duty to the decision-maker to try to implement the standards correctly even where this is an arduous task. Without this option, institutional hierarchies could only rely on the conscientiousness of the people involved in the institution, i.e., one could only provide subordinates with the authority to make a choice and hope that the decision-maker exercised the choice in a responsible way. Fortunately, the assignment of duties is far more flexible. One can direct a subordinate to apply standards through the imposition of a duty to make a judgement as to a right answer. This operation of duty-governed behaviour makes members of the institution far more accountable for their activities. Such accountability is well illustrated when the decision-maker is required to use a fair amount of ingenuity.

As a result, the cases where the decision-maker can plead that it is impossible to do what is required will be drastically reduced. As has been illustrated in the

examples of the sergeant, even in difficult cases, it is possible for the decision-maker to vary the criteria to apply the standards he is directed to use. More importantly he has a duty so to proceed. An observer who fails to understand this attempt of the decision-maker to vary the criteria may well conclude, when the facts are not amenable to an obvious application of the standards, that the decision is no longer a judgement as to a right answer. In such a case, it may only be because the observer has the luxury of not being called to account for the decision that he can represent the process in this way. The observer's distortion of the decision-making process has a veneer of plausibility because it is made in a vacuum. The actual decision-maker, who has the duty to find the right answer, is particularly accountable for his efforts in the difficult cases where the mere observer has dismissed the making of the judgement as implausible.

In observing the institutional activity of the common law judge this misconstrual is potentially even more distorting. In discrete cases, it may be plausible to explain the actual decision reached while also insisting that the facts of the case neutralized the decision-maker's duty so that the case could have been decided differently. However, for a series of decisions, if an observer fails to emulate the actual process employed, then he will be unable to reproduce the rationale of the

set of decisions. Since common law judicial activity is an ongoing process of decision-making, if it turns out to be a role which requires a search for right answers, we can expect a description of that activity to be sadly deficient if it ignores this fact. One of the objectives of the remainder of the dissertation is to show that this is precisely the failing of legal positivism.

III

LEGAL POSITIVISM AND JUDICIAL CHOICES

It has been argued that the duty to search for right answers can be frustrated. In this chapter my main objective is to show why the most viable opponents to the right answer thesis, legal positivists, could be unanimous in using the doctrine of frustration to reject it.

The first section of this chapter shall argue that the burden of proof still remains with the legal positivist if he wishes to employ the idea of frustration to refute the right answer thesis. The remaining sections of the chapter shall argue that the positivist can only discharge this burden of proof by appealing to the positivist theory of law. To that end, sections two and three will explicate the legal positivists conception of law as a system of rules. Section four will then draw on this explication to show why legal positivists must ultimately invoke their own theory of law to refute the right answer thesis.

Section 1 - Frustration and Choices

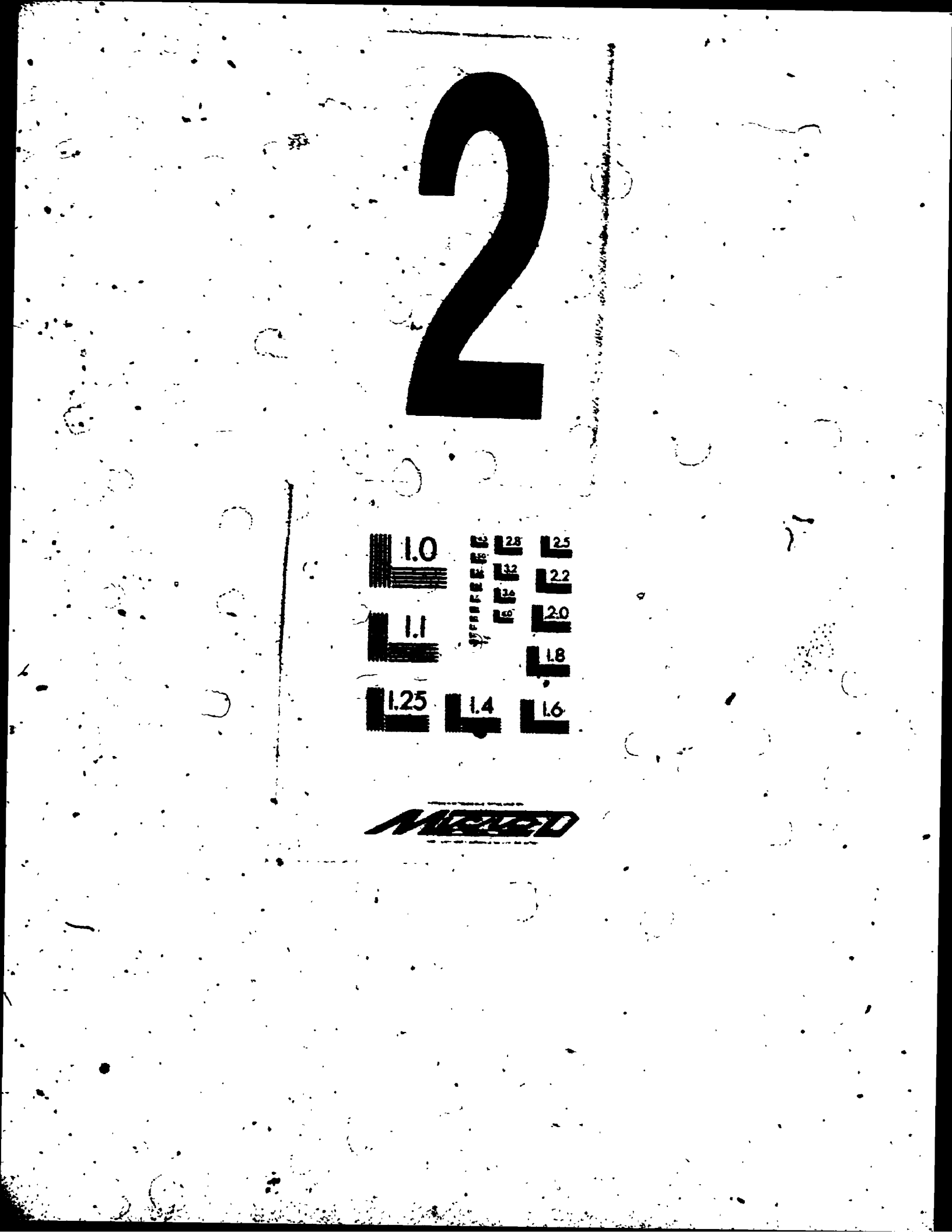
Wilfred Waluchow, a recent commentator on Dworkin's analysis of discretion, makes a forceful case for the need to make a choice arising as the result of frustrated search for a right answer and I shall accordingly use his work to examine the idea.[1] Waluchow's position is important because it has found a very sympathetic audience among contemporary legal positivists. Curiously, the position to be discussed can only be maintained if one of the hallmarks of modern legal positivism is ignored: Hart's idea of the internal point of view. Essentially, my construction of a paradigm of institutional decision making has much in common with the internal point of view. Yet, legal positivism cannot bring itself to take a sympathetic view to such an idea. The high theoretical stakes that account for this reluctance (viz., the need to base an explanation of law on the idea of purpose) will become evident in the ensuing discussion.

Waluchow states that there are two possible ways to understand the relationship between choices and judgements as to right answers. On the first alternative (A) a decision-maker cannot make a choice even if he is actually not controlled by standards so long as the standards purport to control his decision. On the second alternative (B) a decision-maker cannot make a choice only if he is actually controlled by the standards the authority set for

his decision.[2] For Waluchow, the acid test is the case where the decision-maker knows there is no correct implementation of a standard even though he knows a judgement as to a right answer is expected. He argues that because such a case is possible, it undermines the 'A' account. Standards may purport to govern but if the decision-maker realizes they cannot be implemented, and he nonetheless has a duty to make a decision, then he must make a choice. In such a case, Waluchow suggests that denying this fact has a 'hollow ring'.[3]

> Yet if, in these cases, the sergeant knows full well that his decision is not fully controlled, does he not also know that if he is to make a decision on the basis of his orders, he must choose from among alternatives which those orders leave open? It would seem so. But then, is it not true that in such cases the sergeant has, and knows that he has, strong discretion to choose from among those open alternatives.[4]

Waluchow proceeds to consider how Dworkin (who introduced the distinction between choices and judgements) could escape from this problem. He concludes that Dworkin's best chance is to argue that legal decisions are not like the simple dilemmas of the harried sergeant. The complexity of the law is such that one can never be sure that there is no correct implementation of legal standards. Therefore, because the nature of legal standards is such that it is impossible to establish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definitely whether the purported control of legal standards is successful, a judge, unlike the sergeant, will never find himself in a situation where he knows a judgement as to a right answer is impossible. Once considered, Waluchow rejects this tactic. He claims that Dworkin cannot support A as analytic of judgements as to right answers by appealing to the special case of judicial decision making.

> It is obviously fallacious to defend it by an appeal to contingent features of certain special cases where, it is claimed, the complexity of the standards which must be applied ensures that one could never know, and would likely be wrong were one to assume, that a particular decision is not fully controlled.[5]

Waluchow and I agree that Dworkin's account of the role of right answers in judicial decision making is incomplete. Further, we both have pet examples we use to support our arguments. My objection against Waluchow is that his analysis is incapable of accommodating my example. Waluchow's favourite case is where the decision-maker confronts a set of facts which frustrate the exercise of judgement by making a unique implementation of the assigned standards impossible. He maintains that this example gives Dworkin a lot of trouble but I prefer a case within PID which I believe is more instructive. Recall my example where the sergeant must pick the 'five most

experienced men' for a patrol from a platoon of new men. It is still possible for the sergeant to vary the criteria for the standard 'most experienced' in the face of an unanticipated set of circumstances; indeed, where the decision is anticipated by the assignor to be both serious and difficult, this is precisely what the decision-maker is expected to do when unforseen facts are encountered in the context of execution.

Waluchow's example trades on a decision-maker's capability to evaluate the appropriateness of potential decisions in particular circumstances. Waluchow wishes to argue from the possibility that circumstances can frustrate the execution of an assignment to make a judgement as to a right answer to draw the conclusion that it is always the circumstances which determine whether such a judgement is possible.[6] His example illustrates the possibility and is offered as evidence for the conclusion: the sergeant knows he must make a judgement as to a right answer but he concludes that the facts force him to make a choice.

> What are we to say about cases where authoritative standards purport to single out a uniquely correct decision on some question, and yet the decision-maker is fully aware that they fail to do so. This failure, and the problems which it brings, are too easily obscured by saying that in such cases the decision is nonetheless controlled. It seems far better to say that authoritative standards purport

> to control the decision, but fail to do so.[7]

Unfortunately, the great weakness in Waluchow's argument is that it cannot explain those cases within PID where a duty is imposed to make a judgement as to a right answer and this requires a reference to institutional values and objectives. My first two chapters described how this works and explained why it is an integral part of institutional activity. This is Waluchow's Achilles' heel because if a dispute arises over whether a right answer exists, one cannot always rely on an appeal to the circumstances in the context of execution to claim that the judgement cannot be made. To be useful, Waluchow's formulation of the relationship between choices and judgements as to right answers must presume that the existence of a right answer is an ascertainable fact. This presumption seriously distorts important instances where a duty can be imposed on the decision-maker to organize his decision around the search for a right answer even when the conclusion cannot be absolutely verified as the correct one. Therefore, I conclude that Waluchow's account is inadequate. What is lacking in this approach is precisely what Dworkin tried to explain: when the existence of a right answer is difficult to determine, one cannot always appeal to the facts to assert that it is impossible to make the judgement. Waluchow was wise to

appreciate the usurping potential of circumstances, but he has overstated the case. In sum, and this is the crux, when PID is used to impose a duty to make a judgement as to a right answer, one cannot argue from the conceptual possibility of frustration to the empirical claim that such frustration always obtains.

Waluchow may resist my argument because of a belief that the examples I use to support it do not represent typical cases. He seems to take this line in the same section where he criticizes Dworkin's use of judicial discretion to illustrate weak discretionary decision making. There he characterizes complex examples where the existence of right answers is uncertain as 'special cases'. He cautions that it would be fallacious to build our analysis of the concept of discretion on them.

> It is obviously fallacious to defend it by an appeal to contingent features of certain special cases where, it is claimed, the complexity of the standards which must be applied ensures that one could never know, and likely be wrong were one to assume, that a particular decision is not fully controlled.[8]

Even if Waluchow is correct to minimize the importance of what he terms 'special cases', his position must be able to explain them and as I have already argued, he cannot do so. Further, arguments I have made in the first two chapters support the suggestion that these could

be cases where the weak variant of the paradigm of institutional decision making is at work. Thus, the inability to explain them may not just render Waluchow's analysis incomplete for failure to accommodate a peripheral case. Rather, if they are typical, and there is persuasive evidence to suggest they are, then the need to make choices as a consequence of the inability to implement assigned standards is only a small part of the story.

For the purposes of legal theory, the most important conclusion to be drawn from this section is that the legal positivist still has the burden of proof if he wishes to refute the claim of institutional right answers in the common law by appealing to the idea of frustration. At this juncture, the positivist rebuttal of the right answer thesis is unsatisfactory because it is empirically inadequate. One can readily concede the conceptual possibility of frustration and still insist that such failure is empirically scarce in the common law. Even when the facts do not facilitate a ready application of the assigned standards, there is an umbrella of institutional values and objectives the judge can draw on. To this end, the account of PID shows how duty-imposed decision making can promote the idea of 'institutional right answers' and require 'criteria variation' when the assigned standards are not readily applicable in the context of execution. Thus, unless the positivist can

show that frustration is rampant, he has not empirically substantiated his conceptual point.

In the remainder of the chapter, I shall argue that the positivist inevitably must cite his own theoretical commitments on the question to substantiate invoking the doctrine of frustration. I will try to show that the positivist's theory of law commits him to the claim that frustration is not just conceptually possible but conceptually necessary given his view of law. Proceeding this way will enable me to respond the positivist rejection of the right answer thesis via a critique of his theory of law.

Section 2 - The Game Analogy

The contemporary positivist idea of law conceives of it as a system of rules. It is best represented in H.L.A. Hart's The Concept of Law. There, Hart introduces the game analogy to illustrate how the system works. The illustration is offered to refute what Hart takes to be the most powerful argument of legal realism, the possibility of judicial abuse of the rules, and he labels the argument under attack 'scorer's discretion'. I shall try to demonstrate that the ramifications of the analogy go beyond the objectives Hart wished to achieve by using it. Proceeding in this way thus constitutes both an

exegesis and finally a criticism of Hart.

Hart introduces and argues against scorer's discretion in his study of the significance of the 'finality' of judicial decision-making. The argument is in response to the rule-skeptics who have argued that the finality of the finding of the highest court enables it to supercede rule-following constraints. According to the rule-skeptics, there is no point in explaining the functioning of a legal system in terms of rules since the decision of the final court cannot be overridden.

> This leads to another form of the denial that courts in deciding are ever bound by rules: 'The law (or the constitution) is what the courts say it is'.[9]

Hart responds to this claim by considering the relationship between the officials and the players in a game. The players of a game often follow a scoring rule without the need of officials. With the introduction of an 'official scorer' into the game, the scoring rule remains the same but the decisions of the scorer are final. What is introduced with the official scorer is a 'secondary' rule that provides a statement of the scoring rule; only the decisions of the official scorer count. Hart writes:

> The addition to the game of secondary rules providing for the institution of a scorer whose rulings are final, brings into the system a new kind of internal statement; for unlike the

> player's statements as to the score, the scorer's determinations are given, by the secondary rules, a status which renders them unchallengeable.[10]

Even though the decision of the official scorer is final, both the players and the official scorer are following the same rule. If the scorer did not apply the scoring rule and the scoring rule was only what the scorer said then this would be a different game. We might, as Hart does, call this new game 'scorer's discretion', but it is important to see that there can be both a scoring rule and an official scorer. The finality of the scorer's decision does not necessarily override the scoring rule because the rule empowering the official scorer "is a rule providing for the authority and finality of his appreciation of the scoring rule in particular cases."[11]

Hart is aware that the finality of judicial decision-making could threaten the rules of the system. Again using the game analogy, if the official scorer continually fails to apply the scoring rule properly then the game can be changed. However, while there is a limit to the number of times the official scorer can violate the scoring rule, the occasional violation does not change the game. Similarly, while the judiciary could theoretically change the rules of the legal system through the finality of its decisions, it does not follow that this is necessarily the case.

> But the standing possibility of such transformations does not show that the system now is what it would be if the transformation took place.[12]

According to Hart, the finality of decision making does not undermine his theory of rules although it does demonstrate the importance of the judiciary. Judges must follow the rules in the execution of their offices for those rules to exist.

> Any individual judge coming to his office, like any scorer coming to his, finds a rule, such as the rule that the enactments of the Queen in Parliament are law, established as a tradition and accepted as the standard for the conduct of that office...Such standards could not indeed continue to exist unless most of the judges most of the time adhered to them, for their existence at any given time consists simply in the acceptance and use of them as standards of correct adjudication.[13]

Further, even though rules cannot exist if they are ignored in judicial decision making, the individual judge does not create them.

> The adherence of the judge is required to maintain the standards, but the judge does not make them.[14]

Hart's recourse to the game analogy constitutes his attack on legal realism. By emphasizing the power of the courts to make decisions which violated legal standards,

the realists rejected the analysis of law in terms of the existence of these standards. Hart concedes that this is a theoretical possibility. However, while acknowledging the potential power of the courts, he simultaneously refuses to follow the realists in analyzing a legal system in terms of this power. Scorer's discretion is used to make the distinction.

What Hart intends to achieve with the game analogy is far more modest than the basic conceptual picture embodied in the analogy. This picture has been elegantly captured by Philip Soper in his "Metaphors and Models of Law: The Judge as Priest."[15] The remainder of the section shall outline Soper's analysis as it provides the foundation to situate the positivist conception of judicial choices at its deepest level.

The puzzle Soper begins with is how one can distinguish between Austin and Hart on judicial obligation.[16] The question he raises is that even though Austin reduces obligation to a capacity to coerce, it is still possible that an Austinian judge could have other reasons to conceive his judicial duties as obligatory. Soper asserts that although Austin did not address the problem of judicial obligation, the most obvious alternative open to him is to conceive the judge as a henchman of the sovereign.[17] Under such a scheme the judge would perceive himself as obligated to carry out his

duties not because of the threat of sanctions but because it is in his own best interest to perpetuate the system. Hence, he performs his tasks because he wishes to ensure the system continues. It is not the fear of personal reprisals that motivates his action but the desire to maintain his henchman privileges. Because of this wish, he has good reason to adhere to his judicial obligations. In other words, prudence generates obligation.

With the conceptual possibility that Austin can absorb judicial obligation into the coercive model, Soper wonders how Hart's analysis can be conceived to be an advance over Austin. It is here that Soper makes an interesting claim which invites us to see the importance of the game analogy for Hart's theory of law. According to Hart, the obligation to conform follows from the fact of acceptance. Even though the reasons for acceptance of the obligation to conform can range from the belief in the righteousness of the regime to blatant self-interest, the fact of acceptance must be distinguished from these reasons.

> Rules can be accepted for reasons that have nothing to do with the merits of the rules: demands for conformity can presumably be made simply because the rules are accepted (for whatever reasons) by other members of the group.[18]

Soper's charge encapsulates Hart's view of the basic

structure of law; as its most fundamental level law resembles a game. One can choose not to play, but so long as one remains a player, there is an obligation to adhere to the accepted rules.

> In the case of games, the 'merit' of particular rules of the game is irrelevant to the claim that one has an obligation to follow the rules when playing... One's obligation is to play by the accepted rules until they are changed by authorized procedures.[19]

The view is fundamental because without the formal property of acceptance, law cannot be sustained. To exist, law must exhibit self-contained structural elements which (at least some) participants both understand and use. Since the perseverance of the entity is explained in the same way that the ongoing existence of a game is explained, the importance of the game analogy far exceeds Hart's use of it to mount the scorer discretion argument. Not only does the game analogy serve to rebut the attempt to reduce law to the official decisions of judges, it also reflects Hart's most basic claim: Law functions much like the rules of the game both in its systemic character and in the way officials acquire their duties as officials.

Once the new perspective has been established, the introduction of a master rule which unifies the law into an identifiable system becomes plausible. Further, the obligation to play the law game can be reduced to an acceptance of this master rule. In this way, Hart seeks

both to isolate the identifiable features of law and explain its normative force. By using the game analogy he is able to do so in a way that avoids Kelsen's commitment to a postulated norm. So long as officials participate as players, they are committed (i.e., have an obligation) to the rules by which the game is played. For the law this commitment is describable in terms of a manifested acceptance of the rule of recognition.

> This view of Hart's theory explains why a judge may have many reasons for "accepting" the rule of recognition... It also explains why the judge who fails to conform, whatever his reasons for accepting a rule of recognition, will face criticism of an arguably different sort from that which the judge as henchman faces. He must either follow the rules or get out of the game, resign from the club. If Austin's theory is the "gunman situation writ large," Hart's as one commentator has observed, is "Monopoly writ large."[20]

Now that Hart's basic idea of law has been introduced, it is possible to connect this commitment to the need of the judiciary to sometimes make choices. The link can be briefly stated through Hart's view of the nature of legal rules.

The need of the judiciary to sometimes make choices follows from the fact that the law game is comprised of a set of open-textured legal rules.[21] On Hart's view of open-texture, legal argument in any legal system begins

with the meaning of general terms. These meanings are not clear because the initial formulation of rules cannot address all the situations in which these rules will be used and hence we must delineate our aims as we apply the rule to unanticipated cases. Thus, the process of legal reasoning will sometimes demand the making of choices as to aims and thus will result in choices as to meanings. Because he must inevitably perform such a task, a judge cannot always make judgements as to right answers; for, in some cases, there will simply not be one uniquely correct application of the legal rule he is to apply.

Admittedly, Hart's remarks on the nature of judicial decision making are at best a brief foray into the topic. Fortunately, Neil MacCormick has taken up the cudgel on Hart's behalf and the next section shall continue this discussion by turning to MacCormick's work.

Section 3 - Positivism and Rationality

The most powerful analysis of legal reasoning which tries to remain faithful to Hart's perspective is found in the work of Neil MacCormick, principally his Legal Reasoning and Legal Theory. In this section I try to show how MacCormick modifies the game analogy in order to construct a theory of legal reasoning which can accommodate the techniques of common law argument and

thereby provide a plausible portrayal of common law reasoning. Correlatively, I also try to show why this picture of law is antagonistic to the right answer thesis. Argument to support the claim that positivists are naturally and necessarily led to cite their own theory of law as support for their rejection of the right answer thesis will be reserved for the next section.

Given his endorsement of the idea of law as a system of rules, MacCormick's first objective is to establish the importance of the use of these rules in legal argument. He painstakingly shows the way deductive inferences serve as a justification for a decision.[22] Where there is no dispute over the application of a rule, the task of the court is to make an evidentiary determination as to whether the facts of the case fall under the rule. This process can be captured by the material implication of propositional logic because rules can be translated to the following: given certain facts/circumstances, certain legal consequences follow:

> It has often been argued, and there is no reason to doubt, that all legal rules however formulated in statutes or in precedents can without alteration be recast in the form that if certain facts and circumstances obtain, a certain legal consequence is to follow.[23]

Using this process of justification, the court makes the determination whether the case at bar is an instance of

facts/circumstances P. If it is, and assuming the rule if P then Q, propositional logic (specifically modus ponens) justifies the inference that legal consequences Q follow.

A powerful addendum to this analysis is MacCormick's point that the burden of proof in legal proceedings only makes sense because of the deductive process of reasoning. It is because of the framework, if P then Q, that the respective litigants can establish facts to support their case. Since much legal argument and proceedings are wrapped up in fact determination, this is a compelling argument in favour of the use of modus ponens to justify decisions. Without the deductive framework, a major part of legal activity cannot be explained. The possibility of constructing a legal proof is based on the existence of a rule because the point of the proof is to support or refute the application of the rule.

Once he has made a case for legal rules, MacCormick turns to the question of how a rule should be applied in cases where its application is unclear. MacCormick labels this the problem of interpretation and he devotes several chapters to examining and accounting for the techniques of legal argument used to develop the reasons to justify decisions in these types of cases. He argues that the process of argument indigenous to legal reasoning occurs when we cannot translate the rule to an 'if P then Q' formula without first establishing how to apply the rule

in the case at hand.

What is innovative in MacCormick's work is that legal reasoning outside the deductive framework must be explained in terms of a commitment to rationality. The ramifications of this view are most revealed in MacCormick's account of formal justice. It is an argument which deviates significantly from Hart's analysis. For my purposes, the deviation reveals two things: (1) it reveals the inadequacies in the use of the game analogy to explain legal reasoning, and (2) it exposes the positivist conception of the way law functions as a rational activity.

Hart's explanation of formal justice is closely connected to his scorer's discretion argument and hence is a direct result of the game analogy. I noted that Hart argued that law was a special kind of game where the officials had to enforce the rules to preserve the game. The secondary rules making them officials give them the power to alter the game but the game will only retain the structural features analogous to a legal system if the officials do in fact enforce the rules. This requirement is intimately connected to the maintenance of formal justice; for, if the officials properly apply the rules they will be satisfying the condition of formal justice that like cases be treated alike. Correlatively, should the system degenerate into a variant of scorer's

discretion, this violation of the rules is also a violation of the principle of formal justice that like cases be treated alike. Hence, for Hart, the commitment to a system of rules is also necessarily a commitment to the principles of formal justice. This hints at the claim that the rationality exhibited in maintaining formal justice is derivable from the creation and maintenance of a system of rules.

> The connection between this aspect of justice and the very notion of proceeding by a rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.[24]

A recent commentator on Hart has strenuously objected to this view of formal justice. David Lyons in Ethics and the Rule of Law has argued that the limited notion of following a rule presents a picture which is far too emaciated to capture any sense of justice, even a modest procedural one.[25] Essentially, Lyons rejects Hart's attempt to distinguish between procedural and substantive justice and he offers two arguments to support it.[26] The first points out that an official coerced into the system does not violate formal justice in refusing to apply an unjust rule because there is no substantive justice legitimizing his obligation to perform the task. The

second, more subtle, argument suggests that even if an official is committed to the system, principles of substantive justice restrict the ambit of the rules the official must enforce. Heinous rules do not fall within the requirements of formal justice because these rules supercede the constraints of substantive justice.

> In such cases, it is not that the assumed obligation is overridden, but rather that it cannot be understood to extend so far - to require cooperation in deliberate, grossly immoral acts.[27]

I note Lyons' objection to Hart's argument because this is the theme that likely provides the background for MacCormick's departure from Hart. Hart's argument is dominated by the game analogy. Law is a certain type of game in which rule following is necessary in order to preserve the basic structure of the game. Thus, the principle derived from formal justice is ultimately argued for from the game analogy. MacCormick recognizes that the explanation of formal justice must be more elaborate than this. MacCormick finds it in a commitment to rationality. From this perspective, a far richer account of the constraints of legal reasoning can be derived. Further, the principle of formal justice, i.e., what it means to follow a rule, does not constitute the basis of the account but is only a product of the more fundamental commitment to rationality.

> I follow Thomas Reid in regarding the choice to observe formal justice in such matters as a choice between the rational and the arbitrary in the conduct of human affairs... To somebody who disputes the principle with me, I can indeed resort only to a Humean argument: our society is either organized according to the value of rationality or it is not.[28]

An excellent example of the need for a more complete account of formal justice than provided by the game analogy is aptly illustrated in the technique of consistency. If the preservation of the integrity of the rules provided an adequate basis of rationality, then, rules could be consistent but not coherent. MacCormick persuasively demonstrates the unacceptability of this result with the point that a rule restricting yellow motor vehicles to a maximum of 20 mph is consistent with a rule which restricted blue motor vehicles to a maximum of 70 mph. Under the constraints of the game analogy, any valid rules (i.e., satisfying the criteria which specify rules of the game) must only satisfy the requirement of consistency. However, since the ordering of social affairs entailed in a legal system goes beyond this requirement, the formal constraints generated by the game analogy are not sufficient to represent the accepted constraints in the formulation of legal rules. It is because of our commitment to rationality that we have a broader view of how the rules must be complementary.

Besides being consistent, the rules must also reflect some coherent expression of values. It is not enough that the speeding rule for yellow cars is consistent with the same rule for blue cars, there must be an integration of these rules within a set of values.

> The 'validity thesis' presents law as comprising or at least including a set of valid rules for the conduct of affairs: such rules must satisfy the requirement of consistency... To the extent however that the rules are, or treated as being, instances of more general principles the system acquires a degree of coherence.[29]

MacCormick labels the decision to be rational as the root of the 'underpinning reasons' lurking behind the deductive framework. It lurks in two ways, (1) as the commitment which animates the framework, and (2) as the source of the techniques of argument which must be employed when the deductive framework cannot do the job. Of course, because MacCormick does not accept the hegemony in legal reasoning of the mode of argument which departs from the deductive framework, he envisages the explicit use of those underpinning reasons as a rare occurrence.[30]

The techniques of argument used to sustain the underpinning reasons can be readily derived from MacCormick's richer view of law and I will briefly sketch how this is done. He does wish to preserve Hart's idea of a core set of valid rules but he envisages a more complex account of

the operation of law. Because of his deviation from the Hartian view of the core, the consequences of MacCormick's approach are more subtle. Further, in the next section it will be argued that even though he goes beyond the game analogy, MacCormick's refinements of Hart ultimately cement the positivist rejection of the right answer thesis.

As the distinction between coherence and consistency demonstrates, MacCormick believes that the preservation of law is not reducible to a formal statement of what is required to preserve the integrity of the rules. In this regard, MacCormick straddles the middle ground between the account of legitimacy I will ascribe to Fuller in chapter five and the account of legitimacy based on scorer's discretion (the legitimacy of law as derived from the fact of acceptance). While MacCormick would concur with Hart that if a series of decisions violated the core meaning of the rules we would begin to play scorer's discretion, he would also say that our decision to be rational is the real basis for refusing to allow the alteration of the game. With this basis, MacCormick is able to derive the tools of legal reasoning. He does so by arguing that rationality forces us to make the rules cohere within a set of complementary values. To do so we must formulate principles which 'rationalize' these rules in groupings so that it is possible to make them cohere. Finally, the

technique of arguing by analogy enables us to find similarities in diverse situations whereby we bring them under some general principles and rules.

> Working out the principles of a legal system to which one is committed involves an attempt to give it coherence in terms of a set of general norms which express justifying and explanatory values of the system.[31]

While MacCormick uses his approach to criticize Dworkin's rigid distinction between rules and principles,[32] there is another point which is germane to my purposes. Although MacCormick bases the techniques of reasoning on rationality, he circumscribes limits to rationality by showing the role of consequentialist arguments in legal reasoning. In delineating and arguing for these limits he makes his case for the judicial need to sometimes make choices.

The basic point which MacCormick appeals to in citing consequentialist arguments is that these provide empirical evidence to show that legal rules and principles do not necessarily yield unique results in all cases in which they must be applied. Even when we employ the device of coherence, a creative reading of precedent and arguments from analogy, neither litigant can, in all cases, justifiably claim an exclusive right to win.[33] When the decision-making process reaches this stage, the judge is forced to evaluate the potential consequences of competing

rulings and choose the most preferable one.

This pattern of testing the consequences of potential decisions by generalizing hypothetical cases, MacCormick takes to be the essence of the consequential argument. Of course, the choice of one of the preferences in term of its consequences must also be justified. An example MacCormick uses to establish this is the case where a plea for divorce on the grounds of adultery was made even though the wife had been artificially inseminated. The court rejected the divorce plea on the ground that a finding of adultery could produce the conceptual consequence of 'constructive necrophilia' if a donor was dead at the time of insemination.[34] MacCormick takes it to be significant that the decision could not be derived from the existing body of law and had to be resolved by a consequentialist argument which, though argued for, was ultimately a choice. MacCormick claims that this method of argument is quite common.[35]

The conclusion MacCormick wishes to draw from the use of consequentialist arguments is that the attempt to maintain a rational decision-making process takes us beyond the confines of what the law requires - choices are sometimes necessary. Just as we can only rationalize the existing rules through principles which express our values, so too we can only make our values cohere by making decisions which expand and refine these values.

This requires making choices whose consequences cohere with, but are not derived from, existing values. The limitations on the rationality of the process is revealed in the fact that we can only build on the body of law which expresses our values by making new value judgements. We arrive at these new judgements within a rational framework in that we test the consequences of potential value judgements by their coherence with existing values. However, within these constraints the process of justification must stop. Our ability to conceive of consequences exceeds our ability to select one of the consequences as the justified correct one.

The argument to this point of the section has sought to show that MacCormick's account of the commitment to be rational in a legal system follows from his attempt to modify the game analogy. His criticism of proponents of the right answer thesis as advocating an ultra-rationalism is a direct result of this picture of the relationship between law and rationality. Thus one can reject MacCormick's criticism by offering an alternate account of the role of rationality in law. Such a rebuttal will be offered in the chapter five, but before doing so, I will explicate MacCormick's attack on Ronald Dworkin, the most ardent advocate of the right answer thesis. I shall try to describe the link between the attack and MacCormick's view of law.[36]

To make his case, MacCormick introduces the distinction between practical and theoretical disagreements. He makes the distinction to refute Dworkin's claim that disagreements in law (i.e., the existence of dissenting opinions) constitute proof that a right answer exists even if we have no way to be certain of what exactly the right answer is. This argument asserts that the very fact that people disagree is evidence that their disagreement is over what is the right answer. MacCormick shows that disagreements can be practical as well as speculative and that practical disagreements do not presume that a right answer exists. He then argues that legal disagreements are typically practical, hence, they do not constitute proof that a right answer exists.

MacCormick illustrates the distinction with some illuminating examples.[37] Suppose ~~two people~~ disagree over the distance in miles between two cities. For this to count as a theoretical disagreement there must be a shared understanding as to the appropriate standards to be applied to the dispute. If this agreement exists, then, the existence of a right answer is possible even if it is difficult. Where there is no agreement as to the appropriate standard to be applied, it cannot be characterized as a theoretical dispute. In the case of the dispute over the number of miles between two cities, it is only possible to see it as a theoretical dispute if

the debaters share the same standard as to what counts as a mile. If one uses the normal mile measurement whereas the other counts miles in terms of the number of times he sneezed on a train travelling between the two cities there is no ground for a theoretical dispute.

> Real disagreements on such a matter postulates common standards which can in principle be applied so as to achieve a correct result, however difficult it is to carry out the measuring process accurately.[38]

To demonstrate another sense of disagreement, MacCormick considers another example. Suppose a married couple decide to buy a painting, but they disagree as to what genre to purchase. The husband prefers impressionism and the wife pre-Raphelite. This disagreement turns on the appropriate standard to use and not over how to apply an agreed upon standard. To resolve the dispute, the couple cannot appeal to the correct standard as they disagree over what this is. Further, neither believes the other's preferred standard is mistaken. In such a case, MacCormick says the dispute is resolved either by not making a purchase or by a practical decision as to what they can both live with. This resolution does not arbitrate between the competing standards, but only tries to minimize the discomfort the spouses might feel as to the eventual purchase.

MacCormick suggests that many of the disagreements in

law are of this nature. Further, it is even more so than a dispute over the purchase of a painting because in law a decision is always required. Unlike the couple who can choose to dabble in art collecting, judges must decide and therefore cannot avoid practical disputes where there is no agreement as to the appropriate standard to apply.[39] For MacCormick, when judges face this dilemma, they are no longer applying the law to reach a decision but they are making a choice as to how social life should be organized. In making this choice, the adoption of the relevant legal standard is justified not by claiming that it can be theoretically derived from the law but by appealing to the decision to organize social life in a certain way.

After he has rejected the existence of right answers as substantiated by the fact of disagreements, MacCormick makes his most serious charge. He argues that it is wrong to presume that an objectively valid moral order can be established by reason making possible a theoretical resolution of all disputes. He labels this the ultra-rationalist fallacy.

> The ultra-rationalist fallacy lies in the assumption that there is some way of establishing by reasoning and reflection an objectively valid moral or legal order.[40]

MacCormick's rejection of the right answer thesis follows from his view of law. If one begins with a picture

of the basic structure of law as a game, the analogue already constitutes a picture of how the law organizes social life. Just as the rules of the game can be adapted to meet changing circumstances without violating the basic integrity of the game, so too, judicial decision-makers have a great deal of latitude in how they adapt legal standards to social life without undermining the integrity of the game. If a legal system functions like a game, then, the necessary commitment to rationality that MacCormick has argued for is met if the judiciary preserves the basic legal framework in the ongoing overlay of legal concepts on social life.

To be able to show that adherents of the right answer thesis are not ultra-rationalists, one must be able to give an alternate account of the relationship between judicial decision making and the use and nature of legal standards. I shall do so in the last section of chapter five where I connect the common law judicial duty to search for right answers to a description of the purposes the common law judicial role is designed to achieve. Such a description will neutralize MacCormick's charge that proponents of the right answer thesis are <u>necessarily</u> committed to ultra-rationalism by advocating the idea of 'institutional right answers'.

Section 4 - Judicial Choices

Hart and MacCormick represent the view that law is a system of rules. For Hart, the obligation of the judge to play the law game rather than 'scorer's discretion' commences with his agreement to participate and continues so long as he is a player. MacCormick adds to this portrayal of judicial duty the further requirement that legal players also must be committed to proceed rationally. The acceptance of such a constraint establishes the techniques of legal argument; thus, in the law game, the agreement to be rational is coextensive with the agreement to play.

The most important consequence for Hart and MacCormick's construal of judicial activity is that in both cases an explicit appeal is made as to the judge's awareness of the proper performance of his role. For Hart, this awareness is crystalized in the judge taking up the internal point of view to the rule of recognition; the judge's endorsement of the rule of recognition via the internal point of view signals his agreement to play the law game. MacCormick's acknowledgement of the need to extend the constraints on judges in order to explain legal reasoning leads him to insist that judicial duty is far more complex than merely accepting a rule of recognition. Taking up the internal point of view also involves an endorsement of values, the most fundamental of which is to

proceed rationally.

> What must be essential to the 'internal aspect' of the rule of recognition is some conscious commitment to pursuing the political values which are perceived as underpinning it.[41]

Dworkin long ago insisted that legal positivists will "come naturally" to the position that judges must sometimes make choices.[42] Because positivists maintain that the existence of law (it exists like a game) can be separated from the legal decision-making process (the game can be manipulated in different ways and still exist) this destination is consistent with their view of law. But as a negative reaction to the right answer thesis, the journey is not only acceptable but inevitable. Given their belief that law is a system of rules and that these rules are open-textured, legal positivists will be unanimous in asserting that the doctrine of frustration undermines the right answer thesis. For legal positivist, because the legal rules are open-textured, they will not always have a uniquely correct application and judges will sometimes have to make choices as to the meaning of these rules in order to apply them.

Thus, legal positivists will be united in agreeing that the frustration of the judicial search for right answers is not only theoretically possible but conceptually necessary. They will all agree on this

position because the basic tenets of legal positivism as to the nature of law constitutes their empirical verification for the claim that a judicial duty to search for right answers would in fact be frustrated. Consequently, whatever else legal positivists would agree on, they could all endorse this refutation of the right answer thesis.

One is thus left to reply to the positivist position by challenging their picture of law. In chapter five the positivist picture of law will be challenged through the development of a theory of the common law. It will be argued that the common law is a species of the genus law and legal positivism must be wrong as a theory of law because it cannot accommodate this instance of the genus. In the next chapter I shall challenge the internal consistency of legal positivism. There I shall argue that MacCormick's work reveals the fundamental tension in legal positivism. The more the theory struggles to develop modifications so that it can adequately describe common law reasoning, the more the theory finds itself abandoning its basic tenets.

IV

A CRITIQUE OF LEGAL POSITIVISM

In section one of this chapter an internal criticism of positivism will be developed through a critique of MacCormick's attempt to preserve, in an explanation of law, the idea of a rule of recognition. From that point, the argument will move to a more global level with the aid of Philip Soper's splendid, recent book, A Theory of Law. Section two will use it to conduct a criticism of modern positivism. These criticisms constitute my attempt to rebut the positivist's use of the doctrine of frustration developed in the last chapter by arguing against his theory of law.

In the final section, I shall briefly explicate Soper's radically innovative account as to the function of the judiciary within any legal system. Soper argues that the judicial role within any legal system is defined by its most basic purpose: the judiciary legitimizes the legal enterprise as an obligating endeavour through their good faith attempt to do justice. The ongoing judicial task is to publicly and zealously pursue this purpose; otherwise, the citizenry will not perceive law to be operative within the regime the judiciary serves. These arguments will lay the groundwork for my derivation in the

next chapter of the common law judicial duty to search for right answers.

Section 1 - The Rule of Recognition

Chapter three traced the development from Hart to MacCormick whereby MacCormick lessened the emphasis on the game analogy in acknowledging that legal reasoning entails a commitment to rationality. Nevertheless, MacCormick still insists that the core idea of law can be separated from a commitment to rationality. In this regard, MacCormick's positivism remains traditional. Much is at stake with his insistence on a separation of law and proceeding rationally because the view of common law I shall develop in the next chapter envisages the very idea of it to be a unique expression of rationality.

This section makes an internal criticism of MacCormick's attempt to overcome difficulties in the positivist position. My critique focuses on MacCormick's use of Hart's idea of a rule of recognition to delineate judicial duty and the validity thesis. The position to be criticized is connected to the game analogy because it is the acceptance and use of a rule of recognition that creates and sustains the legal game. The existence of legal rules is explained in terms of their validity and this is determined by whether they satisfy criteria

stipulated by the rule of recognition. Hence, law can be distinguished from other social phenomena by citing the rule of recognition. Evidence for this rule is found through showing how legal validity can be elucidated in terms of the use of a rule of recognition.

It will be argued that the fundamental values promoted by law cannot be separated from the actual collective decision made by officials to perpetuate a legal order. Thus, the resolve by the officials to maintain the legal system follows from the commitment to law as a rational process. Once MacCormick accepts the need to invoke a judicial commitment to rationality to explain legal reasoning, the explanatory power of the rule of recognition is lost.

The conceptual key for MacCormick's utilization of the rule of recognition is in his adoption of Hart's distinction between the fact of acceptance of the rule of recognition and the reasons for that acceptance. MacCormick's initial statement of the distinction is found in an essay entitled "Legal Obligation and the Imperative Fallacy"[1] which precedes his book Legal Reasoning and Legal Theory. There MacCormick acknowledges a number of different grounds for accepting a rule, including utility, imitation of associates, the moral authority of the proclaimer of the rule and prudential considerations (being worse off if one violates the rule). However, like

Hart, MacCormick insists that the very fact of collective acceptance, whatever the reason for it, can be isolated as a legitimate justification for demanding that the rule be followed.

From this perspective, MacCormick attempts to explain the values which are necessary to generate law through the existence of a rule of recognition which organizes and creates law. The values are accounted for by claiming that they accompany the endorsement of the rule of recognition, i.e., taking up the internal point of view. One can 'unpack' the endorsement by elucidating the values which underpin a rule of recognition. According to MacCormick the reasons one would give for maintaining these values constitute the substance of the internal point of view. Of course, he acknowledges that the attempt to reconcile the role of values and the argument for a formal structure takes him beyond what Hart said about the relationship between the internal point of view and the rule of recognition.

> What must be essential to the 'internal' aspects of the rule of recognition is some conscious commitment to pursuing the political values which are perceived as under-pinning it, and to sustain in concrete form the political principles deemed inherent in the constituted order of the society in question. Whether or not that is correct in itself, it is not inconsistent with Hart's thesis, though it involves taking it further than anything said by Hart himself would authorize.[2]

MacCormick's acknowledgement that the preservation of law is associated with the pursuit of fundamental values puts him in an awkward position. This is because he also wants to preserve the formal distinction between the justification of a demand to adhere to the rule of recognition based on the fact of acceptance of this rule and the demand for conforming to the rule of recognition based on the values the rule promotes. Yet, he admits that the rule of recognition is a product of the conscious commitment to sustain certain values. Why, then, cite the fact of acceptance of the rule as a justification? If the rule serves as a vehicle to sustain the values, then, the most fundamental justification of the rule turns on a collective endorsement of these values. The formal distinction between the fact of acceptance and the reasons for it thus collapses if the possibility of the former is predicated upon the existence of the latter. Thus, even if something like a rule of recognition is employed to create a legal system, we seriously misrepresent law if we insist that it is most fundamentally the product of the collective acceptance of a rule of recognition. The promotion of specific values constitutes an essential aim of the legal order and this will find expression in the justification of any particular constituent of that order.

MacCormick's zeal to defend the rule of recognition is connected to his picture of law - the game analogy. I

explicated this picture in chapter three. Following Soper, I argued that legal positivists maintained, as their most basic theoretical commitment, that the existence of the law game is explained in terms of the collective agreement to play. So long as one opts into the game, one has an obligation to play it. This description of law in terms of a game is expressed in the capability of maintaining the distinction between the fact and reasons for acceptance of the rule of recognition. If law is like a game then one's obligation to play can be explained by claiming that one opts into the agreed upon way of doing things merely by the fact of one's acceptance of the rule of recognition. Rejecting the distinction between the fact of acceptance of the rule of recognition and the reasons for that acceptance because it cannot explain the role of values in law thus undermines the game analogy. Therefore, MacCormick's excursion into the realm of values could be fatal to legal positivism. Moreover, his acknowledgement that such an excursion is necessary hints at the sterility of a purely formal account of law that conceives of it as a game which is created and sustained through the acceptance of a rule of recognition.

Another way that MacCormick's legal positivism clashes with other aspects of his work is found in his attempt to establish a conceptual connection between judicial duty and the rule of recognition.[3] The uniqueness

of the judge's role makes it possible for him to violate the rule of recognition in the course of reaching his decision. Violation is conceptually possible because the judge can fail to decide according to the law stipulated by the rule of recognition. Consequently, the acceptance by a judge of a rule of recognition as duty imposing is necessarily linked to the duty to use the rule of recognition in a decision. It is in this way that proponents of the rule of recognition can incorporate it into an account of judicial duty.

An objection can be made against this description of judicial duty that anticipates an argument I will make against 'scorer's discretion' in the next chapter. There I shall argue that adjudication cannot be divorced from proceeding rationally and that this is sufficient to explain the refusal to violate legal standards. Since MacCormick also argues that the animation of a legal system is only possible given a commitment to rationality, he need not invoke the rule of recognition which judges accept as a rule imposing a duty to explain adherence to law in judicial decisions. Apart from fidelity to previous theoretical commitments, no use is served by making such a claim.

Section 2 - Will vs. Obligation

In the second section of chapter two, Philip Soper's original work in A Theory of Law was summarized. He argues that law is best understood as a particular way of doing things and that the legal enterprise generates a duty to obey the law. Hence, one can define the law in terms of obligation because the duty to obey is associated with the very existence of law. In adopting this approach, Soper has the advantage of exploiting one of the most fundamental features of legal institutions: most of us concede to them a moral legitimacy. As such, Soper's bold stroke is to explain law in terms of this perennial sense of moral legitimacy.

> The virtue of the moral approach to legal theory is that it accepts the persistent association of obligation and law as elements of a legal system that must be explained.[4]

In the course of advancing his position, Soper attacks the view of law based on acts of will. He sees this as the hallmark of positivism from Austin through to Hart. Since much in Soper's analysis is compatible with the theory of common law I develop in the following chapter, these next two sections utilize Soper's argument to deepen an understanding of the philosophical commitments entailed in the forthcoming argument. Additional objections to positivism can also be made from this

perspective. Once these investigations have been done, common law adjudication can be situated within Soper's normative view of law. This section will summarize Soper's general attack on positivism as well as provide a restatement of his position. The next section will link Soper's comments on the judiciary to his theory of law.

The basic argument that Soper makes against positivism is that it is incapable of distinguishing between a coercive system and a legal system. He develops this line of attack on two fronts. First, he interprets Austin as a philosopher who provides a definition of law, but one he finds inadequate. Second, he scrutinizes Hart's attempt to conduct a purely descriptive approach which he finds to be virtually no improvement on Austin. From this line of attack Soper preserves the definitional approach of Austin and rejects that of Hart. Soper argues that Austin was right to insist on a definition rather than a description of law but erred in the definition he adopted.

Soper describes a normative system as one where everyone's compliance is based on more than a threat of sanctions. To this extent he agrees with Hart's insistence in The Concept of Law that there are essential features in a legal system that cannot be reduced to the idea of a sanction. Soper writes:

> I shall limit the term 'norm' and the idea of a normative system to include only directives and systems that seek

> compliance primarily for reasons other than the fear of threatened sanctions.[5]

Although Soper's starting point agrees with Hart, it will shortly be noted that he charges Hart with a failure to distinguish between a coercive system and a legal system.

The focal point of the analysis is Austin's insistence that law is not a system of obligation (as Soper has defined it) but is purely coercive. Austin is committed to this claim because his command model reduces law to the idea of orders that are backed by threats. The sovereign issues these orders. What is unique to law is the organized way in which sanctions can be perpetrated on those who fail to obey; thus, the creation of the idea of law as a purely coercive system. Given this view of law, there should be very little difference, save in efficiency and scope, between the activities of the mugger and the tax collector. However, as Soper argues, there is a vast difference between the two that is missed if we fixate on the idea of force alone. Moral outrage is the likely product of a confrontation with a mugger whereas the tax collector is accorded respect. This important difference is not only ignored but cannot be accommodated on the command model.

> The response to the gunman, I suggested, is moral outrage or indignation. This is a natural way to describe the intuitive reaction to

> directives that rely solely or primarily on the fear of threatened sanctions to induce compliance. Systems that employ such directives I shall call coercive. The response to the tax collector, in contrast, I described as respect, which suggests that compliance is sought for reasons that are not necessarily connected to the threatened sanction.[6]

Soper conceives Austin's theory to be an attempt to define law. This approach does not commit Austin to explaining all the features of a legal system. Rather, the burden on Austin is to defend his claim that coercion is the key defining feature of a legal system. A deep disquiet with Austin's point of view may well be revealed in Soper's contrast between the mugger and the tax collector. Nonetheless, Austin's theory does not fail solely because it is unable to capture this. Those who object to Austin's account must also argue against his definition. They cannot, and this is the crux of Hart's failure to surpass Austin, be content to cite empirical evidence to substantiate the claim that Austin's definition is false. In short, the burden of proof is on those who wish to reject Austin's definition and this is only discharged if they can show why the falsifying empirical evidence is important.

> The force of Austin's account derives from viewing his theory as an attempt at definition - at discovering what is meant by a legal system. Definition invites one to move beyond the mere

> description of an object to selecting and defending certain features as more important than others in explaining how a term is used.[7]

Once Soper has located the conceptual battleground between Hart and Austin, he is able to fix the issue on which their differences turn. Austin is concerned with defining a special form of social control that is systemic and not just the product of convergent behaviour. This special form is unified and sustained by force. It is this claim which constitutes the basis for his definitional classification.

> Force or coercion is the bond claimed to characterize the legal order, and the widespread prudential interest in avoiding organized sanctions is the interest that is invoked in defense of that claim. We use the term 'legal' to mark off those social systems that back directives with effective threats from those that do not.[8]

Hart, to reject this definition of law, must give reasons to demonstrate why it involves an inadequate classificatory scheme. However, as Soper notes, Hart's own project abandons the definitional approach for a purely descriptive one.[9] Consequently, Hart engages Austin only indirectly.

The turn taken by Hart and other contemporary positivists has already been examined from another perspective in the discussion of the game analogy.

Basically, the objection to Austin is that the exercise of power among the officials of a legal system involves their voluntary allegiance to it and this constitutes a minimum normative feature that the command model cannot account for. If we are mindful of the definitional approach, the burden falls to Hart to support this claim and it is Soper's contention that he cannot do so.

> He must explain why it might be important to reflect in a classification scheme the idea of voluntary allegiance, at least among officials, along with the idea of coercion in calling a social order legal. What general human purpose or interest would explain including respect for accepted social standards without regard to their coercive aspect? The only answer Hart offers to this question is the suggestion that the puzzled or ignorant person might want to conform to society's expectations, regardless of accompanying sanctions.[10]

Soper makes two points to argue that Hart cannot sustain the objection against Austin. First, he tries to show the ultra-minimal nature of the kind of normativity Hart argues for. Secondly, he tries to demonstrate that Austin can easily accommodate it. Soper states that in any coercive system there will certainly be voluntary allegiance among those in power. Although the motive for this allegiance may not extend beyond pure self-interest, it is entirely consistent with Austin to root the fact of allegiance in an act of will. To this end it is a natural

extension of the command model which is a special act of will (namely, order backed by threats). Thus, if all that voluntary allegiance requires is that the officials agree to collaborate, Austin's definition of law emerges unscathed.

> Coercive regimes can and do exist with no voluntary allegiance, beyond what is implied in the idea that those in charge voluntarily accept their role.[11]

Since any de facto exercise of power will entail voluntary allegiance at least by some of those exercising it, the account of the normativity of law must go beyond the fact of acceptance by the officials. As we have already seen in the analysis of the game analogy, Hart does not go beyond this fact of acceptance in his account of normative attitude. It is for this reason that his effort constitutes little improvement over Austin.

> This claim that law is coercive is compatible with the existence of a normative attitude among some people; indeed, even the idea of an order backed by a threat entails at least one normative (uncoerced) attitude on the part of the person or persons doing the ordering.[12]

After he has conflated Hart into Austin, Soper also considers the work of both Kelsen and Raz. In both cases he also finds that their insistence on a normative dimension in the law is reducible to an arbitrary adjunct

on Austin's model. None of these contemporary positivist theorists can escape the charge that they utilize the normativity of law, and that is because all of them ultimately rest their case for this feature on the appeal to the real or purported allegiance of the officials. On this basis, Soper draws two conclusions. One, positivists are right to insist on preserving the idea that law is a normative system. Second, (this is quite original) the normative dimension of law can only be captured through a radically new definitional approach to law.

> To advance beyond the coercive model two requirements must be met: first, one must describe the normative attitude that is essential to law in a way that distinguishes it from what is implicit in any exercise of de facto power; and second, one must defend as a matter of definition the claim that this particular attitude is an essential part of what is meant by a legal system.[13]

To launch his fresh start of explaining law in terms of an obligation to obey it, Soper insists that his approach is the only way clearly and satisfactorily to distinguish between coercive regimes and legal systems. It is clear because the existence of sanctions in both types of systems blends the two together unless a normative, definitional approach is taken. It is satisfactory because our collective sense that there is a vast difference between a group of efficient gangsters and

a legal order can be most aptly expressed in terms of the values associated with the existence of a legal system.

> If claims of legal obligation do not share the same root meaning as claims of moral obligation, then they probably are only reports of legal validity or predictions of a chance of harm.[14]

To construct the definition Soper moves beyond the focus of the officials of a system to the citizens of a system. It is an interesting and innovative shift and once it has been summarized, the next section will try to show that the approach provides credence to the argument that some judicial duties must be accounted for in terms of the purposes that legal institutions are designed to serve. The question Soper poses, one he sees as also a question of political theory, is whether one can find a rational basis for the citizen's duty to obey the law.

> The quest for grounding political obligation begins, in short, where this picture of law ends: with citizens who do not share the official normative attitude towards the rules imposed on them but who nevertheless can be said to have a rational basis for obligation.[15]

The point of departure for Soper's inquiry is a claim made by Hart but not incorporated into the foundation of his argument. This is the fact that rules of obligation reflect highly prized features of social life. The

officials and the citizenry share an appreciation that the features of social life reified in the rules are worth preserving. This constitutes an essential bond between the two groups and provides the bridge between the duty to obey of the citizens and the duty of the officials (the duty of the latter will be pursued later).

> This stronger view of obligation, which requires group reference to prized features of social life, gives a very different picture of the relationship between rulers and ruled by suggesting that officials hold out the system they administer as one that deserves the allegiance of dissenters and supporters alike.[16]

Soper uses the idea of prized features in an original way. Sanctions which accompany them are only incidental, i.e., not an essential feature of the obligation generated by these rules, because the rules express certain social purposes. One gives an account of why the rules are prized and hence obligatory by describing the purposes they serve and why these purposes are valuable.

> A purpose theory, which requires the statement that a group believes a rule to be obligatory to entail the statement that the group is prepared to show that the rule serves some purpose in terms of defensible group interests.[17]

From this perspective, Soper introduces a conception of law as distinguished from a coercive system, as based

on the obligation of a citizen to obey it. Law is a system in which the interests of all are served by a good faith belief in justice by the officials. The citizenry both understand and accept the attempt by the officials, via their legal activity, to maintain this good faith. Law is thus a highly prized value because of the way in which it seeks to serve the common good. The social consensus as to an obligation to obey the law is thus derived from our comprehension of its purpose. Further, even if law, on occasion, fails to promote the common good, it is the belief in its attempt to do so that is essential.

> One interprets it instead to require only that legal directives aim at serving the common good... Legal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all. It is this claim of justice, rather than justice in fact, that one links conceptually with the idea of law.[18]

The next section will elaborate on this idea of law. To this point, it can be argued is that it is impossible to distinguish between law and coercive systems unless a normative, definitional approach can be successfully defended. Perhaps the most dramatic modern example of the intuitive appeal of the perspective is found in Soltzhenitsyn's <u>The Gulag Archipelago</u> volumes I-II.[19] An eloquent chronicle of twentieth century barbarism, it is resounding evidence of Soper's insistence that the very

idea of law entails a good faith belief in justice. As we learn in the Gulag, most of the monstrosities are perpetrated in the dead of night. Further, the authorities went to ludicrous ends to display a veneer of propriety; it was not enough just to shoot the victims, confessions had to be extracted and crimes proven.

Section 3 - The Judiciary and the Giving of Reasons

At the outset of his argument, Soper readily concedes that it is possible to construe the law in more ways than one.[20] Thus, part of the task of argument is to make a case for the proper subject matter to be explained. If one can show, 1) that certain phenomena must be satisfactorily accounted for, and 2) one theory is capable of doing so whereas another is not, then this is one way to arbitrate among competing explanations of law. The present study of duty-imposed decision making constitutes an enthusiastic endorsement of the point. It invites us to look at the legal conceptual terrain through this window; a recipe for judicial decision making would appear to be essential to any theory of law and duty-acquired decision making is a necessary ingredient.

Positivism has already been taken to task as a theory of law. As an extension of the criticism, this section examines the phenomenon of the giving of reasons in the

common law. It will be argued that defects in the positivist methodology render it unable to accommodate the purposes that delineate the role of the judge in any legal system. At the end of the section, the common law will be subsumed under Soper's theory of law (the compatibility between the two readily facilitates this maneuvre). This will permit the use of Soper's arguments to engage positivism and mount the most comprehensive case that can be made for the claim that common law judges have a duty to search for right answers.

The overall objection to the positivist view of legal argument is that most of the positivist efforts are geared to an abstract account of legal validity. This emphasis restricts their ability to explain the common law method of justification appealed to by advocates and used by judges to reach their decisions. The tension in the positivist approach to the phenomenon of justification is best revealed in the struggle of MacCormick to preserve a preeminent place in legal reasoning for a rule of recognition. As I argued in section one, this attempted reconciliation leads MacCormick to flirt with an abandonment of the game analogy altogether. Perhaps the lesson that can be drawn from this is that MacCormick recognizes the importance of explaining the legal phenomenon of justification, yet, also realizes that the positivist approach is incapable of explaining the giving of reasons

in the common law.

Soper approaches the problem of judicial decision making from a methodological perspective. The key question he raises is why the positivist insistence on examining legal directives as the subject matter of law is no less arbitrary than focusing on the phenomenon of legal obligation.

> In that sense, by insisting that actual obligation is one of the phenomena of legal systems for which theory must account, one is no less arbitrary in the selection of data than are those who focus only on that other entity, the legal directive.[21]

Of course positivists, at least since the work of Hart, believe obligation can be explained in terms of legal directives. Yet, since the positivist focus leads to an emphasis on the identification of law, it ultimately denigrates the interpretation of law. This explanatory slight seriously undermines the explanatory power of the positivist programme.

> An adequate concept of law must reflect, even in theory, both processes - interpretation as well as identification.[22]

There is also an important methodological insight that follows from Soper's criticism of the positivist focus on legal directives. In noting this objection, one can both anticipate and account for the explanatory shift

Soper advocates. The insistence on reducing law to a set of directives will inevitably lead one to study the decision-making process through an exclusive scrutiny of the language of these directives. Thus, one will come to understand the function of law in society from one's conclusions as to the nature of these directives. As a result, one's picture of law is already painted: for the positivist, the function of law is to organize social life via a set of discernible norms. The rejection of a directive based account of law enables us to develop a richer view of the way in which law organizes social life: according to Soper, the function of law in society is to obligate people to cooperate voluntarily through the institutionalization of a shared sense of purpose.

Connected to the positivist focus on legal directives is a basic premise of the entire programme. Whether positivists opt for definition (Austin) or description (Hart) they all agree that explanation must be based on clearly ascertainable social phenomena. This should not be surprising since it was the rallying cry for the creation of positivism in the nineteenth century as a mode of intellectual investigation.[23] Nonetheless, it leads to an insistence that law be explained in terms of 'observable social facts' such as acts of will. This insistence on certainty in explanation constitutes the real attractiveness of legal positivism.

> The positivist seems to have in his favour the point just made in connection with the problem of certainty. A theory built exclusively on observable social facts seems easier to apply and use than a theory that includes evaluative elements as well.[24]

Soper rejects the consequences of the approach, implying that it entails methodological blinders which render it incapable of accommodating law as a practical activity. The level of certainty positivism seeks makes it capable of explaining law only at a very abstract level. This cuts the programme off from law as a human endeavour which guides action. The conceptual inadequacy is best illustrated in the inability of positivism to account for the process of interpretation in common law reasoning. Soper enables us to see that this failure is a result of a methodological deficiency.

> No theory that insists on completely eliminating uncertainty can provide a coherent account of the phenomenon under investigation.[25]

In addition to a methodological critique, Soper also invokes the main line of argument he uses to develop his own theory of law. Assuming that our task is to explain those constraints which law places on behaviour,[26] we must acknowledge that the standards and procedures of justification are part of the law. Otherwise we cannot distinguish the legal order from a coercive regime.

> The claim that the standards used in justifying particular legal results or procedures are themselves part of the law rests on several ideas. First, without such justification the directives are merely coercive, not legal... (One can certainly understand the mugger's command, whether or not knows his justification for giving the command.) The requirement for justification stems rather from the fact that without it, the command is no different from the mugger's and thus is not law.[27]

In invoking his main theme, Soper is once again insisting that law can only be explained by capturing the purposeful nature of the enterprise. His own account of the giving of reasons is highly original and constitutes a radical rethinking of judicial decision making. According to Soper, the traditional view of the judiciary has conceived the process to be the resolution of disputes according to law. Soper rejects this picture and substitutes one of the courts as the justificatory organ of the law. To execute this funttion, courts must of course engage in decision-making. However, the settling of disputes is the only vehicle through which the courts achieve their main task, which is to sustain legal legitimacy, i.e., the obligation to obey the law.

> By shifting the focus to make the concept of obligation central to legal theory, one changes the distinguishing feature of the court. From this new perspective the court appears primarily as a justificatory rather than an adjudicatory institution...

> The prevailing view of the court as a law finder will be seen to have mistaken a contingent, if dominant, function of an institution for its essential and distinguishing characteristic.[28]

It is through the giving of reasons for decision that the officials of the legal system manifest their good faith attempt to do justice. In this way, the courts function as the institution within which the reciprocal respect of the citizenry and the officials can be created and reinforced. Through the process of the justification of decisions via the giving of reasons, the legal order can be distinguished from a coercive regime.

> Courts represent the most efficient way of demonstrating the good faith of the implicit claim of justice that distinguishes the legal from the coercive regime.[29]

The radical nature of Soper's reconstruction of the judicial process might appear to render it bizarre. To conclude, I will attempt to show that such a perception confuses a distinction Soper is anxious to preserve. This is the distinction between the role of the judiciary in a theory of law and particular processes of justification. I will make the point while simultaneously performing the self-serving task of using Soper's thesis to augment my forthcoming purpose account of common law judicial activity. The strategy is to argue that Soper formulates

the genus law and accordingly, the common law theory I shall develop must be subsumed under it as a particular species of this genus.

Because of the way Soper's theory of law conceives the role of the giving of reasons and hence of the judiciary, he readily concedes that more than one process of justification is compatible with the theory.

> The major conclusion that results from the preceding discussion is that very little can be said a priori about the content of potential theories of justification in particular societies.[30]

Constraints on potential systems of justification can be derived from the requirements for the preservation of the maintenance and exhibition of the good faith attempt to do justice. Soper labels these constraints of 'sincerity' and takes them to be the limits which circumscribe possible forms of justification. As an illustration of his approach, Soper notes that Dworkin's idea of law as a system whereby preexisting rights determinations are made is one possible mode of justification. However, others are also compatible with the theory of law developed by Soper. While the courts can only fulfill their justificatory function through the giving of reasons for decision, more than one method of justification is conceptually possible. In sum, there is no one process of justification which is part of what is meant by the concept of law.

> Justification by reference to an underlying political theory is still required, but it need not be the particular method of justification (right answers and principles) suggested by Dworkin.[31]

It follows from Soper's argument that the judicial duty to search for right answers cannot be derived from the idea of law. Under Soper's view of law as a normative enterprise, different forms of judicial decision making can be incorporated into different legal systems. On this basis, and this is the crux, one can argue for the right answer thesis within the common law without being forced to claim a necessary connection between the judicial duty to search for right answers and the concept of law. All one need argue is that such a decision-making duty best describes the way one particular set of legal institutions has instantiated law. Other forms of legal institutions may not require this search. Such a view is conceptually consistent with the concept of law.

Finally, one can draw on Soper's theory of law to understand the point of common law right answers even apart from institutional ambitions. In the spirit of Soper, one could argue that the pragmatic process of decision making within a common law adjudicative framework dramatically enhances respect for the law by requiring legal reasoning to be based on a search for right answers. Of course, this relegates to an institutional level

Dworkin's distaste for the judiciary as a legislative organ when he insists that such a function is inconsistent with democratic political theory. Following Soper, it can be claimed that the judicial duty to search for right answers follows from molding the common law adjudicative process so it conforms with a particular political theory. Nevertheless, the goal of the construction is to ensure that respect for the law is preserved. Given different political theories, this respect can be achieved in different ways.

In the next chapter, I shall exploit Soper's insight that the role of the judiciary most fundamentally must be explained in terms of its basic purpose of legitimizing the institution it serves.[32] I shall argue that the judicial search for right answers is part of the way the common law enterprise tries to achieve this legitimacy.

V

COMMON LAW RIGHT ANSWERS

I now propose to portray the common law judicial role through an elucidation of the purposes of the common law structure of adjudication. The theory, derived from the work of Lon Fuller and Ronald Dworkin, supports the claim that common law judges have a duty to search for right answers. One must explain how the common law has been designed to function as a dispute settling mechanism to reach this conclusion. This view of common law, which conceives of it as a special way to structure and manage social affairs, will be introduced in section two and elaborated on in sections three through six. Section three also performs the important task of introducing the connection between the purposes of the common law and the institutionalization of a requirement that judges search for right answers. The final section of the chapter completes this argument. Before commencing the study, section one attempts to cultivate a sympathetic audience for the approach through a demonstration and reminder of the practical nature of common law reasoning.

Section 1 - Rules and Reasons

Written almost twenty years ago, Graham Hughes' article, 'Rules, Policy and Decision Making' persuasively demonstrates the pragmatic process of reasoning used to apply legal rules in the common law.[1] One of the implications that can be drawn from the article is that, notwithstanding MacCormick's work, there has not been sufficient attention paid to the unique nature of legal reasoning.[2] The detailed examples Hughes employs to support this claim are instructive. I will begin this section by briefly summarizing his analysis and then connecting it to my own approach. Before proceeding, I must make one comment on terminology. Hughes uses the term 'policy' to describe the considerations that are appealed to in the formulation of the reasons for the application of rules. I shall adhere to Hughes' usage in the summary of his position. Once I make the transition to my own argument, I shall change to my own terminology.

Hughes proceeds by showing various ways in which policy enters into the process of judicial reasoning. One way is when a policy statement is written into a statute as a guide to the interpretation of a rule. As an example of this situation, Hughes cites the English Wills Act which stipulates that a will must be signed 'at the foot or end'. There is an amending statute to this condition which makes clear that the purpose of requiring the

signature at the 'foot or end' is to ensure that the testator intends the document to be his will. The amendment makes this clear because it loosens the requirements of where the will must be signed in order to be a valid will. Here we have a situation where the policy fixes the general aim of the rule, i.e., it clarifies how the rule should be applied.

There is also another type of situation where questions of policy enter a legal decision. To illustrate, Hughes supposes that a will is written on a cardboard box with the signature on the detachable lid. In this situation, Hughes feels even the amending statute does not provide sufficient guidance to the judge, for the intention of the testator is not evidenced in his signature. In this sort of case the judge must reach beyond the statute encased policy to the underlying policy of probate law. He might stress for example:

> the underlying policy of probate law that wherever possible effect should be given to the wishes of the deceased, and that, therefore, where other arguments are nicely balanced, the benefit of the doubt should be given to the document.[3]

On the other hand, he might want to curb sloppiness in the drawing of vital documents and thus invalidate the will. In this case the policy differs, (a) in that it is not part of statute, and (b) in that it can come into conflict

with other considerations. This would not happen with the policy directives which are contained in a statute unless of course there was an error in drafting the statute. Nevertheless, in spite of the difference between the two types of material, the second type of policy consideration can be as decisive in a judicial decision as the first type.

Hughes also considers a third type of policy consideration. This type follows from the use of a principle to guide a decision. An example of this type of policy factor is the principle 'Hard cases make bad law'. Hughes illustrates how this could be used by supposing that a judge was faced with the problem that if he overturned a will he would deprive a crippled child of all financial support. In this case, the invocation of the principle 'Hard cases made bad law' would guide the judge in overriding the appeal to compassion.

> Judges have often said that hard cases make bad law. This aphorism expresses the idea that to depart from the principle of consistency solely out of compassion may carry great dangers for the future course of the law.[4]

All of the above types of policy considerations demonstrate that there are various levels of legal material. As well as legal rules, there are policy considerations within a statute that guide the application of the statute and there are policy considerations that

are reiterated as ways to interpret a statute. Moreover, one also finds more general policy considerations, some of which have a vague legal status such as 'Hard cases make bad law', and some of which have a more formal legal status, such as the doctrine of precedent.

> These examples reveal that in the edifice of argumentation in which a legal problem is debated and in the structure of reasoning by which a judicial opinion supports a judgment, there is constant movement between different layers of material.[5]

Since these factors can conflict even though they all contribute to the making of a decision, none of them solves the problem. Consequently, their existence redoubles the complexity of judicial decision making.

Hughes now proceeds to argue that there is a complex relationship that can exist between legal rules and policies. He begins with an example of one way in which policies and rules can interact. Suppose that a child's parents set a rule that he cannot watch television more than one hour per day and the child requests permission to watch television for two hours one day because of circumstances which make it impossible for him to watch television another day. The correct decision on the part of the parent in this case will depend on the policy behind the rule. If the policy is about eye-sight (more than one hour of television per day is harmful), then the

answer should be no. However, if the policy is to restrict television watching in order to insure that time is left for other activities, then the answer could be yes. In any event, it is a case where the policy must be known before the rule can be applied, i.e., it is the policy that guides the decision and not the rule.

Now let us consider a more difficult case. Suppose that television watching is restricted to one hour per day and the child must also do two hours of homework and have one hour of fresh air. In this situation, the rule could be about homework and exercise with the policy of restricted television watching to support it; or the rule could still be about restricted television watching with the policy about homework and exercise to support it. In this case, not only is it necessary to understand the policy in order to apply the rule, but it is also necessary to understand which part is the rule and which part is the policy. Pursuing the example helps us to see the integration between policies and legal rules. If there was a previous regulation which called for one hour of homework and two hours of fresh air, we know that the new rule contains the policy of more emphasis on academic activity. However, if the previous rule prescribed three hours of homework and no fresh air, then the new rule is introducing a policy of fresh air.

Hughes' taxonomy of the various types of legal

material that can function as policy considerations in judicial reasoning and his argument that legal rules and policies are 'intertwined', together provide the basis for his claim that it is impossible to reduce the role of policy in judicial decision making to the application of open-textured legal rules. This serves his objective of showing that because Hart does not accurately portray the many ways in which policy factors can influence a decision, he cannot account for the structure of argumentation used in judicial reasoning. For my part, I am more interested in his broader claim. This is his view of the role of judicial reasoning within the process of judicial decision making. According to Hughes, the many ways that rules and policies interact require judges in the standard cases of judicial decision making to construct arguments which evaluate the degree of influence of each type of legal material.

> The process of statutory interpretation or, indeed, any form of judicial decision making is more typically a rummaging through layers of material in which prescription and policy are more or less expressed and more or less vague. The material used in this argumentation and decision making will sometimes have a sharply legal character, as where it is a statutory clause; sometimes a more diffused legal character, as where it amounts to a general common law doctrine, a principle or maxim; sometimes only a vaguely legal character, as where it is no more than a reiterated judicial idea.[6]

Hughes succeeds in demonstrating that the considerations he labels policy are both necessary and independent of the standards to be applied. They are independent in that the arguments judges use to reach decisions are not derived from the standards but are constructed as ways to make sense of the standards. Thus, a judge must acquire the skill of constructing arguments to justify decisions which balance and weigh the various types of legal material, and acquire a knowledge of the legal material that is appropriate in legal argument. It is the emphasis on these skills of reasoning that Hughes labels the real insight of the American legal realists.

> There is a world of special expertise between a rule and a decision, and the most practical and fruitful task of legal philosophy is its study. There are rules in the law and there is law in rules, but one needs special tools to dig it out, and these tools are as centrally important and as worthy of examination as the rules themselves.[7]

There is a surface simplicity in Hughes' approach that follows from his gross distinction between rules and policies. I have utilized the dichotomy because it is a companion to my own efforts in the first two chapters. I will now draw upon my analysis, seeking to extend it in the light of the present discussion.

Hughes employs the idea of policy to describe the reasons given for the application of a rule in a certain

way. For example, the policy of giving effect to the testator's wishes is a reason which recurs throughout the various will cases. There are three points I want to extract from Hughes' analysis of what he terms 'policy' and I more generally label as reasons for decisions.[8] I shall state them and then attend to them individually. First, in judicial decisions that require a judgement as to the correct application of the law, we justify decisions by giving reasons for them that do not merely appeal to the standards to be applied. Second, in different situations, even though the same standards are being applied, different reasons founded on an assessment of the concrete circumstances will be given. The third point is a consequence of the first two. Because an 'edifice of reasoning'[9] must be constructed to accommodate the vicissitudes of actual circumstances in which standards are to be applied, techniques of decision making must be developed to meet the challenges.

The first point drawn from Hughes might seem trite. Indeed, it is because it seems so obvious that it has been overlooked. Even the simple example of the sergeant who must apply the command 'Pick your five most experienced men' reveals it. Assuming that the facts make it possible to make the judgement, the sergeant connects the command to the circumstances in which it must be applied by constructing a set of reasons supporting the particular

decision he makes. Of course, he is not required to record these reasons for posterity. In law, the need for the construction of reasons is even greater because the standards to be applied are likely to be more complex than the univocal requirement of determining what counts as 'most experienced'. Further, custom requires that the reasons be stated publicly. Once we focus on the need for the giving of reasons in law in order to mediate between the standards to be applied and the facts of the case, we can see the necessity for emphasizing the judicial process of decision making. Since the giving of reasons has as its conclusion what the standard will mean in the circumstances, it seems misleading to describe the decision merely as the use of the standard. The process used to reach the conclusion seems far more important.

The second point drawn from Hughes accentuates the primacy of the process of decision making in the common law. The reasons for a decision will vary with the circumstances and consequently the edifice of reasoning cannot be reduced to a calculus. Hughes' example of the parental rule against more than one hour of television watching can illustrate the point. The reasons for the application of the rule will vary with the circumstances in which the decision must be made. If the child becomes sick the parent might suspend the rule notwithstanding the objectives the parent had in mind for originally

introducing it. Or if the child takes up an organized programme of exercise, the parent could modify the rule to meet these new circumstances. The sergeant who must apply the same order under different circumstances also will vary his reasons with the circumstances. Thus, in situations such as litigation, where each decision must deal with a unique set of facts, the process of decision making is fundamental. It is fundamental because a decision can only be made by devising a set of reasons for a particular application of the standard.

Once it is seen that circumstances can severely limit the guidance the decision-maker can receive from the standards to be applied, the need to devise techniques of reasoning becomes apparent. Decision making is not just about the execution of understood standards but is also a process in which justificatory reasons are given for particular applications of the standards. Thus, Hughes helps us to see that legal circumstances are sufficiently complex such that the giving of reasons is an ongoing necessity. Therefore, for Hughes, the typical cases of legal reasoning will be based on a process of argument which offers reasons for the decision. Put too simply, legal argument does not fit the facts to the standards but rather attempts to fit the standards to the facts.

There is a similarity between the above description of legal reasoning and the quandries of the sergeant. When

the sergeant is asked to justify his decision (i.e., reproduce the reasons that led him to it) he will appeal to the possibilities that were open to him in the circumstances. If he is asked to pick his most experienced men where no one is evidently experienced, his attempt to apply the command will require him to modify it according to the circumstances. What will justify the decision and hence the modifications will be the reasons that lead him to determine what counts as 'most experienced'. Such a process is far more practical than debating the meaning of terms. Rather, the sergeant tries to reach a decision on the basis of the facts he has at hand. He might decide, where all his men are new, that those with boy scout experience are his best bet. In citing this strategy as his reason for picking the men, he attempts to apply the order.

The main lesson Hughes teaches us is that the appeal to rules plays a very limited role in common law reasoning. Legal argument offers reasons for the use of standards in certain ways and the point of the argument is to connect them to the facts of the case so that the dispute between the litigants can be resolved in a rational way. The rationality of common law reasoning is found in the <u>accepted</u> way legal standards are molded to the facts of the case and so given meaning. In sum, there is a consensus in the legal community that judges must

reach a decision:

> by arriving at an interpretation of materials generally acknowledged to be relevant in a fashion generally acknowledged to be acceptable.[10]

Hughes has shown that even in the case of legal rules the creation of reasons in these cases is the key to the process of decision making, and even if this does not constitute the archetype of common law argument (and Hughes thinks it does), it is certainly an integral component. The rest of this chapter is spent arguing that in fact the process of common law adjudication constitutes a framework in which the judge is required to search for the right answer in the case before him. This requirement can be derived from the strategic objectives which structure the way common law adjudication develops reasons for judgement.

Section 2 - Fuller on Adjudication

One of the most innovative and insightful essays in contemporary jurisprudence is Lon Fuller's posthumously published "The Forms and Limits of Adjudication."[11] As the title suggests, Fuller sought to explore the role of adjudication in the law, an investigation which took him beyond the scope of common law judicial decision making. Nevertheless, because he frames the analysis in the terms

of the purposes of adjudication, he provides the conceptual tools to analyze the common law judicial role in this way.

Unique to Fuller's approach is the way in which he delineates the adjudicative process as a rational enterprise. The argument he offers to support the formulation constitutes a great contribution. The essential idea which animates the approach is that adjudication is a form of dispute settling where the plaintiff and defendant offer reasoned arguments and proofs which the decision-maker employs to resolve the dispute. Trial by battle, the throwing of dice, or the inscrutable pronouncements of oracles are other ways to resolve disputes. The peculiarity of adjudication is in the rational participation of the disputants. They do not resolve the problem by a test of strength, the vagaries of luck or the whims of a guru. Rather, adjudication provides a forum in which each of the disputants argues for the propriety of his claim. The judge reaches his decision by accepting the arguments and proofs of one of the two disputants. The rationality of adjudication is thus to be found in the necessary conditions which must be met to enable the respective participants to fulfill their roles within the process.

To begin an investigation of adjudication, Fuller compares it to voting. Both fall under the same basic form

of social ordering, organization by common aims.[12] The other basic form of social ordering, organization by reciprocity, is illustrated in contracting, but is only relevant by way of contrast. Fuller recognizes that social organizations based on shared aims vary in the degree of formality. This is part of the value of comparing adjudication and the important government process of voting, they are both highly formal. While there often are many competing objectives in the use of social organizations held together by common aims, Fuller maintains that without these aims the association would not persevere.

> In considering this constellation of objectives, it should not be forgotten that it is, in the long run, the actively shared and at least vaguely understood aims that give the association its motive power.[13]

Fuller conceives the rational core of a social institution to be isolable by focusing on how it functions as one of the two basic forms of social organization. He thus need not pretend that humans are never irrational or that institutions cannot be manipulated for self-interest. His method simplifies the analysis by showing us how to comprehend the fundamental purposes that give an institution its identity.

Fuller does not assume that human beings at all times behave rationally but that it is the rational core of

human institutions that is alone capable of keeping those institutions viable and sound.[14] This rational core can only be explained through a shared sense of purpose. Ultimately, then, it will become apparent as the discussion progresses that Fuller provides the means to derive, from the shared aims of common law adjudication, the judge's recognition that he must search for right answers.

Fuller invites us to consider the contrast between the process of voting and the process of adjudication to see the essential features of the latter. The aims of voting are achieved by the way in which voters participate in the process. Certain conditions are necessary to preserve the integrity of the process. For example, votes must be honestly counted, voters must not be coerced and the ballot box must not be stuffed. An essential feature of adjudication, also necessary to preserve the process but not to be found in voting, is the use of reasoned argument. It is the requirement for reasoned argument which constitutes the rationality of adjudication.

Fuller demonstrates that reasoned argument is the peculiar feature of adjudication by showing how it is intrinsic to the institution. To do so he argues that the process of voting may, or may not, involve rational debate prior to election day. Presenting reasoned argument to the electorate is an acceptable and conventional way to

conduct elections but it is only the voting process itself which is guaranteed. Adjudication, on the other hand, would not exist without the institutional guarantee that rational argument will take place. Further, candidates for election have no assurance that anyone will pay attention to their arguments whereas participants in adjudication have guarantees that their reasoned assertions will be considered. It is the institutional reification of argument before a decision-maker who must consider the disputants reasoned claims that constitutes the rationality of the process. All participants in adjudication must share the common aim of promoting its core of rationality. Being involved in the process necessarily makes one a collaborator in promulgating its defining features. Fuller characterizes the rationality in adjudication as an onerous burden not shared by other forms of social organization. Examining the strengths and weaknesses of the burden help us to see both the limits of adjudication as well as what we attempt to do in constructing and employing the process.

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of

> rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength and the weakness of adjudication as a form of social ordering.[15]

The great strength of adjudication as a form of dispute settling is that the institution ensures that the reasons given by the disputants for a favourable decision will enter into the judge's finding. Fuller acknowledges that the connection between the arguments of the disputants and decision-maker is not always isomorphic. For example, the judge may emphasize what the disputants took to be a minor point. However, even though the striving for a complete congruence in argument between the judge and adversaries may ultimately be an ideal, without a semblance of agreement the participation of the disputants is meaningless.

> We need to remind ourselves that if this congruence is utterly absent - if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant - then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.[16]

Adjudication is pointless if the adversaries do not see their role in the process as substantial and real. It is this participation which makes the resolution of the dispute far more acceptable to the losing party than

resolving the dispute in a test of strength, etc. Hence, the judge must seriously consider the arguments of disputants and demonstrate this respect in his reasons for judgement. The participation is also rendered meaningless if the participants perceive the judge to be prejudiced, or believe he has been bribed. Besides impartiality, the judge must also demonstrate a capacity to understand the arguments presented to him, e.g., he cannot be insane.

One contemporary criticism of adjudication, and ultimately of the role of law in contemporary social life, offers another interpretation of the role of the disputants. A recent, popular, version of it is found in Alasdair MacIntyre's After Virtue. MacIntyre asserts that the role of the Supreme Court of the United States in some cases of serious moral conflict is to mollify the adversaries. He argues that this is necessary because the arguments of the participants follow from incommensurable moral conceptual schemes and therefore are fundamentally incompatible. The incommensurability makes it impossible for the dispute to be rationally resolved.

> The type of decision which I have in mind is exemplified by the Bakke case, where two, at first sight strongly incompatible, views were held by members of the court, and Mr. Justice Powell who wrote the decision was the one justice to hold both views. But if my argument is correct, one function of the Supreme Court must be to keep the peace between rival social groups adhering to rival and incompatible

> principles of justice by displaying a fairness which consists of even-handedness in its adjudications.[17]

Lon Fuller provides a powerful antidote to this perspective. In challenging us to look for the rational core of adjudication, he enables us to understand what is intrinsic to the process. If the adversaries do not see their participation as meaningful and substantial then the institution of adjudication will lose its legitimacy. MacIntyre may well be right that in particular, unusual, cases, the courts are a prophylactic for defusing moral conflict. But, if he wishes to claim that this is an essential part of their function, he sadly underestimates the astuteness of the general populace. If mollification was an essential feature of adjudication, over time the population would come to realize this. The credibility and effectiveness of the process as a way for disputants to participate actively in the resolution of their disputes would therefore be undermined. It is only because adversaries are provided with the opportunity to have a decision rendered in their favour on the basis of arguments which they make, that adjudication is capable of mollification. Once we understand the purpose of adjudication, we can see that mollification is a peripheral adjunct.

Many claims in legal theory tumble if we accept Fuller's argument from rationality. To demonstrate its

ramifications, I shall, to conclude the section, consider Hart's scorer's discretion argument from this perspective. It is germane to the present analysis because, like MacIntyre, it ignores the consequences that must result given the nature of the process of adjudication. Fuller's insistence on the dynamics of the rationality of adjudication preempts the otherwise powerful critique of scorer's discretion. Hart wants to claim that although there is a standing possibility of judicial domination in a legal system, we should not equate this possibility with the actual function of adjudication. For Hart, scorer's discretion is theoretically possible but highly implausible. Fuller offers the possibility of a far richer rebuttal of scorer's discretion.

According to Fuller, because the purpose of adjudication is to settle disputes by reasoned arguments and proofs, there is the presumption that the justification of the decision is based on these arguments. Thus, even if a series of decisions are rendered without the giving of reasons, the social group which employs the process will infer reasons for these decisions. Further, members of the group will proceed to act on those reasons.

> Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments. A less obvious point is that, where a

> decision enters some continuing relationship, if no reasons are given the parties almost inevitably guess at reasons and act accordingly.[18]

The consequences of these facts for scorer's discretion is as follows: A) if the members of the group perceive no discernible pattern to the decisions, then, the rationality of the process is thrown in doubt or, B) if the pattern fortuitously changes, then, again the rationality of the process in which the decision was reached is thrown in danger.

The basic argument to be inferred here is that the legitimacy of the decision of the scorer is not founded solely on the rules which empower him to make the decision. The legitimacy also entails an endorsement of the process of argument, proof and participation that the rules are intended to promote. If this process appears to be subverted, then, the credibility of the decisions cannot be maintained merely by arguing that the rules have been formally adhered to. Put succinctly, scorer's discretion is impossible. Because we impute the rationality of the process to the decisions that are a product of it, the legitimacy of these decisions is founded on their preserving the integrity of the process. In sum, the claim of legitimacy is associated with maintaining the core of rationality of adjudication; it is not reducible to a description of the fact of adherence to

the rules of authority empowering judges to make decisions.

Section 3 - Common Law and Purpose

Through his insightful account of the expectations of legal dispute settling, Fuller derives a fascinating account of adjudication. His discussion on this matter will be contrasted in the next section with Dworkin's theory of judicial reasoning. In the present section, the rational strategy reflected in the structure of common law adjudication will be examined. To do so, Paul Weiler's article "Two Models of Judicial Decision-Making"[19] is incorporated into the discussion. The theme I am seeking to develop is that the method of argument in common law adjudication is structured such that the legal standards are applied through the search for a right answer.

Weiler's essay in effect narrows Fuller's analysis to common law adjudication. Fuller argues that partisan advocacy and a passive court are essential to adjudication. Weiler's view complements this claim with arguments to show how the self-interest of the disputants actually serves the rationality of the process. Fuller points out that if the court, not plaintiff, initiated the proceeding this would undermine the impartiality of the process; it would appear that the court was acting on the

plaintiff's behalf. Further, the plaintiff should decide whether it is in his best interest to undergo the trauma and cost of litigation. Partisan advocacy also contributes to the impartiality of the proceedings thereby augmenting the attempt to have reasoned argument carry the day. It does so in two ways. First, because the disputants present the arguments, the judge can suspend his judgement and avoid the tendency to let the familiar influence the unknown. Second, by institutionalizing vigorous argument on both sides, the decision-maker can be confident that his decision rests on a thorough airing of the competing alternatives. This increases the likelihood that the correct decision has been reached.

Weiler expands on the picture of adjudication as a rational process by deepening our understanding of the role the adversary process plays in common law adjudication. It is this argument which establishes the link to conceive of the common law as a purposeful endeavour that is committed to the search for right answers. Weiler begins by reminding us why adjudication was created in the first place, namely to resolve actual disputes in concrete cases arising out of a clash of competing interests. It is a retrospective, not forward looking activity.

> The disputes which are necessary to set the process of adjudication in motion involve 'controversies' arising

> out of a particular line of conduct which causes a collision of specific interests.[20]

Structuring the process so that the plaintiff and defendant plead on their own behalf brings them into the process as Fuller suggests. By having their say they have a good reason to believe the process serves their interest. In addition, it is the disputants, acting in their own self-interest, who will likely see the necessary points to argue the case from their point of view.[21] Moreover, the model of adjudication permits a clarification of the dispute as the adversaries undergo trial preparations. This clarification is a realistic presumption because legal disputes must be concrete rather than hypothetical and it is only the plaintiff(s) and defendant(s) that are allowed to participate (the plurality allows for the joinder of parties).

Although both Weiler and Fuller elegantly argue for adjudication as a uniquely rational way to resolve disputes, both conceive of the role of the judge in an ideal way. As I have already argued, Fuller asserts that the judge should strive for a congruence between the reasons for his decision and the arguments of the disputants. Weiler, on the other hand, suggests that there might be a limit to the employment of reasoned argument in judicial decisions, a limit which is the result of human capabilities.[22] Because of these limits, Weiler believes

that the role of reasons in adjudication, without which the process would not survive, is an ideal.

> What is demanded by a viable institution of adjudication is that the pursuit of reasoned decisions be the ideal towards which the institution tends and that judges accept the demand that their subjective, idiosyncratic preferences be overcome. On such a perceived quality to the process rests the legitimacy of its results.[23]

Fuller has shown us that adjudication cannot exist without reasoned advocacy. If this advocacy is an ideal, how does such a fragile base sustain the process? At least in the common law, it sustains the process because of a fundamental assumption that is built into common law adjudication. The articulation of this presumption has been the surreptitious goal of the argument of this section. The most basic element in common law adjudication is that the process is structured on the presumption that a right answer exists between the disputants. Virtually any system requires that the judge must make a decision; he cannot avoid it.[24] Further, the common law encourages both the plaintiff and the defendant to argue that they are entitled to a decision in their favour. Therefore, two beliefs sustain the core of rationality of the institution of common law adjudication, (1) as between the plaintiff and defendant a right answer exists, and (2) it is the judge who must find it (aided by adversarial argument).

Common law adjudication demands right answers and the claim that judges are required to make this determination thus rests on the way the process organizes legal issues. It is not, and this is crucial, just a consequence of the ideals common law adjudication seeks to promote but is rather built into the structure of that adjudication. Although Weiler does not give this point my emphasis he appears to accept it.

> As we have seen, an appropriate judicial decision must be justifiable by a reasoned opinion which establishes the judgement as conclusion from accepted premises. The source of these premises is formally determined by the same institutional and functional structure which limits adjudication to reasoned, principled decisions in the first place. Because adjudication affords adversary participation and argument within a legal system of 'entitlements', of claims and duties... The litigants have the right to demand the correct result.[25]

I recognize that the claim introduced here is a bold one and over the next four sections I attempt to clarify it. Essentially, I seek to show that the common law judicial duty to search for right answers is a result of the way the process is framed. Let me restate the claim. Litigants in a civil action have a right to a result, no matter how difficult their case.[26] Moreover, the legal forum is structured as a rational arena where the adversaries can offer reasons to support a finding and the

decision-maker, as a matter of convention, will give reasons for his decision. The fact that a decision must be made, and that reasons will be given in support of it, constitutes a systemic constraint whereby all the parties to the dispute, including the decision-maker, proceed on the assumption that the correct application of the law will support a judgement for one of the two litigants. Put another way, it is a fundamental presumption of the dispute settling function within a common law system that one of the parties has an entitlement and the other does not. Following Fuller, it is my contention that the purposes that comprise the rational core of the common law constitute a set of ideals that judges must strive to achieve. The common law commitment to the search for right answers is one of the most sacred of these ideals.

In a recent work, H.L.A. Hart has come very close to my argument in his remarks on Pound. Hart interprets Pound's argument for the existence of right answers as a "regulative ideal". Of course, Hart approaches the conclusion from the perspective of the legal standards to be applied and not from the perspective of the process in which those standards are used. Nonetheless, it is encouraging to find a semblance of harmony at least at the end point of the argument.

> What are the ground for thinking that there must be some unique resolution of such conflicts awaiting the judge's

> discovery and not calling for his choice? To be fair to Pound, it must be said that he probably conceived of the idea that a whole system with its principles and perceived values would provide a determinate, unique answer when particular legal rules ran out, not as a literal truth about legal systems but rather as a regulative ideal for judges to pursue. (my italics).[27]

Section 4 - Legal Rights and Purpose

One of the most provocative passages in Lon Fuller's entire oeuvres is his discussion of the relationship between legal rights and the process of adjudication. According to Fuller, the conception of law as entitlements is an inevitable consequence of adjudication.

Fuller develops the argument in the following way: 1) law is a process in which the plaintiff and defendant are required to give reasoned argument, 2) the existence of the propositions appealed to in argument is a product of this process, 3) because the essence of law is the way we arrive at conclusions, legal standards are not a set of propositions that exist independent of the process and, finally, 4) law is a rational enterprise in which rights determinations are made. Put another way, law is not a set of rights which are appealed to in justifying a decision. Rather, law constitutes an institutional arrangement whereby decisions are made as to which of the disputants

has an entitlement. This is what is meant by calling law a system of entitlements and not a set of entitlements. The concept of system here expresses the idea that although legal rights are used to justify decisions, the process by which these rights are determined is more fundamental. Law is a form of social ordering where the appeal to rights is inevitable because the rationality of its institutional organization necessarily converts legal argumentation to decisions about right claims. Fuller writes:

> In fact, what purports here to be a distinct assertion is merely an implication of the fact that adjudication is a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments. It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that whatever they decide, or whatever is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function.[28]

Fuller's picture of the way we settle legal disputes leads to his explanation of the role of rights in adjudication. Ronald Dworkin, the leading proponent of law as a system whereby preexisting rights determinations are made, reverses the relationship between rights and adjudication but still preserves the idea of judicial decision making as a purposeful endeavour. The remainder

of this section will use Dworkin to corroborate my claim that the most fundamental explanation of common law adjudication must describe it as a rational pursuit of ideals. However, I shall not endorse Dworkin's ambitious theory as to why judges have a duty to search for right answers. In the last section of the chapter, I shall use my study of the paradigm of institutional decision making to offer a far more modest derivation of the duty. My objectives in the use of Dworkin are twofold. First, to secure another ally for the purpose approach and second, to borrow from Dworkin's insightful elucidation of some techniques of legal argument. One can accept these techniques as indigenous to the common law enterprise without necessarily committing oneself to Dworkin's theory of law.

Dworkin provides a comprehensive statement of the justification of judicial decisions in the chapter of Taking Rights Seriously entitled "Hard Cases".[29] Here Dworkin tries to describe in detail how legal principles are used to formulate the considerations that judges must entertain in justifying a decision. The description follows from a fundamental distinction he draws between principles and policies. Policy considerations promote collective goals and fall within the province of the legislature. Considerations of principle support individual or group rights and are within the competence

of the judiciary. While legislatures can promote policies and principles, the judiciary is restricted to the use of principles.

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individuals or group right (my italics).[30]

I have added the italics to the above quotation because the idea of securing or respecting a right hints at the relationship between legal principles and judicial decision making. A disputant can request a right which has not previously been recognized by appealing to legal principles. These principles make it possible to determine rationally whether the disputant has an entitlement. The most obvious need for the existence and employment of legal principles is to make consistent decisions across a range of cases. As was argued in the critique of scorer's discretion, if the decisions were at the whim of the decision-maker, the rationality of the process would collapse. To ensure that this does not occur, it is necessary that individual decisions be unified within a comprehensive theory. Hence, the rationality of the legal

process requires that judicial decision-makers engage in ongoing theory construction to unite individual right claims. Legal principles serve this activity by articulating and supporting the rights that, 1) citizens conceive themselves to possess, and 2) are reflected in the institutions of the society.

> It condemns the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.[31]

At the base of Dworkin's approach is the claim that adjudication enforces political rights. These rights are exemplified in personal and institutional morality and can be formulated in terms of legal principles. Arguments from principle uphold political rights and the process of justification in judicial decisions reflects this fact.

> We therefore need an account of the intenaction of personal and institutional morality that is less metaphorical and explains more successfully that pervasive interaction. The rights thesis, that judicial decisions enforce existing political rights, suggests an explanation that is more successful on both counts.[32]

Thus, Dworkin reverses the priority Fuller established between rights claims and adjudication. Where Fuller maintains that rights claims are the inevitable result of

adjudication, Dworkin leaves us with the implication that the purpose of adjudication is to enforce pre-existing political rights.

Besides their relationship to rights, Dworkin also argues that legal principles provide the means to integrate decisions. A judge has the political responsibility to be consistent in his decisions and the use of principles enable him to do so.

> 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.[33]

However, since Dworkin is anxious to base judicial decisions on political rights, he must purify legal argument from the influence of policy. Meeting this challenge is crucial for him because policies need not be based on political rights, and are more flexible in application. Both these features of policy threaten to undermine Dworkin's contention that the winning disputant in adjudication has a pre-existing entitlement which the decision enforces. If these decisions were based on policy then expediency, convenience, etc., could be the basis of the basis of the decision thereby vitiating the presumption that the court enforces political rights.

To eliminate the role of policy in judicial decision making, Dworkin distinguishes between concrete and abstract rights. Abstract rights state general aims but do not express in specifics how these aims are to be applied when they come in conflict with other rights. Concrete rights are precisely defined aims that are delineated with respect to other rights. Besides being concrete or abstract, rights can also be background or institutional. Background rights justify political decisions in general whereas institutional rights justify political decisions for specific institutions. According to Dworkin, it is concrete rights arising within the legal institutional setting that are enforceable at law.

> The rights thesis provides that judges decide hard cases by confirming or denying concrete rights. But the concrete rights upon which judges rely must have two other characteristics. They must be institutional rather than background rights, and they must be legal rather than some other form of institutional rights.[34]

All of this circumvents the role of policy because the collective goals expressive of considerations of policy are ways of compromising 'abstract rights'. These considerations may enter into legislative decisions but not in judicial decisions.

One of the most innovative ways Dworkin demonstrates the possibility of framing judicial decisions in terms of

political rights is his study of a problem in the institution of chess.[35] This enables him to show how the process of adjudication can organize the subject-matter of legal decisions. In describing this decision procedure, he shows how the determination of political rights is an active, not passive, inquiry. In so doing he builds his case for the claim that adjudication is designed to yield uniquely correct decisions.

Dworkin asserts that chess is a simple, autonomous institution. It is autonomous because all of the decisions are made by appealing to standards emanating from the institution. As such, it has the consequence of 'insulating' the claims any disputants could make from general principles of morality. Further, for the purposes of analysis, it has the merit of being a simple institution in that there is a limited number of tasks the institution is intended to perform.

Dworkin conducts his study by considering the following problem faced by a chess referee. Suppose that one of the two opponents engages in the tactic of excessive smiling. This raises the question whether the tactic constitutes an 'unreasonable annoyance' and therefore justifies invoking the forfeiture rule if the other player claims a right to such an interpretation. To resolve the dispute the referee must be guided by the character of the game. Given that it is an intellectual

activity requiring great amounts of concentration under severe time constraints, there is persuasive evidence to suggest that excessive smiling does constitute an unreasonable annoyance. Dworkin characterizes these considerations as institutional constraints.

> We have, then, in the case of the chess referee, an example of an official whose decisions about institutional rights are understood to be governed by institutional constraints even when the force of these constraints is not clear... If one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation.[36]

Dworkin finds that there are two ways the referee could make the decision. The first way would be to trade on his intuitive knowledge of the game developed over a career. This is the likely way he will reach the decision.

> Any official's sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgment.[37]

The second way the official could reach the decision could be to reflect on the criteria that can be extrapolated from the institution. These criteria would follow from reflecting on the kind of intellectual game it is. For example does chess, like poker, include intimidation. These ruminations are questions concerning the character

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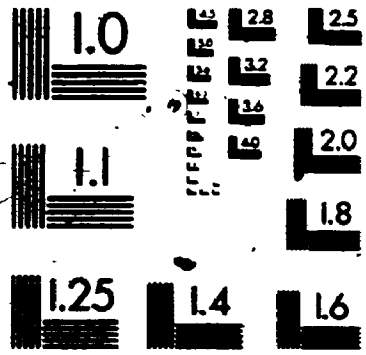

of the game.

In struggling to 'reconstruct' the character of chess, the referee is seeking to determine the institutional rights that the game embodies. These rights are not reducible to the rules of the game but are a way of understanding the enterprise the rules of the game are devised for. Participants in the game are deemed to have these rights in lieu of their consent to play the game.

> The concept of a game's character... internalizes the general justification of the institution so as to make it available for discriminations within the institution itself (my italics).[38]

I have inserted the italics in this quote to show that Dworkin made an argument (some years before) similar to the one I made in section three of chapter two when I discussed criteria variation. Dworkin does something of the same thing here; criteria one uses to make a decision within an institution can be found in the practices of that institution.

To make his case for law as the enforcement of political rights, Dworkin must show that it can accommodate the doctrine of precedent in the common law. This doctrine appears to be based on the existence of common law rules and not the existence of political rights. He also has to explain why the determination of political rights by the courts is an acceptable role for the

judiciary. This must show that justifications of judicial decisions based on political rights neither usurps the legislative function nor reduces political judgements to the personal convictions of the judge. Dworkin dispatches both these potential objections with clever argumentation.[39] It is not necessary for me to repeat or comment on these arguments here. For my purpose it is enough to state briefly the relationship between legal rights (as a species of political rights) and adjudication. The role of the judge in adjudicating a dispute is to construct a political theory which abstracts the issues under dispute, and accurately captures the morality of the community. The judge employs legal principles to do so. Once he has done this he can adjudicate the dispute between the litigants by enforcing the appropriate political rights derived from the theory. Of course, Dworkin recognizes that the achievement of this task is an ideal and he relegates its perfect performance to the mythical judge Hercules.

> Hercules' theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community.[40]

Although this account of Dworkin's does insist that

there is a judicial duty to search for right answers, and that this duty must be explained in terms of the purposes the decision-maker is striving to achieve, in a more recent work he seems to opt for a more pragmatic explanation. I shall explicate this account in section six as I find it more compatible with my version of the right answer thesis. But before doing so, the next section shall use Lon Fuller's discussion of legal fictions to show that common law reasoning can function as a pragmatic endeavour and still be committed to the right answer thesis.

Section 5 - Legal Fictions

Fuller's study of legal fictions exposes the pragmatic dimension of common law reasoning. Because the search for right answers can, at certain points, fail to be satisfied by the legal standards at hand, we develop legal fictions in the common law to bridge the gap. Fuller's thesis is that legal fictions are necessary because the rational justification that the law demands cannot always be met. This can be connected to the nature of the common law decision-making process. Common law adjudication is organized such that a right answer to the problem is demanded, but at the time of litigation we may not be able to provide the proper theoretical explanation. Fictions are created to escape conclusions we do not

believe are institutionally right, but to which we are otherwise led, given the legal standards at our disposal.

Generally, a fiction is intended to escape the consequence of a valid rule of law. Thus, the fiction of 'inviting' in the attractive nuisance cases is intended to escape the rule that there is no duty of care towards trespassers.[41] Fuller maintains that legal concepts are fictions when they describe in inadequate and misleading way an existing and enforced legal relation.[42] At the time he wrote (1930), Fuller saw the use of fiction as most prevalent in law and physics. He suggests both disciplines are committed to it because the complexity of the relationship between theory and fact inevitably requires the employment of concepts to bridge the gaps in the theory.

> What characteristic sets law and physics apart from other branches of human study? I suggest it is their commitment to <u>comprehensive system</u>... The physicist cannot - at least openly and comfortably - say, "Of course this newly observed phenomenon does not fit our theories, but this simply means that it falls outside he area of our concern." The judge cannot say, "For the litigation now before me there happens to be no clearly formulated legal rules, so I shall simply leave it undecided."[43]

Although Fuller claims that legal fictions resist any succinct summary, he does make two clear points. First, the creation and use of a fiction does not constitute a retreat to the easiest solution but is likely the only

solution when the decision-maker must give reasons for a novel judgement.[44] Second, fictions not only simplify a difficult and seemingly intractable subject matter but they may also help organize that subject matter.[45]

The existence of legal fictions points to the possibility of a gap between what the common law adjudicative process strives to achieve and what is conceptually possible at any given time. Fictions are employed so that we do not violate the ideal solution of a legal dispute even when we cannot fulfill it. For this reason alone they are rational. In addition, they also serve the incremental nature of adjudication. I argued in the second section that Fuller sees the process of adjudication as spanning individual decisions, fictions provide one of the ways of doing so. After a long period of reflection and advocacy (the litmus test of clarity) it is likely that we will be able to formulate principles to cover the case. In the mean time fictions provide us with a patchwork coherence. Because adjudication does not permit decisions to be postponed, judges cannot remain agnostic on all the issues of law pressed by litigants. They must base their decision on rational grounds and legal fictions enable them to decide in the present, but postpone an adequate theoretical explanation to the future.

Situating fictions within the constraints of the

process of adjudication reveals an interesting dimension of legal argument that is frequently ignored. MacCormick's elegant argument has shown that adjudication can employ a deductive process. In addition to using deduction to argue to a conclusion, fictions reveal most graphically the argument from a conclusion in legal argument. Recall my assertion that common law adjudication is structured to yield a right answer as between a plaintiff and defendant. Accordingly, litigants start with a claim of entitlement and proceed to give reasons to justify it. Where judges cannot adequately substantiate their support for a conclusion and invoke a fiction they can do so because the conclusion is ready made. One might be tempted to define the role of argument in the law as an infinitely plastic affair because of the primacy of making a finding over the giving of reasons for that finding. But to do so would ignore Fuller's contention that the credibility of the decision is in a symmetrical relationship to the quality of the reasons that are given for that decision. Thus, even though law aspires to ideals that can not always be achieved, this does not destroy the credibility of the process. There must be argument, reasons and a decision for one of the litigants. But we do not undermine the enterprise by construing it ambitiously.

Section 6 - Dworkin on Adjudication

I now wish to reinforce the argument that the rational core of common law adjudication is found in its design as a pragmatic solution to practical problems. Dworkin gives support to this viewpoint in the essay "No Right Answer?",[46] and I shall once again borrow from his work. The analysis shall be restricted to the two main lines of argument in the "No Right Answer?" essay.

The first line introduces what Dworkin labels 'dispositive concepts'. He elucidates these concepts as ideas which delineate the way in which decisions can be made. An excellent example he uses is the concept of a tennis serve being in or out. What counts as 'in' and 'out' may change but the fact that the official must make a decision on the basis of whether a serve is in or out does not change.[47] In performing this function, dispositive concepts link the actual circumstances in which decisions are made to the claims of right that litigants plead for. Dworkin calls this linkage a bridge.

> These concepts provide a special kind of bridge between certain sorts of events and the conclusory claims about rights and duties that hold if these events can be demonstrated to have occurred.[48]

Dworkin's account of dispositive concepts is innovative because he connects it to the structure of adjudication. They are the conceptual device whereby a

finding for the entitlement claim of either the plaintiff or defendant is ensured because they preempt the possibility that a judge could reject the pleas of both plaintiff and defendant on the grounds that neither has an entitlement. Dworkin terms this eliminated option the "logical space" between the entitlement claims of the disputants. Dispositive concepts close this 'space' and thus are a manifestation of the most fundamental feature of legal reasoning; the adjudicative process is structured so that one of the litigants must receive a finding in his favour. Our use of these concepts commits us to the search for right answers in the law.

> The need for concepts having that function in legal argument arises because the concepts of right and duty in which conclusory claims are framed are structured, that is, because there is space between the opposite conclusory claims.[49]

As the legal tool that guarantees the success of the adjudicative process, the existence of dispositive concepts provides evidence for the right answer thesis. Dworkin takes it to be a powerful argument that these concepts are used in legal argument to argue for a right answer as between the plaintiff and defendant. Put another way, our use of these concepts commits us to the search for right answers.

> I am able to point to the fact that lawyers treat the claim that a contract is not valid as the negation of the claim that it is valid, the claim that someone is not liable as the negation of the claim that he is, and so forth... These are powerful arguments in my favour against this account, and though they are not conclusive, I do not see any arguments that he might make on his own side.[50]

Dworkin's appeal to the way common law judges argue has great merit and is solid empirical evidence that they have a duty to search for right answers. If judges perceived their role as enabling them, in some cases, to decide either way, then, it is hard to explain the predominance of dissenting opinions at the appellate level. It would certainly enhance the prestige of the courts, if they construed their role as requiring the making of a choice, to be unanimous in proclaiming that choice. Such is the custom at party conventions after the deciding vote in declaring the victor, the unanimous preference of the party. Thus, the issuance of dissenting opinions is counter productive unless it is an institutional reaffirmation of the pursuit of 'right answers'.

Dworkin's objective in describing dispositive concepts is to enhance the plausibility of arguing that the law is designed to produce right answers.[51] What I wish to claim is that this original argument ultimately makes another case for the association of the judicial

duty to search for right answers with the rational core of the common law. The constraints of common law adjudication require that we employ concepts that ensure that a decision for one of the two disputants will be forthcoming. Contracts are valid or invalid, they are not inchoate, litigants have cause of action or they do not, and definitive answers are given and argued for as to criminal and civil liability. Thus dispositive concepts in the common law constitute empirical evidence for the right answer thesis.

Dworkin's second argument for right answers makes an overt plea to the claim that there is a shared understanding in the common law community that the function of common law is to be a rational, dispute settling mechanism. Accordingly, an accurate portrayal of it must capture this shared understanding.

Dworkin tries to neutralize two objections with his argument, claiming that the first of the two is reducible to the second. The first objection maintains that there are no right answers in the law because legal standards are vague. Dworkin states that this objection confuses the fact of vagueness with the consequence of vagueness. Since the law provides us with mechanisms to resolve the problems arising from the existence of vague standards, this fact does not undermine the right answer thesis. The second, more basic, objection which Dworkin believes the

argument turns on is the appeal to the fact of disagreement. There cannot be right answers in the law because there is perpetual disagreement among lawyers as to the proper decision in any given case. How can we maintain that the law is concerned with right answers when we can never reach an agreement as to what these answers are?

It is in response to this second objection that Dworkin makes his most demonstrable appeal to the purpose approach. Using the analogy of literary interpretation, Dworkin tries to illustrate how disagreements can arise over what counts as the right answer within a context where there is agreement that a right answer can be found. Literary interpretation can follow a conception of 'narrative consistency' that the participants all use. Here the argument for the existence of the right answer is not based on an empirical appeal but to a shared process of interpretation. Those who are dubious of the activity will see their doubt evaporate if they undertake the activity.

Dworkin's argument here is very much like Hart's insistence on the internal point of view. One can only understand human activity if one appreciates the frame of reference used by the agents engaged in the activity.

> It is very likely that if he is asked to take part in the exercise he will find, at least after listening to the group for a while, that he himself will have beliefs of narrative consistency, and that he will be able to provide arguments that others recognize as arguments.[52]

He builds on the analogy by claiming that if the participants can successfully debate within a context which presumes a shared process of reasoning, then, this is evidence that the process is tangible and not ephemeral.

> The fact that the enterprise succeeds in the way it does is a reason for supposing that there are facts of narrative consistency about which the participants debate.[53]

Dworkin connects the analogy to adjudication in terms of ground rules of legal activity.[54] He does not provide a precise statement of these rules but he must acknowledge that they perform two distinct tasks. First, they stipulate that one of the litigants in a legal dispute has an entitlement which the law must uphold. Second, they stipulate the process of reasoning used to accommodate the demands for a decision. The process of common law adjudication requires the search for a right answer between litigants and Dworkin's idea of the enforcement of political rights is his particular version of how the process justifies the claim that the goal has been achieved. Thus, even though the right answer thesis and the political rights thesis are complementary components in the explanation of common law adjudication, they are separable.

Dworkin is not clear about the relationship between

the judicial duty to search for right answers and the political rights thesis. The general claim is that law employs dispositive concepts to frame legal argument. This guarantees that, (1) a decision will be reached, and (2) litigants will argue for a finding on the basis of an entitlement. Both of these general requirements result in a search for right answers. Dworkin's more specific claim is that we dispatch the dispositive concepts with a process of justification based on political theory. In sum, Dworkin's claim about political theory is an argument for the right answer thesis. Dworkin uses it to demonstrate how the law generates justificatory reasons; decisions are correct when they enforce the relevant political right. Further, we learn, by participating, that there is a decision procedure to determine what the right answer is.

Dworkin's ambivalence over the relationship between political rights and right answers has resulted in his unwillingness to state his argument in the way I have just explicated it. Although Dworkin prefers to argue for the right answer thesis on the basis of the political rights thesis, his argument for dispositive concepts acknowledges the independence of an argument based on understanding the rational core of common law adjudication. Dworkin's explicit refusal to construct two parallel lines of argument, with one independently based on the purpose of

common law adjudication probably reflects a distaste with restricting the argument for the right answer thesis to the institutional level of a particular legal system. Yet it is precisely at that level that he makes his most fundamental plea for the right answer thesis. Dworkin offers a pragmatic justification for the process of common law adjudication that appeals to its efficacy.

> Whether it is so will depend upon whether the enterprise, taken as a whole, serves some worthwhile purpose, and serves it better than a revised form of the enterprise would.[55]

The most important ramification I wish to draw from Dworkin's justification is that it dovetails with the analysis of the paradigm of institutional decision making I developed in Chapter I. That analysis enables me to endorse Dworkin's claim that the best justification for the right answer thesis is a pragmatic one. Recall there that I argued that the imposition of a duty to search for right answers obligates the decision-maker to sustain institutional values and objectives. Further, such an assignment of duties also has the effect of obligating the decision-maker to do his best. Dworkin's pragmatic argument for the search for right answers is an expression of this view. If the process of adjudication is structured so that judges must search for right answers, the quality of their decisions is thereby enhanced, and the efficacy

of the common law enterprise reinforced through the preservation and promotion of institutional values and objectives. I submit, and this is a point I shall now elaborate on, that this is part of the rational core of common law adjudication that underlies the common law judicial role.

Section 7 - Common Law Right Answers

From Soper's analysis we learn that the explanation of judicial activity within any legal system must be explained in terms of the fundamental judicial function of certifying the very existence of law. Through the good faith attempt to do justice, the judiciary affirm and reassure the citizenry that an obligation to obey the standards produced by the institution is both justified and required. Even though the common law constitutes an ambitious variance within this overall conceptual framework, it must nonetheless satisfy the judicial curatorial function of legitimizing the standards emanating from that institution as normative and not just coercive. To this end, the common law commitment to the right answer thesis is an integral part of the way the institution achieves the respect necessary to generate and sustain law. The requirement that the judge search for right answers, in conjunction with the active participation of the

disputants, is aimed at ensuring that the decisions of the court are worthy of our allegiance. The common law in this way establishes the citizen's obligation to obey. The existence of the requirement that common law judges search for right answers must be understood and therefore explained in the light of this ultimate purpose.

PID AND THE COMMON LAW

Although the common law must be accounted for as a species of the genus law, my main objective in this chapter has been the parochial one of describing the rational core of common law adjudication. To that end, I attempted to delineate the specific purposes indigenous to common law adjudication and I shall now translate those purposes to the common law judiciary. In so doing, a more detailed account can be provided as to why the common law judge understands that the proper performance of his role requires a search for right answers and accordingly a duty to conduct such a search is acquired when he takes up the role. It is here that I shall trade on the analysis of PID conducted in the first two chapters.

The study of PID makes it possible to understand why the common law judge does not perceive the need to search for right answers merely because of the fact that common law argument is structured so that the plaintiff and

defendant argue for an entitlement on the basis of dispositive concepts. The common law judge is capable of appreciating the purposes this structure is designed to serve and it is through his understanding of these purposes that the requirement that he search for right answers arises. I shall now piece together various threads of the study of the weak variant of PID to make the comparison.

First, the contingent necessities the judicial role is devised to respond to have a remarkable similarity to the institutional objectives achieved when a superior uses PID to impose a duty on a subordinate to search for a right answer. Both exemplify the same strategic response to practical dilemmas that must be resolved. The formulation of the right answer thesis has its genesis in this situation. The weak variant of PID and common law adjudication both constitute the same problem solving response to the need of institutional players to make decisions. In the case of common law, it is for a multiplicity of decisions over a protracted period of time whereas in the case of PID it is for particular decisions at specific times. Nevertheless, in both cases, the decision-making duties satisfy the same requirement. As I have argued, the demand that the decision-maker make a judgement as to a right answer preserves institutional values and objectives in the face of the inability of a

superior to specifically direct the institutional agent to perform a certain task. In the case of PID, the superior confronts this limitation as a conceptual barrier or a time constraint barrier: he is incapable or practically unable to formulate a detailed directive that precisely specifies what the subordinate is to do. By employing PLD, he can appeal to a shared sense of purpose that enables him to impose decision-making duties on the subordinate. In the case of the common law, the nature of the decision-making function renders it conceptually impossible to specify judicial responsibilities in precise detail. Judicial decisions are aimed at resolving practical problems, i.e., they are concerned with concrete not hypothetical problems. Moreover, in situations where the question of the judge's decision-making duties arises, this is because either the standards are complex or the facts make their application difficult or both factors jointly contribute to the difficulty of making a decision. Thus, circumstances will arise in common law that are particularly suitable to the formulation of decision-making duties by connecting them to a shared sense of purpose. Otherwise, and this is a point I shall momentarily return to, one could only trust the judiciary to respond in an acceptable manner.

It is the practical nature of common law adjudication that makes it most amenable to the right answer thesis.

Even though both the plaintiff and defendant plea for an entitlement on the basis that there is a uniquely correct legal solution for their dispute there are many institutional constraints that drastically reduce possible errors the decision-maker might make in looking for the right answer. Unlike the sergeant who might let his imagination run wild, a judge is far more limited in the considerations he must entertain. Further, the advocacy process ensures that those most interested in the dispute will be given a chance to enter argument on their own behalf. This helps to guarantee that the judge will entertain the appropriate considerations in reaching his decision. A sergeant does not have this luxury and may err in the reasons he unilaterally devises for his decision.

The common law adjudicative process also provides the judge with the opportunity to ponder his decision. The forum is both serious and contemplative and makes more reasonable the demand that he reach the correct decision than if he was forced to make quick decisions. Further, judges have the resources of the law reports and scholarly works to draw on to enhance their expertise. The influence of commentators and judges in other legal jurisdictions from that of the decision-maker can best be explained in this way. Finally, judges are trained in techniques of legal argument which prepare them for the arduous tasks they are expected to fulfill. Indeed, Hughes characterizes

the honing of this expertise as the essence of law school training.

> It is true that the law can in some fashion be reduced to a body of rules, as indeed happens with collected editions of the statutes or with such works as the Restatement. But every law student quickly discovers (if he ever thought to the contrary) that he does not come to a law school to learn the content of these volumes, and it is a familiar cliche that no lawyer can know very much of the law. The tasks of law teaching are to impart sophistication in techniques of argument and reasoning.[56]

The compatibility between weak PID and the common law is revealed in the fact that neither is committed to claiming that an accepted decision procedure exists that is capable of verifying the decision as the correct one. What is substituted in both cases is the belief that, in the light of institutional values and objectives, standards can be molded to the actual facts encountered by decision-makers such that the decision arrived at can be argued to be the correct one. The fact that this faith animates non-legal institutional life is evidence for claiming that the same faith is at the rational core of common law adjudication. It also helps us to understand why the right answer thesis is belief based.

> A wide variety of institutional arrangements tended to produce cohesion of thought .... so too did such beliefs as the belief that the

> common law was of immemorial antiquity, and the belief that if only the matter was considered long enough and with sufficient care a uniquely correct answer could be distilled for every problem.[57]

In the study of PID I also argued that the imposition of a duty to search for right answers is particularly useful when the subordinate must employ some special expertise in arriving at the decision. It is here that the pragmatic nature of the common law decision-making process complements the way the weak variant of PID functions as a purposeful endeavour. By having the search for right answers built into the common law process, the reliance on judicial expertise is not merely a matter of trust. Just because the nature of the judicial task is such that it is impossible to tell them in advance what to do, our reliance on their decision-making capabilities need not just be a matter of trusting them to get on in whatever way they deem appropriate. Within the common law, the judiciary can be called to account by reviewing their decisions according to the purposes that define the institution. To that end, the design of the process so that a search for a right answer is required obligates the judge to employ his legal expertise as best he can; his resolve to so proceed is not just a matter of personal integrity but also of obligation.

Further, as I tried to show in the study of PID, such

a demand will be efficacious even in the case of sporadic frustration. The eclectic nature of the considerations that can be entertained to resolve each special set of factual circumstances militates against the conclusion that one has failed to obtain the right answer. Thus, the pragmatic nature of the decision-making enterprise both in PID and the common law not only leads us to derive decision-making requirements from a shared sense of purpose but it also enables us to sustain our commitment to the enterprise provided that these purposes are generally satisfied.

There is an important difference between the imposition of decision-making duties within PID and those acquired within the common law that should be noted. The subordinate has the duty imposed within PID because of his position in the institutional hierarchy. As such, he acquires it passively; as long as the subordinate maintains his position in the hierarchy he has the duty to perform decision-making duties assigned by the superior. The judge, on the other hand, acquires his decision-making duties in an active way. The act of taking on the common law judicial role, in conjunction with his recognition of the shared sense of purpose the role is designed to serve, creates the duty to search for right answers. The duty arises because the agreement to perform the role substantiates the demand that he perform it correctly.

This has the result of requiring the judge to sustain the shared sense of purpose that constitutes the rational core of common law adjudication. Since I have found the right answer thesis to be part of that rational core, I therefore conclude that one can properly derive a duty to search for right answers for the common law judiciary. In describing this legal system we are elucidating a particularly familiar species of the genus law.

LEGAL REASONING

Admittedly, there is clearly a pragmatic bent to the version of the right answer thesis that I have developed. But, it should not be forgotten that the common law is an encounter between litigants where theoretical considerations are strained through real disputes and virtually never exceed the scope necessary to resolve that dispute. Nevertheless, as both Dworkin and MacCormick point out, the need to render decisions which are both consistent and coherent sometimes will require the formulation of broad statements of principle to show that these constraints have been satisfied. However, following Fuller, we can explain abstract theoretical ruminations as only required when there is a need in a particular case to preserve the integrity of adjudication by demonstrating that the particular case has been resolved rationally. To

satisfy this goal, decisions are justified by placing them within a theoretical framework.

What I hope to be one of the merits of my approach is its capability of accounting for the common law as an oral culture. If common law is most fundamentally a commitment to resolve disputes by mediating established legal doctrines to specific facts through a shared conception of purpose, then one can come to understand the endeavour by grasping the purposes. Even in principle, common law reasoning does not proceed on the basis of a commitment to a complex decision-making procedure requiring elaborate excursions into theorizing (I am now thinking of Dworkin.) In place of such sophistication, I substitute a pragmatic account; common law reasoning is a practical problem-solving strategy. This explains why the common law prospers without inculcating in new lawyers an explicitly stated theory of reasoning. Common law argument proceeds on the basis of the purposes it is designed to achieve. By participating in the process, new lawyers come to understand these purposes and are thereby initiated into the profession. Exposing students to such an indoctrination into purpose constitutes one of the functions of law school.

The centrality of the judiciary to the common law even extends to preserving its pragmatic base. The belief that "institutional right answers" can be achieved through

the consideration of institutional values and objectives appropriate to the case at bar requires the judge to make the determination as to what these are. To make the determination he must assess the consensus on the values and objectives that exists among those familiar with legal practices, standards and the ongoing history of the institution. Typically, it will be the members of the legal profession who sustain the consensus. However, because of his need to make the decisions, it falls to the judge to function as the repository of the consensus; for, when there is a disagreement as to an appropriate value and, or, objective, an "institutional right answer" can only be obtained if the judge first makes the determination as to ongoing consensus within the professional community.[58] As in other aspects of common law decision making, legal scholars and adversarial argument can aid the judge when the consensus comes into question. Nevertheless, the onerous task of preserving the institution once again falls to the judge.

> [It] seems to me that the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. <u>These ideas and practices</u>

> exist only in the sense that they are accepted and acted upon within the legal profession. (my italics)[59]

Parenthetically, it should not be forgotten that this same presumption of consensus animates decision making within the paradigm of institutional decision making. Further, as I suggested in the study of PID, the maintenance of a fidelity to institutional values and objectives dramatically enhances the possible scope of institutional activity.

The argument thus ends on a familiar refrain. The intimate connection between the faith that a professional consensus exists and the belief that "institutional right answers" can be achieved, coupled with the reliance on the judiciary to perpetuate the creed, once again underscores the purposeful nature of common law judicial decision making. In short, any inquiry that insists on a more complex account of common law reasoning has likely failed to appreciate the way in which its basic pragmatic framework of reasoning and argument is organized in terms of a shared sense of purpose.

CONCLUSIONS

We conceive law as existing when the relevant institution is perceived to pursue certain purposes. The common law, through the activities of its professional class, and most crucially through its judiciary, satisfies this grand purpose through the pragmatic but eminently sensible strategy of searching for "institutional right answers".

But the case for common law right answers can also be made at another level. It begins by demonstrating the importance of the paradigm of institutional decision making. Once the social practice is appreciated, one can better understand the point of imposing a duty to search for right answers even when the decision arrived at can never be definitely established as the correct one. The paradigm can then be appropriated to the common law arena. Common law adjudication shares with the paradigm of institutional decision making the fact that it is most fundamentally a purposeful endeavour. Isolating the social practice of deriving decision-making duties from a shared sense of purpose corroborates a similar finding in the common law.

To conclude, the elaborate analysis of the paradigm of institutional decision making makes us sensitive to the

purposes commensurate with the imposition of a duty to search for a right answer. This enables one to appreciate the unique way that the acquisition of such a duty by the common law judiciary serves the common law enterprise. If there is any one lesson to be drawn from the dissertation, this would be it.

ENDNOTES

INTRODUCTION

1. Sartorius, "Social Policy and Judicial Legislation", APQ, Vol. 8, No. 2, 1971, p. 158.

2. A clear statement of the connection is made by Altman in his 'Legal Realism, Critical Legal Studies and Dworkin', Philosophy and Public Affairs, Vol. 15, No. 3, (Summer 1986), pp. 205-235.

CHAPTER I

1. Ronald Dworkin, "Model of Rules I", Taking Rights Seriously, pp. 14-45. Originally published as "The Model of Rules", 35 U. Chi. L. Rev. 14, (1967).

2. Ibid., p. 31.

3. Reconstituting Dworkin in this way does no harm. The type of discretion which drops out of the analysis (Dworkin's sense two) is virtually ignored by all commentators. For example, Edgar Bodenheimer "Hart, Dworkin and the Problem of Judicial Law-making Discretion", 11GLR 1143 (1977) at p. 1153 footnote 50.

4. Op. cit., pp. 31-32.

5. Ibid., p. 33.

6. At various points, I shall abbreviate the reference to the paradigm of institutional decision making by just using the word paradigm or the acronym PID. Further, the phrase 'social practice' shall also be used solely as a synonym for what I analyze as the paradigm of institutional decision making. I find the synonym useful because I am trying to capture the idea of an institutional convention that exists in the same way that social rules exist (Hart, The Concept of Law, p. 55).

7. Although I shall distinguish between weak and strong variants of PID, I shall at some points in referring to Dworkin revert to his terminology of weak and strong discretion. I shall do so to make the reference clear when I am trying to suggest possible

similarities between the existing literature and my approach.

8. Nozick, Anarchy, State and Utopia, p. 19.

9. Hart, The Concept of Law, p. 192.

10. Ibid., p. 126.

11. Ibid., p. 128.

12. I have reintroduced the verb 'search' as a substitute for judgement to emphasize the belief shared by superiors and subordinates that it is possible, at least in principle, to obtain a right answer even in difficult cases. I shall elaborate on the relationship between the adherence to this belief and the purposes the belief serves in sections three and four.

    The term 'search' is intended to capture the fact that one does not appeal to an established decision procedure (such as in logic or mathematics) to justify the decision as the correct one. The phrase "searching for right answers" shall be used to refer exclusively to this sub-set of weak PID.

13. Soper, A Theory of Law, pp. 69-74.

14. I leave aside the possibility that the lieutenant delegates out of laziness or to avoid responsibility. We are able to cite these maneuvres as abuses because we are familiar with the purposes of the practice.

15. Dworkin, Taking Rights Seriously, p. 32.

16. Again, it is not hard to conceive of abuses. This is why one could be said to humiliate or harass a subordinate when insisting he make a judgement as to a right answer for an unimportant task. It is pointless in such cases to require such an expenditure of energy.

17. I shall hereafter be referring exclusively to this sub-set of weak PID when discussing the weak variant of PID. I shall accordingly drop the qualifier 'sub-set' when referring to it.

18. Robert Moffat makes a similar point in "Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction", 37 Univ. Florida Law Review 197 (Spring 1985) at p. 307. For the sake of certainty,

legal positivists (most particularly H.L.A. Hart) are anxious to distinguish between the purposes of a legal rule and its 'core' meaning.

19. Philip Soper, A Theory of Law, p. 14.

20. Ibid., p. 50.

21. Ibid., p. 107.

22. Ibid., p. 106.

23. Aristotle, Nichomachean Ethics, translated by Terence Irwin Hackett, 1985, p. 3.

24. Both of these points will be discussed in detail in Chapter V.

CHAPTER II

1. There is a popular movement in the philosophy of science which explains the scientific process in this way. Originating in the work of Polanyi, the claim is made that the rites of initiation into the scientific community takes place tacitly in the student/teacher interaction within the laboratory setting.

2. Soper, A Theory of Law.

3. Ibid., p. 59.

4. Ibid., p. 60.

5. Ibid., p. 76.

6. Ibid., p. 80.

7. Ibid., p. 89.

8. Ibid., pp. 69-74.

9. Ibid., p. 77.

10. Ibid., p. 90.

11. The idea of criteria for the application of assigned standards will be cross-referenced to the findings of chapter one in the next section. The other two aspects will be cross-referenced in this section.

12. Dworkin, Taking Rights Seriously, p. 31.

13. This point is reminiscent of Hart's idea of the internal point of view - we must see things from the agent's point of view to understand his actions.

14. The argument I am now making has similarities to Dworkin's analysis of the institution of chess in the 'Hard Cases' chapter of Taking Rights Seriously, pp. 101-105. There Dworkin describes the process whereby one reflects on the institution of chess to derive criteria for the application of the forfeiture rule when the obvious criteria do not seem applicable to the concrete facts at hand. I shall explicate this argument of Dworkin's in section four of chapter five.

15 Dworkin, Taking Rights Seriously, p. 33.

CHAPTER III

1. Wilfred Waluchow, "Strong Discretion", The Philosophical Quarterly, Vol. 33, No. 133, p. 321.

2. Ibid., p. 323. I use (A) where Waluchow uses P1 and (B) where he uses P2.

3. Ibid., p. 327.

4. Ibid., p. 326.

5. Ibid., p. 329.

6. Ibid., pp. 331-335.

7. Ibid., p. 330.

8. Ibid., p. 329.

9. Hart, The Concept of Law, p. 138.

10. Ibid.

11. Ibid., p. 139.

12. Ibid., p. 142.

13. Ibid.

14. Ibid.

15. Philip Soper, "Metaphors and Models of Law: The Judge as Priest", Michigan Law Review, Vol. 75, p. 1196.

16. Ibid., pp. 1199-1201.

17. Ibid., p. 1200.

18. Ibid., p. 1208.

19. Ibid.

20. Ibid., p. 1209.

21. Hart, The Concept of Law, pp. 121-132. Hart develops the idea of open-texture to show that it would be possible to derive a theory of legal reasoning from his idea of law as a system of rules. His discussion of judicial discretion (which I noted in chapter one) takes place in the same section.

22. Neil MacCormick, Legal Reasoning and Legal Theory, pp. 18-52.

23. Ibid., p. 45.

24. Hart, The Concept of Law, pp. 156-157.

25. David Lyons, Ethics and the Rule of Law, pp, 82-83.

26. Ibid., pp. 84-85. Lyons does not distinguish the two senses of justice and therefore is somewhat unfair to Hart. However, Lyons' points are not affected by this rhetorical maneuvre.

27. Ibid., pp. 84-85.

28. MacCormick, Legal Reasoning and Legal Theory, p. 76.

29. Ibid., p. 107.

30. Ibid., p. 64.

31. Ibid., p. 153.

32. Ibid., pp. 182-183. I merely note this argument. It is not a worry for my purposes.

33. MacCormick has an interesting discussion of 'explanative discretion' at p. 255, of Legal Reasoning and Legal Theory, which adds to, but does

not alter, his main line of argument.

34. Ibid., p. 148.

35. Ibid.

36. Chapter five will offer an account of why common law judges must search for right answers that differs sharply from that of Dworkin. However, since that chapter shall also develop an account of the relationship between law and rationality that differs from the one MacCormick ascribes to proponents of the right answer thesis, my objective here is to show that MacCormick's critique follows from his own theory and that an alternate account of the way law functions as a rational endeavour can commit itself to the right answer thesis while simultaneously remaining immune to the charge of ultra-rationalism. In a word, MacCormick can be outflanked.

37. Ibid., pp. 246-248.

38. Ibid., p. 247.

39. Ibid., p. 248.

40. Ibid., p. 269.

41. MacCormick, Legal Reasoning and Legal Theory, pp. 140-141.

42. Dworkin, Taking Rights Seriously, pp. 38-39.

CHAPTER IV

1. Neil MacCormick, "Legal Obligation and the Imperative Fallacy", pp. 100-129, Oxford Essays in Jurisprudence, Oxford, 1973.

2. MacCormick, Legal Reasoning and Legal Theory, pp. 139-140.

3. MacCormick, H.L.A. Hart, pp. 105-106.

4. Philip Soper, A Theory of Law, p. 10.

5. Ibid., p. 17.

6. Ibid.

7. Ibid., p. 20.

8. Ibid., p. 23.

9. Among other things, Soper here is showing us the full import of Hart's insistence in the Preface to The Concept of Law that it is an essay in descriptive sociology.

10. Ibid., p. 24.

11. Ibid., p. 25.

12. Ibid., p. 26.

13. Ibid.

14. Ibid., p. 34.

15. Ibid., p. 39.

16. Ibid., p. 40.

17. Ibid., p. 44.

18. Ibid., p. 55.

19. Solzhenitsyn, The Gulag Archipelago, Harper and Row, 1973.

20. Soper, A Theory of Law, p. 14.

21. Ibid.

22. Ibid., p. 103.

23. J.S. Mill, Auguste Comte and Positivism, Ann Arbor Paperbacks, 1961, p. 6.

24. Philip Soper, A Theory of Law, p. 102.

25. Ibid., p. 106.

26. Ibid., p. 107.

27. Ibid., pp. 108-109.

28. Ibid., p. 112.

29. Ibid., p. 113.

30. Ibid., p. 119.

31. Ibid., p. 117.

32. The insistence here that a professional role can be explained in terms of a basic purpose is not unique to law. It has been argued that a doctor's role can be defined in terms of a basic purpose, i.e., "So act as to promote the health of your patient". H.A. Bassford, "Processes in the Formulation and Legitimisation of Professional Ethics in a Changing World", Soc. Sci. Med., Vol. 17, No. 16, pp. 1191-1197, 1983 at p. 1192.

CHAPTER V

1. Graham Hughes, "Rules, Policy and Decision-Making", The Yale Law Journal, pp. 411-439, Vol. 77, No. 3 (1968).

2. Ibid., p. 439.

3. Ibid., p. 422.

4. Ibid., p. 425.

5. Ibid.

6. Ibid., p. 429.

7. Ibid., p. 439.

8. In a comment on p. 433 where he criticizes an early attempt by Dworkin to equate valid law with a good reason for a decision, Hughes shifts from policy to reasons. This suggests that the taxonomy he undertook under the rubric policy is intended to describe what the legal community would accept as good reasons for a decision.

9. Ibid., p. 433.

10. Ibid., p. 433.

11. Lon Fuller, "The Forms and Limits of Adjudication", 92 Harv L. Rev. (1978), p. 353.

12. Ibid., p. 357.

13. Ibid., p. 359.

14. Ibid., p. 360.

15. Ibid., pp. 366-367.

16. Ibid., p. 388.

17. Alasdair MacIntyre, After Virtue, p. 235.

18. Fuller, op. cit., p. 388.

19. Paul Weiler, "Two Models of Judicial Decision-Making, The Canadian Bar Review, Vol. (1968), pp. 406-471.

20. Ibid., p. 410.

21. Ibid., p. 413.

22. Ibid., p. 431.

23. Ibid., p. 432.

24. Two qualifications are necessary: individual judges can resign or disqualify themselves from hearing a particular case. This just shifts the burden of making the decision to another judge.

25. Ibid., p. 431.

26. Following Dworkin, I take the paradigm of common law adjudication to be the civil action. As he notes, in a criminal action, even if the defendant is guilty, the state has no right to a conviction without satisfying the burden of proof. Taking Rights Seriously, p. 100.

27. Hart, Essays in Jurisprudence and Philosophy, p. 136.

28. Lon Fuller, "The Forms and Limits of Adjudication", p. 369.

29. Dworkin, Taking Rights Seriously, pp. 81-130.

30. Ibid., p. 82.

31. Ibid., p. 87.

32. Ibid.

33. Ibid., p. 88.

34. Ibid., p. 101.

35. Ibid., pp. 101-105.

36. Ibid., p. 102.

37. Ibid., p. 104.

38. Ibid., p. 105.

39. Ibid., pp. 110-130.

40. Ibid., p. 126.

41. Lon Fuller, Legal Fictions, p. 53.

42. Ibid., p. 33.

43. Ibid., p. X.

44. Ibid., p. 94.

45. Ibid., p. 130.

46. Ronald Dworkin, "No Right Answer?" in Hacker and Raz (eds.), Law, Morality and Society, Clarendon Press, 1977, pp. 58-84.

47. Ibid., p. 65.

48. Ibid.

49. Ibid.

50. Ibid., pp. 65-66.

51. Dworkin, "No Right Answer?" p. 58. Dworkin makes this comment because he recognizes that holding this position resulted in many ignoring anything else he has to say. The charge he wishes to refute is that the position is wildly ridiculous. He claims it is eminently sensible.

52. Ibid., p. 79.

53. Ibid.

54. Ibid., p. 74.

55. Ibid., p. 81.

56. Hughes, 'Rules, Policing and Decision Making', p. 436.

57. Simpson, "The Common Law and Legal Theory", pp. 95-96.

58. One is reminded here of Justice Holmes' distinction between the role of the advocate and the role of the judge. The lawyer only has a duty to his client and therefore he can properly function exclusively as a predictor and manipulator of judicial decisions. The judge, on the other hand, has a duty to preserve and foster the growth of the law. The most skillful advocate is the one who understands that the "true basis of prophecy" is founded in the way in which judges strive to rationally arrive at decisions. Holmes, "The Path of the Law", in Collected Legal Papers: p. 19.

59. Simpson, "The Common Law and Legal Theory", p. 94.

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