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HARD CASES †

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Philosophers and legal scholars have long debated the means by which decisions of an independent judiciary can be reconciled with democratic ideals. The problem of justifying judicial decisions is particularly acute in "hard cases," those cases in which the result is not clearly dictated by statute or precedent. The positivist theory of adjudication — that judges use their discretion to decide hard cases — fails to resolve this dilemma of judicial decisionmaking. Professor Dworkin has been an effective critic of the positivist position and in this essay he provides an alternative theory of adjudication that is more consistent with democratic ideals. He first posits a distinction between arguments of principle and arguments of policy and suggests that decisions in hard cases should be and are based on arguments of principle. He then illustrates how this distinction is used in cases involving constitutional provisions, statutes, and common law precedents.

THIS essay is a revised form of an inaugural lecture given at Oxford in June of 1971. I should like to repeat what I said then about my predecessor in the Chair of Jurisprudence. The philosophers of science have developed a theory of the growth of science; it argues that from time to time the achievement of a single man is so powerful and so original as to form a new paradigm, that is, to change a discipline's sense of what its problems are and what counts as success in solving them. Professor H.L.A. Hart's work is a paradigm for jurisprudence, not just in his country and not just in mine, but throughout the world. The province of jurisprudence is now the province he has travelled; it extends from the modal logic of legal concepts to the details of the law of criminal responsibility, and in each corner his is the view that others must take as their point of departure. It is difficult to think of any serious writing in jurisprudence in recent years, certainly in Great Britain and America, that has not either claimed his support or taken him as a principal antagonist. This essay is no exception.

His influence has extended, I might add, to form as well as

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substance. His clarity is famous and his diction contagious: other legal philosophers, for example, once made arguments, but now we only deploy them, and there has been a perfect epidemic of absent-mindedness in imitation of the master. How shall we account for this extraordinary influence? In him reason and passion do not contend, but combine in intelligence, the faculty of making clear what was dark without making it dull. In his hands clarity enhances rather than dissipates the power of an idea. That is magic, and it is the magic that jurisprudence needs to work.

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I. INTRODUCTION

A. The Rights Thesis

Theories of adjudication have become more sophisticated, but the most popular theories still put judging in the shade of legislation. The main outlines of this story are familiar. Judges should apply the law that other institutions have made; they should not make new law. That is the ideal, but for different reasons it cannot be realized fully in practice. Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules. So judges must sometimes make new law, either covertly or explicitly. But when they do, they should act as deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem.

That is perfectly familiar, but there is buried in this common story a further level of subordination not always noticed. When judges make law, so the expectation runs, they will act not only as deputy to the legislature but as a deputy legislature. They will make law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own. This is a deeper level of subordination because it makes any understanding of what judges do in hard cases parasitic on a prior understanding of what legislators do all the time. This deeper subordination is therefore conceptual as well as political.

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

of principle on the one hand and arguments of policy on the other.[1]

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 individual or group right. The argument in favor of antidiscrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle. These two sorts of argument do not exhaust political argument. Sometimes, for example, a political decision, like the decision to allow extra income tax exemptions for the blind, may be defended as an act of public generosity or virtue rather than on grounds of either policy or principle. But principle and policy are the major grounds of political justification.

The justification of a legislative program of any complexity will ordinarily require both sorts of argument. Even a program that is chiefly a matter of policy, like a subsidy program for important industries, may require strands of principle to justify its particular design. It may be, for example, that the program provides equal subsidies for manufacturers of different capabilities, on the assumption that weaker aircraft manufacturers have some right not to be driven out of business by government intervention, even though the industry would be more efficient without them. On the other hand, a program that depends chiefly on principle, like an antidiscrimination program, may reflect a sense that rights are not absolute and do not hold when the consequences for policy are very serious. The program may provide, for example, that fair employment practice rules do not apply when they might prove especially disruptive or dangerous. In the subsidy case we might say that the rights conferred are generated by policy and qualified by principle; in the antidiscrimination case they are generated by principle and qualified by policy.

It is plainly competent for the legislature to pursue arguments of policy and to adopt programs that are generated by such arguments. If courts are deputy legislatures, then it must be competent for them to do the same. Of course, unoriginal judicial decisions that merely enforce the clear terms of some plainly valid

[1] I discussed the distinction between principles and policies in an earlier article. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–29 (1967). The more elaborate formulation in Part II of this essay is an improvement; among other virtues it prevents the collapse of the distinction under the (artificial) assumptions described in the earlier article.

statute are always justified on arguments of principle, even if the statute itself was generated by policy. Suppose an aircraft manufacturer sues to recover the subsidy that the statute provides. He argues his right to the subsidy; his argument is an argument of principle. He does not argue that the national defense would be improved by subsidizing him; he might even concede that the statute was wrong on policy grounds when it was adopted, or that it should have been repealed, on policy grounds, long ago. His right to a subsidy no longer depends on any argument of policy because the statute made it a matter of principle.

But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle. Consider, for example, the problem of the recent *Spartan Steel* case.[2] The defendant's employees had broken an electrical cable belonging to a power company that supplied power to the plaintiff, and the plaintiff's factory was shut down while the cable was repaired. The court had to decide whether to allow the plaintiff recovery for economic loss following negligent damage to someone else's property. It might have proceeded to its decision by asking either whether a firm in the position of the plaintiff had a right to a recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested, which is a matter of policy.

If judges are deputy legislators, then the court should be prepared to follow the latter argument as well as the former, and decide in favor of the plaintiff if that argument recommends. That is, I suppose, what is meant by the popular idea that a court must be free to decide a novel case like *Spartan Steel* on policy grounds; and indeed Lord Denning described his own opinion in that case in just that way.[3] I do not suppose he meant to distinguish an argument of principle from an argument of policy in the technical way I have, but he in any event did not mean to rule out an argument of policy in that technical sense.

I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically are and should be generated by principle not policy. That thesis plainly needs much elaboration, but we may notice that certain arguments of political theory and jurisprudence support the thesis even in its abstract form. These arguments are not decisive, but they are sufficiently powerful to suggest the importance of the thesis, and to justify the attention that will be needed for a more careful formulation.

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[2] Spartan Steel & Alley Ltd. v. Martin & Co., [1973] 1 Q.B. 27.

[3] *Id.* at 36.

B. Principles and Democracy

The familiar story, that adjudication must be subordinated to legislation, is supported by two objections to judicial originality. The first argues that a community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law. The second argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event.

These two arguments combine to support the traditional ideal that adjudication should be as unoriginal as possible. But they offer much more powerful objections to judicial decisions generated by policy than to those generated by principle. The first objection, that law should be made by elected and responsible officials, seems unexceptionable when we think of law as policy; that is, as a compromise among individual goals and purposes in search of the welfare of the community as a whole. It is far from clear that interpersonal comparisons of utility or preference, through which such compromises might be made objectively, make sense even in theory; but in any case no proper calculus is available in practice. Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. The political system of representative democracy may work only indifferently in this respect, but it works better than a system that allows nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers.

The second objection is also persuasive against a decision generated by policy. We all agree that it would be wrong to sacrifice the rights of an innocent man in the name of some new duty created after the event; it does, therefore, seem wrong to take property from one individual and hand it to another in order just to improve overall economic efficiency. But that is the form of the policy argument that would be necessary to justify a decision in *Spartan Steel*. If the plaintiff had no right to the recovery and the defendant no duty to offer it, the court could be justified in taking the defendant's property for the plaintiff only in the interest of wise economic policy.

But suppose, on the other hand, that a judge successfully justifies a decision in a hard case, like *Spartan Steel*, on grounds

not of policy but of principle. Suppose, that is, that he is able to show that the plaintiff has a *right* to recover its damages. The two arguments just described would offer much less of an objection to the decision. The first is less relevant when a court judges principle, because an argument of principle does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community. On the contrary, an argument of principle fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it. A judge who is insulated from the demands of the political majority whose interests the right would trump is, therefore, in a better position to evaluate the argument.

The second objection to judicial originality has no force against an argument of principle. If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him. Even if the duty has not been imposed upon him by explicit prior legislation, there is, but for one difference, no more injustice in enforcing the duty than if it had been.

The difference is, of course, that if the duty had been created by statute the defendant would have been put on much more explicit notice of that duty, and might more reasonably have been expected to arrange his affairs so as to provide for its consequences. But an argument of principle makes us look upon the defendant's claim, that it is unjust to take him by surprise, in a new light. If the plaintiff does indeed have a right to a judicial decision in his favor, then he is entitled to rely upon that right. If it is obvious and uncontroversial that he has the right, the defendant is in no position to claim unfair surprise just because the right arose in some way other than by publication in a statute. If, on the other hand, the plaintiff's claim is doubtful, then the court must, to some extent, surprise one or another of the parties; and if the court decides that on balance the plaintiff's argument is stronger, then it will also decide that the plaintiff was, on balance, more justified in his expectations. The court may, of course, be mistaken in this conclusion; but that possibility is not a consequence of the originality of its argument, for there is no reason to suppose that a court hampered by the requirement that its decisions be unoriginal will make fewer mistakes of principle than a court that is not.

C. Jurisprudence

We have, therefore, in these political considerations, a strong reason to consider more carefully whether judicial arguments cannot be understood, even in hard cases, as arguments generated by principle. We have an additional reason in a familiar problem of jurisprudence. Lawyers believe that when judges make new law their decisions are constrained by legal traditions but are nevertheless personal and original. Novel decisions, it is said, reflect a judge's own political morality, but also reflect the morality that is embedded in the traditions of the common law, which might well be different. This is, of course, only law school rhetoric, but it nevertheless poses the problem of explaining how these different contributions to the decision of a hard case are to be identified and reconciled.

One popular solution relies on a spatial image; it says that the traditions of the common law contract the area of a judge's discretion to rely upon his personal morality, but do not entirely eliminate that area. But this answer is unsatisfactory on two grounds. First, it does not elucidate what is at best a provocative metaphor, which is that some morality is embedded in a mass of particular decisions other judges have reached in the past. Second, it suggests a plainly inadequate phenomenological account of the judicial decision. Judges do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own. The institutional constraints they sense are pervasive and endure to the decision itself. We therefore need an account of the interaction 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. If the thesis holds, then institutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about the rights of an individual must accommodate. Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions. So the supposed tension between judicial originality and institutional history is dissolved: judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past. When a judge chooses between the rule established in precedent and some new rule

thought to be fairer, he does not choose between history and justice. He rather makes a judgment that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete.

The rights thesis therefore provides a more satisfactory explanation of how judges use precedent in hard cases than the explanation provided by any theory that gives a more prominent place to policy. Judges, like all political officials, are subject to the doctrine of political responsibility. This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make. The doctrine seems innocuous in this general form; but it does, even in this form, condemn a style of political administration that might be called, following Rawls, intuitionistic.[4] 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. Suppose a Congressman votes to prohibit abortion, on the ground that human life in any form is sacred, but then votes to permit the parents of babies born deformed to withhold medical treatment that will keep such babies alive. He might say that he feels that there is some difference, but the principle of responsibility, strictly applied, will not allow him these two votes unless he can incorporate the difference within some general political theory he sincerely holds.

The doctrine demands, we might say, articulate consistency. But this demand is relatively weak when policies are in play. Policies are aggregative in their influence on political decisions and it need not be part of a responsible strategy for reaching a collective goal that individuals be treated alike. It does not follow from the doctrine of responsibility, therefore, that if the legislature awards a subsidy to one aircraft manufacturer one month it must award a subsidy to another manufacturer the next. In the case of principles, however, the doctrine insists on distributional consistency from one case to the next, because it does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question. If an official believes, for example, that sexual liberty of some sort is a right of individuals, then he must protect that liberty in a way that distributes the benefit reasonably equally over the class of those whom he supposes to have the right. If he allows one couple to use contraceptives on the ground that this right would otherwise be invaded,

[4] *See generally* Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973).

then he must, so long as he does not recant that earlier decision, allow the next couple the same liberty. He cannot say that the first decision gave the community just the amount of sexual liberty it needed, so that no more is required at the time of the second.

Judicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility. If the rights thesis holds, then the distinction just made would account, at least in a very general way, for the special concern that judges show for both precedents and hypothetical examples. An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy. They would be free to say that some policy might be adequately served by serving it in the case at bar, providing, for example, just the right subsidy to some troubled industry, so that neither earlier decisions nor hypothetical future decisions need be understood as serving the same policy.

Consistency here, of course, means consistency in the application of the principle relied upon, not merely in the application of the particular rule announced in the name of that principle. If, for example, the principle that no one has the duty to make good remote or unexpected losses flowing from his negligence is relied upon to justify a decision for the defendant in *Spartan Steel*, then it must be shown that the rule laid down in other cases, which allows recovery for negligent misstatements, is consistent with that principle; not merely that the rule about negligent misstatements is a different rule from the rule in *Spartan Steel*.

D. Three Problems

We therefore find, in these arguments of political theory and jurisprudence, some support for the rights thesis in its abstract form. Any further defense, however, must await a more precise statement. The thesis requires development in three directions. It relies, first, on a general distinction between individual rights and social goals, and that distinction must be stated with more clarity than is provided simply by examples. The distinction must be stated, moreover, so as to respond to the following problem. When politicians appeal to individual rights, they have in mind grand propositions about very abstract and fundamental interests, like the right to freedom or equality or respect. These grand rights do not seem apposite to the decision of hard cases at law,

except, perhaps, constitutional law; and even when they are apposite they seem too abstract to have much argumentative power. If the rights thesis is to succeed, it must demonstrate how the general distinction between arguments of principle and policy can be maintained between arguments of the character and detail that do figure in legal argument. In Part II of this essay I shall try to show that the distinction between abstract and concrete rights, suitably elaborated, is sufficient for that purpose.

The thesis provides, second, a theory of the role of precedent and institutional history in the decision of hard cases. I summarized that theory in the last section, but it must be expanded and illustrated before it can be tested against our experience of how judges actually decide cases. It must be expanded, moreover, with an eye to the following problem. No one thinks that the law as it stands is perfectly just. Suppose that some line of precedents is in fact unjust, because it refuses to enforce, as a legal right, some political right of the citizens. Even though a judge deciding some hard case disapproves of these precedents for that reason, the doctrine of articulate consistency nevertheless requires that he allow his argument to be affected by them. It might seem that his argument cannot be an argument of principle, that is, an argument designed to establish the political rights of the parties, because the argument is corrupted, through its attention to precedent, by a false opinion about what these rights are. If the thesis is to be defended, it must be shown why this first appearance is wrong. It is not enough to say that the argument may be an argument of principle because it establishes the legal, as distinguished from the political, rights of the litigants. The rights thesis supposes that the right to win a law suit is a genuine political right, and though that right is plainly different from other forms of political rights, like the right of all citizens to be treated as equals, just noticing that difference does not explain why the former right may be altered by misguided earlier decisions. It is necessary, in order to understand that feature of legal argument, to consider the special qualities of institutional rights in general, which I consider in Part III, and the particular qualities of legal rights, as a species of institutional rights, which I consider in Part IV.

But the explanation I give of institutional and legal rights exposes a third and different problem for the rights thesis. This explanation makes plain that judges must sometimes make judgments of political morality in order to decide what the legal rights of litigants are. The thesis may therefore be thought open, on that ground, to the first challenge to judicial originality that I mentioned earlier. It might be said that the thesis is indefensible

because it cheats the majority of its right to decide questions of political morality for itself. I shall consider that challenge in Part V.

These, then, are three problems that any full statement of the rights thesis must face. If that full statement shows these objections to the thesis misconceived, then it will show the thesis to be less radical than it might first have seemed. The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do; and the virtues of this new description are not empirical but political and philosophical.

II. Rights and Goals

A. Types of Rights

Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals. But what are rights and goals and what is the difference? It is hard to supply any definition that does not beg the question. It seems natural to say, for example, that freedom of speech is a right, not a goal, because citizens are entitled to that freedom as a matter of political morality, and that increased munitions manufacture is a goal, not a right, because it contributes to collective welfare, but no particular manufacturer is entitled to a government contract. This does not improve our understanding, however, because the concept of entitlement uses rather than explains the concept of a right.

In this essay I shall distinguish rights from goals by fixing on the distributional character of claims about rights, and on the force of these claims, in political argument, against competing claims of a different distributional character. I shall make, that is, a formal distinction that does not attempt to show which rights men and women actually have, or indeed that they have any at all. It rather provides a guide for discovering which rights a particular political theory supposes men and women to have. The formal distinction does suggest, of course, an approach to the more fundamental question: it suggests that we discover what rights people actually have by looking for arguments that would justify claims having the appropriate distributional character. But the distinction does not itself supply any such arguments.

I begin with the idea of a political aim as a generic political justification. A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect,

that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.[5] A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.

Collective goals encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole. Economic efficiency is a collective goal: it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way. Some conception of equality may also be taken as a collective goal; a community may aim at a distribution such that maximum wealth is no more than double minimum wealth, or, under a different conception, so that no racial or ethnic group is much worse off than other groups. Of course, any collective goal will suggest a particular distribution, given particular facts. Economic efficiency as a goal will suggest that a particular industry be subsidized in some circumstances, but taxed punitively in others. Equality as a goal will suggest immediate and complete redistribution in some circumstances, but partial and discriminatory redistribution in others. In each case distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall.

Collective goals may, but need not, be absolute. The community may pursue different goals at the same time, and it may compromise one goal for the sake of another. It may, for example, pursue economic efficiency, but also military strength. The suggested distribution will then be determined by the sum of the two policies, and this will increase the permutations and combinations of possible trade-offs. In any case, these permutations and combinations will offer a number of competing strategies for serving each goal and both goals in combination. Economic efficiency may be well served by offering subsidies to all farmers, and to no

[5] I count legal persons as individuals, so that corporations may have rights; a political theory that counts special groups, like racial groups, as having some corporate standing within the community may therefore speak of group rights.

manufacturers, and better served by offering double the subsidy to some farmers and none to others. There will be alternate strategies of pursuing any set of collective goals, and, particularly as the number of goals increases, it will be impossible to determine in a piecemeal or case-by-case way the distribution that best serves any set of goals. Whether it is good policy to give double subsidies to some farmers and none to others will depend upon a great number of other political decisions that have been or will be made in pursuit of very general strategies into which this particular decision must fit.

Rights also may be absolute: a political theory which holds a right to freedom of speech as absolute will recognize no reason for not securing the liberty it requires for every individual; no reason, that is, short of impossibility. Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary, routine goals of political administration, but only by a goal of special urgency. Suppose, for example, some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point to recognizing it as a right at all.

These definitions and distinctions make plain that the character of a political aim — its standing as a right or goal — depends upon its place and function within a single political theory. The same phrase might describe a right within one theory and a goal within another, or a right that is absolute or powerful within one theory but relatively weak within another. If a public official has anything like a coherent political theory that he uses, even intuitively, to justify the particular decisions he reaches, then this theory will recognize a wide variety of different types of rights, arranged in some way that assigns rough relative weight to each.

Any adequate theory will distinguish, for example, between background rights, which are rights that provide a justification

for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution. Suppose that my political theory provides that every man has a right to the property of another if he needs it more. I might yet concede that he does not have a legislative right to the same effect; I might concede, that is, that he has no institutional right that the present legislature enact legislation that would violate the Constitution, as such a statute presumably would. I might also concede that he has no institutional right to a judicial decision condoning theft. Even if I did make these concessions, I could preserve my initial background claim by arguing that the people as a whole would be justified in amending the Constitution to abolish property, or perhaps in rebelling and overthrowing the present form of government entirely. I would claim that each man has a residual background right that would justify or require these acts, even though I concede that he does not have the right to specific institutional decisions as these institutions are now constituted.

Any adequate theory will also make use of a distinction between abstract and concrete rights, and therefore between abstract and concrete principles. This is a distinction of degree, but I shall discuss relatively clear examples at two poles of the scale it contemplates, and therefore treat it as a distinction in kind. An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract. Politicians speak of a right to free speech or dignity or equality, with no suggestion that these rights are absolute, but with no attempt to suggest their impact on particular complex social situations.

Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. Suppose I say, not simply that citizens have a right to free speech, but that a newspaper has a right to publish defense plans classified as secret provided this publication will not create an immediate physical danger to troops. My principle declares for a particular resolution of the conflict it acknowledges between the abstract right of free speech, on the one hand, and competing rights of soldiers to security or the urgent needs of defense on the other. Abstract rights in this way provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it.[6]

[6] A complete political theory must also recognize two other distinctions that I

B. *Principles and Utility*

The distinction between rights and goals does not deny a thesis that is part of popular moral anthropology. It may be entirely reasonable to think, as this thesis provides, that the principles the members of a particular community find persuasive will be causally determined by the collective goals of that community. If many people in a community believe that each individual has a right to some minimal concern on the part of others, then this fact may be explained, as a matter of cultural history, by the further fact that their collective welfare is advanced by that belief. If some novel arrangement of rights would serve their collective welfare better, then we should expect, according to this thesis, that in due time their moral convictions will alter in favor of that new arrangement.

I do not know how far this anthropological theory holds in our own society, or any society. It is certainly untestable in anything like the simple form in which I have put it, and I do not see why its claim, that rights are psychologically or culturally determined by goals, is a priori more plausible that the contrary claim. Perhaps men and women choose collective goals to accommodate some prior sense of individual rights, rather than delineating rights according to collective goals. In either case, however, there must be an important time lag, so that at any given time most people will recognize the conflict between rights and goals, at least in particular cases, that the general distinction between these two kinds of political aims presupposes.

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use implicitly in this essay. The first is the distinction between rights against the state and rights against fellow citizens. The former justify a political decision that requires some agency of the government to act; the latter justify a decision to coerce particular individuals. The right to minimum housing, if accepted at all, is accepted as a right against the state. The right to recover damages for a breach of contract, or to be saved from great danger at minimum risk of a rescuer, is a right against fellow citizens. The right to free speech is, ordinarily, both. It seems strange to define the rights that citizens have against one another as political rights at all; but we are now concerned with such rights only insofar as they justify political decisions of different sorts. The present distinction cuts across the distinction between background and institutional rights; the latter distinguishes among persons or institutions that must make a political decision, the former between persons or institutions whom that decision directs to act or forbear. Ordinary civil cases at law, which are the principal subject of this essay, involve rights against fellow citizens; but I also discuss certain issues of constitutional and criminal law and so touch on rights against the state as well.

The second distinction is between universal and special rights; that is, between rights that a political theory provides for all individuals in the community, with exceptions only for phenomena like incapacity or punishment, and rights it provides for only one section of the community, or possibly only one member. I shall assume, in this essay, that all political rights are universal.

The distinction presupposes, that is, a further distinction between the force of a particular right within a political theory and the causal explanation of why the theory provides that right. This is a formal way of putting the point, and it is appropriate only when, as I am now supposing, we can identify a particular political theory and so distinguish the analytical question of what it provides from the historical question of how it came to provide it. The distinction is therefore obscured when we speak of the morality of a *community* without specifying which of the many different conceptions of a community morality we have in mind. Without some further specification we cannot construct even a vague or abstract political theory as the theory of the community at any particular time, and so we cannot make the distinction between reasons and force that is analytically necessary to understand the concepts of principle and policy. We are therefore prey to the argument that the anthropological thesis destroys the distinction between the two; we speak as if we had some coherent theory in mind, as the community's morality, but we deny that it distinguishes principle from policy on the basis of an argument that seems plausible just because we do not have any particular theory in mind. Once we do make plain what we intend by some reference to the morality of a community, and proceed to identify, even crudely, what we take the principles of that morality to be, the anthropological argument is tamed.

There are political theories, however, that unite rights and goals not causally but by making the force of a right contingent upon its power, as a right, to promote some collective goal. I have in mind various forms of the ethical theory called rule utilitarianism. One popular form of that theory, for example, holds that an act is right if the general acceptance of a rule requiring that act would improve the average welfare of members of the community.[7] A political theory might provide for a right to free speech, for example, on the hypothesis that the general acceptance of that right by courts and other political institutions would promote the highest average utility of the community in the long run.

But we may nevertheless distinguish institutional rights, at least, from collective goals within such a theory. If the theory provides that an official of a particular institution is justified in making a political decision, and not justified in refusing to make it, whenever that decision is necessary to protect the freedom to speak of any individual, without regard to the impact of the decision on collective goals, the theory provides free speech as a

[7] *See* Brandt, *Toward a Credible Form of Utilitarianism*, in MORALITY AND THE LANGUAGE OF CONDUCT 107 (H. Castenada and G. Nakhnikian, eds. 1963).

right. It does not matter that the theory stipulates this right on the hypothesis that if all political institutions do enforce the right in that way an important collective goal will in fact be promoted. What is important is the commitment to a scheme of government that makes an appeal to the right decisive in particular cases.

So neither the anthropological thesis nor rule utilitarianism offers any objection to the distinction between arguments of principle and arguments of policy. I should mention, out of an abundance of caution, one further possible challenge to that distinction. Different arguments of principle and policy can often be made in support of the same political decision. Suppose that an official wishes to argue in favor of racial segregation in public places. He may offer the policy argument that mixing races causes more overall discomfort than satisfaction. Or he may offer an argument of principle appealing to the rights of those who might be killed or maimed in riots that desegregation would produce. It might be thought that the substitutibility of these arguments defeats the distinction between arguments of principle and policy, or in any case makes the distinction less useful, for the following reason. Suppose it is conceded that the right to equality between races is sufficiently strong that it must prevail over all but the most pressing argument of policy, and be compromised only as required by competing arguments of principle. That would be an empty concession if arguments of principle could always be found to substitute for an argument of policy that might otherwise be made.

But it is a fallacy to suppose that because some argument of principle can always be found to substitute for an argument of policy, it will be as cogent or as powerful as the appropriate argument of policy would have been. If some minority's claim to an antidiscrimination statute were itself based on policy, and could therefore be defeated by an appeal to overall general welfare or utility, then the argument that cites the majority's discomfort or annoyance might well be powerful enough. But if the claim cites a right to equality that must prevail unless matched by a competing argument of principle, the only such argument available may be, as here, simply too weak. Except in extraordinary cases, the danger to any particular man's life that flows from desegregation adequately managed and policed will be very small. We might therefore concede that the competing right to life offers some argument countervailing against the right to equality here, and yet maintain that that argument is of negligible weight; strong enough, perhaps to slow the pace of desegregation but not strong enough even to slow it very much.

C. Economics and Principle

The rights thesis, in its descriptive aspect, holds that judicial decisions in hard cases are characteristically generated by principle not policy. Recent research into the connections between economic theory and the common law might be thought to suggest the contrary: that judges almost always decide on grounds of policy rather than principle. We must, however, be careful to distinguish between two propositions said to be established by that research. It is argued, first, that almost every rule developed by judges in such disparate fields as tort, contract and property can be shown to serve the collective goal of making resource allocation more efficient.[8] It is argued, second, that in certain cases judges explicitly base their decisions on economic policy.[9] Neither of these claims subverts the rights thesis.

The first claim makes no reference to the intentions of the judges who decided the cases establishing rules that improve economic efficiency. It does not suppose that these judges were aware of the economic value of their rules, or even that they would have acknowledged that value as an argument in favor of their decisions. The evidence, for the most part, suggests the contrary. The courts that nourished the unfortunate fellow-servant doctrine, for example, thought that the rule was required by fairness, not utility, and when the rule was abolished it was because the argument from fairness, not the argument from utility, was found wanting by a different generation of lawyers.[10]

If this first claim is sound, it might seem to some an important piece of evidence for the anthropological thesis described in the last section. They will think that it suggests that judges and lawyers, reflecting the general moral attitudes of their time, thought that corporations and individuals had just those rights that an explicit rule utilitarian would legislate to serve the general welfare. But the first claim might equally well suggest the contrary conclusion I mentioned, that our present ideas of general welfare reflect our ideas of individual right. Professor Posner, for example, argues for that claim by presupposing a particular conception of efficient resource allocation. He says that the value of some scarce resource to a particular individual is measured by the amount of money he is willing to pay for it, so that community welfare is maximized when each resource is in the hands of some-

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[8] *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 10–104 (1972).

[9] *See, e.g.*, Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 19–28 (1960).

[10] *See* Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 71 (1972).

one who would pay more than anyone else to have it.[11] But that is hardly a self-evident or neutral conception of value. It is congenial to a political theory that celebrates competition, but far less congenial to a more egalitarian theory, because it demotes the claims of the poor who are willing to spend less because they have less to spend. Posner's conception of value, therefore, seems as much the consequence as the cause of a theory of individual rights. In any case, however, the anthropological thesis of the first claim offers no threat to the rights thesis. Even if we concede that a judge's theory of rights is determined by some instinctive sense of economic value, rather than the other way about, we may still argue that he relies on that theory, and not economic analysis, to justify decisions in hard cases.

The second claim we distinguished, however, may seem to present a more serious challenge. If judges explicitly refer to economic policy in some cases, then these cases cannot be understood simply as evidence for the anthropological thesis. Learned Hand's theory of negligence is the most familiar example of this explicit reference to economics. He said, roughly, that the test of whether the defendant's act was unreasonable, and therefore actionable, is the economic test which asks whether the defendant could have avoided the accident at less cost to himself than the plaintiff was likely to suffer if the accident occurred, discounted by the improbability of the accident.[12] It may be said that this economic test provides an argument of policy rather than principle, because it makes the decision turn on whether the collective welfare would have been advanced more by allowing the accident to take place or by spending what was necessary to avoid it. If so, then cases in which some test like Hand's is explicitly used, however few they might be, would stand as counterexamples to the rights thesis.

But the assumption that an economic calculation of any sort must be an argument of policy overlooks the distinction between abstract and concrete rights. Abstract rights, like the right to speak on political matters, take no account of competing rights; concrete rights, on the other hand, reflect the impact of such competition. In certain kinds of cases the argument from competing abstract principles to a concrete right can be made in the language of economics. Consider the principle that each member of a community has a right that each other member treat him with the minimal respect due a fellow human being.[13] That is a very abstract

[11] R. POSNER, *supra* note 8, at 4.

[12] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Coase, *supra* note 9, at 22–23, gives other examples, mostly of nuisance cases interpreting the doctrine that a "reasonable" interference with the plaintiff's use of his property is not a nuisance.

[13] A more elaborate argument of principle might provide a better justification

principle: it demands some balance, in particular cases, between the interests of those to be protected and the liberty of those from whom the principle demands an unstated level of concern and respect. It is natural, particularly when economic vocabulary is in fashion, to define the proper balance by comparing the sum of the utilities of these two parties under different conditions. If one man acts in a way that he can foresee will injure another so that the collective utility of the pair will be sharply reduced by his act, he does not show the requisite care and concern. If he can guard or insure against the injury much more cheaply or effectively than the other can, for example, then he does not show care and concern unless he takes these precautions or arranges that insurance.

That character of argument is by no means novel, though perhaps its economic dress is. Philosophers have for a long time debated hypothetical cases testing the level of concern that one member of a community owes to another. If one man is drowning, and another may save him at minimal risk to himself, for example, then the first has a moral right to be saved by the second. That proposition might easily be put in economic form: if the collective utility of the pair is very sharply improved by a rescue, then the drowning man has a right to that rescue and the rescuer a duty to make it. The parallel legal proposition may, of course, be much more complex than that. It may specify special circumstances in which the crucial question is not whether the collective utility of the pair will be sharply advanced, but only whether it will be marginally advanced. It might put the latter question, for example, when one man's positive act, as distinct from a failure to act, creates a risk of direct and foreseeable physical injury to the person or property of another. If the rights thesis is sound, of course, then no judge may appeal to that legal proposition unless he believes that the principle of minimal respect states an abstract legal right; but if he does, then he may cast his argument in economic form without thereby changing its character from principle to policy.

Since Hand's test, and the parallel argument about rescuing a drowning man, are methods of compromising competing rights, they consider only the welfare of those whose abstract rights are at stake. They do not provide room for costs or benefits to the community at large, except as these are reflected in the

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for Hand's test than does this simple principle. I described a more elaborate argument in a set of Rosenthal Lectures delivered at Northwestern University Law School in March, 1975. The simple principle, however, provides a sufficiently good justification for the present point.

welfare of those whose rights are in question. We can easily imagine an argument that does not concede these restrictions. Suppose someone argued that the principle requiring rescue at minimal risk should be amended so as to make the decision turn, not on some function of the collective utilities of the victim and rescuer, but on marginal utility to the community as a whole, so that the rescuer must take into account not only the relative risks to himself and the victim, but the relative social importance of the two. It might follow that an insignificant man must risk his life to save a bank president, but that a bank president need not even tire himself to save a nobody. The argument is no longer an argument of principle, because it supposes the victim to have a right to nothing but his expectations under general utility. Hand's formula, and more sophisticated variations, are not arguments of that character; they do not subordinate an individual right to some collective goal, but provide a mechanism for compromising competing claims of abstract right.

Negligence cases are not the only cases in which judges compromise abstract rights in defining concrete ones. If a judge appeals to public safety or the scarcity of some vital resource, for example, as a ground for limiting some abstract right, then his appeal might be understood as an appeal to the competing rights of those whose security will be sacrificed, or whose just share of that resource will be threatened if the abstract right is made concrete. His argument is an argument of principle if it respects the distributional requirements of such arguments, and if it observes the restriction mentioned in the last section: that the weight of a competing principle may be less than the weight of the appropriate parallel policy. We find a different sort of example in the familiar argument that certain sorts of law suits should not be allowed because to do so would "swamp" the courts with litigation. The court supposes that if it were to allow that type of suit it would lack the time to consider promptly enough other law suits aiming to vindicate rights that are, taken together, more important than the rights it therefore proposes to bar.

This is an appropriate point to notice a certain limitation of the rights thesis. It holds in standard civil cases, when the ruling assumption is that one of the parties has a right to win; but it holds only asymmetrically when that assumption cannot be made. The accused in a criminal case has a right to a decision in his favor if he is innocent, but the state has no parallel right to a conviction if he is guilty. The court may therefore find in favor of the accused, in some hard case testing rules of evidence, for example, on an argument of policy that does not suppose that the accused has any right to be acquitted. The

Supreme Court in *Linkletter v. Walker*[14] said that its earlier decision in *Mapp v. Ohio*[15] was such a decision. The Court said it had changed the rules permitting the introduction of illegally obtained evidence, not because Miss Mapp had any right that such evidence not be used if otherwise admissible, but in order to deter policemen from collecting such evidence in the future. I do not mean that a constitutional decision on such grounds is proper, or even that the Court's later description of its earlier decision was accurate. I mean only to point out how the geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds symmetrically.

III. Institutional Rights

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. We cannot appreciate or test the thesis, therefore, without further elaboration of these distinctions.

Institutional rights may be found in institutions of very different character. A chess player has a "chess" right to be awarded a point in a tournament if he checkmates an opponent. A citizen in a democracy has a legislative right to the enactment of statutes necessary to protect his free speech. In the case of chess, institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game, or to a particular tournament. Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality. No one may argue, for example, that he has earned the right to be declared the winner by his general virtue. But legislation is only partly autonomous in that sense. There are special constitutive and regulative rules that define what a legislature is, and who belongs to it, and how it votes, and that it may not establish a religion. But these rules belonging distinctly to legislation are rarely sufficient to determine whether a citizen has an institutional right to have a certain statute enacted; they do not decide, for example, whether he has a right to minimum wage legislation. Citizens are expected to repair to general considerations of political morality when they argue for such rights.

[14] 381 U.S. 618 (1965).

[15] 367 U.S. 643 (1961).

The fact that some institutions are fully and others partly autonomous has the consequence mentioned earlier, that the institutional rights a political theory acknowledges may diverge from the background rights it provides. Institutional rights are nevertheless genuine rights. Even if we suppose that the poor have an abstract background right to money taken from the rich, it would be wrong, not merely unexpected, for the referees of a chess tournament to award the prize money to the poorest contestant rather than the contestant with the most points. It would provide no excuse to say that since tournament rights merely describe the conditions necessary for calling the tournament a chess tournament, the referee's act is justified so long as he does not use the word "chess" when he hands out the award. The participants entered the tournament with the understanding that chess rules would apply; they have genuine rights to the enforcement of these rules and no others.

Institutional autonomy insulates an official's institutional duty from the greater part of background political morality. But how far does the force of this insulation extend? Even in the case of a fully insulated institution like chess some rules will require interpretation or elaboration before an official may enforce them in certain circumstances. Suppose some rule of a chess tournament provides that the referee shall declare a game forfeit if one player "unreasonably" annoys the other in the course of play. The language of the rule does not define what counts as "unreasonable" annoyance; it does not decide whether, for example, a player who continually smiles at his opponent in such a way as to unnerve him, as the Russian grandmaster Tal once smiled at Fischer, annoys him unreasonably.

The referee is not free to give effect to his background convictions in deciding this hard case. He might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule. He could not say, for example, that annoying behavior is reasonable so long as it has the effect of reducing the importance of intellectual ability in deciding who will win the game. The participants, and the general community that is interested, will say that his duty is just the contrary. Since chess is an intellectual game, he must apply the forfeiture rule in such a way as to protect, rather than jeopardize, the role of intellect in the contest.

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. We do not think that he is free to legislate interstitially within the "open texture" of imprecise rules.[16] 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. We may hope to find, in this relatively simple case, some general feature of institutional rights in hard cases that will bear on the decision of a judge in a hard case at law.

I said that the game of chess has a character that the referee's decisions must respect. What does that mean? How does a referee know that chess is an intellectual game rather than a game of chance or an exhibition of digital ballet? He may well start with what everyone knows. Every institution is placed by its participants in some very rough category of institution; it is taken to be a game rather than a religious ceremony or a form of exercise or a political process. It is, for that reason, definitional of chess that it is a game rather than an exercise in digital skill. These conventions, exhibited in attitudes and manners and in history, are decisive. If everyone takes chess to be a game of chance, so that they curse their luck and nothing else when a piece *en prise* happens to be taken, then chess is a game of chance, though a very bad one.

But these conventions will run out, and they may run out before the referee finds enough to decide the case of Tal's smile. It is important to see, however, that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions; that is, in a *contested* concept.[17] The referee must select one or another of these conceptions, not to supplement the convention, but to enforce it. He must *construct* the game's character by putting to himself different sets of questions. Given that chess is an intellectual game, is it, like poker, intellectual in some sense that includes ability at psychological intimidation? Or is it, like mathematics, intellectual in some sense that does not include that ability? This first set of questions asks him to look more closely at the game, to determine whether its features support one rather than the other of these conceptions of intellect. But he must also ask a different set of questions. Given that chess is an intellectual game of some sort, what follows about reasonable behavior in a chess game? Is ability at psychological intimidation, or ability

[16] *See generally* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961).

[17] *See* Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 167–68 (1955–56). *See also* Dworkin, *The Jurisprudence of Richard Nixon*, NEW YORK REVIEW OF BOOKS, May 4, 1972, at 27.

to resist such intimidation, really an intellectual quality? These questions ask him to look more closely at the concept of intellect itself.

The referee's calculations, if they are self-conscious, will oscillate between these two sets of questions, progressively narrowing the questions to be asked at the next stage. He might first identify, by reflecting on the concept, different conceptions of intellect. He might suppose at this first stage, for example, that physical grace of the sort achieved in ballet is one form of intelligence. But he must then test these different conceptions against the rules and practices of the game. That test will rule out any physical conception of intelligence. But it may not discriminate between a conception that includes or a conception that rejects psychological intimidation, because either of these conceptions would provide an account of the rules and practices that is not plainly superior, according to any general canons of explanation, to the account provided by the other. He must then ask himself which of these two accounts offers a deeper or more successful account of what intellect really is. His calculations, so conceived, oscillate between philosophy of mind and the facts of the institution whose character he must elucidate.

This is, of course, only a fanciful reconstruction of a calculation that will never take place; any official's sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgments. But the reconstruction enables us to see how the concept of the game's character is tailored to a special institutional problem. Once an autonomous institution is established, such that participants have institutional rights under distinct rules belonging to that institution, then hard cases may arise that must, in the nature of the case, be supposed to have an answer. If Tal does not have a right that the game be continued, it must be because the forfeiture rule, properly understood, justifies the referee's intervention; if it does, then Fischer has a right to win at once. It is not useful to speak of the referee's "discretion" in such a case. If some weak sense of discretion is meant, then the remark is unhelpful; if some strong sense is meant, such that Tal no longer has a right to win, then this must be, again, because the rule properly understood destroys the right he would otherwise have.[18] Suppose we say that in such a case all the parties have a right to expect is that the referee will use his best judgment. That is, in a sense, perfectly true, because they can have no more, by way of the referee's judgment, than his best judgment. But they are nevertheless entitled to his best judgment about which behavior is, in the circumstances of the game, un-

[18] *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32–40 (1967).

reasonable; they are entitled, that is, to his best judgment about what their rights are. The proposition that there is some "right" answer to that question does not mean that the rules of chess are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants.

But if the decision in a hard case must be a decision about the rights of the parties, then an official's reason for that judgment must be the sort of reason that justifies recognizing or denying a right. He must bring to his decision a general theory of why, in the case of his institution, the rules create or destroy any rights at all, and he must show what decision that general theory requires in the hard case. In chess the general ground of institutional rights must be the tacit consent or understanding of the parties. They consent, in entering a chess tournament, to the enforcement of certain and only those rules, and it is hard to imagine any other general ground for supposing that they have any institutional rights. But if that is so, and if the decision in a hard case is a decision about which rights they actually have, then the argument for the decision must apply that general ground to the hard case.

The hard case puts, we might say, a question of political theory. It asks what it is fair to suppose that the players have done in consenting to the forfeiture rule. The concept of a game's character is a conceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. It supposes that a player consents not simply to a set of rules, but to an enterprise that may be said to have a character of its own; so that when the question is put — To what did he consent in consenting to that? — the answer may study the enterprise as a whole and not just the rules.

IV. Legal Rights

A. Legislation

Legal argument, in hard cases, turns on contested concepts whose nature and function are very much like the concept of the character of a game. These include several of the substantive concepts through which the law is stated, like the concepts of a contract and of property. But they also include two concepts of much greater relevance to the present argument. The first is the idea of the "intention" or "purpose" of a particular statute or statutory clause. This concept provides a bridge between the political justification of the general idea that statutes create rights and those hard cases that ask what rights a particular statute has created. The second is the concept of principles that "underlie"

or are "embedded in" the positive rules of law. This concept provides a bridge between the political justification of the doctrine that like cases should be decided alike and those hard cases in which it is unclear what that general doctrine requires. These concepts together define legal rights as a function, though a very special function, of political rights. If a judge accepts the settled practices of his legal system — if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules — then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices. The concepts of legislative purpose and common law principles are devices for applying that general political theory to controversial issues about legal rights.

We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules. I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.

1. *The Constitution.* — Suppose there is a written constitution in Hercules' jurisdiction which provides that no law shall be valid if it establishes a religion. The legislature passes a law purporting to grant free busing to children in parochial schools. Does the grant establish a religion? [19] The words of the constitutional provision might support either view. Hercules must nevertheless decide whether the child who appears before him has a right to her bus ride.

He might begin by asking why the constitution has any power at all to create or destroy rights. If citizens have a background right to salvation through an established church, as many believe they do, then this must be an important right. Why does the fact that a group of men voted otherwise several centuries ago prevent this background right from being made a legal right as well? His answer must take some form such as this. The constitution sets out a general political scheme that is sufficiently just to be taken

[19] *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution. But Hercules must then ask just what scheme of principles has been settled. He must construct, that is, a constitutional theory; since he is Hercules we may suppose that he can develop a full political theory that justifies the constitution as a whole. It must be a scheme that fits the particular rules of this constitution, of course. It cannot include a powerful background right to an established church. But more than one fully specified theory may fit the specific provision about religion sufficiently well. One theory might provide, for example, that it is wrong for the government to enact any legislation that will cause great social tension or disorder; so that, since the establishment of a church will have that effect, it is wrong to empower the legislature to establish one. Another theory will provide a background right to religious liberty, and therefore argue that an established church is wrong, not because it will be socially disruptive, but because it violates that background right. In that case Hercules must turn to the remaining constitutional rules and settled practices under these rules to see which of these two theories provides a smoother fit with the constitutional scheme as a whole.

But the theory that is superior under this test will nevertheless be insufficiently concrete to decide some cases. Suppose Hercules decides that the establishment provision is justified by a right to religious liberty rather than any goal of social order. It remains to ask what, more precisely, religious liberty is. Does a right to religious liberty include the right not to have one's taxes used for any purpose that helps a religion to survive? Or simply not to have one's taxes used to benefit one religion at the expense of another? If the former, then the free transportation legislation violates that right, but if the latter it does not. The institutional structure of rules and practice may not be sufficiently detailed to rule out either of these two conceptions of religious liberty, or to make one a plainly superior justification of that structure. At some point in his career Hercules must therefore consider the question not just as an issue of fit between a theory and the rules of the institution, but as an issue of political philosophy as well. He must decide which conception is a more satisfactory elaboration of the general idea of religious liberty. He must decide that question because he cannot otherwise carry far enough the project he began. He cannot answer in sufficient detail the question of what political scheme the constitution establishes.

So Hercules is driven, by this project, to a process of reasoning that is much like the process of the self-conscious chess referee. He must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government, just as the chess referee is driven to develop a theory about the character of his game. He must develop that theory by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution. When the discriminating power of that test is exhausted, he must elaborate the contested concepts that the successful theory employs.

2. Statutes. — A statute in Hercules' jurisdiction provides that it is a federal crime for someone knowingly to transport in interstate commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever. . . ." Hercules is asked to decide whether this statute makes a federal criminal of a man who persuaded a young girl that it was her religious duty to run away with him, in violation of a court order, to consummate what he called a celestial marriage.[20] The statute had been passed after a famous kidnapping case, in order to enable federal authorities to join in the pursuit of kidnappers. But its words are sufficiently broad to apply to this case, and there is nothing in the legislative record or accompanying committee reports that says they do not.

Do they apply? Hercules might himself despise celestial marriage, or abhor the corruption of minors, or celebrate the obedience of children to their parents. The groom nevertheless has a right to his liberty, unless the statute properly understood deprives him of that right; it is inconsistent with any plausible theory of the constitution that judges have the power retroactively to make conduct criminal. Does the statute deprive him of that right? Hercules must begin by asking why any statute has the power to alter legal rights. He will find the answer in his constitutional theory: this might provide, for example, that a democratically elected legislature is the appropriate body to make collective decisions about the conduct that shall be criminal. But that same constitutional theory will impose on the legislature certain responsibilities: it will impose not only constraints reflecting individual rights, but also some general duty to pursue collective goals defining the public welfare. That fact provides a useful test for Hercules in this hard case. He might ask which interpretation more satisfactorily ties the language the legislature used to its

[20] *See* Chatwin v. United States, 326 U.S. 455 (1946).

constitutional responsibilities. That is like the referee's question about the character of a game. It calls for the construction, not of some hypotheses about the mental state of particular legislators, but of a special political theory that justifies this statute, in the light of the legislature's more general responsibilities, better than any alternative theory.[21]

Which arguments of principle and policy might properly have persuaded the legislature to enact just that statute? It should not have pursued a policy designed to replace state criminal enforcement by federal enforcement whenever constitutionally possible. That would represent an unnecessary interference with the principle of federalism that must be part of Hercules' constitutional theory. It might, however, responsibly have followed a policy of selecting for federal enforcement all crimes with such an interstate character that state enforcement was hampered. Or it could responsibly have selected just specially dangerous or widespread crimes of that character. Which of these two responsible policies offers a better justification of the statute actually drafted? If the penalties provided by the statute are large, and therefore appropriate to the latter but not the former policy, the latter policy must be preferred. Which of the different interpretations of the statute permitted by the language serves that policy better? Plainly a decision that inveiglement of the sort presented by the case is not made a federal crime by the statute.

I have described a simple and perhaps unrepresentative problem of statutory interpretation, because I cannot now develop a theory of statutory interpretation in any detail. I want only to suggest how the general claim, that calculations judges make about the purposes of statutes are calculations about political rights,

[21] One previous example of the use of policy in statutory interpretations illustrates this form of construction. In Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344 (1830), *aff'd*, 36 U.S. (11 Pet.) 420 (1837), the court had to decide whether a charter to construct a bridge across the Charles River was to be taken to be exclusive, so that no further charters could be granted. Justice Morton of the Supreme Judicial Court held that the grant was not to be taken as exclusive, and argued, in support of that interpretation, that:

> [I]f consequences so inconsistent with the improvement and prosperity of the state result from the liberal and extended construction of the charters which have been granted, we ought, if the terms used will admit of it, rather to adopt a more limited and restricted one, than to impute such improvidence to the legislature.
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> . . . [Construing the grant as exclusive] would amount substantially to a covenant, that during the plaintiffs' charter an important portion of our commonwealth, as to facilities for travel and transportation, should remain *in statu quo*. I am on the whole irresistibly brought to the conclusion, that this construction is neither consonant with sound reason, with judicial authorities, with the course of legislation, nor with the principles of our free institutions.

Id. at 460.

might be defended. There are, however, two points that must be noticed about even this simple example. It would be inaccurate, first, to say that Hercules supplemented what the legislature did in enacting the statute, or that he tried to determine what it would have done if it had been aware of the problem presented by the case. The act of a legislature is not, as these descriptions suggest, an event whose force we can in some way measure so as to say it has run out at a particular point; it is rather an event whose content is contested in the way in which the content of an agreement to play a game is contested. Hercules constructs his political theory as an argument about what the legislature has, on this occasion, done. The contrary argument, that it did not actually do what he said, is not a realistic piece of common sense, but a competitive claim about the true content of that contested event.

Second, it is important to notice how great a role the canonical terms of the actual statute play in the process described. They provide a limit to what must otherwise be, in the nature of the case, unlimited. The political theory Hercules developed to interpret the statute, which featured a policy of providing federal enforcement for dangerous crimes, would justify a great many decisions that the legislature did not, on any interpretation of the language, actually make. It would justify, for example, a statute making it a federal crime for a murderer to leave the state of his crime. The legislature has no general duty to follow out the lines of any particular policy, and it would plainly be wrong for Hercules to suppose that the legislature had in some sense enacted that further statute. The statutory language they did enact enables this process of interpretation to operate without absurdity; it permits Hercules to say that the legislature pushed some policy to the limits of the language it used, without also supposing that it pushed that policy to some indeterminate further point.

B. The Common Law

1. Precedent. — One day lawyers will present a hard case to Hercules that does not turn upon any statute; they will argue whether earlier common law decisions of Hercules' court, properly understood, provide some party with a right to a decision in his favor. *Spartan Steel* was such a case. The plaintiff did not argue that any statute provided it a right to recover its economic damages; it pointed instead to certain earlier judicial decisions that awarded recovery for other sorts of damage, and argued that the principle behind these cases required a decision for it as well.

Hercules must begin by asking why arguments of that form are ever, even in principle, sound. He will find that he has avail-

able no quick or obvious answer. When he asked himself the parallel question about legislation he found, in general democratic theory, a ready reply. But the details of the practices of precedent he must now justify resist any comparably simple theory.

He might, however, be tempted by this answer. Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved. If this account of the matter were a sufficient justification of the practices of precedent, then Hercules could decide these hard common law cases as if earlier decisions were statutes, using the techniques he worked out for statutory interpretation. But he will encounter fatal difficulties if he pursues that theory very far. It will repay us to consider why, in some detail, because the errors in the theory will be guides to a more successful theory.

Statutory interpretation, as we just noticed, depends upon the availability of a canonical form of words, however vague or unspecific, that set limits to the political decisions that the statute may be taken to have made. Hercules will discover that many of the opinions that litigants cite as precedents do not contain any special propositions taken to be a canonical form of the rule that the case lays down. It is true that it was part of Anglo-American judicial style, during the last part of the nineteenth century and the first part of this century, to attempt to compose such canonical statements, so that one could thereafter refer, for example, to the rule in *Rylands v. Fletcher*.[22] But even in this period, lawyers and textbook writers disagreed about which parts of famous opinions should be taken to have that character. Today, in any case, even important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents and principles are taken to justify. Sometimes a judge will acknowledge openly that it lies to later cases to determine the full effect of the case he has decided.

Of course, Hercules might well decide that when he does find, in an earlier case, a canonical form of words, he will use his techniques of statutory interpretation to decide whether the rule composed of these words embraces a novel case.[23] He might well

[22] L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

[23] But since Hercules will be led to accept the rights thesis, *see* pp. 1091–93 *infra*, his "interpretation" of judicial enactments will be different from his interpretation of statutes in one important respect. When he interprets statutes he fixes to some statutory language, as we saw, arguments of principle or policy that

acknowledge what could be called an enactment force of precedent. He will nevertheless find that when a precedent does have enactment force, its influence on later cases is not taken to be limited to that force. Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase. If *Spartan Steel* were a New York case, counsel for the plaintiff would suppose that Cardozo's earlier decision in *MacPherson v. Buick*,[24] in which a woman recovered damages for injuries from a negligently manufactured automobile, counted in favor of his client's right to recover, in spite of the fact that the earlier decision contained no language that could plausibly be interpreted to enact that right. He would urge that the earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit.

This gravitational force is part of the practice Hercules' general theory of precedent must capture. In this important respect, judicial practice differs from the practice of officials in other institutions. In chess, officials conform to established rules in a way that assumes full institutional autonomy. They exercise originality only to the extent required by the fact that an occasional rule, like the rule about forfeiture, demands that originality. Each decision of a chess referee, therefore, can be said to be directly required and justified by an established rule of chess, even though some of these decisions must be based on an interpretation, rather than on simply the plain and unavoidable meaning, of that rule.

Some legal philosophers write about common law adjudication as if it were in this way like chess, except that legal rules are much more likely than chess rules to require interpretation. That is the spirit, for example, of Professor Hart's argument that hard cases arise only because legal rules have what he calls "open texture." [25] In fact, judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all. In some cases both the majority and the dissenting opinions recognize the same earlier cases as relevant, but disagree about what rule or principle these precedents should be understood to have established. In adjudication, unlike chess, the argu-

provide the best justification of that language in the light of the legislature's responsibilities. His argument remains an argument of principle; he uses policy to determine what rights the legislature has already created. But when he "interprets" judicial enactments he will fix to the relevant language only arguments of principle, because the rights thesis argues that only such arguments acquit the responsibility of the "enacting" court.

[24] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[25] H.L.A. HART, *supra* note 18, at 121–32.

ment *for* a particular rule may be more important than the argument *from* that rule to the particular case; and while the chess referee who decides a case by appeal to a rule no one has ever heard of before is likely to be dismissed or certified, the judge who does so is likely to be celebrated in law school lectures.

Nevertheless, judges seem agreed that earlier decisions do contribute to the formulation of new and controversial rules in some way other than by interpretation; they are agreed that earlier decisions have gravitational force even when they disagree about what that force is. The legislator may very often concern himself only with issues of background morality or policy in deciding how to cast his vote on some issue. He need not show that his vote is consistent with the votes of his colleagues in the legislature, or with those of past legislatures. But the judge very rarely assumes that character of independence. He will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past.

In fact, when good judges try to explain in some general way how they work, they search for figures of speech to describe the constraints they feel even when they suppose that they are making new law, constraints that would not be appropriate if they were legislators. They say, for example, that they find new rules imminent in the law as a whole, or that they are enforcing an internal logic of the law through some method that belongs more to philosophy than to politics, or that they are the agents through which the law works itself pure, or that the law has some life of its own even though this belongs to experience rather than logic. Hercules must not rest content with these famous metaphors and personifications, but he must also not be content with any description of the judicial process that ignores their appeal to the best lawyers.

The gravitational force of precedent cannot be captured by any theory that takes the full force of precedent to be its enactment force as a piece of legislation. But the inadequacy of that approach suggests a superior theory. The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future. This general explanation of the gravitational force of precedent accounts for the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion. If the government of a community has forced the manufacturer of defective motor cars to pay damages to a woman who was injured because of the defect, then that historical fact

must offer some reason, at least, why the same government should require a contractor who has caused economic damage through the defective work of his employees to make good that loss. We may test the weight of that reason, not by asking whether the language of the earlier decision, suitably interpreted, requires the contractor to pay damages, but by asking the different question whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second.

Hercules will conclude that this doctrine of fairness offers the only adequate account of the full practice of precedent. He will draw certain further conclusions about his own responsibilities when deciding hard cases. The most important of these is that he must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions. If an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force. Its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion. The distributional force of a collective goal, as we noticed earlier, is a matter of contingent fact and general legislative strategy. If the government intervened on behalf of Mrs. MacPherson, not because she had any right to its intervention, but only because wise strategy suggested that means of pursuing some collective goal like economic efficiency, there can be no effective argument of fairness that it therefore ought to intervene for the plaintiff in *Spartan Steel.*

We must remind ourselves, in order to see why this is so, of the slight demands we make upon legislatures in the name of consistency when their decisions are generated by arguments of policy.[26] Suppose the legislature wishes to stimulate the economy and might do so, with roughly the same efficiency, either by sub-

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[26] In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Justice Douglas suggested that legislation generated by policy need not be uniform or consistent:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted).

Of course the point of the argument here, that the demands of consistency are different in the cases of principle and policy, is of great importance in understanding the recent history of the equal protection clause. It is the point behind attempts to distinguish "old" from "new" equal protection, or to establish "suspect" classifications, and it provides a more accurate and intelligible distinction than these attempts have furnished.

sidizing housing or by increasing direct government spending for new roads. Road construction companies have no right that the legislature choose road construction; if it does, then home construction firms have no right, on any principle of consistency, that the legislature subsidize housing as well. The legislature may decide that the road construction program has stimulated the economy just enough, and that no further programs are needed. It may decide this even if it now concedes that subsidized housing would have been the more efficient decision in the first place. Or it might concede even that more stimulation of the economy is needed, but decide that it wishes to wait for more evidence — perhaps evidence about the success of the road program — to see whether subsidies provide an effective stimulation. It might even say that it does not now wish to commit more of its time and energy to economic policy. There is, perhaps, some limit to the arbitrariness of the distinctions the legislature may make in its pursuit of collective goals. Even if it is efficient to build all shipyards in southern California, it might be thought unfair, as well as politically unwise, to do so. But these weak requirements, which prohibit grossly unfair distributions, are plainly compatible with providing sizeable incremental benefits to one group that are withheld from others.

There can be, therefore, no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises. I do not mean simply that the government may change its mind, and regret either the goal or the means of its earlier decision. I mean that a responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret, but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well. It might legislate the rule that manufacturers are responsible for damages flowing from defects in their cars, for example, and yet properly refuse to legislate the same rule for manufacturers of washing machines, let alone contractors who cause economic damage like the damage of *Spartan Steel*. Government must, of course, be rational and fair; it must make decisions that overall serve a justifiable mix of collective goals and nevertheless respect whatever rights citizens have. But that general requirement would not support anything like the gravitational force that the judicial decision in favor of Mrs. MacPherson was in fact taken to have.

So Hercules, when he defines the gravitational force of a particular precedent, must take into account only the arguments of principle that justify that precedent. If the decision in favor of

Mrs. MacPherson supposes that she has a right to damages, and not simply that a rule in her favor supports some collective goal, then the argument of fairness, on which the practice of precedent relies, takes hold. It does not follow, of course, that anyone injured in any way by the negligence of another must have the same concrete right to recover that she has. It may be that competing rights require a compromise in the later case that they did not require in hers. But it might well follow that the plaintiff in the later case has the same abstract right, and if that is so then some special argument citing the competing rights will be required to show that a contrary decision in the later case would be fair.

2. The Seamless Web. — Hercules' first conclusion, that the gravitational force of a precedent is defined by the arguments of principle that support the precedent, suggests a second. Since judicial practice in his community assumes that earlier cases have a *general* gravitational force, then he can justify that judicial practice only by supposing that the rights thesis holds in his community. It is never taken to be a satisfactory argument against the gravitational force of some precedent that the goal that precedent served has now been served sufficiently, or that the courts would now be better occupied in serving some other goal that has been relatively neglected, possibly returning to the goal the precedent served on some other occasion. The practices of precedent do not suppose that the *rationales* that recommend judicial decisions can be served piecemeal in that way. If it is acknowledged that a particular precedent is justified for a particular reason; if that reason would also recommend a particular result in the case at bar; if the earlier decision has not been recanted or in some other way taken as a matter of institutional regret; then that decision must be reached in the later case.

Hercules must suppose that it is understood in his community, though perhaps not explicitly recognized, that judicial decisions must be taken to be justified by arguments of principle rather than arguments of policy. He now sees that the familiar concept used by judges to explain their reasoning from precedent, the concept of certain principles that underlie or are embedded in the common law, is itself only a metaphorical statement of the rights thesis. He may henceforth use that concept in his decisions of hard common law cases. It provides a general test for deciding such cases that is like the chess referee's concept of the character of a game, and like his own concept of a legislative purpose. It provides a question — What set of principles best justifies the precedents? — that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own

decision about what that general justification requires in some particular hard case.

Hercules must now develop his concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent. He will now discover a further important difference between this concept and the concept of statutory purpose that he used in statutory interpretation. In the case of statutes, he found it necessary to choose some theory about the purpose of the particular statute in question, looking to other acts of the legislature only insofar as these might help to select between theories that fit the statute about equally well. But if the gravitational force of precedent rests on the idea that fairness requires the consistent enforcement of rights, then Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy. He does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent with other decisions that his court also proposes to uphold.

Suppose, for example, that he can justify Cardozo's decision in favor of Mrs. MacPherson by citing some abstract principle of equality, which argues that whenever an accident occurs then the richest of the various persons whose acts might have contributed to the accident must bear the loss. He nevertheless cannot show that that principle has been respected in other accident cases, or, even if he could, that it has been respected in other branches of the law, like contract, in which it would also have great impact if it were recognized at all. If he decides against a future accident plaintiff who is richer than the defendant, by appealing to this alleged right of equality, that plaintiff may properly complain that the decision is just as inconsistent with the government's behavior in other cases as if *MacPherson* itself had been ignored. The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.

You will now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal

ordering. The vertical ordering is provided by distinguishing layers of authority; that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States the rough character of the vertical ordering is apparent. The constitutional structure occupies the highest level, the decisions of the Supreme Court and perhaps other courts interpreting that structure the next, enactments of the various legislatures the next and decisions of the various courts developing the common law different levels below that. Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level.

Suppose Hercules, taking advantage of his unusual skills, proposed to work out this entire scheme in advance, so that he would be ready to confront litigants with an entire theory of law should this be necessary to justify any particular decision. He would begin, deferring to vertical ordering, by setting out and refining the constitutional theory he has already used. That constitutional theory would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make. These differences at a high level of vertical ordering will exercise considerable force on the scheme each judge would propose at lower levels. Hercules might think, for example, that certain substantive constitutional constraints on legislative power are best justified by postulating an abstract right to privacy against the state, because he believes that such a right is a consequence of the even more abstract right to liberty that the constitution guarantees. If so, he would regard the failure of the law of tort to recognize a parallel abstract right to privacy against fellow citizens, in some concrete form, as an inconsistency. If another judge did not share his beliefs about the connection between privacy and liberty, and so did not accept his constitutional interpretation as persuasive, that judge would also disagree about the proper development of tort.

So the impact of Hercules' own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify.

He will not follow those classical theories of adjudication I mentioned earlier, which suppose that a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own. His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.[27]

3. Mistakes. — I shall not now try to develop, in further detail, Hercules' theory of law. I shall mention, however, two problems he will face. He must decide, first, how much weight he must give, in constructing a scheme of justification for a set of precedents, to the arguments that the judges who decided these cases attached to their decisions. He will not always find in these opinions any proposition precise enough to serve as a statute he might then interpret. But the opinions will almost always contain argument, in the form of propositions that the judge takes to recommend his decision. Hercules will decide to assign these only an initial or prima facie place in his scheme of justification. The purpose of that scheme is to satisfy the requirement that the government must extend to all the rights it supposes some to have. The fact that one officer of the government offers a certain principle as the ground of his decision may be taken to establish prima facie that the government does rely that far upon that principle.

But the main force of the underlying argument of fairness is forward-looking, not backward-looking. The gravitational force of Mrs. MacPherson's case depends not simply on the fact that she recovered for her Buick, but also on the fact that the government proposes to allow others in just her position to recover in the future. If the courts proposed to overrule the decision, no substantial argument of fairness, fixing on the actual decision in the case, survives in favor of the plaintiff in *Spartan Steel.* If, therefore, a principle other than the principle Cardozo cited can be found to justify *MacPherson,* and if this other principle also justifies a great deal of precedent that Cardozo's does not, or if it provides a smoother fit with arguments taken to justify decisions of a higher rank in vertical order, then this new principle is a more satisfactory basis for further decisions. Of course, this argument for not copying Cardozo's principle is unnecessary if the new principle is more abstract, and if Cardozo's principle can be seen as only a concrete form of that more abstract principle. In that case Hercules incorporates, rather than rejects, Cardozo's account of his decision. Cardozo, in fact, used the opinion in the

[27] *See* pp. 1101–09 *infra.*

earlier case of *Thomas v. Winchester*,[28] on which case he relied, in just that fashion. It may be, however, that the new principle strikes out on a different line, so that it justifies a precedent or a series of precedents on grounds very different from what their opinions propose. Brandeis' and Warren's famous argument about the right to privacy [29] is a dramatic illustration: they argued that this right was not unknown to the law but was, on the contrary, demonstrated by a wide variety of decisions, in spite of the fact that the judges who decided these cases mentioned no such right. It may be that their argument, so conceived, was unsuccessful, and that Hercules in their place, would have reached a different result. Hercules' theory nevertheless shows why their argument, sometimes taken to be a kind of brilliant fraud, was at least sound in its ambition.

Hercules must also face a different and greater problem. If the history of his court is at all complex, he will find, in practice, that the requirement of total consistency he has accepted will prove too strong, unless he develops it further to include the idea that he may, in applying this requirement, disregard some part of institutional history as a mistake. For he will be unable, even with his superb imagination, to find any set of principles that reconciles all standing statutes and precedents. This is hardly surprising: the legislators and judges of the past did not all have Hercules' ability or insight, nor were they men and women who were all of the same mind and opinion. Of course, any set of statutes and decisions can be explained historically, or psychologically, or sociologically, but consistency requires justification, not explanation, and the justification must be plausible and not sham. If the justification he constructs makes distinctions that are arbitrary and deploys principles that are unappealing, then it cannot count as a justification at all.

Suppose the law of negligence and accidents in Hercules' jurisdiction has developed in the following simplified and imaginary way. It begins with specific common law decisions recognizing a right to damages for bodily injury caused by very dangerous instruments that are defectively manufactured. These cases are then reinterpreted in some landmark decision, as they were in *MacPherson*, as justified by the very abstract right of each person to the reasonable care of others whose actions might injure his person or property. This principle is then both broadened and pinched in different ways. The courts, for example, decide that no concrete right lies against an accountant who has been negligent in the preparation of financial statements. They also

[28] 6 N.Y. 397 (1852).

[29] Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

decide that the right cannot be waived in certain cases; for example, in a standard form contract of automobile purchase. The legislature adds a statute providing that in certain cases of industrial accident, recovery will be allowed unless the defendant affirmatively establishes that the plaintiff was entirely to blame. But it also provides that in other cases, for example, in airplane accidents, recovery will be limited to a stipulated amount, which might be much less than the actual loss; and it later adds that the guest in an automobile cannot sue his host even if the host drives negligently and the guest is injured. Suppose now, against this background, that Hercules is called upon to decide *Spartan Steel.*

Can he find a coherent set of principles that justifies this history in the way that fairness requires? He might try the proposition that individuals have no right to recover for damages unless inflicted intentionally. He would argue that they are allowed to recover damages in negligence only for policy reasons, not in recognition of any abstract right to such damages, and he would cite the statutes limiting liability to protect airlines and insurance companies, and the cases excluding liability against accountants, as evidence that recovery is denied when policy argues the other way. But he must concede that this analysis of institutional history is incompatible with the common law decisions, particularly the landmark decision recognizing a general right to recovery in negligence. He cannot say, compatibly with the rest of his theory, that these decisions may themselves be justified on policy grounds, if he holds, by virtue of the rights thesis, that courts may extend liability only in response to arguments of principle and not policy. So he must set these decisions aside as mistakes.

He might try another strategy. He might propose some principle according to which individuals have rights to damages in just the circumstances of the particular cases that decided they did, but have no general right to such damages. He might concede, for example, a legal principle granting a right to recover for damages incurred within an automobile owned by the plaintiff, but deny a principle that would extend to other damage. But though he could in this way tailor his justification of institutional history to fit that history exactly, he would realize that this justification rests on distinctions that are arbitrary. He can find no room in his political theory for a distinction that concedes an abstract right if someone is injured driving his own automobile but denies it if he is a guest or if he is injured in an airplane. He has provided a set of arguments that cannot stand as a coherent justification of anything.

He might therefore concede that he can make no sense of insti-

tutional history except by supposing some general abstract right to recover for negligence: but he might argue that it is a relatively weak right and so will yield to policy considerations of relatively minor force. He will cite the limiting statutes and cases in support of his view that the right is a weak one. But he will then face a difficulty if, though the statute limiting liability in airplane accidents has never been repealed, the airlines have become sufficiently secure, and the mechanisms of insurance available to airlines so efficient and inexpensive, that a failure to repeal the statute can only be justified by taking the abstract right to be so weak that relatively thin arguments of policy are sufficient to defeat it. If Hercules takes the right to be that weak then he cannot justify the various common law decisions that support the right, as a concrete right, against arguments of policy much stronger than the airlines are now able to press. So he must choose either to take the failure to repeal the airline accident limitation statute, or the common law decisions that value the right much higher, as mistakes.

In any case, therefore, Hercules must expand his theory to include the idea that a justification of institutional history may display some part of that history as mistaken. But he cannot make impudent use of this device, because if he were free to take any incompatible piece of institutional history as a mistake, with no further consequences for his general theory, then the requirement of consistency would be no genuine requirement at all. He must develop some theory of institutional mistakes, and this theory of mistakes must have two parts. It must show the consequences for further arguments of taking some institutional event to be mistaken; and it must limit the number and character of the events than can be disposed of in that way.

He will construct the first part of this theory of mistakes by means of two sets of distinctions. He will first distinguish between the specific authority of any institutional event, which is its power as an institutional act to effect just the specific institutional consequences it describes, and its gravitational force. If he classifies some event as a mistake, then he does not deny its specific authority, but he does deny its gravitational force, and he cannot consistently appeal to that force in other arguments. He will also distinguish between embedded and corrigible mistakes; embedded mistakes are those whose specific authority is fixed so that it survives their loss of gravitational force; corrigible mistakes are those whose specific authority depends on gravitational force in such a way that it cannot survive this loss.

The constitutional level of his theory will determine which mistakes are embedded. His theory of legislative supremacy, for

example, will insure that any statutes he treats as mistakes will lose their gravitational force but not their specific authority. If he denies the gravitational force of the aircraft liability limitation statute, the statute is not thereby repealed; the mistake is embedded so that the specific authority survives. He must continue to respect the limitations the statute imposes upon liability, but he will not use it to argue in some other case for a weaker right. If he accepts some strict doctrine of precedent, and designates some judicial decision, like the decision denying a right in negligence against an accountant, a mistake, then the strict doctrine may preserve the specific authority of that decision, which might be limited to its enactment force, but the decision will lose its gravitational force; it will become, in Justice Frankfurter's phrase, a piece of legal flotsam or jetsam. It will not be necessary to decide which.

That is fairly straightforward, but Hercules must take more pains with the second part of his theory of mistakes. He is required, by the justification he has fixed to the general practice of precedent, to compose a more detailed justification, in the form of a scheme of principle, for the entire body of statutes and common law decisions. But a justification that designates part of what is to be justified as mistaken is prima facie weaker than one that does not. The second part of his theory of mistakes must show that it is nevertheless a stronger justification than any alternative that does not recognize any mistakes, or that recognizes a different set of mistakes. That demonstration cannot be a deduction from simple rules of theory construction, but if Hercules bears in mind the connection he earlier established between precedent and fairness, this connection will suggest two guidelines for his theory of mistakes. In the first place, fairness fixes on institutional history, not just as history but as a political program that the government proposed to continue into the future; it seizes, that is, on forward-looking, not the backward-looking implications of precedent. If Hercules discovers that some previous decision, whether a statute or a judicial decision, is now widely regretted within the pertinent branch of the profession, that fact in itself distinguishes that decision as vulnerable. He must remember, second, that the argument from fairness that demands consistency is not the only argument from fairness to which government in general, or judges in particular, must respond. If he believes, quite apart from any argument of consistency, that a particular statute or decision was wrong because unfair, within the community's own concept of fairness, then that belief is sufficient to distinguish the decision, and make it vulnerable. Of course, he must apply the guidelines with a sense of the

vertical structure of his overall justification, so that decisions at a lower level are more vulnerable than decisions at a higher.

Hercules will therefore apply at least two maxims in the second part of his theory of mistakes. If he can show, by arguments of history or by appeal to some sense of the legal community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force that it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut. If he can show by arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports that principle is overridden. Hercules will be delighted to find that these discriminations are familiar in the practice of other judges. The jurisprudential importance of his career does not lie in the novelty, but just in the familiarity, of the theory of hard cases that he has now created.

V. Political Objections

The rights thesis has two aspects. Its descriptive aspect explains the present structure of the institution of adjudication. Its normative aspect offers a political justification for that structure. The story of Hercules shows how familiar judicial practice might have developed from a general acceptance of the thesis. This at once clarifies the thesis by showing its implications in some detail, and offers powerful, if special, argument for its descriptive aspect. But the story also provides a further political argument in favor of its normative aspect. Hercules began his calculations with the intention, not simply to replicate what other judges do, but to enforce the genuine institutional rights of those who came to his court. If he is able to reach decisions that satisfy our sense of justice, then that argues in favor of the political value of the thesis.

It may now be said, however, by way of rebuttal, that certain features of Hercules' story count against the normative aspect of the thesis. In the introductory part of this essay I mentioned a familiar objection to judicial originality: this is the argument from democracy that elected legislators have superior qualifications to make political decisions. I said that this argument is weak in the case of decisions of principle, but Hercules' story may give rise to fresh doubts on that score. The story makes plain that many of Hercules' decisions about legal rights depend upon judgments of political theory that might be made differently by different judges or by the public at large. It does not matter, to this objection, that the decision is one of principle rather than

policy. It matters only that the decision is one of political conviction about which reasonable men disagree. If Hercules decides cases on the basis of such judgments, then he decides on the basis of his own convictions and preferences, which seems unfair, contrary to democracy, and offensive to the rule of law.

That is the general form of the objection I shall consider in this final Part. It must first be clarified in one important respect. The objection charges Hercules with relying upon his own convictions in matters of political morality. That charge is ambiguous, because there are two ways in which an official might rely upon his own opinions in making such a decision. One of these, in a judge, is offensive, but the other is inevitable.

Sometimes an official offers, as a reason for his decision, the fact that some person or group holds a particular belief or opinion. A legislator might offer, as a reason for voting for an anti-abortion statute, the fact that his constituents believe that abortion is wrong. That is a form of appeal to authority: the official who makes that appeal does not himself warrant the substance of the belief to which he appeals, nor does he count the soundness of the belief as part of his argument. We might imagine a judge appealing, in just this way, to the fact that he *himself* has a particular political preference. He might be a philosophical skeptic in matters of political morality. He might say that one man's opinion in such matters is worth no more than another's, because neither has any objective standing, but that, since he himself happens to favor abortion, he will hold anti-abortion statutes unconstitutional.

That judge relies upon the naked fact that he holds a particular political view as itself a justification for his decision. But a judge may rely upon his own belief in the different sense of relying upon the truth or soundness of that belief. Suppose he believes, for example, that the due process clause of the Constitution, as a matter of law, makes invalid any constraint of a fundamental liberty, and that anti-abortion statutes constrain a fundamental liberty. He might rely upon the soundness of those convictions, not the fact that he, as opposed to others, happens to hold them. A judge need not rely upon the soundness of any *particular* belief in this way. Suppose the majority of his colleagues, or the editors of a prominent law journal, or the majority of the community voting in some referendum, holds a contrary view about abortion. He may decide that it is his duty to defer to their judgment of what the Constitution requires, in spite of the fact that their view is, as he thinks, unsound. But in that case he relies upon the soundness of his own conviction that his institutional duty is to defer to the judgment of others in this

matter. He must, that is, rely upon the substance of his own judgment at some point, in order to make any judgment at all.

Hercules does not rely upon his own convictions in the first of these two ways. He does not count the fact that he himself happens to favor a particular conception of religious liberty, for example, as providing an argument in favor of a decision that advances that conception. If the objection we are considering is pertinent, therefore, it must be an objection to his relying upon his own convictions in the second way. But in that case the objection cannot be a blanket objection to his relying upon any of his convictions, because he must, inevitably, rely on some. It is rather an objection to his relying on the soundness of certain of his own convictions; it argues that he ought to defer to others in certain judgments even though their judgments are, as he thinks, wrong.

It is difficult, however, to see *which* of his judgments the objection supposes he should remand to others. We would not have any such problem if Hercules had accepted, rather than rejected, a familiar theory of adjudication. Classical jurisprudence supposes, as I said earlier, that judges decide cases in two steps: they find the limit of what the explicit law requires, and they then exercise an independent discretion to legislate on issues which the law does not reach. In the recent abortion cases,[30] according to this theory, the Supreme Court justices first determined that the language of the due process clause and of prior Supreme Court decisions did not dictate a decision either way. They then set aside the Constitution and the cases to decide whether, in their opinion, it is fundamentally unfair for a state to outlaw abortion in the first trimester.

Let us imagine another judge, called Herbert, who accepts this theory of adjudication and proposes to follow it in his decisions. Herbert might believe both that women have a background right to abort fetuses they carry, and that the majority of citizens think otherwise. The present objection argues that he must resolve that conflict in favor of democracy, so that, when he exercises his discretion to decide the abortion cases, he must decide in favor of the prohibitive statutes. Herbert might agree, in which case we should say that he has set aside his morality in favor of the people's morality. That is, in fact, a slightly misleading way to put the point. His own morality made the fact that the people held a particular view decisive; it did not withdraw in favor of the substance of that view. On the other hand, Herbert might disagree. He might believe that background rights in general, or this right in particular, must prevail against popular opinion even

[30] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

in the legislature, so that he has a duty, when exercising a legislative discretion, to declare the statutes unconstitutional. In that case, the present objection argues that he is mistaken, because he insufficiently weighs the principle of democracy in his political theory.

In any case, however, these arguments that seem tailor-made for Herbert are puzzling as arguments against Hercules. Hercules does not first find the limits of law and then deploy his own political convictions to supplement what the law requires. He uses his own judgment to determine what legal rights the parties before him have, and when that judgment is made nothing remains to submit to either his own or the public's convictions. The difference is not simply a difference in ways of describing the same thing: we saw in Part III that a judgment of institutional right, like the chess referee's judgment about the forfeiture rule, is very different from an independent judgment of political morality made in the interstices provided by the open texture of rules.

Herbert did not consider whether to consult popular morality until he had fixed the legal rights of the parties. But when Hercules fixes legal rights he has already taken the community's moral traditions into account, at least as these are captured in the whole institutional record that it is his office to interpret. Suppose two coherent justifications can be given for earlier Supreme Court decisions enforcing the due process clause. One justification contains some principle of extreme liberality that cannot be reconciled with the criminal law of most of the states, but the other contains no such principle. Hercules cannnot seize upon the former justification as license for deciding the abortion cases in favor of abortion, even if he is himself an extreme liberal. His own political convictions, which favor the more liberal justification of the earlier cases, must fall, because they are inconsistent with the popular traditions that have shaped the criminal law that his justification must also explain.

Of course, Hercules' techniques may sometimes require a decision that opposes popular morality on some issue. Suppose no justification of the earlier constitutional cases can be given that does not contain a liberal principle sufficiently strong to require a decision in favor of abortion. Hercules must then reach that decision, no matter how strongly popular morality condemns abortion. He does not, in this case, enforce his own convictions against the community's. He rather judges that the community's morality is inconsistent on this issue: its constitutional morality, which is the justification that must be given for its constitution as interpreted by its judges, condemns its discrete judgment on the particular issue of abortion. Such conflicts are familiar within

individual morality; if we wish to use the concept of a community morality in political theory, we must acknowledge conflicts within that morality as well. There is no question, of course, as to how such a conflict must be resolved. Individuals have a right to the consistent enforcement of the principles upon which their institutions rely. It is this institutional right, as defined by the community's constitutional morality, that Hercules must defend against any inconsistent opinion however popular.

These hypothetical cases show that the objection designed for Herbert is poorly cast as an objection against 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. He must, of course, rely on his own judgment as to what the principles of that morality are, but this form of reliance is the second form we distinguished, which at some level is inevitable.

It is perfectly true that in some cases Hercules' decision about the content of this community morality, and thus his decision about legal rights, will be controversial. This will be so whenever institutional history must be justified by appeal to some contested political concept, like fairness or liberty or equality, but it is not sufficiently detailed so that it can be justified by only one among different conceptions of that concept. I offered, earlier, Hercules' decision of the free busing case as an example of such a decision; we may now take a more topical example. Suppose the earlier due process cases can be justified only by supposing some important right to human dignity, but do not themselves force a decision one way or the other on the issue of whether dignity requires complete control over the use of one's uterus. If Hercules sits in the abortion cases, he must decide that issue and must employ his own understanding of dignity to do so.

It would be silly to deny that this is a political decision, or that different judges, from different subcultures, would make it differently. Even so, it is nevertheless a very different decision from the decision whether women have, all things considered, a background right to abort their fetuses. Hercules might think dignity an unimportant concept; if he were to attend a new constitutional convention he might vote to repeal the due process clause, or at least to amend it so as to remove any idea of dignity from its scope. He is nevertheless able to decide whether that concept, properly understood, embraces the case of abortion. He is in the

shoes of the chess referee who hates meritocracy, but is nevertheless able to consider whether intelligence includes psychological intimidation.

It is, of course, necessary that Hercules have some understanding of the concept of dignity, even if he denigrates that concept; and he will gain that understanding by noticing how the concept is used by those to whom it is important. If the concept figures in the justification of a series of constitutional decisions, then it must be a concept that is prominent in the political rhetoric and debates of the time. Hercules will collect his sense of the concept from its life in these contexts. He will do the best he can to understand the appeal of the idea to those to whom it does appeal. He will devise, so far as he can, a conception that explains that appeal to them.

This is a process that can usefully be seen as occupying two stages. Hercules will notice, simply as a matter of understanding his language, which are the clear, settled cases in which the concept holds. He will notice, for example, that if one man is thought to treat another as his servant, though he is not in fact that man's employer, then he will be thought to have invaded his dignity. He will next try to put himself, so far as he can, within the more general scheme of beliefs and attitudes of those who value the concept, to look at these clear cases through their eyes. Suppose, for example, that they believe in some Aristotelian doctrine of the urgency of self-fulfillment, or they take self-reliance to be a very great virtue. Hercules must construct some general theory of the concept that explains why those who hold that belief, or accept that virtue, will also prize dignity; if his theory also explains why he, who does not accept the belief or the virtue, does not prize dignity, then the theory will be all the more successful for that feature.

Hercules will then use his theory of dignity to answer questions that institutional history leaves open. His theory of dignity may connect dignity with independence, so that someone's dignity is compromised whenever he is forced, against his will, to devote an important part of his activity to the concerns of others. In that case, he may well endorse the claim that women have a constitutional liberty of abortion, as an aspect of their conceded constitutional right to dignity.

That is how Hercules might interpret a concept he does not value, to reach a decision that, as a matter of background morality, he would reject. It is very unlikely, however, that Hercules will often find himself in that position; he is likely to value most of the concepts that figure in the justification of the institutions of his own community. In that case his analysis of these con-

cepts will not display the same self-conscious air of sociological inquiry. He will begin within, rather than outside, the scheme of values that approves the concept, and he will be able to put to himself, rather than to some hypothetical self, questions about the deep morality that gives the concept value. The sharp distinction between background and institutional morality will fade, not because institutional morality is displaced by personal convictions, but because personal convictions have become the most reliable guide he has to institutional morality.

It does not follow, of course, that Hercules will even then reach exactly the same conclusions that any other judge would reach about disputed cases of the concept in question. On the contrary, he will then become like any reflective member of the community willing to debate about what fairness or equality or liberty requires on some occasion. But we now see that it is wrong to suppose that reflective citizens, in such debates, are simply setting their personal convictions against the convictions of others. They too are contesting different conceptions of a concept they suppose they hold in common; they are debating which of different theories of that concept best explains the settled or clear cases that fix the concept. That character of their debate is obscured by the fact that they do value the concepts they contest, and therefore reason intuitively or introspectively rather than in the more sociological mode that an outsider might use; but, so long as they put their claims as claims about concepts held in common, these claims will have the same structure as the outsider's. We may summarize these important points this way: the community's morality, on these issues at least, is not some sum or combination or function of the competing claims of its members; it is rather what each of the competing claims claims to be. When Hercules relies upon his own conception of dignity, in the second sense of reliance we distinguished, he is still relying on his own sense of what the community's morality provides.

It is plain, therefore, that the present objection must be recast if it is to be a weapon against Hercules. But it cannot be recast to fit Hercules better without losing its appeal. Suppose we say that Hercules must defer, not to his own judgment of the institutional morality of his community, but to the judgment of most members of that community about what that is. There are two apparent objections to that recommendation. It is unclear, in the first place, how he could discover what that popular judgment is. It does not follow from the fact that the man in the street disapproves of abortion, or supports legislation making it criminal, that he has considered whether the concept of dignity presupposed by the Constitution, consistently applied, supports his

political position. That is a sophisticated question requiring some dialectical skill, and though that skill may be displayed by the ordinary man when he self-consciously defends his position, it is not to be taken for granted that his political preferences, expressed casually or in the ballot, have been subjected to that form of examination.

But even if Hercules is satisfied that the ordinary man has decided that dignity does not require the right to abortion, the question remains why Hercules should take the ordinary man's opinion on that issue as decisive. Suppose Hercules thinks that the ordinary man is wrong; that he is wrong, that is, in his philosophical opinions about what the community's concepts require. If Herbert were in that position, he would have good reason to defer to the ordinary man's judgments. Herbert thinks that when the positive rules of law are vague or indeterminate, the litigants have no institutional right at all, so that any decision he might reach is a piece of fresh legislation. Since nothing he decides will cheat the parties of what they have a right to have at his hands, the argument is plausible, at least, that when he legislates he should regard himself as the agent of the majority. But Hercules cannot take that view of the matter. He knows that the question he must decide is the question of the parties' institutional rights. He knows that if he decides wrongly, as he would do if he followed the ordinary man's lead, he cheats the parties of what they are entitled to have. Neither Hercules nor Herbert would submit an ordinary legal question to popular opinion; since Hercules thinks that parties have rights in hard cases as well as in easy ones, he will not submit to popular opinion in hard cases either.

Of course, any judge's judgment about the rights of parties in hard cases may be wrong, and the objection may try, in one final effort, to capitalize on that fact. It might concede, *arguendo,* that Hercules' technique is appropriate to Hercules, who by hypothesis has great moral insight. But it would deny that the same technique is appropriate for judges generally, who do not. We must be careful, however, in assessing this challenge, to consider the alternatives. It is a matter of injustice when judges make mistakes about legal rights, whether these mistakes are in favor of the plaintiff or defendant. The objection points out that they will sometimes make such mistakes, because they are fallible and in any event disagree. But of course, though we, as social critics, know that mistakes will be made, we do not know when because we are not Hercules either. We must commend techniques of adjudication that might be expected to reduce the number of mistakes overall based on some judgment of the relative capacities of men and women who might occupy different roles.

Hercules' technique encourages a judge to make his own judgments about institutional rights. The argument from judicial fallibility might be thought to suggest two alternatives. The first argues that since judges are fallible they should make no effort at all to determine the institutional rights of the parties before them, but should decide hard cases only on grounds of policy, or not at all. But that is perverse; it argues that because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones. The second alternative argues that since judges are fallible they should submit questions of institutional right raised by hard cases to someone else. But to whom? There is no reason to credit any other particular group with better facilities of moral argument; or, if there is, then it is the process of selecting judges, not the techniques of judging that they are asked to use, that must be changed. So this form of skepticism does not in itself argue against Hercules' technique of adjudication, though of course it serves as a useful reminder to any judge that he might well be wrong in his political judgments, and that he should therefore decide hard cases with humility.