NEW YORK UNIVERSITY
LAW REVIEW

VOLUME 53 APRIL 1978 NUMBER 1

NO RIGHT ANSWER?*

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Responding to his earlier essays, where it was argued that hard cases have right answers, Professor Dworkin's critics have maintained that cases often arise in which there is no right answer, and that judges as a consequence exercise discretion. Professor Dworkin now details a refutation of two versions of the claim that there is no right answer in a case at law. He first argues that an understanding of dispositive legal concepts, which link individual rights with official duty, defeats the claim that there is a logical space between affirmative and negative judicial results such that neither may be right. He then assembles and dismantles arguments from vagueness, positivism, and controversy, each of which purports to show that there is sufficient indeterminacy in judicial decisions to preclude demonstrable rightness of result. Finally, a rarity thesis is sketched to show that even if there are some cases in which there is no right answer, they are sufficiently rare in a mature legal system as to be exotic.

I

WHAT IS THE QUESTION?

When is there no right answer to a question of law? Suppose the legislature has passed a statute stipulating that "sacrilegious contracts shall henceforth be invalid." The community is divided as to whether a contract signed on Sunday is, for that reason alone, sacrilegious. It is known that very few of the legislators had that question in mind when they voted, and that they are now equally divided on the question of whether it should be so interpreted. Tom and Tim have signed a contract on Sunday, and Tom now sues Tim to enforce the

 From LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P.M.S. Hacker & J. Raz eds., Oxford University Press 1977). Reprinted, in a revised and expanded form, by permission of the author and the publisher.

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terms of the contract, whose validity Tim contests. Shall we say that the judge must look for the right answer to the question of whether Tom's contract is valid, even though the community is deeply divided about what the right answer is? Or is it more realistic to say that there simply is no right answer to the question?

That issue is central to a large number of controversies about what law is. It has been debated under many titles, including the question of whether judges always have discretion in hard cases, and whether there are what some legal philosophers call "gaps" in the law. I now wish to defend the unpopular view, that in the circumstances just described the question of Tom's contract may well have a right answer, against certain arguments on which its opponents knowingly or unknowingly rely. I shall also try to show what sense there is in the no-right-answer thesis, and why the occasions when a legal question has no right answer in our own legal system may be much rarer than is generally supposed. I shall begin, however, by insisting upon a clarification of the issue that removes a troublesome ambiguity.

Certain legal concepts, like the concept of a valid contract, of civil liability, and of a crime, have the following characteristic: If the concept holds in a particular situation, then judges have a duty, at least prima facie, to decide some legal claim one way; but if the concept does not hold, then judges have a duty, at least prima facie, to decide the same claim in the opposite way. I shall call such concepts "dispositive" concepts. Lawyers seem to assume, in the way they talk and argue, what we might call the "bivalence thesis" about dispositive concepts: that is, that in every case *either* the positive claim, that the case falls under a dispositive concept, *or* the opposite claim, that it does not, must be true even when it is controversial which is true. Lawyers seem to assume, for example, that an exchange of promises either does or does not constitute a valid contract. If it does, then judges have at least a prima facie duty to enforce these promises if so requested within their jurisdiction; but if it does not, then they have at least a prima facie duty not to do so on contractual grounds. Lawyers seem to assume that a particular person is either liable in law for the damage his act has caused or he is not; if he is, then judges have a duty to hold him in damages, but if he is not, then they have a duty not to. They seem to assume that a particular piece of conduct, taking into account intention and circumstances, either constitutes a crime or it does not; if it does, and the actor has no other defense, then the judge (or jury) has a duty to hold him guilty; but if it does not, then the judge (or jury) has a duty to find him innocent.

If it is true that an exchange of promises either does or does not constitute a valid contract, and that someone sued in tort either is or is not liable in damages, and that someone accused of a crime either is or is not guilty, then at least every case in which these issues are dispositive has a right answer. It may be uncertain and controversial what that right answer is, of course, just as it is uncertain and controversial whether Richard III murdered the princes. It would not follow from that uncertainty that there is no right answer to the legal question, any more than it seems to follow from the uncertainty about Richard that there is no right answer to the question whether he murdered the princes. But is it true that an exchange of promises always either does or does not constitute a valid contract, or that someone always is either liable or not liable in tort, or guilty or not guilty of a crime?

I can now state the ambiguity latent in the thesis that in some cases a question of law has no right answer. We may distinguish two versions of that thesis. Both versions deny that the bivalence thesis holds for important dispositive concepts. They deny that an exchange of promises always either does or does not constitute a valid contract (and that a defendant always either is or is not liable in tort, and so forth). But they differ in the character of argument each makes. The first version argues that the surface linguistic behavior of lawyers just described is misleading because it suggests that there is no logical space between the proposition that a contract is valid and the proposition that it is not valid; that is, because it does not contemplate that both propositions may be false. In fact, however, if we look more deeply into the matter, we find that it might be false both that a contract is valid and that it is not valid, false both that a person is liable and that he is not liable for some act, and false both that a particular act constitutes a crime and that it does not. In each case both propositions may be false because in each case they do not exhaust the logical space they occupy; in each case there is a third independent possibility that occupies the space between the other two. On this first version of the thesis, the question "Is Tom's contract valid or invalid?" makes a mistake like the one that the question "Is Tom a young man or an old man?" makes. The latter question may have no right answer because it ignores a third possibility, which is that Tom is a middle-aged man. According to the first version, the legal question also ignores a third possibility, which is that an exchange of promises may constitute neither a valid contract, such that judges have a duty to enforce the exchange, nor a contract that is not valid, with the consequence that judges have a duty not to enforce it, but something else that might be called, for example, an "inchoate" contract.

The second version of the no-right-answer thesis, on the other hand, does not suppose that there is any logical space, in that sense, between the propositions that a contract is valid and that it is not valid, or that a person is liable or that he is not, or that an act is a crime or that it is not. It does not suppose that there is any third possibility, and yet it denies that one of the two available possibilities always holds, because it may not be true that either does. On this second version of the thesis, the question "Is Tom's contract valid or not valid?" is like the question "Is Tom middle-aged or not?" There may be no right answer to the latter question if Tom is of an age that lies on the border between youth and middle age, not because we recognize categories of age distinct from both middle age and non-middle age, but because, at the border, it is a mistake to say of someone either that he is or that he is not middle-aged.

I do not mean to suggest, by offering this comparison, that the second version of the thesis must suppose that the concepts of a valid contract, of legal liability, and of crime are vagne like the concept of middle age. Though, as we shall see, some arguments for the second version are based on claims about vagueness, others are of the different character suggested by the following comparison. Some philosophers believe that there is no right answer to the question of whether Charles was brave if Charles is dead and never faced any occasion of danger during his lifetime, not because "brave" is vague but because it is wrong to say that a man was either brave or not brave if we could have no evidence bearing on the question of which he was.[1] The second version of the thesis may be defended, as we shall also see, in a manner that seems closer to this argument than to the argument from vagueness.

We may state the difference between the first and second version of the no-right-answer thesis more formally. Let $(\sim p)$ be defined as the logical negation of (p), so that if (p) is false $(\sim p)$ is true, and if $(\sim p)$ is false (p) is true. Let the proposition that Tom's contract is valid be represented by "p" and the proposition that his contract is not valid as "non-p." The bivalence thesis supposes that the question about Tom's contract must have a right answer, even if we are not sure what it is, because (non-p) is identical with $(\sim p)$ and either (p) is true or $(\sim p)$ is true because $((p)$ or $(\sim p))$ is necessarily true. Both versions of the no-right-answer thesis agree that this is a mistake, but they disagree about what kind of mistake it is. The first version ar-

[1] *See* Dummett, *Truth*, in PHILOSOPHICAL LOGIC 64-66 (P. Strawson ed. 1967).

gues that (non-p) is not identical to ($\sim p$); (non-p) should be represented as a proposition (r) that is not the logical negation of (p). (I do not mean, by the choice of "r" in that representation, to suggest that the first version must hold that (non-p) is unstructured, but only that it is not the negation of (p).) Plainly, ((p) or (r)) is not necessarily true; it does not allow for the possibility of (q) which is neither (p) nor (r) but something in between. The second version, on the other hand, does not deny that (non-p) is identical to ($\sim p$); instead it holds that in some cases neither (p) nor ($\sim p$) is true, that is, that in some cases bivalence does not hold.

If either version of the thesis is right, then there may be many lawsuits in which it would be wrong to say that either party is entitled to a decision, and right to concede that the judge has a discretion to decide either way. But there is this important difference. If the first version holds, then this discretion is affirmatively provided by law, because the law distinguishes circumstances in which exchanges of promises, for example, fall into a distinct category which has discretion as a consequence. If the second version holds, on the other hand, discretion follows, not by affirmative provision, but by default: since the law stipulates nothing, even discretion, the judge must do what he can on his own.

II

THE FIRST VERSION

We can easily imagine a legal system such that if anyone claimed that there is always a right answer to the question of whether judges have a duty to enforce an exchange of promises, or to refuse to enforce the exchange, he would be making a mistake of the sort the first version supposes. Even under our own law, after all, there are many decisions that a judge has no duty to make either way. That is so, for example, when the plaintiff requests an early adjournment on some particular day and the defendant asks that the request be denied. It is also so when the defendant has been convicted of a crime for which the statute provides a sentence of from three to five years, and the prosecution asks for the maximum, while the defense asks for the minimum, sentence. The concept of duty provides a space between the proposition that the judge has a duty to decide one way and the proposition that he has a duty to decide another way; this space is occupied by the proposition that he has no *duty* to decide one way or the other, but rather a permission or, as lawyers say, a "discretion," to decide either way.

That space might easily be exploited to introduce a form of contract that is neither valid nor invalid, as we now use those terms, but inchoate. The law might provide, for example, that if a contract otherwise unobjectionable is entered into by two people each over twenty-one years of age the contract is "valid," and judges have a duty to enforce it; if either party is less than sixteen years of age, the contract is "invalid," and judges have a duty not to enforce it; but if the younger party is between sixteen and twenty years of age the contract is "inchoate," and the judge has a discretion to enforce it or not depending upon whether, all things considered, he thinks that the right thing to do. The law might stipulate, in a similar way, circumstances in which someone who has caused damage is neither liable nor not liable for that damage, but rather, as we might say, "vulnerable to liability," or circumstances in which a particular act is neither a crime nor not a crime but, perhaps, "criminous." In a legal system like that it would, of course, be wrong to translate "Tom's contract is valid" as "p" and "Tom's contract is not valid" as "$\sim p$," and therefore wrong to appeal to the bivalence thesis to argue that one of these propositions must be true.

The first version of the no-right-answer thesis argues that, contrary to how lawyers seem to talk, our own legal system is really like that; that is, that there is space between each dispositive concept and its apparent negation that is occupied by a distinct concept, like the concept of an inchoate contract, though, as it happens, we do not have a separate name for that distinct concept. But what argument is available to support that claim? It is a semantic claim, about the meaning of legal concepts, and it would therefore be natural to support the claim by some appeal to a linguistic practice that is decisive. But since lawyers do seem to treat "not valid" as the negation of "valid," "not liable" as the negation of "liable," and "is not a crime" as the negation of "is a crime," the argument cannot take that natural course. It cannot be like the argument that "old man" is not the true negation of "young man." That argument may proceed simply by calling attention to a widespread linguistic practice, or, more likely, simply by reminding the speaker who has made the mistake of how he, as a speaker of the language, ordinarily speaks. Since the legal argument cannot proceed in that direct way, it is unclear how it can proceed at all.

It would plainly be fallacious, for example, to argue for the first version in the following way: "There is logical space between the proposition that a judge has a duty to enforce the contract and the proposition that he has a duty not to. That space is occupied by the proposition that he has discretion to enforce it or not. Since it is a

consequence of the proposition that the contract is valid that a judge has a duty to enforce it, and a consequence of the proposition that the contract is not valid that he has a duty not to enforce it, there must therefore be a parallel space between these two propositions about the contract, which is left available for the proposition that the contract is inchoate."

That would be a fallacious argument because it does not follow from the fact that the concept of duty has, in this sense, three values, that the concepts used to define occasions of duty must also have three values. In tennis, for example, judges have a duty to call a fault if a serve falls wholly outside the service court, and a duty not to call a fault if it does not. There is space between the propositions that a judge has a duty to call a fault and that he has a duty not to, but it does not follow that there is space between the propositions that the serve fell wholly without the service court and that it did not. Dispositive concepts are used to describe the occasions of official duty, but it does not follow that these concepts must themselves have the same structure as the concept of duty.

Someone who wishes to defend the first version of the thesis will properly object, however, to that analogy. He will rightly say that the concept of a valid contract does not simply describe the factual circumstances under which, as it happens, judges have a certain duty. We can easily imagine the rules of tennis being changed so that, for example, the judge will have a duty to call a fault if the ball lands on the service-court line. But we cannot imagine a change in the rules of law such that judges would no longer have even a prima facie duty to enforce a valid contract; in any case, if such a change were made, we should certainly say that the concept of contract had itself radically changed. For we use that concept (and the concepts of tort liability and crime) not simply to report in a neutral way that certain events, comparable to the ball landing in a certain area, have occurred, but as an argument in itself that certain legal consequences, including official duties, follow from these facts.

But though this is certainly right, it is unclear what useful conclusions a defender of the first version is able to draw. Suppose he were to take the point further, and say, not simply that statements about contracts always provide grounds for claims about official duty, but that such statements are indistinguishable from statements about duty. He might say, for example, that it means the same thing to say that a contract is valid as to say that a judge has a duty to enforce the promises that compose it, and the same thing to say that it is invalid as to say that he has a duty not to enforce these promises. If these

equivalences in meaning hold, then the first version of the thesis follows in a straightforward way. Since there is space between the two propositions about judicial duty, and since the two propositions about contracts mean the same thing as the propositions about judicial duty, there must be space between the two latter propositions as well.

This argument would be impeccable if the semantic theory on which it is based, that propositions of law are equivalent in meaning to propositions about official duties, were sound. But that theory is not sound. There must be some differences in meaning between the proposition that a contract is valid and the proposition that judges have a duty to enforce the promises that compose the contract, because the former statement is ordinarily taken as providing an argument for the latter, not simply as a question-begging restatement of it. If there is a conceptual, and not simply a contingent, connection between dispositive concepts and legal rights and duties, there is also a conceptual, and not merely a contingent, connection between such concepts and the types of events they report. If a lawyer says that his client has a right to win a judgment because the contract on which he sues is valid, or because the contract on which he is being sued is invalid, he indicates his readiness to make certain sorts of arguments rather than others, to point to facts having to do with offer, acceptance, capacity, illegality, or mistake rather than to other sorts of facts, to support his client's claim. The semantic theory which simply translates statements about contracts into statements about official duties therefore obscures the interesting and distinctive role of dispositive concepts in legal argument. These concepts provide a special kind of bridge between certain sorts of events and the conclusory claims about rights and duties that hold if these events can be demonstrated to have occurred. They both designate tests for conclusory claims and insist that if the tests they designate are not met, then the opposite conclusory claim, not simply the denial of the first, holds instead. The need for concepts having that function in legal argument arises *because* the concepts of right and duty in which conclusory claims are framed are structured, that is, because there is space between the opposite conclusory claims. The function is the function of denying that the space thus provided may be exploited by rejecting both the opposing claims. Dispositive concepts are able to fill this function just because the first version of the no-right-answer thesis is false; if there were space between the propositions that a contract is and is not valid, that concept could not close the space provided by the concepts of right and duty.

The correct analogy, on this account of the matter, is not between dispositive legal concepts and factual events in a game, like a

ball landing within or without a physical area. The correct analogy is between these concepts and dispositive concepts that fulfill the same function within a game. The concept of a tennis serve being "in" or "out" *tout court,* rather than within or without a physical area, is a dispositive tennis concept. The events that make a serve "in" may change, within limits, as when the rules change so that a serve on the line is "out," but the dispositive concept nevertheless has the function of connecting whatever events do constitute a serve's being "in" to official duties in such a way as to close the space left open by the structure of claims of duty.

Someone who defends the first version of the no-right-answer thesis will, of course, challenge my description of the function of dispositive concepts. He will say that the function of these concepts is to enforce, rather than to suppress, the structure of claims of rights and duties. But he cannot win that dispute with me in advance; if he believes that the way lawyers use the concept justifies his description of its function rather than mine, he must provide affirmative evidence drawn from their practice. I am able to point to the fact that lawyers treat the claim that a contract is not valid as the negation of the claim that it is valid, the claim that someone is not liable as the negation of the claim that he is, and so forth; and I am also able to show that lawyers do not use words of the sort his description suggests they would, like "inchoate" contracts or "vulnerability to liability" or "criminous" acts. These are powerful arguments in my favor against his account, and though they are not conclusive, I do not see any arguments that he might make on his own side.

One argument (which I have heard in various forms) at best begs the question. The argument is this: "An ordinary legal statement, like 'Tom's contract is valid,' is simply a shorthand form of a longer and more accurate structured statement, namely, 'The law provides that Tom's contract is valid.' Similarly the statement, 'Tom's contract is not valid,' is simply a shorthand form of the statement 'The law provides that Tom's contract is not valid.' But the two longer statements may plainly both be false. The law may simply stand silent, that is, provide nothing either way. But in that case, since the two shorter statements have the same meaning as the longer statements, the shorter statements are both false also, which is exactly what the first version of the no-right-answer thesis provides."

But we must ask what is meant by proposing that "Tom's contract is valid" has the same meaning as "The law provides that Tom's contract is valid." It might be meant that the latter is simply a redundant way of saying the former, just as "Legally, Tom's contract is valid" might be regarded simply as a redundant way of saying "Tom's

contract is valid." But in that case no reason has been given to suppose that "The law provides that Tom's contract is valid" and "The law provides that Tom's contract is not valid" may both be false. It is not evident that "Legally, Tom's contract is valid" and "Legally, Tom's contract is not valid" may both be false. That is what the first version must prove, not presuppose. If it strikes someone as evident that "The law provides that the contract is valid" and "The law provides that the contract is not valid" may both be false, this is because he personifies "the law"; that is, he takes it to be like a person who may provide (p) or ($\sim p$) or neither. But the law is not a person.

Perhaps, however, the proposal is based, not on that redundancy, but on a more ambitious semantics, which holds that ordinary propositions of law have the same meaning as propositions about what some person or institution has said. "The law provides that Tom's contract is valid" may be read, on this understanding, as "Appropriate authorities have decreed some rule according to which contracts like Tom's must be enforced" or something of the sort. It may certainly be false that appropriate authorities have decreed either that rule or a rule requiring the opposite. But it is hardly evident that "Tom's contract is not valid" means the same thing as "Authorities have enacted some rule according to which the contract is not valid" (or that "Tom is not guilty of a crime" means the same thing as "Authorities have decreed some rule according to which what Tom did is not a crime"). On the contrary, that seems wrong. One strong argument against it is just the fact that "Tom's contract is not valid" seems to be the negation of "Tom's contract is valid" (and "Tom is not guilty of a crime" the negation of "Tom is guilty of a crime"). So the argument under consideration (on this second interpretation as well as on the first) is not an argument for the first version of the no-right-answer thesis; it rather presupposes that thesis.

I shall mention one more apparent argument that the defender of the first version might urge, which we might call the argument from realism. He might say that my description of the function of dispositive concepts must be wrong, because if it were right legal practice would be grossly unrealistic in the following way: If we look to the actual tests the law provides for claims about the validity of contracts, we see that in fact there is sometimes no right answer to the question of whether these tests are met in a particular case. Since there may be no right answer to the question whether an agreement is sacrilegious or not, for example, there can be no right answer to the question whether Tom's contract is valid or invalid, whether lawyers think there is a right answer or not. This kind of indeterminacy occurs with such frequency that it would be unrealistic and indeed perverse for

lawyers to insist that there is nevertheless no logical space between the concept of a valid and an invalid contract. The frequency of such cases, that is, provides a strong motive for adjusting legal semantics to accommodate the case, and we should therefore expect that lawyers have already made that adjustment. They may not have actually developed separate names for each of the third categories they have been forced to acknowledge—perhaps they regret such third categories and wish to keep them secret from the public at large—but they nevertheless must recognize such cases as distinct. If we attend very carefully to the nuances of their arguments, therefore, we may expect to see traces of an unnamed concept actually in use.

I set out this argument from realism because I think it has been influential. We must now notice, however, that it is not an independent argument for the first version of the no-right-answer thesis; on the contrary, it assumes that the second version has already been made out. The common sense lawyers are supposed to have is the common sense necessary to accept the second version of the thesis, and therefore to adapt their semantics to its truth. We may therefore safely ignore the argument from realism, and turn instead to the second version of the no-right-answer thesis itself. If the second version fails, the argument from realism collapses; if the second version holds, the argument from realism is of no independent philosophical interest.

III

THE SECOND VERSION

I shall consider three arguments that might be thought to support the second version of the no-right-answer thesis. The first supposes that the inevitable vagueness or open texture of legal language sometimes makes it impossible to say that a particular proposition of law is either true or false. The second supposes that propositions of law, like the proposition that Tom's contract is valid, have a hidden structure, explicated by legal positivism, that explains how it may be true neither that Tom's contract is valid nor that his contract is not valid. The third fixes on the fact that sometimes, as in our example, a proposition of law is contested in such a way that neither side has any hope of proving that the other is wrong; this argument supposes that propositions of law that are inherently controversial cannot be either true or false.

A. The Argument from Vagueness

It is a very popular idea among lawyers that the vagueness of the language they use guarantees that inevitably there will be no right answer to certain legal questions. But the popularity of this idea is based on a failure to discriminate between the fact and the consequences of vagueness in canonical legal language.

Consider the argument that since the word "sacrilegious" is vague there can be no right answer to the question whether Tom's contract is valid. I should want to insist that the argument makes one mistake not presently important. It confuses the case in which a legislature uses a vague term, like "middle-aged" or "red," with the different case in which it lays down a concept that admits of different conceptions. I shall not press that distinction here, however, because someone who accepts the distinction might simply add that in either case what the legislature has said does not dictate a particular answer to the question of Tom's contract, either because it used a vague term or, if I am right, for the different reason that it used a concept that admits of different conceptions. I shall therefore assume, in this essay, that "sacrilegious" is vague, and that the statute in question is therefore vague in the way that a statute providing that contracts signed by people of middle age are invalid would be vague.

In any case the argument from vagueness makes a further mistake. It assumes that if a legislature enacts a statute, the effect of that statute on the law is fixed by nothing but the abstract meaning of words it has used, so that if these words are vague, it must follow that the impact of the statute on the law must be in some way indeterminate. But that assumption is plainly wrong, because a lawyer's tests for fixing the impact of a statute on the law may include canons of statutory interpretation or construction which determine what force a vague word must be taken to have on a particular occasion, or at least make its force depend upon further questions that in principle have a right answer. These tests may refer to matters of intention or other psychological facts. It is open for a lawyer to argue, for example, that the extension of "sacrilegious," on this occasion of its use, must be confined to cases which at least a majority of those who voted for the statute had in mind, or would have wished to embrace if the case had been put to them. But the tests may not rely on psychological facts. It is open for a lawyer to argue, as I have myself,[2]

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[2] *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 , 1085-87 (1975) [hereinafter Dworkin, *Hard Cases*], *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81, 107-10 (1977).

that the impact of the statute on the law is determined by asking which interpretation, of the different interpretations admitted by the abstract meaning of the term, best advances the set of principles and policies that provides the best political justification for the statute at the time it was passed. Or it is open for him to argue the much more conservative position that if a statute uses vague language it must be taken to have changed the legal *status quo ante* only to the extent justified by the indisputable core of the language employed.

This last suggestion is interesting, not because the recommendation to protect the status quo is either popular or attractive, but because it shows dramatically that vagueness in canonical legal language does not guarantee indeterminacy in propositions of law. But the suggestion is open to an apparent objection. Suppose I put the suggestion this way: (A) If the proposition that a particular contract is sacrilegious is not true, then the law must treat it as false, so that all propositions of law are true that would be true if it were false. It may be objected that, just as it may be indeterminate whether a contract is sacrilegious, it may also be indeterminate whether the proposition that it is sacrilegious is true. After all, someone seeking to apply (A) in practice may find that he is genuinely puzzled whether (A) requires him to treat a particular contract as sacrilegious or as not sacrilegious. Suppose all contracts are arranged on a spectrum from those clearly sacrilegious to those clearly not so. There will be a group at one end as to which the proposition, "This contract is sacrilegious," will be true and another group, around the middle, as to which that proposition will be neither true nor false. But there are still others (roughly one third the way along) as to which it is unclear whether that proposition is true or neither-true-nor-false. So instructions like (A) cannot eliminate indeterminacy, though they may reduce it.

This objection raises interesting issues, but it does not succeed as a refutation of my present point. Let me recapitulate my argument with the Person (V) who urges that vagueness in legal language necessarily produces indeterminacy in propositions of law. V, who is pursuing the second version of the no-right-answer thesis, argues that if "ϕ" is a vague term, then there will be sentences of the form "x is ϕ" that are true, others that are false, and still others that are neither true nor false. (This is different from the claim, which would be made by someone supporting the first version of the thesis, that in some cases "x is ϕ" and "x is not ϕ" are both false.) I reply (in this part of the argument) that if that is so, then indeterminacy will not result if a principle of legislation is adopted which requires that if "x is ϕ" is not true, it be treated as false. Now the present objector (R) replies that

though this may reduce the indeterminacy, it cannot eliminate it; *R* moves up one level of language to assert that, if "ϕ" is vague, then there will be cases in which "'x is ϕ' is true" will itself be neither true nor false. If I try to meet *R* by amending my recommended principle of legislation to provide that if "'x is ϕ' is true" is not true, then it must be treated as false, I have achieved nothing. *R* may then move to a higher level of language still, and I shall be chasing him forever.

But is *R*'s initial move sound? Can "'x is ϕ' is true" itself be neither true nor false? Not if we hold to *V*'s original scheme of three exhaustive truth values—true, false, and neither-true-nor-false. If "x is ϕ" is true, then "'x is ϕ' is true" is true; but if "x is ϕ" is false *or* neither true nor false, then "'x is ϕ' is true" is false. In none of the three possible cases is "'x is ϕ' is true" itself neither true nor false. So *R* seems to be the victim of *V*'s own formulation of his argument. *V*'s argument assumes that propositions of law are indeterminate only when some proposition of the form "x is ϕ" is indeterminate in consequence of the vagueness of "ϕ," but it also assumes that whenever it is indeterminate whether "ϕ" holds, then the proposition that "x is ϕ" is not true.[3]

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[3] *V*'s argument assumed bivalence between "is true" and "is not true." Can *R* deny this, and claim that "is true" is itself vague? *V*'s argument that vagueness produces indeterminacy relied on a distinction between "x is not ϕ" and "it is not true that x is ϕ." That distinction is necessary to his claim that "x is ϕ," and "x is not ϕ" might neither be true without either being false. We can grasp the distinction only if we have independent criteria for asserting that something is "ϕ" and asserting that it is not. (I mean, by "independent," that the criteria for asserting the one is not just the absence of the criteria for asserting the other.) Otherwise we could make no sense of the idea that our criteria may not be satisfied for asserting either. The alleged vagueness of "ϕ" consists in this independence of criteria. But can we distinguish in this way between (1) "p is not true" and (2) "it is not true that p is true"? (1) says (on the analysis just described) that the criteria for asserting (p) are not met. It does not say that the criteria for asserting ($\sim p$) are met. But (2) seems to say nothing more than the same thing, that is, that the criteria for asserting (p) are not met. What more or less might it be taken to claim? But if (1) and (2) do not make different claims, then "is true" cannot be shown to be vague, at least on *V*'s theory of vagueness. The reader may feel that *R* has been cheated by this argument. After all, the circumstance that *R* called attention to might well arise, for all this complex argument. Someone told that if it is not true that a contract is sacrilegious he is to treat the contract as not sacrilegious may still find himself in the difficulty of being uncertain whether it is not true that the contract before him is sacrilegious. I agree. But that is a problem for *V*, not for my answer to *R*. Someone defending the bivalence thesis I described earlier may say that every contract is either sacrilegious or not, though it may be unclear which, and reasonable men may differ. *V* must show that this claim is wrong, because the proposition that a contract is sacrilegious may be neither true nor false. *R*'s practical problem provides (I think) an embarrassment for *V*'s whole approach, at least if it is taken to be an argument for the second version of the no-right-answer thesis.

So the objection we have been discussing may be set aside. There is no reason to assume that no general theory of legislation can be found that will provide an answer to the question of what happens to the law when some institution has used vague language. It might now be said, however, that there is no such theory of legislation in general use. If we look at the decisions of courts called upon to interpret statutes containing vague terms, we find that the courts either disagree about techniques of statutory construction or agree only on canons that critically use terms like "intention" and "purpose" that are in their own way as vague as "sacrilegious." But what of that? Even if we treat these pronouncements by courts as canonical statements of law, like statutes, we still leave open the question of how the law is affected by the fact that courts, in *these* canonical statements, have used vague terms.

Suppose we put our question about Tom's contract, to which there is supposed to be no right answer, this way. Given that the legislature has enacted a statute which provides that "sacrilegious" contracts are void, given whatever we may suppose about the state of mind of the legislators who did this, given whatever we might suppose about the attitudes of the general public towards the Sabbath, and given whatever else may be relevant, is Tom's contract valid in law, so that he is entitled to have the exchange of promises enforced, or is the contract invalid, so that Tim is entitled not to have the exchange enforced? The vagueness of the term "sacrilegious" and the vagueness inherent in any description the legislators might have given of their own state of mind, or members of the public of their own attitudes, are simply facts which our expanded question invites us to take into account. They do not mean that our question has no right answer. If someone now points out that the statements judges make about the construction of statutes themselves contain vague terms, he simply supplies a further fact. If we agree that that further fact is relevant to our question, as it plainly is, then we might add, to our list of considerations, that judges have made such statements. Nothing has yet been said, relying on the vagueness of the term "sacrilegious," to make us doubt that our question has an answer.

I emphasize that qualification because I think that the popular idea, that some legal questions have no right answer because legal language is sometimes vague, does not depend on any argument from vagueness after all, but rather on the different argument, which I describe later, that there can be no right answer to a legal question when reasonable lawyers disagree about what the right answer is. The concept of a valid contract is not itself vague like the concept of middle age, and it does not follow from the fact that some statutory lan-

guage pertinent to the validity of a contract is vague that the question is also vague whether, given that language, the contract is valid. That fact does make it more likely, however, that lawyers will disagree about whether the contract is valid than if the statute contained no vague terms—not because the meaning of terms is decisive of questions of validity, but because lawyers do disagree about the techniques of interpretation and construction properly used to answer such questions.

B. The Argument from Positivism

Legal positivism has many different forms, but they all have in common the idea that law exists only in virtue of some human act or decision. In some forms of positivism, this act is the command of a person or group with actual political power; in other forms, it may be an act as passive as the general and casual acceptance of a customary rule; but in every form some set of acts is defined as necessary and sufficient. We may therefore state the structure of positivism, as a type of legal theory, this way. If "p" represents a proposition of law, and "$L(p)$" expresses the fact that someone or some group has acted in a way that makes (p) true, then positivism holds that (p) cannot be true unless $L(p)$ is true.

It might therefore seem that positivism, in any of its different forms, provides an argument for the second version of the no-right-answer thesis. Suppose (p) cannot be true unless $L(p)$ is true, and that $(\sim p)$ cannot be true unless $L(\sim p)$ is true. For any plausible value of "L," in some cases both $L(p)$ and $L(\sim p)$ are false. If "L" expresses the fact that a sovereign has issued a particular command, for example, it might be false that he has commanded that act, and also false that he has commanded that the act not be done, that is, false that he has prohibited that act. But if $L(p)$ and $L(\sim p)$ are both false, then neither (p) nor $(\sim p)$ can be true, which is what the second version of the no-right-answer thesis holds.

Of course, the fact that legal positivism supports the second version of the no-right-answer thesis would not count as a complete proof of the second version without an independent proof that positivism is right. Nevertheless, since positivism in one form or another is a very popular legal theory, the apparent connection between that theory and the second version, if it can be sustained, would provide important support for the second version and also explain the great popularity of the no-right-answer thesis. It can quickly be shown, however, that none of the familiar forms of positivism does support the second version, and that the only form that might do so would support it only to a very limited degree.

We can distinguish types of positivism not only by distinguishing the different values given to "L" in the general structure I described, but also by distinguishing different relations supposed to hold between (p) and $L(p)$. Semantic positivism holds that (p) is identical in meaning to $L(p)$ so that, for example, "Tom's contract is valid" means the same thing as "A sovereigu has commanded that contracts like Tom's be enforced" or something of the sort. Plainly, semantic positivism cannot offer an argument for the second version of the no-right-answer thesis. The second version concedes that "Tom's contract is not valid" is the logical negation of "Tom's contract is valid"; it concedes that if the latter proposition is represented as "p" the former must be represented as "$\sim p$." If a particular form of semantic positivism supplies a value of "L" such that $L(p)$ and $L(\sim p)$ cannot both be false, then the argument for the second version of the thesis just described does not, for this form of positivism, go through. But if it supplies some value for "L" such that $L(p)$ and $L(\sim p)$ may both be false (as the command form of semantic positivism does) then it contradicts itself, because, since (p) and $(\sim p)$ cannot both be false, it cannot be that (p) means the same as $L(p)$ and $(\sim p)$ means the same as $L(\sim p)$. Semantic positivism must therefore deny that "Tom's contract is not valid" is the negation of "Tom's contract is valid"; it is entitled to deny that, of course, only if it has already been shown that the surface linguistic behavior of lawyers is misleading in the way that the first version of the thesis claims.

There are, however, forms of positivism that do not claim that the relation between (p) and $L(p)$ is identity of meaning. Some forms of positivism claim only the relation of mutual logical entailment, so that it is logically necessary, for example, that Tom's contract is valid if a sovereigu has commanded that contracts like his be enforced, and vice versa. Others claim only the still weaker relation of truth-functional equivalence, so that whenever Tom's contract is valid it will always also be true that some sovereigu has commanded judges to enforce contracts like his, and vice versa.

It is easy to show, however, that neither mutual-entailment positivism nor truth-functional-equivalence positivism can support the second version of the no-right-answer thesis. I will make the argument for the latter, weaker form of positivism; the same argument obviously holds for the stronger form. If (p) is truth-functionally equivalent to $L(p)$, then (p) is false, and not simply not true, when $L(p)$ is false. Therefore when $L(p)$ is false, $(\sim p)$, which is the logical negation of (p), must be true. Since $L(p)$ must be either true or false, then either (p) or $(\sim p)$ must be true, which is what the second version denies.

The argument from positivism I described earlier in this section is misleading, because it capitalizes on the supposed distinction between the internal negation of $L(p)$, which is $L(\sim p)$, and the external negation of $L(p)$, which is $\sim L(p)$. If (p) is truth-functionally equivalent to $L(p)$, then it seems naturally to follow that $(\sim p)$ is truth-functionally equivalent to $L(\sim p)$. That seems to leave $\sim L(p)$ equivalent to nothing, so that it seems plausible that neither (p) nor $(\sim p)$ is true when $\sim L(p)$ is true. But all that overlooks the fact that if $L(p)$ is indeed equivalent to (p) and $L(\sim p)$ is equivalent to $(\sim p)$, then it follows from the former equivalence that $\sim L(p)$ is equivalent to $(\sim p)$ and therefore that $L(\sim p)$ and $\sim L(p)$, being equivalent to the same thing, are equivalent to each other. Truth-functional positivism, if it concedes that the first version of the no-right-answer thesis is false, provides an argument against, not for, the second version.

That has the following interesting consequence. It has always been assumed that the values traditional forms of positivism assign to "L" use the ordinary meanings of the terms they employ; that the command theory uses, for example, the ordinary meaning of "command." But unless positivism maintains the first version of the no-right-answer thesis, that cannot be so. In the ordinary meaning of "command," the proposition that someone has commanded that a contract not be enforced is not equivalent to the proposition that he has not commanded that the contract be enforced. But if it is maintained that "Tom's contract is valid" is truth-functionally equivalent to "Lawmakers have commanded that such contracts be enforced" and that "Tom's contract is not valid" is the logical negation of "Tom's contract is valid," then it follows that "Lawmakers have commanded that the contract not be enforced" is equivalent to "Lawmakers have not commanded that the contract be enforced."[4]

In any case, no form of positivism that stipulates truth-functional equivalence or mutual entailment between every proposition of law and some proposition about lawmaking acts can support the second

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[4] In this essay I am concerned only with showing that legal positivism, even if it is true, does not provide a good argument for the second version of the no-right-answer thesis. This paragraph suggests an argument against positivism itself (it is, in fact, one way of stating what I have in various lectures called the "simple-minded argument" against positivism). I do not propose to pursue that argument in this essay, but it might be useful to notice these points: (1) The argument, as presented here, fails against what I called in the text semantic positivism. It fails against, for example, a form of positivism that claims that "Tom's contract is valid" *means* that judges have a duty to enforce the contract, and the proposition that "Tom's contract is not valid" *means* that judges have a duty not to enforce it. (But semantic positivism is indefensible.) (2) The argument also fails against a form of positivism that sustains the following claims. Prop-

version of the no-right-answer thesis. If the argument from positivism is to be effective, some form of positivism must be found that makes the connection between these propositions a special one such that a proposition of law is true if and only if a proposition about lawmaking acts is true, but is not false when that proposition about lawmaking acts is false. None of the orthodox forms of positivism seems to make that special and limited connection plausible. If a proposition of law is true when and only when a sovereign has issued a particular sort of command, then why should it not be false when he has not issued that command? If a proposition of law is true only when some rule from which the proposition follows has been enacted or adopted or accepted pursuant to some rule of recognition, why should it not be false when no such rule has been enacted or adopted or accepted?

I shall try to suggest, through an analogy, how a positivist might succeed in answering these difficult questions and thereby in making that special one-way connection more plausible than it might seem. Suppose a group of Dickens scholars proposes to discuss David Copperfield as if David were a real person. They propose to say, for example, that David attended Salem House, that he was industrious, and so forth. They might well develop the following ground rules governing these various assertions:

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ositions of law can be divided into two classes, which may be called inherently positive (or inherently mandatory or something of the kind) and inherently negative (or inherently permissive, etc.), such that, for every proposition of law and its negation, one is inherently positive and the other inherently negative. If that is so, then a form of positivism can be defended which argues that a positive proposition of law is truth-functionally equivalent to some statement about lawmaking acts, so that, for example, it is true if and only if the sovereign has so commanded, but that this is not so for negative propositions of law, which may be true just in virtue of the failure of the sovereign to command the related positive proposition. But notice that this form of positivism presupposes a kind of reductionism. It supposes, that is, that all propositions of law that do not on the surface assert or deny duties or permissions can be translated, with no change or loss in meaning, into propositions that do. It also supposes that when this reduction is carried through, each proposition so reduced will belong to an opposite class from that to which its negation is reduced, rather than, for example, each being seen to be (at bottom) claims of permission that cannot, as a matter of law, both be true. It supposes, further, that the normative proposition it expresses, which is that whatever is not prohibited is permitted, is a fair description of legal practice. This assumption may be reasonable in cases in which the law intervenes on a clean slate, as when legal rules for property are provided for a community which has no (pre-legal) scheme of ownership. It is unreasonable when some area of law develops step-by-step rather than by deploying and then refining some all-embracing principle, as in the case, for example, of the development of large parts of the law of negligence. I do not regard these brief remarks as effective arguments against a canonical positive/negative (or mandatory/permissive) distinction, but only as a reminder of the difficulties such a distinction must surmount.

(1) Any proposition about David may be asserted as "true" if Dickens said it, or said something else such that it would have been inconsistent had Dickens denied it

(2) Any proposition may be denied as "false" if Dickens denied it, or said something else such that it would have been inconsistent had Dickens said it.

The first version of the no-right-answer thesis would not hold in this enterprise. Consider any concept we use to describe real people such that if it is true that a person has the property in question it is false that he does not, and if it is false that he has the property it is true that he does not. That concept will have the same logical behavior in the literary discussion. If it is true that David attended Salem House, then it must be false, under the rules, that he did not, and vice versa. If it is true that David had an affair with Steerforth there, then it must be false, under the rules, that he did not, and vice versa. If it is true that David had type-A blood then it is false that he did not, and vice versa. We can even say, of David as of real people, that for any property it is true that either David had that property or not, because the law of the excluded middle is a necessary truth that it would have been inconsistent for Dickens to deny once he had said anything at all about David.

But the second version of the no-right-answer thesis would hold in the literary enterprise, for there would be many propositions about David that the participants would know were neither assertable as true nor deniable as false. Dickens never said that David had a homosexual affair with Steerforth, and it would not have been inconsistent with anything he did say if he had denied it. But he did not deny it, and it would not have been inconsistent with anything he said if he had asserted it. So the participants can neither assert nor deny the proposition, not because they lack sufficient information, but because they have sufficient information to be certain that, under their rules, the proposition is neither true nor false.

This story suggests a form of positivism that provides for the special connection I described between propositions of law and propositions about lawmaking acts. Law is an enterprise such that propositions of law do not describe the real world in the way ordinary propositions do, but rather are propositions whose assertion is warranted by ground rules like those in the literary exercise. A proposition of law will be assertable as true, under these ground rules, if a sovereign has issued a command of a certain sort, or if officials have adopted rules of a certain form in a certain way, or something of that sort. The same proposition will be deniable as false only if a sovereign has commanded to the contrary, or if officials have adopted a contrary

rule, or something of that sort. This form of positivism does not presuppose the first version of the no-right-answer thesis, because it does not suggest that there is any conceptual space, within the institution of law, between any proposition and its apparent negation. It does not suppose that the proposition that a contract is valid and the proposition that it is not valid may both be false. But it does support the second version of the thesis, because it shows how a particular proposition may be neither true nor false, not because of some vagueness or open texture in canonical language, but because the ground rules of the legal enterprise, like the ground rules of the literary enterprise I described have that consequence.

We must now notice that this form of positivism differs from more familiar forms in one important respect. Orthodox positivism, in each of its forms, claims some sort of conceptual connection between law and the particular act or acts designated by the theory as the distinctive law-creating act. For an Austinian positivist, for example, the fact that law is the command of the sovereign is not simply the consequence of the particular legal practices in some countries. It is, on the contrary, constitutive of the very idea of law. But the new version of positivism I constructed, based on the analogy of the literary game, does not permit the positivist so global a claim. He must be content to say that (as it happens) the citizens and officials in a particular jurisdiction follow ground rules about the assertion and denial of legal propositions such that no such proposition may be asserted unless a sovereign has made the appropriate command, or denied unless he has made the contrary command, and that, for that reason, there are propositions of law that can neither be asserted nor denied. But then his claim is not that there must be, in any legal system, questions of law that have no right answer for that reason; but only that there are such questions, for that reason, in the legal system under consideration. He must concede the possibility, at least, of other legal systems which follow very different ground rules about the assertion and denial of propositions of law, and he must also concede that questions of law that do not have right answers in the system he describes have right answers in those other systems, even though no further commands or other lawmaking acts have taken place there.[5] It is not difficult to imagine such other systems.

[5] I hope that the "new" positivist will not make a different sort of claim. He might say that a *legal* system exists only if citizens and officials follow the ground rules he has stipulated, and

The participants in the literary game (to return to that analogy) might easily have chosen less ascetic ground rules for themselves. We might, in fact, distinguish a great many varieties of the literary exercise by progressively relaxing these ground rules. The second form of the exercise might provide, for example, that further propositions about David are assertable as true (or deniable as false) if it would be very likely indeed (or very unlikely indeed) that a real person having the properties true of David under the standard game would also have the properties asserted in the further propositions. The second version of the no-right-answer thesis would still hold for the second form of the literary exercise, but there would be many fewer cases of questions that have no right answer in the second form than in the first, not because the raw data of what Dickens said has changed, but because the ground rules now warrant the assertion or denial of much more. We can imagine a third form of the exercise in which the number of such questions would be reduced to very boring questions no one would wish to ask. The rules of this third form provide that a further proposition about David is assertable as true (or deniable as false) if that further proposition provides a better (or worse) fit than its negation with propositions already established, because it explains in a more satisfactory way why David was what he was, or said what he said, or did what he did, according to those already established propositions. In fact, literary criticism often takes the form of an exercise much closer to this third form of the exercise than to either of the other two.

We can imagine correspondingly different forms of the legal enterprise by supposing progressively less strict ground rules of assertion and denial for propositions of law. We can imagine an enterprise like the first form of the literary exercise, in which participants assert or deny propositions of law only if some stipulated lawmaker asserted or denied those very propositions, or propositions that entail these propositions. But we can also imagine an enterprise much more like the third form in which participants assert (or deny) propositions that

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that if they do not (but rather follow some different ground rules of the sort I describe in succeeding paragraphs) then the arrangement does not count as a legal system. He could not claim any justification in ordinary language for that piece of linguistic tyranny, so that his theory would become simply an unprofitable stipulation, as if some student of literature claimed that the different forms of literary criticism described in the next paragraph of the text were not forms of *literary* criticism. He would fall into the same banality if he were to say that, although a political arrangement might count as a legal system even if different ground rules were followed, an answer to a question about what a court should do would count as a *legal* answer only if it would be generated by his ground rules, whether or not it is generated by theirs.

provide a better (or worse) fit with the political theory that provides the best justification for propositions of law already established.

The issue of whether there is a right answer to any particular question of law will crucially depend upon which form of the legal enterprise is in play. If it is like the first form of the literary exercise, then the question of whether Tom's contract is valid will not have a right answer on the simple facts I stipulated at the start of the essay. But if it is like the third form, on the other hand, that question will almost certainly have a right answer, because, for reasons I consider more fully in the next section, it is very unlikely that one answer will not provide a better fit in the sense just described. If a positivist wishes to argue that in cases like Tom's case there is no right answer, so that judicial discretion must be exercised willy-nilly, then he must show that our own legal practice is like the first form of the literary exercise and not like the third. (I leave aside the question of whether the latter would count as a positivistic account of law at all.) But whether our system is more like the first than the third form is a question of fact. So even if we accept the general account of law I described, which holds that legal propositions are not directly true or false of some external world, but are rather propositions whose assertion or denial is licensed by ground rules that vary with practice, nothing follows, from that general theory of law, about the extent, if any, to which the second version of the no-right-answer thesis is true of any particular legal jurisdiction.

C. The Argument from Controversy

I shall now consider what I think has been the most influential argument in favor of the second version of the no-right-answer thesis, even though this argument has not always been recognized or clearly set out in the thoughts of those whom it has influenced. The argument may be put in the form of a doctrine which I shall call the demonstrability thesis. This thesis states that if a proposition cannot be demonstrated to be true, after all the hard facts that might be relevant to its truth are either known or stipulated, then it cannot be true. By "hard facts" I mean physical facts and facts about behavior (including the thoughts and attitudes) of people. By "demonstrated" I mean backed by arguments such that anyone who understood the language in which the proposition is formed must assent to its truth or stand convicted of irrationality.

If the demonstrability thesis holds, then there must be legal questions to which no right answer can be given because neither the proposition that some dispositive concept holds nor the proposition

that it does not hold can be true. If reasonable lawyers can disagree whether Sunday contracts are sacrilegious within the meaning of the statute, because they hold different views about how statutes containing vague terms should be interpreted or construed, then the proposition that Tom's contract is valid cannot be demonstrated to be true, even when all facts about what the legislators had in mind are known or stipulated. Therefore, on the demonstrability thesis, it cannot be true. But the same holds for the proposition that Tom's contract is not valid. Since neither of these propositions can be true, and since they are assumed to exhaust the range of possible answers, then there is no right answer to the question.

The demonstrability thesis therefore provides a conclusive argument for the second version of the no-right-answer thesis. But why should we accept the demonstrability thesis? Anyone will accept it, of course, who holds a strict form of empiricism in metaphysics. If we believe that no proposition can be true except in virtue of some fact that makes it true, and that there are no facts in the world but hard facts, then the demonstrability thesis follows from that metaphysics. The proposition could rationally be believed to be true, even though its truth is not demonstrated when all the hard facts are known or stipulated, only if there were something else in the world in virtue of which it could possibly be true. But if there is nothing else, then the proposition cannot rationally be believed to be true; the failure of hard facts to make it true would have exhausted all hope of making it true.

But if, on the other hand, we suppose that there is something else in the world beside hard facts, in virtue of which propositions of law might be true, then the demonstrability thesis, in the form I set it out, must be false. Suppose, for example, there are moral facts, which are not simply physical facts or facts about the thoughts or attitudes of people. I do not mean that there are what are sometimes called "transcendent" or "Platonic" moral facts; indeed I do not know what these would be. I mean only to suppose that a particular social institution like slavery might be unjust, not because people think it unjust, or have conventions according to which it is unjust, or anything of the sort, but just because slavery is unjust. If there are such moral facts, then a proposition of law might rationally be supposed to be true even if lawyers continue to disagree about the proposition after all hard facts are known or stipulated. It might be true in virtue of a moral fact which is not known or stipulated.

The demonstrability thesis, therefore, seems to depend upon an answer to the question of what there is. I shall not, in this essay, try to make plausible the idea that moral facts exist, but I shall try to

support the idea that some facts beside hard facts do. I wish, for this purpose, to consider again the third form of the literary exercise I described in the last section. Participants assert a proposition about David as true (or deny it as false) if that proposition provides a better (or worse) fit than its negation with propositions already established, because it explains in a more satisfactory way why David did what he did, or said what he said, or thought what he thought, according to the established propositions.

I do not mean to raise the question, through this story, of whether fictitious persons are in some sense real so that all these propositions may be said to be true of someone or something. I do not mean to suggest, that is, that in addition to hard facts there are facts like the fact that David Copperfield first read *Hamlet* at Salem House. The literary exercise I imagine does not require that assumption to make it a sensible exercise. But it does require the assumption, I think, that there are facts of narrative consistency, like the fact that the hypothesis that David had a sexual relationship with Steerforth provides a more satisfactory explanation of what he subsequently did and thought than the hypothesis that he did not.

That is not, I take it, a hard fact. It is not the sort of fact that is even in principle demonstrable by ordinary scientific methods. Since no one ever did have just the history and character Dickens said David did, we cannot provide ordinary arguments of probability, even when all the histories of real people are known, that would necessarily convince any rational man either to accept or reject the hypothesis. In some cases, the argument will be so strong for a particular proposition, no doubt, that we should say that any participant who did not agree with that proposition was simply incompetent at the exercise. In other cases, we should not say this at all; we should say that there is so much to be said on both sides that competent participants might reasonably disagree.

Suppose that the exercise proceeds with fair success. The participants often agree, and even when they disagree they understand the arguments on both sides well enough to rank each set, for example, in rough order of plausibility. Suppose now that an empiricist philosopher visits the proceedings of the group, and tells them that there are no such things as facts of narrative consistency or that, in any case, there are no such facts when reasonable men can disagree about what they are. He adds that therefore no one can have any reason to think, in response to the terms of the exercise, that the argument that David had an affair with Steerforth is stronger than the argument that he did not. Why should they be persuaded by what he says? This case is not like Dummett's example of Charles's bravery I

mentioned earlier. The participants do have reasons for preferring one proposition to another, or at least they think they do, and even when they disagree each of them thinks he can distinguish cases when his opponents have genuine reasons on their side from cases when they do not. If they have all made a mistake, and no reasons exist, it is difficult to see why they think they do, and how their exercise can have had the success it has.

The philosopher's argument would be compromised, moreover, by the following consideration. It is very likely that if he is asked to take part in the exercise he will find, at least after listening to the group for a while, that he himself will have beliefs of narrative consistency, and that he will be able to provide arguments that others recognize as arguments, and so forth. But how can he say that he believes it is more likely that David had an affair with Steerforth, and offer reasons for that belief, and nevertheless maintain that no one can have reasons for such a belief, or that all such beliefs are illusions?

Suppose he says that while it is true that he and the other participants have such beliefs, they have these only as participants, so that it would be quite impossible for an independent observer or critic to say that one participant's beliefs are superior to another's. Would the independent observer or critic himself have beliefs, if he became a participant, even in controversial cases? If not, then the participants will properly doubt whether he has the capacity to judge their debates. But if so, then he does think, after reflection, that some of the participants have the better of the argument, namely those with whom he would agree. Why should he lose that belief, and whatever reasons he has to support it, when he steps back from the debate and reassumes the role of critic? Of course, he cannot demonstrate his beliefs, either as participant or critic, any more than the other participants can demonstrate their beliefs. But the fact that a critic is in that position offers no more argument for the demonstrability thesis than the fact that a participant is in the same position.

We might now assume the offensive against the philosopher and argue that the fact that the enterprise succeeds in the way it does is a reason for supposing that there are facts of narrative consistency about which the participants debate. He might oppose that argument in this way: He might try to show that the fact that a particular participant holds a particular belief of narrative consistency can be satisfactorily explained by considering only the participant's own personality and tastes and history, so that it is not necessary, to explain his beliefs, to suppose any objective fact to which he is responding, in the way in which we ordinarily suppose objective facts in explaining

why people hold beliefs about hard facts. It is unclear how he might conceivably show this. Perhaps he might invent a machine which would be able to predict, with great accuracy, what a participant's belief would be with respect to any question about David that might be asked, once highly specific information about the participant's blood chemistry was programmed into the machine. It is, of course, very speculative that if such a machine were built it would yield such predictions in the case of this literary exercise, but not also in the case of, for example, astronomers who debate about the number of Jupiter's moons. If the demonstrability thesis depends on the speculation that the machine would yield positive results in the one case, but not in the other, then it rests on very shaky ground.

Let us assume, nevertheless, that such a machine could be built, and that it would yield that discriminatory information about the literary exercise. What follows? The philosopher might be justified in concluding that the literary exercise was special in the following sense: In many exercises, including the experimental sciences, participants are trained to respond to their observations of the external world in a way which, we suppose, increases our collective knowledge of the world. In the literary exercise, participants are trained to respond to certain questions of a highly specific form which, as the machine is supposed to have proved, cannot be said to be questions about the external world. They are trained to subject their responses to the disciplines of reflection and consistency, and then to make certain assertions that their training authorizes them to make on the authority of these responses so disciplined. The exercise, conducted by participants so trained, serves some purpose—perhaps recreational or cultural—other than to increase our collective knowledge of the external world.

Suppose this distinction, or some more sophisticated version, can in fact be made out between enterprises like astronomy and enterprises like literary games. That would be an important discovery, and we should certainly wish to mark the distinction in some way. Suppose a philosopher argues that, in consequence of the distinction, we should not say that propositions asserted by participants in the literary exercise can be either true or false. If he explained that he wished to mark the important distinction in this way, we might or might not agree that the constraint he suggests is an appropriate way to do this. But we should be careful to stipulate what must not follow from the decision to restrict the use of "true" and "false" in that way.

It must not follow, for example, that the participants have no reason to think one judgment of narrative consistency superior to another when they disagree about which is superior. They still have

just the reason the enterprise teaches them to recognize—the fact of their disciplined and reflective response to the distinct questions the enterprise requires them to ask. The philosopher might concede this, but then say that they must recognize that the enterprise that encourages them to make judgments of this sort is based on an illusion. But if the exercise serves its purpose, whatever that might be, what reform would be justified in consequence of what he says? If no reform would be justified, what is the illusion?

Our philosopher might say that the illusion is the supposition that facts about narrative consistency are part of the external world in the same sense in which facts about the weight of iron are part of the world. But the participants certainly do not think that narrative consistency is the same sort of thing as the weight of iron, or that it is part of the external world in anything like the way that the weight of iron is. The philosopher may say that they think that their judgments of narrative consistency are objective, whereas it has now been shown that they are merely subjective. But his own theory makes us lose our grip on that ancient distinction. Whatever sense statements about narrative consistency may have, they are given that sense by the enterprise that trains participants to make and respond to such statements. The philosopher's claim that the reasons of one are no better—provide no superior warrant for his assertion—than the reasons of another is a claim that can only be made from *within* the enterprise. From within the enterprise (except in certain circumstances I shall discuss in a moment) that claim is simply false, or, if we choose to avoid that word, simply not warranted. Our philosopher may, of course, say that an institution so constructed is a silly one, and that may or may not be so. Whether it is so will depend upon whether the enterprise, taken as a whole, serves some worthwhile purpose, and serves it better than a revised form of the enterprise would.

The third form of the literary exercise is therefore an enterprise that makes trouble for the demonstrability thesis. I suggested, in the last section, that our own legal system might resemble that form of the literary exercise. In a recent article,[6] in fact, I offered a theory of adjudication which supports the following description of our legal enterprise. A proposition of law, like the proposition that Tom's contract is valid, is true if the best justification that can be provided for the body of propositions of law taken to be settled provides a better case for that proposition than for the contrary proposition that Tom's con-

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[6] Dworkin, *Hard Cases*, *supra* note 3.

tract is not valid, but is false if that justification provides a better case for that contrary proposition. There are important differences between the idea of consistency used in this account of legal reasoning and the idea of narrative consistency used in the literary exercise. Legal reasoning makes use of the idea of normative consistency which is plainly more complex than, and may be thought to introduce grounds for claims of subjectivism not present in, narrative consistency. Nevertheless the comparison may help to explain why it is sensible to suppose that there might be a right answer to the question of whether Tom's contract is valid even when that answer cannot be demonstrated.

The comparison is useful in another way as well. It helps us to understand why, even though we reject the demonstrability thesis and therefore reject the idea that there is no right answer whenever the right answer is not demonstrable, it might nevertheless be sensible to say that there is no right answer to a question of law in certain very special cases. In certain circumstances, even in the third form of the literary exercise, it might be right for the participants to refuse to assert either that David had some property or that he did not. Suppose the question is raised whether David had type-A blood or not, and there is no reason to think that a boy with that blood type would be more likely to have had the history and character Dickens stipulates than a boy with any other blood type. The proposition that David had type-A blood is not vague; we can say that any historical boy would either have had type-A blood or not, and that there is a right answer to the question whether he did, even though we shall never know. But the assertion conditions of the literary exercise forbid saying that of David; it seems more sensible, given these conditions, to say that though the proposition that he had that blood type is not true, the proposition that he did not is not true either. In such a case the grounds for saying that there is no right answer to the question are not based on any external criticism of the enterprise, or on any external philosophical position like the demonstrability thesis. The grounds are simply that that is the right response *within* the terms of the enterprise itself. We may imagine a genuine controversy within the enterprise as to whether, in any particular case, that *is* the right response. One party may say that there is a reason for thinking that boys like David would for that reason have been more likely to have type-A blood and another that there is a reason for thinking that they would more likely not, and a third thinking either that there were no reasons either way, or that whatever reasons there were were so equally balanced that no sensible discrimination could be made.

The occasions on which the participants would be tempted to say that there was no right answer to some question about David would be a function of two considerations. The first is the length of the novel, or, rather, the density of the information that Dickens does in fact supply. The second is the character of the question. If it is a question about a feature that is randomly distributed throughout a population, so that the fact that a boy had the specific characteristics Dickens described, no matter how dense the description, can have little bearing on the question of whether he had the feature in question, then it is more likely that the question will have no right answer.

Can we imagine questions that might be raised within a legal system that would have no right answer for the same sort of reason? That must depend upon the legal system, of course, but it also depends upon how we understand and expand the claim, just mentioned, that a proposition of law is sound if it figures in the best justification that can be provided for the body of legal propositions taken to be settled. I argue that there are two dimensions along which it must be judged whether a theory provides the best justification of available legal materials: the dimension of fit and the dimension of political morality.[7] The dimension of fit supposes that one political theory is *pro tanto* a better justification than another if, roughly speaking, someone who held that theory would, in its service, enact more of what is settled than would someone who held the other. Two different theories may well provide equally good justifications, along that dimension, in immature legal systems with few settled rules, or in legal systems treating only a limited range of the conduct of their constituents. But in a modern, developed, and complex system, the antecedent likelihood of that kind of tie is very small. The tie result is possible in any system, but it will be so rare as to be exotic in these. I do not mean, of course, that it will be rare that lawyers disagree about which theory provides, even on that dimension, a better justification. It will be rare, I think, that many lawyers will agree that neither provides a better fit than the other.

The second dimension—the dimension of political morality—supposes that, if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact

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[7] *See* R. DWORKIN, *supra* note 3, 81-130 (ch. 4).

have.[8] The availability of this second dimension makes it even less likely that any particular case will have no right answer. But the force of the second dimension—and the character of the indeterminacy it introduces—will be a matter of dispute, because lawyers who hold different types of moral theory will assess these differently. Straightforward moral skeptics will argue that the second dimension adds nothing, because no theory is superior, as a matter of political morality, to any other. If some case has no right answer taking into account the first dimension only, then that case has no right answer *tout court*. Someone who holds an old-fashioned pleasure-pain utilitarian theory of rights, on the other hand, will find it incredible that two theories distinct enough to require different decisions in any particular case will score equally on the second dimension. He will recognize the theoretical possibility that two distinct sets of moral rules would have exactly the same pleasure-pain consequences over the long run; but he will think that the possibility is so small that it may be ignored in practice.

In the case of some theories of rights, it will be problematic whether there is even the theoretical possibility of no-right-answer. Suppose a right-based theory of political morality that seeks to derive particular individual rights from some presumed absolute right to be treated as an equal, that is, with equal concern and respect. Two lawyers who accept that general theory may hold different conceptions of what counts as equal respect. May a third lawyer plausibly believe that neither is right, because one conception of respect is exactly as good as another? Once we grasp the ideas of the old-fashioned utilitarian, we can see what sense it makes to suppose a tie, within his system, between two acts or two rules or principles. They are tied if each would produce exactly the same positive pleasure balance. But it is not so easy to see how someone could accept the general idea of the equal respect theory and still maintain, not that he is uncertain which conception is superior, but that neither is. There seems to be no room here for the ordinary idea of a tie. If there is no right answer in a hard case, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.

The question, therefore, of whether there are no-right-answer cases in a particular jurisdiction—and whether such cases are rare or

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[8] The relation between these two dimensions of justification is considered in Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1252-53 (1977).

numerous—is not an ordinary empirical question. I believe that such cases, if they exist at all, must be extremely rare in the United States and Great Britain. Someone who disputes this cannot, if the arguments of this essay are right, establish his case simply by relying on the demonstrability thesis or the other *a priori* arguments considered earlier. But nor is he likely to succeed by attempting to find actual examples of no-right-answer cases in a case-by-case search of the law reports. Each case report carries an opinion arguing that one side has, on balance, the better of the legal argument. Some cases carry a dissenting opinion as well, but this is also an argument that one side has the better case. Perhaps both the majority and minority opinions are wrong: Perhaps some combination of legal and philosophical analysis can show that, in this particular case, the arguments for neither side are on balance stronger than those for the other. But it is extremely unlikely that an argument that this is so in some particular case will convince all lawyers. Any case cited as an example by one scholar will be disputed by others.

The argument that I am wrong must therefore be a philosophical argument. It must challenge my assumption that in a complex and comprehensive legal system it is antecedently unlikely that two theories will differ sufficiently to demand different answers in some case and yet provide equally good fit with the relevant legal materials. It must provide and defend some idea of skepticism, or of indeterminacy in moral theory, which makes it plausible to suppose that neither of such theories can be preferred to the other on grounds of political morality. I do not think that any such argument has been provided, though I have certainly not shown that none could be.