Taking Wright Seriously: Of Judicial Discretion, Jurisprudents, and the Chief Justice

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Introduction

"The better part of valor," boasted Falstaff, "is discretion."[1] Shakespeare's character was, however, better noted for his indiscretions, and was congratulating himself on the wisdom of having played dead on the battlefield, the better to stay alive. During the Chief Justiceship of Donald Wright, the Supreme Court of California was hardly given to shrinking from the fray. The court, happily, remained very much alive notwithstanding its disregard of Falstaff's example.

The forte of Chief Justice Wright, and many of the triumphs of the court under his flag, lay in the field of criminal procedure. He performed superlatively the task of leading the Supreme Court of California in deciding such cases correctly: that is, with courage, without cant, and with due regard for the social as well as individual consequences. His accomplishments attest that, for high courts in hard cases of criminal procedure, the better part of discretion is valor.

One cannot, these days, address judicial discretion without paying heed to the intense debate among legal philosophers as to whether such discretion properly exists at all in any meaningful sense. I propose to attend to that debate, and perhaps to add a footnote to it, by examining it in light of a case which falls at its edge and yet raises issues central to jurisprudents' concern over the proper scope of judicial discretion. I begin by sketching in broad strokes the basic outline of the jurisprudential debate, including the nature of

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1. W. SHAKESPEARE, KING HENRY IV, pt. 1, act 5, sc. 4, line 120.

"hard cases," the varying meanings of "discretion," and the evolution of the debate. I present in more detail and with some comment a précis of the current terms of the debate. Against this backdrop I pose a study of a classically hard case, *People v. Coleman*,[2] into which I incorporate references to several other hard cases of criminal procedure. Based on this case study, I contend that for reasons not adequately accounted for in the jurisprudential debate over judicial discretion, problems of adjudicatory procedure, especially in criminal cases, are legitimately within the province of quasi-legislative judicial discretion. It is this sort of discretion, I conclude, of which Chief Justice Wright was past master.

I. Definitional Background

A. Hard Cases

The starting point for discussing judicial discretion is the somewhat elusive notion of the "hard case." The definition of a hard case is itself not troublesome. Hard cases are those which, assuming agreement as to the facts, still afford rational grounds for dispute among equally competent lawyers as to the proper legal result. This definition would presumably be accepted even by Professor Ronald Dworkin, who maintains—in his inspiringly entitled collection of essays, *Taking Rights Seriously*[3]—that, at least as a philosophical matter, there is a uniquely right legal answer to virtually every case, no matter now "hard" the case may appear to be in terms of having to decide among reasonable, alternative resolutions.[4] Thus Dworkin

2. 13 Cal. 3d 867, 553 P.2d 1024, 120 Cal. Rptr. 384 (1975), *noted in The Supreme Court of California 1974-1975*, 64 CALIF. L. REV. 239, 516 (1976) [hereinafter cited as *Supreme Court*].

3. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter cited as DWORKIN]. Most of the chapters of this book appeared earlier in various periodicals. *See, e.g.*, Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter cited as *Hard Cases*]; Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972); Dworkin, *The De Funis Case: The Right to go to Law School*, 23 NEW YORK REV. OF BOOKS 29-33 (Feb. 5, 1976). Only chapters twelve and thirteen are new. *See* DWORKIN, *supra*, at xv.

4. DWORKIN, *supra* note 3, at 99-130, 279-90. Dworkin does admit to the philosophical possibility of there being a "tie" between alternative answers to a hard case, so that in such a hard case there is indeed no one right answer. *Id.* at 284-86. However, he contends that in a very advanced legal system possessing a sophisticated body of legal rules and precedents, "[t]he antecedent probability of a tie [compared to the probability of judges erroneously deciding a tie exists because that decisionmaking option is allowed to them] is very much lower; indeed it might well be so low as to justify a further ground rule . . . which instructs judges to eliminate ties from the range of answers they might give. That instruction does not deny the theoretical possibility of a tie, but it does suppose that . . . judges will . . . come to think that one side or the other has, all things considered and marginally, the better of the case. This further instruction will be rational if the antecedent probability of error in a judicial decision seems to be greater than the antecedent probability that some case will indeed be, in fact, a tie, and if there are advantages of finality or other political advantages to be gained by denying the possibility of tie cases at law." *Id.* at 286-87.

himself defines a hard case—notwithstanding his conviction that it has a single philosophically right answer—as a "case in which one answer cannot be proved in a way that can only be challenged by the irrational."[5] The distinguishing characteristic of a hard case is, then, that able lawyers do not agree on the right result that the law should produce in the case. Even the theoretical existence of a single right answer does not detract from the difficulty of a hard case, because Dworkin himself seems willing to concede that as a practical fact "that right answer is locked in legal philosopher's heaven, inaccessible to laymen, lawyers and judges alike. Each can have only his own opinion, and the opinion of the judge comes no more warranted for truth than the opinion of anyone else."[6]

The elusiveness of the hard case notion lies not in defining hard cases in the abstract, but in deciding how to apply that definition to specific cases. What are the grounds for dispute in a particular case and how charitable a standard of rationality is to be applied to these grounds? Properly defined, are hard cases commonplace or extraordinary in our legal system? Such questions have, with one exception,[7] received scant attention in the recent spate of commentary on judicial discretion that Dworkin's views have provoked.[8] Yet, whether hard cases are routine or unusual would seem to have an important bearing on the debate over how hard cases are (or ought to be) decided.

Justice Cardozo, for one, appears to have vacillated in his assessment of the predominance of hard cases. He began his famous series of lectures on the judicial process by denying that the task of deciding cases is a matter of daily routine susceptible to easy description.[9] Indeed, he went on,

5. *Id.* at 287. Dworkin was here referring specifically to a "controversial" case, but appears to have used this term interchangeably with "hard" case.

6. *Id.* at 280. See note 68 *infra*.

7. *See* Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 484-88 (1977) [hereinafter cited as Soper].

8. *See, e.g.*, Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143 (1977) [hereinafter cited as Bodenheimer]; Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975) [hereinafter cited as Greenawalt]; Hart, *Law in the Perspective of Philosophy: 1776-1976*, 51 N.Y.U.L. REV. 538 (1976) [hereinafter cited as Hart, *Law in Perspective*]; *Soper, supra* note 7; Note, *Dworkin's "Rights Thesis,"* 74 MICH. L. REV. 1167 (1976) [hereinafter cited as *Rights Thesis*]. These articles all take account of the views expressed by Dworkin in his 1975 article, *Hard Cases, supra* note 3; Professor Greenawalt's article appeared in advance of Professor Dworkin's book but took note of the development of Dworkin's theories as expressed in "unpublished writings" and "a number of lectures." Greenawalt, *supra*, at 360 n.9, 386 n.65. *See also* Reynolds, *Dworkin as Quixote*, 123 U. PA. L. REV. 574 (1975) [hereinafter cited as Reynolds]; Note, *Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism*, 81 YALE L.J. 912 (1972); and the list of articles supplied by Dworkin himself, DWORKIN, *supra* note 3, at 46 n.2. This body of commentary is predominantly critical of the conclusions drawn by Dworkin while praising the insights offered by his arguments.

9. B. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 108 (M. Hall ed. 1947).

"judge-made law [is a] strange compound which is brewed daily in the cauldron of the courts," and to which all judges contribute.[10] Yet, later in his lectures, he cautioned that in "countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps."[11]

On the other hand, Professor H.L.A. Hart, the leading advocate of the theory of "legal positivism"[12] that Dworkin criticizes in his book,[13] has declared forcefully that hard cases are the exception, not the rule of the judicial process:

> [T]here are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards do *not* require from them a fresh judgment from case to case.[14]

In view of his assertions that hard cases actually have right answers which a judge must strive to discern by perspicacious thought and review of all relevant aspects of the legal system, Professor Dworkin would seem to share the belief that truly hard cases which do not yield their intractability under sustained analysis are relatively rare.[15]

I am inclined to take a contrary position. When one limits consideration to cases actually adjudicated, rather than cases merely filed or otherwise formally added to a court's docket, I suspect that hard cases constitute a substantial and increasing proportion of cases submitted in whole or in part to judicial decision. The situation is admittedly complicated because, as Justice Cardozo noted, the real controversy in many lawsuits is the underlying facts themselves rather than the law applicable to those facts; factual disputes, however, present their own problems of judicial discretion beyond the scope of this discussion.[16] Apart from that, the revolution in civil

10. *Id.* at 109.

11. *Id.* at 160.

12. For an analysis of the concept of legal positivism, see notes 40-43 and accompanying text *infra*.

13. DWORKIN, *supra* note 3, at ix. At least one commentator has characterized the relationship between Hart and Dworkin as an adversarial debate. *See* Soper, *supra* note 7, at 476 & n.11.

14. H. HART, THE CONCEPT OF LAW 132 (1961) [hereinafter cited as HART].

15. See note 4 *supra*.

16. It should be emphasized that, in an artificial sense, hard cases involve doubtful law rather than doubtful facts. I am not here concerned with the judicial role in resolving disputes of fact. Right or wrong in that context is assessed in terms of accuracy rather than ethics, and there are generally only crude means of verification. The fact finder may thus have great practical latitude in refusing to follow instructions of law or in disregarding honest intuition.

procedure that has occurred with the advent of the federal rules and their many state analogues has greatly reduced the purely factual disputes actually tried by a court. Once modern discovery devices have identified the genuine disputes of fact between litigants, the potential cost and delay to be encountered in the resolution of those differences by trial creates great pressure on contemporary litigants to negotiate a settlement of such disputes.[17]

I do not mean to contend that judges of courts of law only rarely confront an "easy" case. In particular, the gravity of being charged with a crime leads us to demand judicial administration of criminal adjudication, even when the issues are primarily factual.[18] In some civil cases, too, the

Whether out of fear of the consequences of placing such practical discretion in the hands of judges, or out of hope of its use by sympathetic peers, the delegation of fact-finding to persons other than judges has a hallowed place in our legal system. Of course, judges as well as juries may be swayed by subjective factors in the finding of facts, *see* Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 35-36 (1931), and such subjectivity may affect a trial judge's resolution of legal issues. The extent of this problem, however, is beyond the scope of this commentary. In another sense the trial court's discretion concerning facts is germane, however. Rules of procedure have a vital bearing on findings of fact, and even when juries rather than judges are charged with ascertaining the facts, rulings regarding evidence and other aspects of procedure will have a profound influence on the substance of those findings.

The standards governing these rulings, especially in the area of civil discovery, often warrant wide discretion to the trial judge. In other areas, such as the order of presentation of evidence, the notion of deference to the "sound discretion of the trial judge" is a virtual totem of appellate review; in still other areas, such as the admissibility of evidence, the imperceptible influence of procedural rulings on findings of fact allow the mistakes of trial courts to be swept *en masse* under the rug of appellate review by the doctrine of harmless error. Thus the trial judge will confront many controversial questions concerning the proper exercise of "discretion." Although such hard cases do not yield controlling precedent in the same fashion as do hard cases before appellate courts, certain expectations attach to the fact that they are decided by judges, even trial judges. I believe that the litigants are entitled to have these hard cases decided in the same spirit as those resolved at the appellate court level.

17. Any census of hard cases in trial courts must take account of the many difficult questions of adjudicatory procedure that even a primarily factual case can present to a trial judge as it proceeds to and through trial. See note 16 *supra*. Moreover, consideration must be given to the recurring yet often intractable legal issues that primarily factual cases have the potential to raise at some point—from demurrer to judgment notwithstanding the verdict—where even assuming adverse resolution of the factual dispute one side claims to be entitled to judgment "as a matter of law." The intractability of such issues stems not only from the difficulty of distinguishing questions of fact from questions of law, *see generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 7.3, 7.10 (2d ed. 1977), but also from the subtle differences between the basic tests for the legal sufficiency of the allegations or the evidence and the degree to which the judge may consider the credibility of the evidence actually adduced, *see id.* §§ 2.9, 7.11, 7.13, 7.22. Even the seemingly archetypal factual considerations placed before a trial judge by a motion for a new trial because the verdict was against the weight of the evidence are edged by difficult questions of the law governing the court's discretion, if a judge does more than sit in the jury box and tries as well to find some benchmark, in Dworkinian terms of institutional history and political morality, by which to gauge the propriety of judicial intrusion into the "province of the jury." *See id.* § 7.20.

18. *See, e.g.*, Gordon v. Justice Court, 12 Cal. 3d 323, 325-26, 525 P.2d 72, 73, 115 Cal. Rptr. 632, 633 (1974), *cert. denied*, 420 U.S. 938 (1975): "We are confronted here with the

presence of a judge may seem imperative because an easy case in point of law ranks high on some scale of consequentiality.[19] Aside from criminal trials and civil cases presenting special circumstances, however, I submit that the adjudication of easy cases is increasingly becoming ancillary to the judicial function in modern America.[20]

Thus I suggest that the problem of how judges decide hard cases is best approached from the perspective that hard cases are commonplace. However controversial this perspective may be when the focus is upon trial courts and courts which hear appeals as of right, it seems difficult to dispute in the context of a court of last resort that has "discretionary" control of its own docket.[21] With the possible exception of cases in which the court's im-

question whether the current practice of allowing nonattorney judges to preside over criminal trials of offenses punishable by a jail sentence, as is the situation in over 60 percent of the justice courts in California, violates the constitutional rights of the defendants in those proceedings. We have decided that this practice does violate the due process clause of the Fourteenth Amendment of the United States Constitution, and that henceforth defendants in such courts are entitled to have an attorney judge preside over all criminal proceedings involving charges which carry the possibility of a jail sentence, unless such right is waived by defendant or his counsel."

19. The most familiar example of a "scale of consequentiality" is of course the jurisdictional amount. Not only do jurisdictional amounts determine the type of court a case may be tried in, *see, e.g.*, 28 U.S.C. § 1332(a) (1970) (diversity case in federal court requires an amount in controversy in excess of $10,000), but also whether a case is tried to a judge at all, *see, e.g.*, 6 B. WITKIN, SUMMARY OF CALIFORNIA PROCEDURE, *Appeal* §§ 18, 24 (2d ed. 1971), describing the prior system of California justice courts, wherein nonattorney judges could try cases involving only $1,000 in damages or less. This system has been completely revised by the state legislature, so that today justice courts have jurisdiction concurrent with that enjoyed by municipal courts, *see* CAL. CIV. PROC. CODE §§ 83, 86 (West Supp. 1977) and all future vacancies on the former tribunals must be filled exclusively by attorneys, *see* CAL. GOV'T CODE § 71701 (West 1976).

20. Decisions truly compelled by law are ministerial, more properly the work of clerks than judges. Most easy cases cannot be decided by clerks, however, for two reasons. First, there may be a dispute as to the operative facts which must be resolved through some fact-finding process performed or administered by one knowledgeable in the law that governs that process. Second, perception of the correct legal answer may be easy only to one well-versed in the relevant doctrines of law. Thus, our society is developing a class of intermediate adjudicators of easy cases, legal technicians sufficiently cognizant of the law to translate accurately its abstract mandates into specific legal imperatives governing the conduct of persons and institutions.

These functionaries, however much they yearn to be called judges rather than arbitrators, referees, hearing officers, commissioners, and the like, do not truly operate in a judicial fashion as I conceive it. They do have a practical discretion with regard to findings of fact, but this is a function which we have always been prepared to delegate to persons or entities other than judges. As for questions of law, these essentially administrative adjudicators are distinguishable from judges because of the narrowness of their jurisdiction, the specialized technicality of their expertise, the insecurity of their tenure, their general lack of insulation from the institutions, personalities, and subject matter with which they deal, and above all, by the very tendentiousness of the law which they construe and administer, law that combines to channel administrative adjudication to desired ends while discouraging any eddies of ambiguity as to the law's true direction.

21. The Supreme Court of California has original jurisdiction of appeals in capital cases. CAL. CONST. art. VI, § 11. Such appeals are, by statute, automatic. CAL. PENAL CODE §1239(b)

primatur is needed in an undemanding case,[22] or when issues clear to the court have proved troublesome to the lower courts,[23] the Supreme Court of California does not hear easy cases.

B. The Meanings of Discretion

Even in the midst of the hard case debate, no one denies that hard cases call for the exercise of judicial discretion. The issue is the nature and dimension of that discretion. Is it a "weak" discretion, in the sense that by definition the law is difficult to discern and apply in hard cases, and that by virtue of their position judges are the ones empowered to make the choice from among the reasonable but competing alternatives argued to the court? Or is it a "strong" discretion, in the sense that hard cases evidence gaps in the law which both free judges from constraint to reach particular, legally-mandated results and invite them to fashion such judicially-created gap-filling law as best serves the judges' extra-legally inspired ends?[24]

Meaningful discussion of the extent of judicial discretion in the decision of hard cases assumes that judges do abide by the law.[25] There is,

(West Supp. 1977). The court may also exercise original jurisdiction by issuance of writs of habeas corpus or extraordinary writs in the nature of mandamus, certiorari, or prohibition. CAL. CONST. art. VI, § 10. The court's principal means of exercising jurisdiction is by granting a hearing before the supreme court of a case pending before or decided by the courts of appeal. CAL. CONST. art. VI, § 12. The procedure for granting a hearing is comparable to the United States Supreme Court's certiorari practice, and is governed by CAL. RULE OF COURT 29, providing: "(a) A hearing in the Supreme Court . . . will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law . . . ."

22. *See, e.g.*, California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 598, 526 P.2d 513, 516, 116 Cal. Rptr. 361, 364 (1974) (exercise of original jurisdiction in issuing a writ of mandate ordering the state treasurer to perform the acts necessary to permit the sale of the bonds of the petitioning authority).

23. *See, e.g.*, People v. Triggs, 8 Cal. 3d 884, 889-94, 506 P.2d 232, 235-38, 106 Cal. Rptr. 408, 411-14 (1973).

24. *See* DWORKIN, *supra* note 3, at 31-33. *But see* Reynolds, *supra* note 8, at 576-87. Actually, Dworkin assigns two meanings to the term "weak discretion." One refers to a situation in which a decisionmaker must apply external standards but must exercise judgment in doing so, rather than operating mechanically. The other refers to a situation in which some official has final authority to make a decision and cannot be reviewed and reversed by any other official. This latter definition will not be discussed in this commentary. See note 25 *infra*.

25. One sense of discretion is excluded from the debate: discretion in the sense of unreviewable power to make a decision. The timeless problem of *quis custodiet ipsos custodes?*—who will watch over the watchmen?—is really beyond the scope of jurisprudence. The idea of a functioning system of law presupposes a social effort to control or conform human conduct by some sort of means, however mutable, flexible, or ambiguous, and thus presupposes that there will be institutions and persons charged with determining the lawfulness of particular conduct. *See* 1 R. POUND, JURISPRUDENCE 15-16 (1959) [hereinafter cited as POUND]. In the Anglo-American legal culture those institutions and persons include in the first instance, police, judges, jurors, hearing officers, and a legion of others from school principals to building

furthermore, substantial agreement on the concept[26] of what the law is, at least in modern Anglo-American culture.[27] In generalized form, the law is a body of standards which, having come into being by the accretion of custom

inspectors. There are of course successive levels of reviewing institutions and persons, but there must ultimately be a level at which legal, as opposed to political, review stops. At that ultimate level there is manifest power to disregard "the law" without legal sanction, but this "discretion" to *disregard* that which is legally required is wholly different from a discretion to *determine* that which is legally required. To the extent that courts of last resort exercise their power simply to disregard the law, jurisprudential debate about how the content of the law is to be determined is irrelevant.

26. It is essential to an enlightened discussion of what we conceive of as law to distinguish semantically between concepts and conceptions. Dworkin has drawn the distinction well. *See* DWORKIN, *supra* note 3, at 134-37. We might well agree on our concept of law as a philosophical entity. Nevertheless, our individual conceptions of what the law decrees in particular situations may vary radically. These variances may be quite reasonable, notwithstanding our equal expertise in law and legal philosophy, and yet do not preclude our continued agreement on the concept of law from which each of us derives our idiosyncratic perspectives.

For instance, we could agree that the law is, in concept, the will of God. Thus, while our jurisprudential debates would then assume a theological cast, our conceptions of what it was exactly that God willed might differ dramatically. Nevertheless, assuming that we could agree in a general way on what we meant by God, our *concept* of the law would be the same.

27. Concepts of law employed by functioning legal systems have not varied greatly throughout history. Three basic themes predominate: law as supernatural force or will, antecedent to and omnipotent over humanity; law as a set of universal values inherent in human society and the physical world; and law as the will of powerful mortals imposed upon less powerful mortals. The concept of law as divine will has always been popular, sometimes operating through the media of various physical phenomena. There have also been many adherents to more agnostic notions of "natural" law, derived from logic, history, and observation of the physical world, which, while not originating from a deistic source, are nonetheless endowed with the ethical overtones of "higher" law, in that they posit immutable principles to which human law should conform. Concepts of natural law, however, generally differ from theories of law based on divine will by being strictly normative, and enforced (if at all) by enlightened and conscientious mortals. *See generally* E. BODENHEIMER, JURISPRUDENCE 4, 31-35 (rev. ed. 1974) [hereinafter cited as BODENHEIMER, JURISPRUDENCE].

Less transcendent theories of law have also abounded, culminating in the empirical concept of law denominated as "positivism." See notes 38-43 and accompanying text *infra*. Classical positivists discerned both power and law as emanating from the barrel of a gun, at least if the one brandishing that gun qualified as an agent of the state.

Finally, there has been the occasional example of law as physical power merged into law as divine will. It is commonplace, of course, for worldly rulers to claim that God's hand has guided them to the throne, and that their acts bespeak God's will. Such invocations of divine power generally relegated the ruler's role to one of merely a medium for the Almighty. To pretend otherwise is dangerous, for if the belief in God is strong, a ruler's arrogation of godly status may be seen as an act of impiety sufficient to shift divine favor to a humbler vassal. Such diverse rulers as Louis XIV, Montezuma, and Caesar Augustus propagated the cult of self-deification to the extent that the governing concept of law in their societies became synonymous with their own personal wills. One should not make the mistake of presuming that even such judges as an Earl Warren or a Donald Wright possessed the freedom of impulsive action open to the aforementioned emperors.

We may recognize and occasionally regret that the unreviewable discretion vested in the judges of our highest courts allows them to act upon conceptions of law which differ from ours, but this does not mean that their actions are premised upon a concept of law as an expression of their own individual wills.

or acts of authoritative articulation, we are prepared to recognize as legitimate. By "legitimate" it is meant that we feel "obligated" as well as "obliged" to obey the law.[28] The law is not just the command of some gangster or warlord with the power of arms, but sets "a standard of behavior that has a call on its subject beyond the threat that may enforce it."[29] Thus there is substantial agreement that the law is a basic set of guidelines for ordering our lives and social institutions, primarily by our personal efforts at compliance with the law, and secondarily by the social enforcement of law under the ultimate control of the judges of our courts of law. The contemporary debate is over the nature of the standards which constitute law, and the nature of the discretion which such standards leave to judges in applying the law.

II. Origins of the Jurisprudential Debate

A. Historical Development of Jurisprudential Attitudes Toward Judicial Discretion

Upon this common ground, then, is waged the battle of the hard case. The opposing forces are each colored by history, and the arguments exchanged have roots traceable to the very origins of human civilization.[30] For our purposes, however, we need retreat no further than 1598, the year Falstaff first addressed discretion from the stage, and the year a lowly case involving sewer assessments gave Sir Edward Coke the opportunity to declare that officials empowered to act "according to their discretions, . . . ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and to not do according to their wills and private affections . . . ."[31]

It is a wholly different matter whether judges may occasionally decide cases purely on the basis of their personal predilections rather than in accordance with their conscious conceptions of the dictates of law. The suspicion of such malfeasance assumes that the judge is operating under some concept of law *other* than the will of the judge. The sin of such judges is not heresy but false homage. To conceal the unlawfulness of spurious decisions, they offer colorable conceptions of law as rationalizations. Because as judges they have the power to act upon any conception which is rationally consistent with our governing concept of law, we are left with the choice of accepting the suspect decisions as rational although (in our opinion) wrong, or concluding that the irrationality of such a decision is indicative of individual derangement and demands the removal of the judge in question.

28. *See* HART, *supra* note 14, at 79-88.

29. DWORKIN, *supra* note 3, at 19-20. Use of the term "standards" is meant to leave open the question of whether the law consists not only of "rules" but also of "principles" and "policies," terms which are commonplace in contemporary jurisprudential usage. See notes 55-56, 65-68, 75-78, and accompanying text *infra*.

30. *See* Bodenheimer, *supra* note 8, at 1143-44.

31. Rooke's Case, 77 Eng. Rep. 209, 210 (C.P. 1598) (footnotes omitted). At the time this case was decided, Coke was serving as Attorney General. In 1606, he became Lord Chief

Coke's characterization of discretion as a matter of procedural purity and dexterity rather than substantive volition underscored his conviction that discretion was always *scire per legem quid sit justum*: to discern that which is just according to law.[32] However conferred, by statute, ruling, or claim of right, and by whomever exercised, be it king, judge, or sewer commissioner, discretion demanded the *application*, not the generation of law. Although Coke did not believe in natural law in some simplistic, apolitical, and highly intuitive sense, he did believe in a technically complex higher law, a common law of custom and "artificial reason"[33] that was part of the national fabric and to which sovereign and citizen were subject alike.[34] This law was immutable, at least at the hands of the legislature or monarch, and the courts were charged with enforcing it.[35]

As a judge and commentator upon whose writings the lawyers of the American Revolution were raised, Coke had a profound influence over the concept and content of the law applied in the American colonies and, later, states.[36] In his own country Coke's compilations of law also had an enduring influence but his concept of the nature of law was less lasting; Coke himself was removed from the bench for continually dissenting from King James' claim to the absolute power of a royal "prerogative" unbounded by law.[37] The contest for hegemony between the monarchy and the legislature was settled by revolution and restoration, not by courts of common law. In Coke's time it had served the ends of Parliament to accept the constraints of

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Justice of the Court of Common Pleas and, seven years later, was appointed as Lord Chief Justice of the Court of King's Bench. In 1580 he began systematically recording cases that he witnessed; the first volume of his bound reports appeared in 1600.

32. Keighly's Case, 77 Eng. Rep. 1136, 1138 (C.P. 1609). In this case Coke as Chief Justice of the Court of Common Pleas adopted *qua* judge statements he had made *qua* reporter in stating the basis for the ruling in Rooke's Case, 77 Eng. Rep. 209 (C.P. 1598). See note 31 *supra*. It should be noted that although *Rooke's Case* and *Keighly's Case* both involved the statutory discretion to set assessments conferred upon commissioners of sewers, in the latter case Coke styled his description of discretion as applying to "every Judge or commissioner," and thus drew no distinction between judicial discretion and administrative discretion. 77 Eng. Rep. at 1138. *See also* S. DESMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 247-49 (3d ed. 1973).

33. Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (1608).

34. *See* C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 77-83 (2d ed. 1963); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 368 (1929) [hereinafter cited as Corwin].

35. BODENHEIMER, JURISPRUDENCE, *supra* note 27, at 56. Coke's belief in the supremacy of judicially-declared common law over the legislature did not make the courts the overseers of Parliament. He conceived the ultimate law-declaring body to be Parliament, but in its judicial rather than legislative incarnation, as the "High Court of Parliament." *See generally* MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?*, 22 MICH. L. REV. 215 (1924).

36. Corwin, *supra* note 34, at 366, 379-80, 394-404.

37. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 437-41 (1927) [hereinafter cited as HOLDSWORTH].

a higher law which would check the crown equally with Lords and Commons. Once the supremacy of Parliament was established, the notion of a law beyond all mortal institutions was no longer an ally of parliamentarianism. At home, higher law became the province of ecclesiastics rather than courts; abroad, it became an inspiration for revolution.

Two centuries after Coke, John Austin expounded what was to become the dominant nineteenth-century, Anglo-American view of law. Inspired by his contemporary, Jeremy Bentham, Austin advocated abandonment of the uneasy and unenforced deference to higher law displayed by existing jurisprudence[38] in favor of the empirical concept of "positive" law.[39]

Austin's concept of law was premised upon distinguishing legal rules from other forms of obligation. Such rules were "positive" because they were unalloyed by any higher law of God or nature, and were a function solely of the relative "position" of persons as political superiors or inferiors.[40] Such rules constituted "laws (properly so called)," as opposed to "morality," because they were not "merely opinions or sentiments held or felt by men in regard to human conduct" but were rather the "direct or circuitous command of a monarch or sovereign number in the character of political superior."[41] In a simple, autocratic society, legal rules would flow directly from a single sovereign personality; in more complex societies, the sovereign power would be more diffused, by virtue of either the number of agents required to do the sovereign's bidding, or the institutionalization of sovereignty itself.[42] Whatever their source, it was crucial to Austin that rules were commands, issued in expectation of compliance and enforced by "the power and the purpose of inflicting eventual evil."[43] Austin's positive law was meant not to guide, but to govern.

Austin himself had no difficulty in acknowledging the existence of gaps in his legal system of sovereign commands and according judges a practical discretion to fill those gaps by their decisions in hard cases.[44] Judges were as worthy agents of the sovereign as any other ministers of state, and the rules of decision in hard cases acquired legal force as

38. *See* W. FRIEDMANN, LEGAL THEORY 134 (5th ed. 1967); BODENHEIMER, JURISPRUDENCE, *supra* note 27, at 56-57. *Compare* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 41 (1771) *with* BODENHEIMER, JURISPRUDENCE, *supra* note 27, at 161.

39. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1965) [hereinafter cited as AUSTIN]. On Bentham's influence, *see id.* at vii-viii, xvi-xvii; Hart, *Law in Perspective, supra* note 8, at 540; DWORKIN, *supra* note 3, at vii.

40. AUSTIN, *supra* note 39, at 11; *see id.* at 253-54.

41. *Id.* at 12, 123.

42. *See id.* at 216-29.

43. *Id.* at 17 (emphasis omitted).

44. *See id.* at 31, 191.

sovereign commands insofar as the state acquiesced in their enforcement.[45] As it became popularized in Anglo-American law in the latter half of the nineteenth century, however, the appeal of Austinian positivism lay not in its legitimation of judicial lawmaking but in its affirmation of the separation of law and morals. The empirical cast of positivism and its celebration of the sovereignty of the legislatures of the English-speaking democracies, unfettered from any traces of natural law, gave rise to an era of "mechanical jurisprudence."[46] A general belief in the pervasiveness of the positive law cast judges in the role of logicians rather than lawmakers, their decisions derived deductively from existing law, rather than contributing inductively to emerging law.

The tendency was to deny the existence of gaps in the legal system at almost any cost to judicial candor. When hard cases arose, the rationalizations constructed to resolve them seemed dedicated principally to demonstrating why they were not really hard cases at all. Rules which fell short of covering the dispute at hand were by official fiat stretched over the apparent gap. Since the terms of the process did not admit that gap-filling was going on, the covering opinions did not reveal why one rule was stretched in preference to another, and the courts were perceived as unresponsive to arguments based on the reasonableness of desired results rather than the reasoning, however sterile, that would best preserve the semblance of a seamless legal web.[47]

45. "The rules which [a judge] makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." *Id.* at 31-32. Austin saw judicial lawmaking as the medium for transforming custom and morality into law, using custom and morality as the grounds of judicial decisions upon cases. *Id.* at 163. Although Austin did not deem judges to be confined to utilizing only custom or morality in deciding hard cases, he would probably have argued that the greater the departure by a judge from some conventional sense of appropriate conduct, the greater the chance that the sovereign will refuse to acquiesce in the decision—especially where the sovereign is a popularly elected legislature. *See id.* at 31, 191-92. *See also* BODENHEIMER, JURISPRUDENCE, *supra* note 27, at 347.

46. *See* Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

47. *See generally* J. GRAY, THE NATURE AND SOURCES OF THE LAW § 224 (1909); POUND, *supra* note 25, at 142 & n.40. Both Hart and Dworkin have suggested that a bygone era of mechanical jurisprudence is more myth than history, at least in Anglo-American law. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-11 (1958) [hereinafter cited as Hart, *Positivism*]; DWORKIN, *supra* note 3, at 15-16. *Cf.* BODENHEIMER, JURISPRUDENCE, *supra* note 27, at 115-16 (gaplessness of turn-of-the-century German legal positivism). The principal importance of the notion of mechanical jurisprudence may be as a conceptual foil which focuses attention on the discretionary aspects of modern judicial decisionmaking, in the sense that however their decisions may now be analyzed, nineteenth-century judges and jurists did not commonly acknowledge the role of judicial discretion.

Thus it was that when a more sociological jurisprudence emerged to offer manifold reasons for the ways in which judges manipulated rules in hard cases, respectable elements of the American legal community erupted from years of repression to display an almost prurient fascination with the "real" reasons, abstract reasoning aside, behind judicial decisionmaking. Indeed, during the earlier years of this century it appeared from the writings of some of the foremost American legal intellectuals as if, like the smile of the Cheshire cat, there was nothing left of the positive law but its gaps.[48] Where once there had been only easy cases, governed ineluctably by positive rules, now *every* case could be treated as a hard case. Habit and the hierarchy of appellate courts placed practical limits on judicial innovation, but in theory the law had become a medium for the expression of the prejudices and principles of the first passing judge.

Whatever the excesses of the legal realists' reaction to the disingenuous adjudication which had occurred under color of gapless positivism, jurisprudential thought in general approached a new consensus. As courts molded law to meet the exigencies of depression and war, it became increasingly difficult to dispute the basic tenets of sociological jurisprudence. Nonetheless, I would contend that the predominant tenor of judicial opinions has remained at least nominally deferential to established legal doctrine.

The formal reconciliation of classical positivism and more sociological views of jurisprudence has taken place at the hands of Professor Hart. For the past two decades he has offered an appealing restatement of positivism which includes three elements relevant here.[49] First, Hart uses the term "rule" in a refined sense which emphasizes the role of social obligation rather than sovereign coercion in inducing compliance.[50] Second, Hart attempts to construct a master test, his so-called "rule of recognition," for

Certainly the realization that such discretion could not easily be disclaimed has profoundly influenced the tenor of modern jurisprudential debate. *See id.* at 347; Bodenheimer, *supra* note 8, at 1145-49. *See also* J. FRANK, COURTS ON TRIAL 55-57, 147, 282 (1949). Both the role-as-foil and the influence of mechanical jurisprudence are evident in these lines from Holmes' famous opening paragraph in *The Common Law*, first published in 1881: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." O.W. HOLMES, THE COMMON LAW 1 (1881).

48. *See, e.g.*, K. LLEWELLYN, THE BRAMBLE BUSH 13 (1930); J. FRANK, LAW AND THE MODERN MIND 50 (1963 ed).

49. *See* HART, *supra* note 14. *See also* Hart, *Positivism, supra* note 47; Hart, *Law in Perspective, supra* note 8.

50. *See* HART, *supra* note 14, at 79-84.

determining which rules are legal rules.[51] Third, Hart acknowledges far more openly than Austin the judicial discretion[52] necessary to deal with the "open texture"[53] of law in a world concededly unfit "for 'mechanical' jurisprudence."[54]

B. The Hart/Dworkin Dispute

The most serious challenge to Hart's articulation of the modern, Anglo-American concept of law has come from Professor Dworkin. Dworkin applauds Hart as a moral philosopher for having demonstrated the important role of moral obligation in the concept of law.[55] Dworkin argues, however, that Hart's emphasis on "rules" fails to take adequate account of less formal sources of law, in the sense that the fundamental tenets of a given legal system's institutional and political morality are a part of its law and are no less binding on its judges than the formal "rules" recognized by Hart.[56] Although it has ramifications throughout Hart's work, Dworkin's criticism is focused most acutely on Hart's acquiescence in judicial discretion to "make" law in hard cases.

In addition to referring to the "open texture" of the law, Hart uses the metaphor of "the problems of the penumbra" in describing judicial discretion.[57] Surrounding the "hard core" of any legal rule is "a penumbra of uncertainty."[58] Within this penumbral area the application of legal rules to specific cases "cannot be a matter of logical deduction."[59] Hart concedes that "if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises,"[60] and even accuses Bentham and Austin of having failed to understand "that the criterion which makes a decision sound in such cases is some concept of what the law ought to be."[61] Where Hart and Dworkin disagree is whether, if a judge must indeed make "a moral judgment about what the law ought to be"[62] in order to decide a hard case, the content of that moral judgment is a matter of personal judicial choice, left to the discretion of the judge in the "strong" sense previously discussed,[63] or is

51. *See id.* at 91-107.
52. *See id.* at 132, 135, 138-43.
53. *See id.* at 124.
54. *Id.* at 125.
55. DWORKIN, *supra* note 3, at 7, 19-20.
56. *See id.* at 14-80.
57. Hart, *Positivism, supra* note 47, at 607.
58. *Id.*; *see also* HART, *supra* note 14, at 12.
59. Hart, *Positivism, supra* note 47, at 607.
60. *Id.* at 608.
61. *Id.*
62. *Id.*
63. See note 24 and accompanying text *supra*.

part of the pre-existing law which the judge is bound to apply, leaving the judge with only the "weak" discretion to fit the governing law to the facts of the case. Hart insists that judges have real choices to make in such situations. In revising positivism to take greater account of the generative role of the judiciary, he refuses to assert that judges in the shadows are bound to navigate a predetermined path through uncharted realms of law by reference to beacons of morality not yet reduced to rule. When confronting hard cases, Hart believes, "here if anywhere we live among uncertainties between which we have to choose, and . . . the existing law imposes only limits on our choice and not the choice itself."[64]

Dworkin contends that judicial discretion in hard cases is circumscribed by a panoply of legally binding imperatives other than the legal "rules" of the positive law. Hart's "rule of recognition" for distinguishing rules of law from moral or otherwise extra-legal grounds for decision is therefore denounced as too limiting.[65] Besides Hart's rules, to which Dworkin attributes an "all-or-nothing" effect which precludes more than one valid rule from applying to a given set of facts,[66] Dworkin claims that the law consists of "principles" which incline but do not control judicial decisions in hard cases.[67] Despite their inability to dispose of cases, such principles are binding on a judge in the sense that their collective weight, properly measured, determines the one legally correct answer to a hard case.[68]

64. Hart, *Positivism, supra* note 47, at 629.

65. DWORKIN, *supra* note 3, at 22-45.

66. *Id.* at 24. *See also id.* at 27. See note 72 *infra*.

67. *See* DWORKIN, *supra* note 3, at 35.

68. *See id.* at 44. A factor in Dworkin's development of a concept of law as existing independently of the minds of judges may be the coexistence of his belief in a moral obligation to follow the law, see note 55 and accompanying text *supra*, and his support of resistance to the draft by conscientious objectors to the Vietnam War. At one time Dworkin advocated a position of tolerance, arguing for lenient treatment of resisters on the basis of the generative role played by acts of dissent in the development and testing of the law through experimentation by citizens and through the adversary process, and dismissing as nonsensical the notion that there is always a right answer to a legal problem to be found in natural law; thus he seemingly disclaimed "treating law as a 'brooding omnipresence in the sky.'" *Id.* at 215-17 (originally published as Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. OF BOOKS 14, 18-19 (June 6, 1968)).

His later writings, such as chapters four and thirteen of *Taking Rights Seriously, see* DWORKIN, *supra* note 3, rely more heavily on the idea that there is indeed a single right answer to every case, even though no means exist to determine conclusively what that answer is. Hart has accordingly hung the "brooding omnipresence" label on Dworkin. *See* Hart, *Law in Perspective, supra* note 8, at 546-47. The philosophical premise of the single right answer allows for the possibility, indeed the inevitability, that judges will make unjust mistakes in adjudicating disputes about legal rights. Thus, it is arguable that those whose rights suffer from such mistakes are justified in acts of dissent, since noncompliance with the judgment of a court does not necessarily entail noncompliance with the moral obligation to abide by the law. *See* DWORKIN, *supra* note 3, at 212-14.

Hart would afford a greater scope to judicial discretion the farther the facts take the judge from the core of settled meaning of a legal rule; Dworkin inverts the image to confine discretion to the "hole in a doughnut, . . . an area left open by a surrounding belt of restriction."[69] Dworkin thus insists that judicial discretion properly consists solely of the "weak" variety necessary to resolve ambiguity in the proper application of legal standards which are acknowledged to be binding.[70] Indeed, he characterizes such discretion as "trivial,"[71] and seemingly believes that an ideal judge will have so astutely ascertained and assayed the relevant legal standards that, outside of whatever fact-finding responsibilities the judge may have,[72] no judicial discretion will remain to be exercised.

A more apt image for Dworkin's purposes would seem to be not the hole of a doughnut, but the sensitivity of the eye of a judge. The better the judicial eye for the law—the more enlightenment the judge can derive from surveying all possible sources of law in search of the single right answer to a hard case—then the more confined will be the scope of discretion open to

69. DWORKIN, *supra* note 3, at 31.

70. *E.g., id.* at 31-38, 68-71.

71. *Id.* at 38, 44.

72. For a discussion of the problems presented by fact finding discretion, see note 16 *supra*.

Dworkin's illustrations of the distinction between strong and weak discretion refer principally to two situations: a sergeant charged with picking the soldiers to take on patrol, and a boxing referee. If the sergeant is ordered to select any five men for his patrol, Dworkin says he has discretion in the strong sense. DWORKIN, *supra* note 3, at 32. Assuming more than five men are available to him, his choice from among them is unrestricted. By contrast, if the sergeant is ordered to take his five most experienced men, his choice must be justified in terms of "experience." *Id.* It may require "judgment" to determine who is experienced, but this is discretion in the weak sense. *Id.* at 34. Similarly, the boxing referee charged with awarding the match to the more aggressive boxer has weak discretion. *Id.* at 32. Both experience and aggression are not clear-cut determinants—both demand the exercise of judgment—but they are nonetheless standards to which the sergeant and the referee must conform.

Dworkin seems strangely ambivalent about the character of the stunted "judgment" which the sergeant and the referee, as paradigms for judges, do exercise: on the one hand it is "trivial," jurisprudentially "otiose," a "tautology" mistaken by positivists as "insight." *Id.* at 33, 34, 38. On the other hand, it takes "a lawyer of superhuman skill, learning, patience and acumen" to give due effect to the process of "judgment." *Id.* at 105; see text accompanying notes 100-13 *infra*. While the *scope* of Dworkin's weak discretion is relatively trivial, the chore of avoiding abuse of such discretion is an exacting one. In the context of his example, the sergeant may not *choose* a meaning for "experience"; he must deduce it from the overall context of the military enterprise of which he is a part. However difficult this may be, he knows it is his duty. This is not zealotry on his part; he is simply aware that if obedience of his orders is questioned, he must have at hand his theory of decision and be able to show that he acted consistently with it, without having arrogated to himself an authority not delegated to him. Thus he devotes his best judgment to determining that his superior meant for him to select, for example, those men with the most hours on patrol during the monsoon season, and knows he has no choice but to apply that standard. His only choice lies in resolving whatever dispute may arise as to which of his men has had the most such experience. *See id.* at 31-32.

the judge. Were that judge to perceive perfectly the institutional history and political morality of the legal system, all discretion would be eliminated from the envisioned decision. Since by Dworkin's lights judges do not possess discretion to make law, Hart's "open texture" of the law must consist not of gaps but of blind spots.

Dworkin's problem, of course, is how judges should grope through blind spots in search of his single right answer. The law may be without gaps in theory, but there will remain hard cases—truly hard cases[73]—in which, no matter how extensive a reference is made to nonformal sources of law, to standards or norms other than what a positivist would call rules, able lawyers may reasonably differ as to the legally right result. Mere knowledge that somewhere in the unfocussed wilderness Dworkinian dogma posits sound ground surrounded on all sides by error will increase the anxiety but not the mental acuity of a sightless searcher for truth and virtue. Dworkin's assurances that a superhuman judge can always divine the one right answer to a hard case offer no comfort to a mortal judge nagged by doubt as to the correct course of decision. Dworkin does not leave doubtful judges without a strategy for salvation, however. Under the rubric of his "rights thesis," he dictates that doubts in hard cases should be resolved in favor of recognizing individual rights rather than effecutating social goals.[74]

Dworkin's rights thesis is premised upon a taxonomy of obligation. At the highest level there is the legal order, and presumably one or more non-legal orders of obligation (moral, religious, political, *etc.*). Within the legal order there are the two genera of rules and principles.[75] Positivists, says

73. As previously suggested, see notes 4 & 15 and accompanying text *supra*, the gist of Dworkin's argument would seem to be that the harder Herculean lawyers labor on a case, the less difficult it will become. As successively more successful theories of justification for a particular result in a hard case are advanced, resort to at least some of the initially attractive alternatives proposed by reasonable adversaries will be revealed as defective, and can be defended further only by resort to irrational claims. By definition, however, irrational arguments do not figure in the hard case calculus. See text accompanying note 5 *supra*. Accordingly, after Herculean labors have cleansed the courtroom as well as the Augean stables, further rational dispute over the right result can only be based on the Hercules' heel of Dworkin's rights thesis: the different conceptions of contested political concepts and institutional morality which Dworkin concedes will leave the most dedicated of rights-conscious judges divided as to the proper resolution of a hard case. DWORKIN, *supra* note 3, at 127-28; see notes 87-90 and accompanying text *infra*. At this point philosophical arguments about smoothly fitting theories, *see* DWORKIN, *supra* note 3, at 106, lose force because the disputants no longer agree on what it is that their theories must fit. "Thus the 'hard case' for Dworkin is what might be called the 'really hard case': the decision that must be reached on the basis of standards that, by definition, lead to results inherently unconventional, inherently controversial, and inherently incapable of producing 'interpersonal checks' as respects the substantive correctness of the result." Soper, *supra* note 7, at 488 (footnote omitted).

74. *See* DWORKIN, *supra* note 3, at 81-150.

75. *Id.* at 22.

Dworkin, confine their taxonomy to rules; his genus of principles embraces the other, nonformal sources of law which he insists determine, collectively, the right results in hard cases. Within the generic class of principles, moreover, Dworkin identifies a species of policies as distinct from a species of principles. A policy "advances or protects some collective goal of the community as a whole."[76] A principle, in the specific sense, "respects or secures some individual or group right."[77]

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76. *Id.* at 82. Dworkin offers as an example: "The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy." *Id.* Dworkin adds that legislative acts effectuating policies give rise to rights supported by principle. Thus the suit of an aircraft manufacturer to recover a statutory subsidy enacted on policy grounds will be decided by a court on the basis of principle. *Id.* at 83.

77. *Id.* at 82. Originally, Dworkin defined a "policy" as "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community" and a "principle" as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." *Id.* at 22. He later elaborated that distinction so that "arguments of policy" were said to "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole," whereas "arguments of principle" were said to "justify a political decision by showing that the decision respects or secures some individual or group right." *Id.* at 82. For Dworkin, both unoriginal decisions merely enforcing statutory language and decisions in hard cases may only be supported by arguments of principle. *Id.* at 83-84. Dworkin claims that his restatement of the principle/policy distinction is an improvement upon his earlier "Model of Rules" formulation, *see id.* at 46-80, in that it avoids the collapse undergone by the earlier formulation of the principle/policy distinction whenever a right is redefined as a social goal or vice versa. An example of the problem is whether there is any difference of substance between a decision premised on an argument of policy, such as a perceived collective social goal of universal adult suffrage, and an identical decision premised on an argument of principle, such as a perceived individual right of each adult to vote. As I understand Dworkin, he relies on the lack of distributional consistency, which his doctrine of political responsibility permits for decisions based on policy rather than principle, to support his distinction in the revised form elaborated in his discussion of hard cases. *See generally id.* at 81-130.

Suppose a dam built and maintained by the government bursts, flooding a community and causing extensive damage. The injured parties claim compensation is owed them by the government. Had a private party operated the dam for profit, it would have been strictly liable to the injured parties. The government had derived substantial revenues from the sale of hydroelectric power generated by the dam, and a hard case is presented as to whether the government is protected from liability by the doctrine of sovereign immunity. Dworkin would say it is the province of the legislature, but not the judiciary, to award compensation to the victims of the flood as a matter of public policy, stemming the tide of bitterness which followed the flood, and showing the concern of the government for those harmed by its actions. Such policy-based compensation would not, according to Dworkin, commit the government to provide similar compensation should another government dam burst. If the legislature does not so act, Dworkin would permit a court to award the victims compensation, but only if the court were to find, as a matter of principle, that the government was not entitled to invoke sovereign immunity to frustrate the civil claims the injured parties would otherwise have. Such a holding, being a recognition of a right rather than an attempt to further the collective goal of good feeling toward the government by the citizenry, would establish the right of others to similar compensation should they be injured in the future in like fashion.

Dworkin's argument is that "judicial decisions in civil cases, even in hard cases . . . , characteristically are and should be generated by principle not policy."[78] The normative aspect of his rights thesis is supported by two arguments. Ideals of democracy, says Dworkin, demand that the making of policy, "a compromise among individual goals and purposes in search of the welfare of the community as a whole," is a matter for the political processes of representative democracy rather than "nonelected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers."[79] Moreover, claims Dworkin, ideals of justice demand that law be created prospectively; if judges decide cases by referring to policy arguments about the ends of social welfare, rather than to arguments of principle about pre-existing individual rights, their decisions will operate ex post facto and hence unfairly.[80]

The descriptive aspect of the rights thesis depends upon what Dworkin styles "the doctrine of political responsibility"[81] and its constituent demand for "articulate consistency."[82] Judges are political officials and their judgments are, in a broad sense, political decisions. If they are to act responsibly, they must "make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make."[83] Policy decisions demand much less consistency than decisions of principle, however, since

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Dworkin admits that some judicial decisions appear to be based on policy rather than principle, as when a court discusses negligence theory in terms of the economic cost of accidents and their avoidance. *Id.* at 98-100. He contends that such cases are nevertheless grounded in principle rather than policy, because what seem to be arguments of policy are actually arguments about competing rights: they concern the claims of the parties against each other, as articulated in an abstract sense of how the parties should best act to enhance their mutual welfare. Such arguments do not interpolate "the costs or benefits to the community at large" in some calculus of general utility. *Id.* at 98-99.

The ease with which policy may thus be transmogrified into principle has left some commentators unimpressed with the principle/policy distinction, even as reformulated. *See* Bodenheimer, *supra* note 8, at 1161-62; *Rights Thesis, supra* note 8, at 1176. Dworkin would probably respond to these critics by emphasizing his doctrine of distributional consistency. If a putatively policy-based judicial decision is nonetheless treated by the judiciary as governing like cases without a fresh redetermination of policy in each such case, that proves that the underlying decision was really based on principle and articulated a right to which those similarly situated are equally entitled. For a discussion of the problems posed by using distributional consistency as a test for whether a decision was generated by principle or policy, see notes 129-39 and accompanying text *infra*.

78. DWORKIN, *supra* note 3, at 84. On the import of the "civil cases" limitation, see notes 100-42 and accompanying text *infra*.

79. DWORKIN, *supra* note 3, at 85.

80. *See id.* at 85-86.

81. *Id.* at 87.

82. *Id.* at 88.

83. *Id.* at 87.

> [p]olicies 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 . . . . 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.[84]

The rights thesis, Dworkin contends, accounts "for the special concern that judges show for both precedents and hypothetical examples," a concern unnecessary if judges are relying on policy rather than principle for their decisions.[85]

Under the rights thesis, "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 rights of an individual must accommodate. Political rights are creatures of both history and morality . . . ."[86] Thus the hard case poses a question of political theory.[87] When the rules run out, says Dworkin, judges must look "to the enterprise as a whole,"[88] developing the theory which best justifies the fabric of the legal system "by referring alternately to political philosophy and institutional detail,"[89] and then "applying that general political theory to controversial issues about legal rights."[90]

Dworkin illustrates his rights thesis by reference to two hypothetical judges, Hercules of Dworkin's camp,[91] and Herbert, an obvious disciple of

84. *Id.* at 88.

85. *Id.*

86. *Id.* at 87; should these words evoke in the reader a sense of déjà vu, see notes 31-35 and accompanying text *supra*. That Coke was a disbeliever in natural law of the continental mold and acknowledged instead a common law of shared tradition only enhances the degree to which Professor Dworkin seemingly offers not a choice but an echo.

In his introduction to *Taking Rights Seriously*, Dworkin characterizes his theory of law as embracing the idea of natural rights in the sense that "individuals can have rights against the state that are prior to the rights created by explicit legislation." DWORKIN, *supra* note 3, at xi. Nonetheless, Dworkin is sensitive to having his theory taken as relying on higher law, and asserts that his theory "does not indicate what rights people have or guarantee, indeed, that they have any." *Id.* Individual rights are "political trumps" held by individuals, and as such lack any special metaphysical character; they are rather a function of "the dominant idea of utilitarianism, which is the idea of a collective goal of the community as a whole. . . . Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." *Id.* As a practical matter, there may be considerable doubt whether certain rights exist or not in a Dworkinian jurisdiction. See note 6 and accompanying text *supra*. Coke's system of supra-legal values had the advantage that Coke himself was apparently ever-willing to tell the world just what the law was. *See* HOLDSWORTH, *supra* note 37, at 441.

87. DWORKIN, *supra* note 3, at 104.

88. *Id.* at 105.

89. *Id.* at 107.

90. *See id.* at 105-07.

91. *See id.* at 105-30.

his namesake Hart.[92] Herbert decides whether either party has a right to a favorable decision by rule of law, and if not, proceeds to exercise "a legislative discretion" informed by history and morality but not controlled by it.[93] Hercules is never faced by a party without a right to a favorable decision, although even he may be sorely taxed by the ratiocination needed to derive the theory of decision which will identify which party has right on its side—a theory to be spun from institutional history and political morality.[94] "The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were."[95] More human judges may, as actors in the very institution whose history and morality they must measure, "reason intuitively and introspectively rather than in the more sociological mode that an outsider might use."[96] But if they follow Hercules' path, they will be conscious that they are not conferring rights but are determining what rights already exist. Thus their personal convictions of what rights should exist are relevant only as guides to institutional mores.

At the foundation of the rights thesis, however, is not morality but history; it is built upon a phenomenon to which Hart admits having paid inadequate heed: the "gravitational force" which an "earlier decision exerts . . . on later decisions even when these later decisions lie outside its particular orbit."[97] Unlike a legislator, whose votes must be personally consistent but need not follow the votes of colleagues or predecessors, "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."[98] Ironically, if Hercules succeeds Herbert on the bench he will find himself bound by Dworkin to follow in Hart's footsteps, for Herbert's ostensibly discretionary paths in the law, unless clearly misguided,[99] will point in the direction of the right answers to Hercules' hard cases.

92. *See id.* at 125-29.

93. *Id.* at 125.

94. *See id.* at 107.

95. *Id.* at 116.

96. *Id.* at 128.

97. Hart has applauded Dworkin's phrase "gravitational force," declaring it "right and illuminating to speak of the existing law as exerting a gravitational pull over the judge . . . ." Hart, *Law in Perspective, supra* note 8, at 549-50. He betrays his skepticism, however, by suggesting that there will often be equal gravitational pulls in different directions. *Id.* at 550. Dworkin has since acknowledged this possibility, but discounted it as being so remote that it should, in practice, be ignored. See note 4 *supra*.

98. DWORKIN, *supra* note 3, at 112.

99. Part of Hercules' problem in reviewing all the past hands of the law in search of trumps, see note 86 *supra*, is the need to reshuffle the misdeals of other judges. "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

C. The Relevance of *People v. Coleman* to the Dispute

One matter remains before turning to the *Coleman* case. How can a case of criminal procedure have any bearing on the dispute between Hart and Dworkin, given that Dworkin purports in places to limit the applicability of his rights thesis in other than "common law" civil cases?[100] If Dworkin truly insists that his work applies only to civil cases posing hard questions about the applicability of precedent, his thesis is in jeopardy of becoming anachronistic. The dominant sources of law in the twentieth century are the legislatures, not the courts;[101] this is what has made the constitutional functions of courts so much more important than their "common law" functions. The "common law" domain of federal courts has shrunk drastically over the last forty years,[102] and indeed in California there is little substantive "common law" at all, save as a colloquialism. In light of the comprehensive attempt to codify the law of California which dates

may, in applying this requirement, disregard some part of institutional history as a mistake." DWORKIN, *supra* note 3, at 119. Dworkin thus includes within his rights thesis a provision for discarding from the deck of precedent decisions based on outmoded or unjust principles. *See id.* at 119-23.

100. *See* note 78 and accompanying text *supra*. *Cf.* DWORKIN, *supra* note 3, at 94 n.1: "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"; *id.* at 115-16: Hercules "[s]ees 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."

101. "Inevitably the work of the Supreme Court reflects the great shift in the center of gravity of lawmaking . . . . [A]s late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense that they 'legislated' the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947).

102. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). As teachers of federal jurisdiction never tire of pointing out, Justice Brandeis performed one of the great straddling acts of legal history by authoring both the opinion for the Court in *Erie* in which he declared resoundingly "there is no federal general common law," *id.* at 78, and the opinion in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), decided the same day as *Erie*, wherein he declared that "[w]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law.' " 304 U.S. at 110. Federal common law continues to be applied not only to interstate water cases, *e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972), but also to cases in which federal interests are deemed to require a uniform federal rule of decision rather than the ad hoc application of the laws of the several states. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (effect to be given to an expropriation order of a foreign nation); United States v. Standard Oil Co., 332 U.S. 301 (1947) (right of the government to recover losses resulting from injury to a soldier); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (law applicable to the issuance of a federal government check). Similarly, much of the law of admiralty remains judicially declared. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

from the very beginning of California's statehood, judicial decisions in California generally assume the form of interpretations of often very vague statutes,[103] except in constitutional cases or where the Supreme Court of California has asserted inherent judicial power to regulate adjudicatory procedure.[104]

Another response to Dworkin's possible limitations is that he is himself inconsistent in his explication of his concept of law and the generality of its scope. Prior to stating that the rights thesis is directed to civil cases[105] and suggesting its further limitation to cases at common law,[106] he offers as illustrations of the application of his thesis a case of constitutional interpretation pitting a child's purported statutory right to a free ride to parochial school against the Establishment Clause;[107] and a case of statutory interpretation concerning the applicability of the federal kidnapping act to an elderly polygamist who induces a mentally retarded minor to escape the clutches of a juvenile court and marry him in Mexico.[108] These examples certainly argue against any intention by Dworkin to exclude constitutional cases, criminal cases or cases arising under statutes from the purview of his rights thesis.

Nor does Dworkin show any consistent determination to exclude from his thesis cases raising questions of procedural rather than substantive rights. It is useful here to note in full Dworkin's two slender elaborations upon the purported limitations to his rights thesis. First, in arguing that there exists no rule of decision in the Anglo-American legal system giving judges the power to decide hard cases by the exercise of "strong" discretion, he goes on:

> Sometimes judges do reach that conclusion; for example, when passing sentences under criminal statutes that provide a maximum and minimum penalty, or when framing equitable relief under a general equity jurisdiction. In such cases judges believe that no one has any right to a particular decision; they identify their task as selecting the decision that is best on the whole, all things considered, and here they talk not about what they must do but about what they should do. In most hard cases, however, judges take the different posture I described.[109]

Thus, Dworkin explicitly concedes that the behavior of at least some judges, with regard to criminal sentencing and "general equity" cases, does

103. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 813-23, 532 P.2d 1226, 1232-39, 119 Cal. Rptr. 858, 864-71 (1975).

104. *See, e.g.*, People v. Cahan, 44 Cal. 2d 434, 442, 282 P.2d 905, 910 (1955).

105. DWORKIN, *supra* note 3, at 84. See note 100 *supra*.

106. DWORKIN, *supra* note 3, at 115-16. See note 100 *supra*.

107. DWORKIN, *supra* note 3, at 106-07 (citing Everson v. Board of Educ., 330 U.S. 1 (1947)).

108. *Id.* at 107-09 (citing Chatwin v. United States, 326 U.S. 455 (1946)).

109. *Id.* at 71.

not conform to his thesis that "judges decide hard cases by confirming or denying concrete rights."[110] He does *not* make a similar concession regarding criminal (and presumably civil) procedure.[111] He does observe, as if in anticipation of the *Coleman* case, that "appeals to public safety or the scarcity of some vital resource," although they might appear to be arguments of policy upon which courts, under the rights thesis, are not supposed to rely, are better understood as arguments of principle based on "abstract rights."[112] He proceeds immediately from this assertion to the following paragraph:

> 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* [381 U.S. 618 (1965)] said that its earlier decision in *Mapp v. Ohio* [367 U.S. 643 (1961)] 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 prosection [*sic*], 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.[113]

I find this paragraph in part incomprehensible. To the extent that to be "innocent" means only that the conduct of the accused is not a crime, as a matter of statutory interpretation, or cannot be made a crime, as a matter of constitutional right, the accused clearly has a right to be acquitted, and by his illustrative references to an Establishment Clause case and the case of the pedophilic polygamist, Dworkin has asserted that claims of innocence on such grounds are supposed to be handled in accordance with his rights thesis. More troublesome is the suggestion that an accused's right to acquit-

110. *Id.* at 101.

111. *See id.* at xii (where in his introduction Dworkin states that he will apply his rights thesis "to the central and politically important cases of constitutional adjudication"); *id.* at 279 (where he begins his concluding chapter by insisting that "whether capital punishment is cruel and unusual within the meaning of the constitution" must be resolved in accordance with the rights thesis).

112. *See id.* at 100.

113. *Id.* The word "prosection" in the final sentence appeared as "prosecution" in the original article. *Hard Cases, supra* note 3, at 1078.

tal turns on some supposition of factual innocence *vel non*. Surely anyone who has pondered the vagaries of judicial fact-finding would be shocked to have one's "rights" in a criminal trial, assuming the offense charged to be substantively valid, limited to the "right" to acquittal if as a matter of abstract fact one has not done what it is alleged one has done. Even when facts are contemporaneously subject to objective observation, efforts at their subsequent construction carry no better warranty for truth than Dworkin's single right answer to issues of law. To the accused, the facts are not a philosophical conundrum but what the finder of fact says they are, and the rights of the accused are not contingent upon but supposedly contributory to the accuracy of that fact-finding, with the additional right that the accused receives the benefit of any perceived doubt in the accuracy of the fact finding.

As Dworkin elsewhere recognizes, the procedural rights of one accused of a criminal offense are classic examples of his definition of rights as political trumps derived from moral principles, by which the interests of individuals or minorities are protected against the majority's utilitarian claims to measures productive of the greater good of the greater number.[114] For instance, he points to the "moral principles" underlying controversial aspects of the criminal law, such as "rules of criminal procedure—regarding interrogation, confessions, and preventive detention, for example—that protect the alleged criminal at some cost to police efficiency," and disavows the propriety of a balancing process between the protection of individual freedom and the prevention of crime.[115] There are, he suggests,

> [l]egal doctrines that are embedded in our traditions (like the doctrines that no man may be forced to condemn himself, and that a man is presumed innocent until proved guilty) to support the claim that society has no right to interrogate a man without a lawyer, and that an accused suspect is entitled to be free before his trial, whether the majority benefits or not.[116]

Thus Dworkin might be understood to be saying this in his limiting paragraph: individuals accused of crime have certain rights regarding the substance of what may be made criminal and the reliability and bias of procedures for determining factual guilt or innocence. Even when all of

114. *See* DWORKIN, *supra* note 3, at 12-13, 143, 185, 203.

115. *Id.* at 12. A serious typographical error involving the transposition of several words makes gibberish of the first sentence of the first full paragraph on page 12 of *Taking Rights Seriously*, from which this quotation is taken. As the essay originally appeared, that paragraph commences with the following two sentences: "The mental defenses are not the only controversial aspects of the criminal law. Just now the public is even more concerned with those rules of criminal procedure—regarding interrogation, confessions, and preventive detention—that protect the alleged criminal at some cost to police efficiency." Dworkin, *Morality and the Law*, N.Y. REV. OF BOOKS 29, 33 (May 22, 1969).

116. DWORKIN, *supra* note 3, at 12-13.

these rights are satisfied, however, and an individual has been found to have committed an act validly punishable as a crime, the state has no "right" to a conviction. Rights relate to the status of individuals and groups against society; the state does what policy dictates, subject to its duty to honor individual rights. Judges, as agents of the state, may act legislatively by refusing to convict guilty individuals on policy grounds, such as the exclusionary rule's policy of deterring police from violations of the Fourth (and Fourteenth) Amendment. Thus, in a criminal prosecution, the rights thesis "holds only asymmetrically" because only the accused has rights which are proof against judicial discretion.[117]

There are several problems with Dworkin's position, even as reformulated. I do not propose to pursue them, only to identify them. First, it would seemingly demand generalization beyond criminal prosecutions to every civil proceeding to which some agent or instrumentality of the state is a party. Is Dworkin really prepared to accept the exercise of legislative discretion by judges in civil litigation as long as the rights of any private parties are not prejudiced? In some such instances Dworkin might cast the state as merely the proxy for non-parties whose "abstract rights" are involved,[118] as when a district attorney sues to have some nuisance abated that poses harm to some portions of the community or (to abide by Dworkin's purported exclusion from the rights thesis of "general equity" cases)[119] seeks civil penalties for acts of consumer fraud. This would preserve a "symmetrical" setting for his rights thesis. In many civil cases, however, the government is clearly representing the interests of society as a whole. Consider, for example, a condemnation case. Dworkin already seems to assert, since individual rights are more important than governmental interests, that a court should be sure to give the claimant a little more rather than a little less, in order to hold inviolate the right to just compensation.[120] Suppose, however, that the condemned land has been acquired for the building of a freeway, construction of which has, at the time of the compensation judgment, been enjoined because of a lack of compliance with the National Environmental Policy Act (NEPA).[121] Would Dworkin permit the court, in order to effectuate a policy of deterring future violations of NEPA, to award the condemnee an additional percentage of the value of the

117. *See id.* at 100.

118. *See id.* See note 112 and accompanying text *supra*.

119. *But see* notes 109-10 and accompanying text *supra*, for Dworkin's purported exclusion of "general equity" cases.

120. *See id.* at 197-205; Greenawalt, *supra* note 8, at 376 n.48. *See also* DWORKIN, *supra* note 3, at 277-78.

121. 42 U.S.C. § 4331-4347 (Supp. V 1975). *Cf.* I-291 Why? Assoc. v. Burns, 372 F. Supp. 223, 232-40 (D. Conn. 1974) (construction of freeway in violation of NEPA enjoined after completion of land acquisition).

land? If this would be inconsistent with the rights thesis, why is *Mapp v. Ohio*[122] not? Even more interesting, perhaps, is a civil case in which governmental entities constitute both sides:[123] if one accepts Dworkin's logic, it would seem that judicial discretion may run rampant on a field of policy in the absence of an applicable statute.

A second problem is posed by Dworkin's acceptance of judicially created, policy-oriented procedural rules only when they do not infringe on the supposed right of an individual to the result dictated by the true facts and the substantive law. This position fails to account for the use of judicially created exclusionary rules in private civil cases, such as the rules of privileged communications or the rule excluding evidence of subsequent remedial measures.[124] If a person manipulates stock to an investor's detriment and the substantive law entitles the investor to damages from the manipulator, it is difficult to find sanction in the rights thesis for denying the investor his or her judgment because the only hard evidence of the true facts is the confession that the manipulator made to his lawyer. Dworkin would argue, presumably, that the privilege protects the competing abstract right to consult a lawyer free of prejudice, but much of the judicial authority for an attorney-client privilege appears to rely equally on both the benefit to the courts of encouraging people to retain lawyers for their causes, and on the benefit to individuals of having legal representation made more effective by the confidences revealed under the cloak of the privilege.[125] Moreover, such an argument would only underscore the contention that, if it is indeed such "[a] simple matter to transform what appears to be an argument of policy into an argument of principle . . . , then nothing counts conceptually as an argument of policy," and the rights thesis is "logically vacuous."[126]

Dworkin must confront at least one more problem if his limiting paragraph on *Mapp v. Ohio*[127] and *Linkletter v. Walker*[128] is indeed to be construed as I have suggested. The essence of his distinction between policies and principles is the "distributional requirements" of the goals and rights to which they respectively appeal.[129] Rights and the arguments of

122. 367 U.S. 643 (1961). See note 139 *infra*.

123. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

124. The common law privileges regarding communications, and the history of the attorney-client privilege in particular, are discussed in 8 J. WIGMORE, EVIDENCE §§ 2285, 2290 (McNaughton rev. 1961). The common law origins of the exclusion of evidence of subsequent repairs are collected in 2 J. WIGMORE, EVIDENCE § 283 (3d ed. 1940).

125. *See* 8 J. WIGMORE, EVIDENCE § 2291, cases collected at 546-47 (McNaughton rev. 1961).

126. *Rights Thesis, supra* note 8, at 1181 (emphasis omitted).

127. 367 U.S. 643 (1961). See note 139 *infra*.

128. 381 U.S. 618 (1965). See note 139 *infra*.

129. DWORKIN, *supra* note 3, at 88.

principle which support them are "individuated": if any one person is entitled to a right, all similarly situated persons are equally entitled to that right.[130] Goals and the policies which advance them are "nonindividuated": that one person may benefit from an effort at serving some collective social goal confers no right to the same benefit on all similarly situated persons.[131] Thus a policy of national defense can permit subsidization of one arms manufacturer without requiring the subsidization of all arms manufacturers, but a right to privacy cannot entitle one couple to access to contraceptives without entitling all such couples to equal access.[132]

The distributional character of the exclusionary rule is clearly of concern to Dworkin. He began his original article on *The Model of Rules*,[133] now chapter two of his book,[134] by citing to *Linkletter* as exposing our "remarkably fragile" understanding of law.[135]

> Supposing the Supreme Court orders some prisoner freed because the police used procedures that the Court now says are constitutionally forbidden, although the Court's earlier decisions upheld these procedures. "Must the Court, to be consistent, free all other prisoners previously convicted through these same procedures? . . ." [Citing *Linkletter*.] Conceptual puzzles about "the law" and "legal obligation" become acute when a court is confronted with a problem like this.[136]

When Dworkin later seeks to capture *Mapp* and *Linkletter* within his rights thesis, he emphasizes *Mapp*'s ostensible basis in arguments of policy, rather than principle.[137] Without committing himself to approval of the result, he seemingly asserts that *Linkletter* is consistent with the rights thesis because distributional consistency is not required of policy: if prospective application of the exclusionary rule announced in *Mapp* is sufficient to serve the collective social goal of deterring illegal police conduct, those who would benefit from retrospective application of *Mapp* have no claim of right to such retrospectivity. But consider the cost of this accommodation of the descriptive aspect of the rights thesis to *Mapp* and *Linkletter*: if *Mapp* does not establish any newly created rights of criminal defendants and is purely a rule of policy, the courts are justified under the correlated normative aspects of the rights thesis in applying that rule on an ad hoc basis.

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130. *See id.* at 91.

131. *See id.*

132. *Id.* at 88.

133. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

134. DWORKIN, *supra* note 3, at 14-45.

135. *Id.* at 14.

136. *Id.* at 14-15. On the misstatement of the *Mapp* case as dealing with police procedures which had not previously been held "constitutionally forbidden," see note 139 *infra*.

137. DWORKIN, *supra* note 3, at 100.

There is indeed recent authority to this effect,[138] but given Dworkin's concern over the rights of individuals against the state this leaves him with the bathwater of his rights thesis sans the baby of individuated Fourth Amendment rights. One hopes that the rights thesis does not receive further vindication, or personal rights regarding criminal procedure further dilution into nonindividuated privileges of policy, by future decisions that hold, for instance, that only every third valid suppression motion should be granted, or that illegally obtained evidence should be admissible against child murderers but not against drug dealers, because this offers a better balance of collective social goals. Dworkin appears hoisted by his own absolutes, insofar as he might wish to credit the policy grounds advanced by the Court in *Mapp* and *Linkletter* in support of the exclusionary rule, and yet contend that the benefits of the rule must be extended to all reasonably similar cases. If the rule in *Mapp* is based in part on arguments of principle and a recognition of rights, no reason exists for denying it retroactive effect consistently with the rights thesis. If *Mapp* is based wholly on policy, no right exists to equal treatment under its rule.

These problems indicate the relevance of my discussion of the *Coleman* case and my argument that rules of criminal procedure, even when nonconstitutional in origin, do not fall into either/or categories of individual rights and collective social goals. Clearly Dworkin must devote more attention to the matter if he is to accommodate successfully and comprehensively the rules of criminal procedure within his rights thesis; he cannot adequately deal with *Linkletter*, for instance, by misstating *Mapp*.[139] Nor

138. *See* Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus not available to assert Fourth Amendment exclusionary rule claims of state prisoners); United States v. Calandra, 414 U.S. 338 (1974) (illegally seized evidence admissible in grand jury proceedings). The Court in *Stone* noted: "But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' *United States v. Calandra, supra*, [414 U.S.] at 348. [Footnote omitted.] Thus, our refusal to extend the exclusionary rule to grand jury proceedings was based on a balancing of the potential injury to the historic role and function of the grand jury by such extension against the potential contribution to the effectuation of the Fourth Amendment through the deterrence of police misconduct . . . ." 428 U.S. at 486-87 (footnote omitted). "The answer [to the habeas corpus question] is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims." *Id.* at 489.

139. In characterizing the problem presented by Linkletter v. Walker, 381 U.S. 618 (1965), at the outset of his explication of his model of rules, see note 136 and accompanying text *supra*, Dworkin hypothesizes a *Mapp*-like case in which the Court "orders some prisoner freed because the police used procedures that the Court now says are constitutionally forbidden, although the Court's earlier decisions upheld these procedures." DWORKIN, *supra* note 3, at 14. It was held in Wolf v. Colorado, 338 U.S. 25, 27-29 (1949), however, that unreasonable searches and seizures by state police were indeed "constitutionally forbidden" under the due process clause of the Fourteenth Amendment. This was explicitly recognized in both *Mapp*, 367 U.S.

can he deal with difficult cases of criminal procedure simply by invoking his "standard civil case" limitation to designate such counterexamples as inapplicable special cases. So treated, his thesis "threatens to become as interesting as a tautology."[140] The literature[141] and, by and large, Dworkin

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at 650-54, and *Linkletter*, 381 U.S. at 630, 635-36. It is relevant to the issue of whether *Mapp* was premised purely on "policy" as opposed to "principle" grounds, as Dworkin uses those terms, that the goal which *Mapp* purportedly sought to advance regarded the scope of a previously announced personal *right* to privacy.

Closer inspection of both *Mapp* and *Linkletter* reveals that neither decision offers much support to the rights thesis, no matter how "asymmetrically" applied. *Mapp* certainly appealed to arguments of principle as well as policy and articulated a right rather than a goal: "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the *individual* no more than *that which the Constitution guarantees him* . . . ." 367 U.S. at 660 (emphasis added). *Cf. id.* at 662 (Black, J., concurring on ground that when Fourth and Fifth Amendments are considered together, "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.").

In *Linkletter*, Justice Clark, after briefly outlining the history and theory of the problem of retrospectivity, went on to repudiate the "Blackstonian" view of discovered law, *id.* at 623-24, to attribute the emerging American rule of retrospectivity to such positivist advocates as Austin and Holmes, *id.* at 623-25, 629, and to articulate that rule as follows: "the actual existence of the law prior to the determination of unconstitutionality 'is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' " *Id.* at 625. Moreover, he drew no distinction between civil and criminal litigation, and claimed that the Court was required to "weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 627, 629.

The *Linkletter* Court characterized *Mapp* as having decided, contrary to *Wolf*, that the enforcement of the Fourth Amendment required "the inclusion of the exclusionary rule *within its rights.*" *Id.* at 636 (emphasis added). Thus *Mapp*, whatever its policy reasons, was depicted as creating a personal, individual right to the exclusion of illegally seized evidence. Retrospectivity was not mandatory because, from the Court's admittedly Austinian point of view, the right did not exist before *Mapp*. "We believe that the existence of the *Wolf* doctrine prior to *Mapp* is 'an operative fact . . . .' " *Id.* Although erroneous, *Wolf* remained valid precedent until the contrary "judgment of this Court . . . . It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date." *Id.* at 639.

This closer reading of *Linkletter* raises serious questions whether, as Dworkin contends, the *Linkletter* Court did indeed premise its nonretrospectivity decision on the premise that *Mapp* had established no "right to be acquitted." DWORKIN, *supra* note 3, at 100. Rather, *Linkletter* treated *Mapp* as having created just such a right; because that right had had no existence prior to the latter case, *Mapp* did not need to be made retrospective. *Linkletter's* appeal to policy lay not in explaining why that right had been created by *Mapp*, but in explaining why the balance of collective goals upon which policy depends would be ill-served by giving prisoners convicted prior to *Mapp* the benefit of a right which they had not then possessed because it was not then in existence.

140. Soper, *supra* note 7, at 506.

141. *See, e.g., id.* at 474: Dworkin "has advanced a descriptive theory of the Anglo-American legal system" (footnote omitted); Hart, *Law in Perspective, supra* note 8, at 547:

himself,[142] treat the rights thesis as a concept of adjudication, general in scope, profound in promise. Let us see what light *Coleman* casts on the subject.

III. *People v. Coleman*: A Tale of Three Cases

A. The Facts Below

When John Coleman was convicted by a California court on a felony charge of grand theft, he faced an indeterminate term of up to ten years in state prison.[143] The sentencing judge chose to suspend Coleman's imprisonment, however, and placed him on probation.[144] As a condition of probation, Coleman served a few months in the county jail. Upon his release he returned to San Francisco, where he took up residence in a hotel with his "common law" wife, Shirley Singletary.[145]

One night Ms. Singletary encountered a stranger in a bar, danced with him briefly, and left with his wallet. The man discovered his loss in time to follow Singletary to her hotel, whereupon he summoned the police. Shortly thereafter Coleman and Singletary stepped out of the hotel elevator and into the arms of the law. Coleman denied any knowledge of the wallet but offered to make good the stranger's loss, claiming to have in his possession

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Dworkin posits a "body of principles" from which "rules can be deduced to solve correctly those hard cases where separate positive constitutional provisions, enactments and precedents given incomplete, ambiguous or conflicting guidance"; Reynolds, *supra* note 8, at 579: "Dworkin denies any legitimate place for judicial discretion in the administration of the law." *But see* Soper, *supra* note 7, at 505-06 (noting Dworkin's equivocation concerning "what counts as a 'typical civil case' "); *Rights Thesis, supra* note 8, at 1172, 1199 (civil case limitation noted without comment).

142. Besides mentioning the civil case limitation only three times amid the hundreds of references to the adjudication of hard cases in general, see note 100 *supra*, Dworkin expressly refers in his introduction to his "liberal theory of law" and its "general theory of rights." DWORKIN, *supra* note 3, at vii, xiv.

143. People v. Coleman, 13 Cal. 3d 867, 871, 877 n.9, 533 P.2d 1024, 1029, 1034 n.9, 120 Cal. Rptr. 384, 389, 394 n.9 (1975).

For the relevant penal provision then in effect, see 1953 Cal. Stats., ch. 734, § 1, p. 1998 (current version at CAL. PENAL CODE § 489 (West Supp. 1977)). For an account of the indeterminate sentencing system then prevailing in California, see Note, *Sentencing Criminals in California—A Study in Haphazard Legislation*, 13 STAN. L. REV. 340 (1961); *Student Symposium on the Proposed California Criminal Code*, 19 U.C.L.A. L. REV. 525, 527-30 (1972). In 1976 California adopted legislation replacing that system with one emphasizing determinate sentencing. *See* 1976 Cal. Stats., ch. 1139, at 4752 (West 1976).

144. 13 Cal. 3d at 871, 533 P.2d at 1029, 120 Cal. Rptr. at 389.

145. *Id.* at 872, 533 P.2d at 1030, 120 Cal. Rptr. at 390. Chief Justice Wright's use of the phrase "common law wife" is apparently euphemistic, since California does not recognize common law marriage. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* § 20 (8th ed. 1974).

nearly the exact amount which had been stolen. A consensual search of their hotel room uncovered no evidence, but Coleman and Singletary were nonetheless arrested for grand theft.[146]

At their preliminary hearings in the municipal court, both defendants were held to answer on the grand theft charges. Since the charges were felonies, their cases were set for trial in the superior court. In proceedings before that court, Coleman was charged with the less serious offense of being an accessory after the fact, and the charge that he had been a principal in the theft was dismissed. Less favorable to Coleman was the superior court's setting of a hearing six days in advance of his trial, at which juncture it would consider whether Coleman's probation should be revoked.[147]

Coleman moved at his revocation hearing for a continuance of that hearing pending the determination of the concurrent criminal charges against him. Coleman's motion was based on his claim that the scheduling of his revocation hearing in advance of his trial had the effect of requiring the waiver of one federal constitutional right as the price for exercising another. If he remained silent to avoid self-incrimination at his trial, he would forfeit his right to be heard in his own defense at his revocation hearing. If he took the stand at that hearing, any admissions he might make would accrue to the state's benefit at trial. The court denied Coleman's motion for a continuance, and he refused to present any evidence in his own behalf. The matter was submitted on the transcript of the testimony against Coleman at his preliminary hearing, and his probation was revoked. Coleman appealed, asserting that his right to procedural due process and his right not to be compelled to incriminate himself operated in conjunction to guarantee him an opportunity to justify his conduct as a convict on probation without assisting the state in convicting him again.[148]

B. The Law Above

Chief Justice Wright's opinion for a unanimous court in *People v. Coleman*[149] illuminates the play of judicial discretion in hard cases of criminal procedure. As with most cases in high courts, however, there is a need to discriminate between what it says and what it shows. The insights it offers are best understood in the context of two decisions of the United States Supreme Court which had dealt in inconsistent ways with constitutional claims similar to Coleman's.

146. 13 Cal. 3d at 872, 533 P.2d at 1030, 120 Cal. Rptr. at 390.
147. *Id.*
148. *Id.* at 871-73, 533 P.2d at 1029-30, 120 Cal. Rptr. at 389-90.
149. 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975).

1. *The United States Supreme Court*

Simmons v. United States[150] involved a bank robbery defendant whose suitcase, containing money wrappers from the bank, had been seized during a warrantless but purportedly consensual search of the home of a codefendant's mother. In order to have "standing" to move to suppress the evidence as illegally seized, the defendant (who was not present when the house was searched) had to admit his ownership of the suitcase in order to establish the requisite violation of his "personal" right to privacy.[151] The suppression motion had been denied, presumably upon the crucial finding of fact as to consent, and the defendant had been left with having admitted ownership of seriously incriminating evidence.[152] This admission was subsequently introduced against him at trial, over his objection.[153]

The United States Supreme Court ordered the reversal of his conviction, Justice Harlan declaring for the Court: "In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another."[154] The testimony in question was deemed voluntary only in an abstract sense;[155] the Court stated that while testimony might not always be involuntary as a matter of law simply because it is given to obtain a benefit, when "the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created."[156]

Given his general solicitude for *stare decisis*, it was somewhat surprising that Justice Harlan again wrote the majority opinion for the Court three years later, in *McGautha v. California*.[157] In that decision, the Court found that no impermissible tension between constitutional rights had been created by a "unitary" system for trying capital cases, in which the jury's determination of punishment was combined with its determination of guilt.[158] The effect of the unitary system was to force the perpetrator of a homicide who

150. 390 U.S. 377, 379-80 (1968).

151. 390 U.S. at 381, 389-91. California's "vicarious" exclusionary rule whereby illegally seized evidence is inadmissible against anyone is not required by the Fourth and Fourteenth Amendments. *Compare* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) *with* Alderman v. United States, 394 U.S. 165 (1969).

152. 390 U.S. at 380.

153. *See id.* at 389 & n.10, 394.

154. *Id.* at 394.

155. *Id.* at 393-94.

156. *Id.* at 394.

157. 402 U.S. 183 (1971).

158. *Id.* at 208-22. A separate portion of the *McGautha* opinion declared it "quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.* at 207. *Contra*, Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

might be able to adduce mitigating circumstances to choose between admitting guilt in order to plea for mercy or remaining silent at reduced risk of conviction but at greater risk of capital sentence if convicted.

Justice Harlan took note that the legal system of the United States required litigants to make many difficult judgments as to how best to conduct their cases and added: "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[159] This test was not met in *McGautha*. The "mere force of evidence" did not constitute compulsion for purposes of the privilege against self-incrimination,[160] and although that privilege expressed a policy against cruelty, the choice involved was not unduly harsh in view of "the clear validity of analogous choices with which criminal defendants and their attorneys are quite routinely faced,"[161] such as impeachment by proof of prior convictions upon cross-examination. The right to be heard on the issue of punishment was of dubious constitutional stature, but assuming such a right to exist, the Court claimed it was adequately fulfilled by the defense counsel's opportunity to argue for mercy in his summation.[162] Justice Harlan concluded by observing that whatever the individual predilections of the members of the Court, the "Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are best of all worlds."[163]

The *McGautha* opinion seemed intent on leaving ambiguous the status of the rule announced in *Simmons*. Justice Harlan declared that *Simmons* should be viewed with circumspection, as follows:

> [W]e held it unconstitutional for the Federal Government to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. We concluded that to permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for lawful police behavior. This was surely an analytically sufficient basis for decision.[164]

The Fourth Amendment claim in *Simmons* was merely "colorable," and the Fifth Amendment interests faded into "insubstantiality" when viewed

159. 402 U.S. at 213.
160. *Id.*
161. *Id.* at 215.
162. *Id.* at 218-19.
163. *Id.* at 221.
164. *Id.* at 211.

with hindsight.[165] *Simmons* was not overruled, however, although it was admittedly undermined.[166]

2. *The California Supreme Court*

Coleman's claim was rejected summarily by the court of appeal. The California Supreme Court granted a hearing upon his petition and, after six months of deliberation,[167] issued a lengthy opinion.

Mr. Coleman's case was difficult because it presented two different controversial aspects, consideration of each of which is instructive of judicial perceptions of the nature of legal standards and the scope of judicial discretion in the resolution of hard cases. First, there was a conspicuous problem of ambiguous authority. In adjudicating Coleman's rights under the federal Constitution, the California Supreme Court was controlled in the first instance not by the text of the Constitution but by the binding precedents of the United States Supreme Court. This decisional authority was ambiguous both because it was vague with regard to the dimensions of the rights in question, and because it was conflicting, in view of the tenuous coexistence of *Simmons* and *McGautha*. The question was one not merely of interpreting precedent, but also of divining the present intentions of a changing Court. Second, there was a latent problem of novelty, in the sense of rules being absent rather than being arguably inapplicable. Once California's highest court acquitted itself of its duty to construe and apply the mandates of the federal Constitution, there would remain the power—and perhaps the obligation—of the court as seven judges sovereign to turn new ground in a field of state law unfurrowed by its own precedent.

In the vein in which the opinion itself is structured, I propose to study the ontogeny of *Coleman* as if the court were dealing with not one but two hard cases. Taking in turn each ground for controversy, I wish to examine the decision to see the nature of the legal standards which Chief Justice Wright saw as relevant to the decision, the scope of the discretion that those standards left to the court, and whether the opinion resolved the controversy in a manner supportive of the theories of either Hart or Dworkin.

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165. *Id.* at 212.

166. *Id.* "While we have no occasion to question the soundness of the result in *Simmons* and do not do so, to the extent that its rationale was based on a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question . . . ." *Id.*

167. Arguments were heard in September of 1974, but no decision was rendered until April of 1975.

IV. The Ambiguity of Rules

A. Coleman's Countervailing Rights

The first level of ambiguity concerned the scope of each of Coleman's asserted rights, insofar as there might be some interrelationship between those rights. There was no question that Coleman had a "constitutional right to be permitted to speak in his own behalf at his probation revocation hearing."[168] The United States Supreme Court had explicitly declared that the opportunity to be heard in person was among the minimum requirements of due process guaranteed at probation revocation hearings.[169] Similarly, the United States Supreme Court had squarely held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."[170] Coleman having been bound over to the superior court for trial on a felony charge arising out of the same conduct that was alleged as the basis for the revocation of his probation, there was no dispute that his concern over self-incrimination was founded on "real dangers, not remote or speculative possibilities."[171] Thus there was no *categorical* ambiguity as to whether the rules of the United States Supreme Court providing rights to an opportunity to be heard and against compulsory self-incrimination applied in Coleman's case. There was, however, the *conditional* ambiguity of the priority of application of two rules, each of which was applicable independently of the other.

Each rule conferred a right rather than imposed a duty; each rule required that Coleman be given an option. He had been placed in a situation in which he could not exercise both options, however, and this raised a question of whether the rule conferring either right was by its terms subordinate to the other. Since the terms of neither right disclosed its interrelationship vis-à-vis the other, ambiguity existed: what was the nature of the opportunity to be heard at one's revocation hearing, and how compulsory was the self-incrimination which might result from testifying at such a hearing?

True to both Hart and Dworkin, the court did not react to this ambiguity like some juridical relic of the supposed era of mechanical jurisprudence,[172] focusing formalistically on the failure of either rule to require by its literal

168. 13 Cal. 3d at 873, 533 P.2d at 1030, 120 Cal. Rptr. at 390.

169. Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972). The *Morrissey* standards were made applicable to probation revocation proceedings in Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

170. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

171. Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 478 (1972).

172. See notes 47 & 54 and accompanying text *supra*.

terms that the option thus afforded to a defendant be accommodated with other similarly guaranteed options to act inconsistently, and thereby concluding that there was no call for accommodation. After reciting the facts, the opinion set out immediately to examine in contextual terms "a probationer's constitutional right to be permitted to speak in his own behalf at his probation revocation hearing,"[173] by reference to the relevant cases of the United States Supreme Court.[174]

The opinion emphasized that this right, which it characterized as assuring a meaningful opportunity to be heard and explain one's actions, extended to arguments in mitigation and appeals to justice as well as to exculpatory arguments.[175] The right served two policies, the foremost being "to assure informed, intelligent and just revocation decisions."[176] Thus " 'the accurate finding of fact and the informed use of discretion' " was essential to reducing the risk of a revocation unjustifiably depriving a probationer of his liberty, unnecessarily interrupting a successful effort at rehabilitation, or " ' imprudently prejudicing the safety of the community.' "[177] A second "broad policy objective" of the constitutional guarantee of an opportunity to testify was to further "the rehabilitative goals of the penal system"[178] by treating probationers with " 'basic fairness.' "[179]

Far from yielding to Coleman's competing right to remain silent, both of these policies were seriously undermined when the possibility of self-incrimination deterred a probationer from taking advantage of his right to be heard at his revocation hearing. A probationer allowed to explain his actions only by jeopardizing his chances of acquittal at a subsequent criminal trial might well feel railroaded to revocation "without one of the essential elements of rudimentary fairness—a meaningful chance to speak on his own behalf."[180] Moreover, the intelligent and just exercise of the revoking court's "broad discretion" would be impaired if the court was deprived of

173. 13 Cal. 3d at 873, 533 P.2d at 1030, 120 Cal. Rptr. at 390.

174. *Id.* at 873-78, 533 P.2d at 1030-34, 120 Cal. Rptr. at 390-94 (citing, *inter alia*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Armstrong v. Manzo, 380 U.S. 545 (1965)).

175. *Id.* at 873, 533 P.2d at 1030-31, 120 Cal. Rptr. at 390-91.

176. *Id.* at 873, 533 P.2d at 1031, 120 Cal. Rptr. at 391 (citing Morrissey v. Brewer, 408 U.S. 471, 484 (1972)).

177. *Id.* at 873, 533 P.2d at 1031, 120 Cal. Rptr. at 391 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)).

178. *Id.* at 874 & n.4, 533 P.2d at 1031 & n.4, 120 Cal. Rptr. at 391 & n.4 (citing THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE ON CORRECTIONS, TASK FORCE REPORT: CORRECTIONS 82 (1967)).

179. *Id.* at 874, 533 P.2d at 1031, 120 Cal. Rptr. at 391 (quoting Morrissey v. Brewer, 408 U.S. 471, 484 (1972)).

180. *Id.*

the probationer's testimony.[181] Himself a superior court judge for many years, the Chief Justice observed that a probationer, "by definition a convicted lawbreaker," was "generally at a disadvantage in terms of the credibility of his testimony" insofar as he might simply seek to contradict the allegations that he had violated the terms of his probation.[182] The probationer's testimony was most likely to be probative to the extent that it added to rather than detracted from the factual picture presented by the state by explaining the circumstances surrounding the conduct that allegedly constituted a violation; yet such mitigating evidence, since it generally involved damaging factual admissions coupled with moral excuses, was "just what is most likely to be withheld from the court by virtue of the probationer's fear of self-incrimination."[183]

Wright next turned to the various policies underlying the privilege against self-incrimination and found these constitutional values to be similarly undermined when, instead of being intimidated into silence at his revocation hearing, the probationer resolved the conflict in the opposite way by risking self-incrimination in order to testify.[184] At least two of the motivating policies for the privilege against self-incrimination were deemed to be adversely affected by permitting a probationer's revocation hearing to be used against him at a subsequent criminal trial for the same alleged misconduct. First, there was the policy of requiring the prosecution to shoulder a heavy procedural and evidentiary burden in order to win a conviction. A " 'fair state-individual balance' "[185] at a criminal trial was maintained by allowing the privilege against self-incrimination to work in conjunction with the presumption of innocence and the requirement of proof of guilt beyond reasonable doubt, so that "the prosecution in a criminal trial [must] produce sufficient evidence to establish the defendant's guilt *before* he must decide whether to remain silent or to testify in his own behalf . . . ."[186]

This policy of imposing on the prosecution a heavy burden would be substantially undercut if, by the simple device of moving to revoke probation prior to trial, the prosecution could achieve a " 'tails we win, heads you

181. *Id.* Even Dworkin does not dispute that sentencing decisions are properly discretionary in the "strong" sense of the term. *See* DWORKIN, *supra* note 3, at 71, 222.

182. 13 Cal. 3d at 874, 533 P.2d at 1031, 120 Cal. Rptr. at 391.

Chief Justice Wright spent the years 1961-68 on the Superior Court of Los Angeles County, and had been a municipal court judge from 1953 until his election to the superior court. K. ARNOLD, CALIFORNIA COURTS AND JUDGES HANDBOOK 920 (2nd ed. 1973).

183. 13 Cal. 3d at 874, 533 P.2d at 1031, 120 Cal. Rptr. at 391.

184. *Id.* at 875, 533 P.2d at 1032, 120 Cal. Rptr. at 392.

185. *Id.* (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

186. *Id.* at 875, 533 P.2d at 1032, 120 Cal. Rptr. at 392 (citing, *inter alia*, *In re* Winship, 397 U.S. 358, 361-64 (1970); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Tehan v. Shott, 382 U.S. 406, 414-16 (1966)).

lose' position *vis-à-vis* the probationer,"[187] because of the lower burden of proof and laxer rules of evidence, the state might more easily punish a probationer by revoking probation than by instituting independent criminal proceedings. Moreover, the state's ability to keep probationers on a shorter string than other citizens would be artificially enhanced if the probationer could successfully defend against revocation only by being "forced, in effect, to be one of the prosecution's principal witnesses in its case-in-chief at his trial."[188] Indeed, Chief Justice Wright suggested that there was as great a danger of criminal charges being brought just to facilitate probation revocation by silencing the probationer, as there was of pre-trial revocation proceedings being brought just to give the prosecution the benefit of the accused's own testimony.[189]

Finally, the court identified a second policy underlying the privilege against self-incrimination which was incompatible with the revocation procedures employed against probationer Coleman. The privilege was meant to guard against exposure to a " 'cruel trilemma' of self-accusation, perjury or injurious silence."[190] Especially with regard to an alleged crime of specific intent such as was involved in *Coleman*, the conduct of a probationer could be wholly innocent, and yet his testimony to establish such innocence would have the effect, before the prosecution had met any burden of going forward with its own case-in-chief, of establishing many of the elements of his alleged crime. In order to avoid being incriminated by truthful testimony about innocent activity, a probationer would either have to commit perjury, or remain silent and possibly suffer an unjustified revocation of probation, a revocation made more probable by "the risk that notwithstanding the ideals of the Fifth Amendment his silence will be taken as an indication that there are no valid reasons why probation should not be revoked."[191]

B. Obligation within the "Open Texture"

By considering the various values and policies subserved by the ambiguous rules which had conferred on Coleman his competing rights, Chief Justice Wright acknowledged implicitly Hart's notions of the "irreducibly open textured" nature of language and the "relative indeterminacy of aim" to be expected of rules propounded by mortals unable to anticipate the future.[192] *Coleman*'s effort at resolving the ambiguity seems at odds, how-

187. *Id.* at 876, 533 P.2d at 1033, 120 Cal. Rptr. at 393.

188. *Id.* at 876-77, 533 P.2d at 1033, 120 Cal. Rptr. at 393.

189. *Id.* at 876 n.7, 877 n.9, 533 P.2d at 1033 n.7, 1033-34 n.9, 120 Cal. Rptr. at 393 n.7, 393-94 n.9.

190. *Id.* at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

191. *Id.* at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394.

192. *See* HART, *supra* note 14, at 125.

ever, with Hart's choice between open alternatives, a discretion which is "very wide . . . even though it may not be arbitrary or irrational."[193] At least at this stage of the opinion, when the meaning and intent of ambiguous federal rules were in issue, the court treated its radius of scrutiny as being strictly circumscribed by authorities less certain than rules, but entitled to no less respect. The purposes and policies employed for interpretation were drawn not from the court's intuition, but rather from the same institutional sources as the ambiguous rules themselves. This carefully documented process of abstracting evidence of meaning from cases applying the ambiguous rules to analogous situations appears to corroborate Dworkin's contention that courts adhere to legal standards other than rules, which influence decisions that rules do not compel.

It might be argued that it is hardly a meaningful test of how judges react to ambiguity in rules of law to study a decision subject to review by a higher court. In view of the ultimate disposition of *Coleman* on independent and apparently adequate state grounds, cutting off the possibility of review by the United States Supreme Court,[194] this objection may not be relevant to my use of *Coleman* as an exemplar of judicial discretion in a hard case. It is nonetheless worth pursuing, because it evidences a misunderstanding of the terms of the inquiry.

Useful discussion of how judges react to ambiguity, and whether they truly exercise a choice between open alternatives, must address the degree of discretion that judges perceive themselves authorized to exercise. Of course, judges share the natural tendency to desire approval of their actions, or at least to avoid the opprobrium of having their decisions explicitly countermanded. Because this may mean that lower court judges will strive to reach results which they are most likely to succeed in justifying to their censors above, it does not follow that lower court judges will tend to eschew exercise of any gap-filling discretion. The best strategy to avoid reversal would seem to be to appeal to the same arguments as the higher court would be expected to follow were it to make the decision itself. This thesis invites analysis of lower court opinions in order to determine what arguments and authority judges themselves think other judges on higher courts will view as appropriate bases for decisions in hard cases. This inquiry is of particular interest when, as in *Coleman*, the lower court judges have had to spend a preponderance of their time deciding hard cases in their alternate capacity as a state court of last resort.

Lower court decisions in hard cases will differ in two respects from high court decisions. I have postulated that high court judges decide cases

193. *Id.* at 124.

194. See notes 269-73 and accompanying text *infra*.

under the law as they see it, rather than by resort to their power to act in disregard of the law.[195] Nonetheless, to the extent that the decisions of such judges may evince the effects of an awareness of sovereignty in subtle ways, such as failure to persevere in attempting to ascertain the law for lack of any sanctions for misperception of the law, those effects should be absent from the decisions of lower courts. The lower court may perceive some "trend of decision" or less dignified evidence of subjective attitudes by its reviewing court, and may cater to those assumed attitudes in order to avoid reversal, but unless such perceptions have their origin in unofficial communications between judges, they represent merely another array of arguments culled from reported cases by which the extent of ambiguity and its proper resolution are conventionally formulated. Such perceptions are, indeed, commonly stated on the face of the lower court decisions which they color.[196]

There is a second aspect in which lower court decisions of hard cases differ from high court decisions. A lower court lacks the ability to overrule mistakes by a higher court; therefore, the former tribunals must treat conflicting precedent as ambiguous rather than mistaken, and appeal to arguments of rationalization rather than repudiation. This was the position of the California Supreme Court regarding Coleman's federal constitutional claims. The overruling power of a high court can be overemphasized, however. Hart and Dworkin agree that a court cannot afford to take lightly its power to reject its own rules. Hart confines the overruling of precedent to the fringe of adjudication and suggests that it threatens "the prestige gathered by courts from their unquestionably rule-governed operations over

195. See notes 25-27 *supra*.

196. *See, e.g.*, People v. Coleman, 13 Cal. 3d 867, 887 n.18, 533 P.2d 1024, 1040 n.18, 120 Cal. Rptr. 384, 400 n.18. *See also* Spector Motor Serv. v. Walsh, 139 F.2d 809 (2d Cir. 1943), *rev'd on other grounds sub nom.* Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944), *on remand sub nom.* Spector Motor Serv. v. O'Connor, 181 F.2d 150 (2d Cir. 1950), *rev'd*, 340 U.S. 602 (1951). That case concerned the validity of a state tax upon the activities of a foreign corporation engaged solely in interstate commerce. In an opinion by Judge Charles Clark, the Second Circuit's first decision held that pre-New Deal precedent immunizing from state taxation companies engaged exclusively in interstate commerce was no longer controlling: "[I]f . . . our duty were limited to picking the closest unoverruled analogy in reported cases and following that blindly and mechanically, we should hold that these cases . . . foreclosed all further discussion. . . . [However, we] must determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants or to others similarly situated. If this means the discovery and applying of a 'new doctrinal trend' in the Court, . . . this is our task to be performed directly and straightforwardly, rather than 'artfully' dodged." 139 F.2d at 814 (citation omitted).

These brave words provoked equally stirring phrases from Judge Learned Hand, expressing his disagreement not of principle but of its application: "[It is not] desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine [*sic*] which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it." *Id.* at 823 (Hand, J., dissenting).

the vast, central areas of the law.''[197] As Dworkin has persuasively argued, the overruling of precedent is unsettling to positivists, forcing them to accept that there must be legally binding standards other than rules, or rules themselves would lack binding force because they could always be discretionarily overruled;[198] but Dworkin must also place limits upon the departure from precedent, because he views a judge's task as one of constructing the theory of decision most consistent with institutional history and morality.[199]

The reasoning of *Coleman* is an instructive example of how all judges respond to ambiguity in precedent when there is no possibility of overruling the cases contributing to the ambiguity. *Coleman* shows judges working within the ''open texture'' of prior rules in seeking to justify the result of a subsequent case. Within this gap in the law, however, the decisional process seems far from legislative; although the opinion does seem directed at striking a balance between competing interests of varying weights, both the interests and their relative weights are identified from and justified by existing authority.[200] The appeal is not to the public welfare as conceived by the court, but to the political aims that the ambiguous rules were perceived as seeking to advance or protect.[201] The extent of authority cited to support the identification of particular aims in *Coleman* suggests a felt sense of obligation to measure possible interpretations of the rules conferring upon probationers the rights to be heard and not to incriminate themselves against the political aims underlying those rules. The ''open texture'' of ambiguity in the law does not appear to present judges with opportunities for discretion unconstrained by obligation, but rather exposes judges to countervailing fields of force, in which the surrounding rules pull against one another so as to align the court's decision at some point of equilibrium between them.

C. The Policy Counterexample

Although *Coleman* thus substantiates Dworkin's position that legal standards other than rules restrict discretion when judges confront ambiguity in the law, it does not support his thesis in its entirety. The opinion by Chief Justice Wright quite conspicuously refers to arguments of policy in seeking to discern the scope of Coleman's rights.[202] Of course, Dworkin has many

197. HART, *supra* note 14, at 150.

198. *See* DWORKIN, *supra* note 3, at 36-38.

199. See notes 86-90, 97-99, and accompanying text *supra*. Dworkin instructs Hercules that he cannot make ''impudent use'' of the device of taking ''any compatible piece of history as a mistake,'' for then ''the requirement of consistency would not be a genuine requirement at all.'' DWORKIN, *supra* note 3, at 121. It is not clear why loose use of the device of overruling precedent is deemed impudent rather than imprudent.

200. See notes 173-91 and accompanying text *supra*.

201. *See* DWORKIN, *supra* note 3, at 91.

202. 13 Cal. 3d at 873-78, 533 P.2d at 1030-34, 120 Cal. Rptr. at 390-94; see notes 173-91 and accompanying text *supra*.

devices for converting apparent appeals to policy into invocations of principle which support his rights thesis.[203] Moreover, a court may simply use the word "policy" in a more inclusive sense than Dworkin's, as denominating the goals served by a rule regardless of whether those goals serve individual or social interests.[204] Thus when *Coleman* refers to the "many and varied policies underlying the privilege against self-incrimination"[205] as including an inherent procedural bias against the prosecution and the avoidance of circumstantial as well as physical cruelty to defendants, the opinion is speaking of principle for Dworkin's purposes, because these many and varied policies justify the privilege in terms of an individual's moral claim to certain political trumps against the otherwise overweening power of the majority.[206] Moreover, Dworkin contends that some appeals to policy are also appeals to the competing abstract rights of some group not coextensive with the community at large;[207] thus, appeals to policies of national defense or public safety may be seen as appeals to the abstract rights of particular soldiers or citizens whose security is threatened.[208] To the extent that *Coleman* found that the right to be heard at a revocation hearing served as a means of avoiding " 'imprudently prejudicing the safety of the community,' "[209] Dworkin might claim that this is such an appeal to abstract rights. In at least one respect, however, *Coleman* looks for guidance in construing an ambiguous rule by relying on what is clearly an argument of policy in the Dworkinian sense.[210] When *Coleman* considers the effect that a passive interpretation of the rule granting probationers an opportunity to be heard at their revocation hearings would have on the rehabilitative goals of the penal system, the court is unmistakably measuring the dimensions of a personal right by examining collective social interests, not the moral claims of individuals against society.[211]

203. See note 77 *supra*.

204. See notes 76-77 and accompanying text *supra*.

205. 13 Cal. 3d at 875 & n.5, 533 P.2d at 1032 & n.5, 120 Cal. Rptr. at 392 & n.5.

206. *See* DWORKIN, *supra* note 3, at xi. See note 86 *supra*.

207. *Id.* at 99.

208. *Id.* at 93.

209. 13 Cal. 3d at 873, 533 P.2d at 1031, 120 Cal. Rptr. at 391 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973)).

210. See note 77 *supra*.

211. An argument positing that the court might have been referring to some "right of rehabilitation" possessed by prisoners would be insupportable in light of the authority given at this point in *Coleman*. *See* 13 Cal. 3d at 874 n.4, 533 P.2d at 1031 n.4, 120 Cal. Rptr. at 391 n.4 (citing THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE ON CORRECTIONS, TASK FORCE REPORT: CORRECTIONS 82 (1967)). The citation is to the first page of chapter eight, "The Legal Status of Convicted Persons," where the Task Force declared: "There is increasing doubt as to the propriety of treating this large group of persons as, in varying degrees, outcasts from society. *And there is increasing recognition that such treatment is not in the ultimate interests of society*. Denying offenders any chance

To the extent that the court in *Coleman* sought to construe a "judicial enactment" of the United States Supreme Court, Dworkin disallows reliance on arguments of policy even to determine what rights such an enactment has created, because he maintains that judicial enactments, as opposed to statutes, may be based only on arguments of principle.[212] To the extent that the court in *Coleman* was seeking to construe the Constitution directly, in the absence of a settled interpretation by the United States Supreme Court, Dworkin is equally insistent that such a decision must be premised on principle rather than policy. He defines constitutionalism as "the theory that the majority must be restrained to protect individual rights,"[213] and treats constitutional adjudication as raising "the issue of what moral rights an individual has against the state."[214] Thus "[t]he difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court which undertakes the burden of applying these clauses fully as law . . . must be prepared to frame and answer questions of political morality."[215] *Coleman*'s use of the rehabilitative goals of the penal system to weigh alternative constructions of the right to due process in terms of their social utility must be construed as a counter-example to Dworkin's rights thesis.

D. The Conflict of Rules

I have thus far examined the process of resolving in *Coleman* the ambiguous scope of the right of a probationer both to an opportunity to be

to challenge *arbitrary assertions of power* by correctional officials, and barring them from legitimate opportunities such as employment, *are inconsistent with the correctional goal of rehabilitation*, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen." (Emphasis added.)

Coleman is certainly not alone among recent criminal procedure cases in which the scope of a claim of right has been ascertained in part by reference to social goals. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974), where the Court ruled that the due process protections there held to be constitutionally required in prison disciplinary hearings were "not graven in stone," and continued: "As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution." *Id.* at 572.

212. DWORKIN, *supra* note 3, at 111 n.1.

213. *Id.* at 142.

214. *Id.* at 149.

215. *Id.* at 147. There is, of course, no "equal protection clause" as such in the Bill of Rights. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Although *Bolling* held that "discrimination may be so unjustifiable as to be violative of due process," since "the concepts of equal protection and due process . . . are not mutually exclusive," it cautioned that "we do not imply that the two are always interchangeable phrases." *Id.; accord*, Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

heard at his revocation hearing, and to avoid self-incrimination at a pending trial for the same conduct as was at issue in the revocation proceedings. Given the outcome in *Coleman* of that process, whereby it was determined that these rights could not be reconciled by construing one as subordinate to the other, and given further that these rights were not inherently irreconcilable but could each be enjoyed by, respectively, postponing the revocation hearing or granting Coleman immunity from the use at trial of statements made at a pre-trial revocation hearing, it might seem that some such accommodation was a matter of constitutional right. This would certainly follow under the rights thesis, for if constitutional rights are really individual rights against the state, rather than dispensations of privilege at the convenience of the majority, then whatever social cost might be entailed by the accommodation of competing constitutional rights would not be a permissible basis for limiting either right. The cost of the accommodation would be part of the price of having a Constitution; whether this price was too high for some particular right would be a matter of social policy and therefore beyond the purview of the courts.

The *Coleman* court deemed itself governed not by the rights thesis, however, but by the Constitution as construed by the United States Supreme Court. That Court had considered the problem of tension between countervailing constitutional rights not once but twice, with seemingly conflicting results. In *Simmons* the Court had first acted consistently with the rights thesis, declaring a failure to alleviate such tension "intolerable."[216] The later decision in *McGautha* had reached an opposite result, not by an outright disavowal of *Simmons*, but by a novel analysis of the nature of the rights in question, which had led it to conclude that, properly construed, the supposedly countervailing rights asserted in both *Simmons* and *McGautha* had created no significant tension at all.[217] This left in considerable doubt the rule governing situations where, even in light of *McGautha*, undeniable tension was found to exist, because requiring a choice between constitutionally guaranteed options did indeed lead to "appreciable" impairment of "the policies behind the rights involved."[218] The *McGautha* test of appreciable impairment was obviously paralleled by *Coleman*'s effort at construing the vague dimensions of the opportunity to be heard and the privilege against self-incrimination to see if either could be reconciled with the other. The *Coleman* court had by this process seemingly found appreciable impairment in Coleman's case, and had to decide what to make of it.

216. Simmons v. United States, 390 U.S. 377, 394 (1968).

217. McGautha v. California, 402 U.S. 183, 208-22 (1971); see notes 157-66 and accompanying text *supra*.

218. 402 U.S. at 213.

However apparent *McGautha*'s influence may have been from the outset of the *Coleman* opinion, neither *McGautha* nor *Simmons* was mentioned by Chief Justice Wright until after it had been established that "requiring a probationer to choose between testifying at his revocation hearing and incriminating himself at a later trial creates a tension between countervailing constitutional rights."[219] This allowed the court to consider whether it was constitutionally compelled to obviate this tension without simultaneously becoming mired in *McGautha*'s murky reasoning, which proceeds backwards from its conclusion that there was no such duty to the premise that there was no such tension. Analysis of *McGautha*'s strict standard for constitutionally required accommodation would in this way not obfuscate the established fact that, whether accommodation was required or not, there was an inescapable tension between constitutional rights in Coleman's case which could not be waived away with the wand of redefinition.

From this perspective, the *Coleman* court approached the *Simmons-McGautha* schism with the admonition that current federal law on the duty to accommodate countervailing constitutional rights was quite confused.[220] The authorship by Justice Harlan of both *Simmons* and *McGautha* was deemed a significant indication that the latter decision meant to reconsider the rationale of *Simmons* rather than merely distinguish the prior case on its facts.[221] The gloss provided by *McGautha* was that "*Simmons* should not be read as invalidating all procedures which produce *some* tension between constitutional rights";[222] tension might exist and yet be permissible under the new test of appreciable impairment, which *McGautha* posited as the "threshold question" in a determination whether tension was constitutionally significant.[223] Chief Justice Wright declared:

> From the manner of its application in *McGautha*, it appears that this test is likely to be more dispositive than the court's "threshold" characterization would imply. The determinations of what are constitutional policies, when such a policy is impaired, and whether the impairment is "appreciable," would seem to involve value judgments controlling of the question of the permissibility in a given context of procedures imposing upon litigants a choice between constitutional rights.[224]

Thus, for example, *McGautha* had found the privilege against self-incrimination affected but not offended by unitary trials in capital cases, not by analyzing the degree of impairment but, rather, by relying on the assump-

219. 13 Cal. 3d at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394.
220. *Id.*
221. *Id.* at 879, 533 P.2d at 1035, 120 Cal. Rptr. at 395.
222. *Id.* at 880, 533 P.2d at 1036, 120 Cal. Rptr. at 396.
223. *Id.*
224. *Id.*

tion of the " 'clear validity of analogous choices . . . quite routinely faced.' "[225]

The *Coleman* court was clearly uncertain of what validity, if any, *Simmons* retained. *McGautha* had made little effort to reconcile its reasoning with that which had preceded it in *Simmons*, yet had not disavowed the result reached in *Simmons*.[226] *Coleman* concluded that *McGautha* thus "implied that *Simmons* should have been decided on the basis of the court's supervisory powers over federal trials rather than the mandates of the Constitution."[227]

Chief Justice Wright then looked for guidance to cases in the lower federal courts which had considered the *Simmons-McGautha* problem, and found that they had only compounded the confusion. One First Circuit case involved issues identical to *Coleman*, but had been decided by a split court.[228] The majority had ruled that a probationer could, under *McGautha*, validly be put to the strategic election between testifying and remaining silent.[229] The dissent had argued that the Constitution compelled the state either to postpone the revocation proceeding pending trial, or to grant the probationer immunity from the use of his testimony at a subsequent trial.[230] For authority, the dissent had relied on another decision by the same circuit,[231] in which a prison inmate faced with a disciplinary hearing had been held to be constitutionally entitled to immunity from subsequent use of his testimony in the disciplinary hearing; *McGautha* had been distinguished as a case involving a procedural context where remaining silent was a viable strategic alternative, and was thus deemed to be dissimilar to a situation involving a prison disciplinary hearing with its more minimal safeguards against prejudicial fact-finding.[232] Yet this latter case had just been vacated by the Supreme Court[233] for reconsideration in light of the Court's newly articulated minimum requirements of procedural due process for prison disciplinary hearings.[234]

225. *Id.* at 881, 533 P.2d at 1036, 120 Cal. Rptr. at 396 (citing McGautha v. California, 402 U.S. 183, 215 (1971)).

226. 402 U.S. at 212-13.

227. 13 Cal. 3d at 881, 533 P.2d at 1037, 120 Cal. Rptr. at 397.

228. Flint v. Mullen, 499 F.2d 100 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).

229. 499 F.2d at 103.

230. *Id.* at 105-06 (Coffin, C.J., dissenting).

231. Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973) (Palmigiano I), *vacated and remanded*, 418 U.S. 908 (1974), *on remand*, 510 F.2d 534 (1st Cir. 1974) (Palmigiano II), *rev'd*, 425 U.S. 308 (1976). See note 243 *infra*.

232. Palmigiano I, 487 F.2d at 1288 n.21.

233. *Id.* at 1280 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 908 (1974).

234. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

These inconclusive precedents led Chief Justice Wright to consider the broader problem of concurrent civil and criminal proceedings. Several cases had discussed aspects of the plight of criminal defendants who were threatened with the loss of property in concurrent civil proceedings arising out of the same facts as their prosecutions.[235] Although the responses of the deciding courts had varied, the alleviation of tension between constitutional rights in concurrent criminal and civil proceedings had consistently been "treated as within the province of a court's discretion in seeking to assure the sound administration of justice,"[236] rather than as a matter of constitutional right. The culmination of *Coleman*'s analysis of the confused federal law on countervailing constitutional rights was the proposal of a theory of decision which would account consistently for all the examined cases. This theory originated in the premise that the constitutional obligation to alleviate tension between constitutional rights could be ascertained by resort to "spectral analysis."[237] All the relevant cases involved a criminal prosecution and some sort of concurrent or ancillary proceeding, in connection with which the claim of countervailing rights arose. At one end of the spectrum, as in the case of prison disciplinary hearings, the concurrent proceedings had the potential of imposing serious personal deprivations, while providing minimal procedural protection against an arbitrary outcome; at the other end of the spectrum, where civil litigation was involved, the need for accommodation was deemed to be far less compelling, and did not appear to be of constitutional dimensions.[238] This theory had its inherent limits, however. With the particular circumstances of each case determining its position on the spectrum, "there emerge[d] the infeasibility of propounding a constitutional rule of universal applicability."[239]

The *Coleman* court was thus left in some doubt, despite its best efforts, as to just what was the appropriate disposition of Coleman's claims under federal law. It had already noted that a probationer's poor procedural posture at a revocation hearing might be further eroded by the probationer's failure to testify at that hearing.[240] Certainly the deprivation suffered by Coleman as a result of the adverse outcome of his revocation hearing (a term of up to ten years in prison)[241] was very serious; this would seem to place him near the prison disciplinary hearing end of the court's spectrum, where

235. *See* Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578 (D.C. Cir. 1970); *In re* Penn Cent. Sec. Litigation, 347 F. Supp. 1347 (E.D. Pa. 1972).

236. 13 Cal. 3d at 885, 533 P.2d at 1039, 120 Cal. Rptr. at 399.

237. *Id.* at 886, 533 P.2d at 1040, 120 Cal. Rptr. at 400.

238. *Id.* at 885-86, 533 P.2d at 1039-40, 120 Cal. Rptr. at 399-400.

239. *Id.* at 886, 533 P.2d at 1040, 120 Cal. Rptr. at 400.

240. *Id.* at 874, 876, 533 P.2d at 1031, 1033, 120 Cal. Rptr. at 391, 393; see text accompanying notes 182 & 187 *supra*.

241. 13 Cal. 3d at 877 n.9, 533 P.2d at 1033 n.9, 120 Cal. Rptr. at 393 n.9.

it had theorized that accommodation might be constitutionally compelled.[242] Yet the court clearly felt uncomfortable with this conclusion, no matter how theoretically sound: there was a more subtle message in *McGautha* which adverted implicitly to the changing judicial philosophy of the members of the United States Supreme Court and led the *Coleman* court "to be especially cautious of perceiving federal constitutional error in this case."[243]

E. Discretion Discounted

Although the *Coleman* court thus decided to leave unanswered the federal constitutional question before it, all of the groundwork for such a decision had been prepared. By construing the interrelationship of Coleman's competing rights, the court showed adherence to legal standards other than rules in somewhat the fashion articulated by Dworkin. The standards influencing its decision were broader than Dworkin deems proper, extending to matters of social goals as well as individual rights,[244] but even so the court did not display discretion. In its reaction to the ambiguity created by the coexistence of *McGautha* and *Simmons*, the *Coleman* court offers further corroboration of some aspects of Dworkin's theory of adjudication.

The court's reference to previous decisions of courts of coordinate or inferior jurisdiction in seeking to resolve the conflict between *McGautha*

242. *Id.* at 885-86, 533 P.2d at 1039-40, 120 Cal. Rptr. at 399-40.

243. *Id.* at 887 n.18, 533 P.2d at 1040 n.18, 120 Cal. Rptr. at 400 n.18. The *Coleman* court's caution was well advised. It is virtually certain today that the United States Supreme Court would not uphold Coleman's federal constitutional claim. See Baxter v. Palmigiano, 425 U.S. 308 (1976) (Palmigiano II). The Court there held that no Fifth Amendment violation was suffered by a state prison inmate who had been charged in prison disciplinary proceedings with inciting a potential riot, informed that he might be prosecuted on criminal charges for the same conduct, and told at the hearing that he had a right to remain silent but that his silence would be held against him. The crucial elements, according to the Court, were that the inmate's silence alone was insufficient under state law to support an adverse finding at the disciplinary hearing, and that the hearing itself was a civil rather than criminal proceeding. *Id.* at 317-19. *See also* Lefkowitz v. Cunningham, 97 S. Ct. 2132, 2138 n.5 (1977) ("*Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify."). The "civil case" label, justified in the *Baxter* opinion because disciplinary proceedings "involve the correctional process and important state interests other than conviction of crime," 425 U.S. at 319, a statement no less applicable to probation and parole revocation proceedings, must have come as a surprise to the inmate in question, who as a result of losing his "civil case" was "placed in 'punitive segregation' for 30 days." *Id.* at 313. Presumably, his disciplinary record also had an impact on his chances for parole, and therefore on his overall length of incarceration. Even more astounding, however, is *Baxter*'s characterization of the Fifth Amendment as having "little to do with a fair trial." *Id.* at 319. All of this caused Justice Brennan in dissent to voice the fervent hope that: "[i]f this Court's insensitivity to the Fifth Amendment violation present in this case portends still more erosion of the privilege, state courts and legislatures will remember that they remain free to afford protections of our basic liberties as a matter of state law." *Id.* at 338-39 (Brennan, J., dissenting).

244. *See* 13 Cal. 3d at 874 n.4, 533 P.2d at 1031 n.4, 120 Cal. Rptr. at 391 n.4; see note 211 and accompanying text *supra*.

and *Simmons* presents a striking illustration of Dworkin's phenomenon of the gravitational force of a decision "on later decisions even when those decisions lie outside its particular orbit."[245] This general gravitational force of precedent supports Dworkin's assertion that "[j]udges 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."[246]

There remains the question whether these institutional constraints which do seem to have influenced the *Coleman* court displaced all discretion on the part of its individual members. I doubt that such constraints do more than define limits to the range of decision; a given decision will vary within the permissible range according to the mettle of the deciding judges and the mass of authority they can master. If the attitudes displayed in *Coleman* are a guide, however, it would seem such variations are more the product of varying perceptions of precedent and perserverance in examining it than of judicial exercise of an individual discretion.

In situations such as *Coleman*, where there is ambiguous authority which cannot be overruled, the choices to be made by judges are more human than legal. Given intellects of mortal dimension, how hard will judges strain to separate their own political aims from those underlying the ambiguous authority which they seek to apply? This question is not answered simply by asserting a duty to determine the single right answer. The duration for which any mind can tolerate the centrifugal forces of ratiocination is limited; some elements of a decision must be accepted at some point in the decisional process as sufficiently tested against "political philosophy and institutional detail"[247] to be certain. The choice as to any given element in any given case may seem discretionary, but even it, I suspect, is " 'instinct with an obligation,' imperfectly expressed."[248]

V. The Discretionary Alternative

As I announced earlier, it has been useful to treat *Coleman* as if it were two separate cases, each involving distinct issues of controversiality.[249] I have completed examination of *Coleman* as a case in which a court without the competence to overrule troublesome precedent tried to construct a feasible theory of decision. In this circumstance, the *Coleman* court did not

245. DWORKIN, *supra* note 3, at 111.

246. *Id.* at 86-87.

247. *Id.* at 107.

248. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917) (Cardozo, J.).

249. See text and accompanying notes 167-68 *supra*.

seek to displace doubt with discretion, but displayed a serious concern for justification as it sought to resolve ambiguity in the fashion most consistent with the policies underlying ambiguous rules and the results reached by similarly situated courts.

The *Coleman* opinion suggests just how strong the sense of obligation is for a court confronting a hard case involving the ambiguous precedents of a higher court. The opinion flows vigorously through the demonstration of the tension between Coleman's rights, proceeds fitfully through the analysis of *Simmons, McGautha*, and the related lower court cases, and then literally grinds to a halt. The opinion fairly proclaims its evolution: a seemingly powerful case of the "intolerable" tension denounced by *Simmons* has crumbled as the court's analysis reveals the extent to which *McGautha* has eviscerated that prior ruling. The lower court cases involving concurrent civil and criminal proceedings, although presenting less compelling circumstances, have left accommodation to the trial court's discretion; the only post-*McGautha* precedent supporting federal relief for Coleman has been vacated; a new majority of the Supreme Court is coalescing under a banner of minimal procedural standards to be imposed on the states under the Constitution. The result is that, in the process of justifying its theory of decision, the court has lost confidence in it; the court's sincerity in following legal standards has forced it to recognize that its initial theory may be wrong.

This process compelled the court to confront a new issue, however. If Coleman were not entitled to relief under federal law, should he be left *in statu quo*? There were two grounds for a decision under state law. As to one, the rules of decision were in great flux; as to the other, the court had undoubted discretion.

A. The State Constitution

One basis for action was the California Constitution's guarantees of the right to due process and the privilege against self-incrimination, phrased in substantially identical terms to the corresponding provisions of the federal Constitution.[250] This basis was not discussed in the opinion, but it raises interesting jurisprudential questions which I wish merely to broach.

If Dworkin is correct, the court would have no discretion in granting or denying relief under the state constitution, nor in framing the scope of that relief. Constitutions, to Dworkin, are not repositories of power for the amusement or gratification of judges, but are solemn guarantees of fundamental moral rights against the state.[251] Yet if constitutional construction

250. CAL. CONST. art. I, § 15.

251. See notes 213-15 and accompanying text *supra*.

requires "a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government,"[252] if "a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy,"[253] and if a precedent really has a gravitational force beyond the lines of authority of reviewing courts, a construction of the state constitution at variance from the authoritative construction of the parallel provision of the federal Constitution would suggest that one or the other construction is mistaken.

In some respects there may be significant differences in the "political philosophy and institutional detail"[254] of the states as opposed to the nation as a whole, but these are likely to be exceptional. If the state and federal constitutions apply the same terms to the same society, and are construed to produce different results, the latter construction necessarily implies that the former was mistaken. Yet mistakes are not a tolerable phenomenon in Dworkin's theory of adjudication; they diminish the distributional consistency of rights upon which his theory is based.[255] Moreover, if an independent construction of a state constitution is in effect a finding that the federal construction is a mistake, what of the duty of the judge to resist imprudent use of this device, and to limit the number and character of the events to be disposed of in that way? How can a judge compelled to find a single right answer have any power to moderate the finding of prior mistakes? Dworkin phrases it in terms of the comparative strength of a theory of decision and declares that "a justification that designates part of what is to be justified as mistaken is prima facie weaker than one that does not."[256] This would seem to chill the independent construction of state constitutions;[257] one cannot help but wonder if that is really Dworkin's intent.

B. The Supervisory Rule

There were less abstract reasons at hand to motivate the *Coleman* court not to look to the state constitution as a source of relief for Coleman. Chief Justice Wright was at the center of competing wings of a court at odds over

252. DWORKIN, *supra* note 3, at 107.

253. *Id.* at 117.

254. *Id.* at 107.

255. See note 199 and accompanying text *supra*.

256. DWORKIN, *supra* note 3, at 122.

257. Although there have been notable exceptions, *see, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (capital punishment); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (school financing), generally the independent state interpretation is the successor in time to the federal construction. *See, e.g.*, People v. Allen, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976) (self-incrimination); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (*Miranda*-impeachment); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (search and seizure).

the propriety of independent state constitutional construction, and at the time of *Coleman* he was in the process of conversion from opposing independent constructions to accepting them in compelling circumstances.[258] Moreover, in *Reynolds v. Superior Court*,[259] he had recently written for an unanimous court an opinion that touched upon the very privilege against self-incrimination under state law that would have had to become the linchpin for state constitutional relief for Coleman.

In *Reynolds* the court had dealt with the propriety of a trial court's order that a defendant in a criminal proceeding give pre-trial notice of an alibi defense. The United States Supreme Court had upheld a "notice-of-alibi" rule against federal constitutional attack on self-incrimination grounds,[260] but Chief Justice Wright had found that the lower court's order presented "delicate and difficult questions of constitutional law, both state and federal."[261] The federal issues arose from discrepancies between the order under review and the procedures for notice-of-alibi approved by the United States Supreme Court; the state issues arose because notwithstanding the contrary federal holding, the "privilege [against self-incrimination] is also secured to the people of California by our state Constitution, whose construction is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions."[262] The California Supreme Court was already "on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires. Thus, there is no foregone answer to the question . . . whether notice-of-alibi discovery procedures in general are permissible under the California Constitution."[263] *Reynolds* went on to draw a distinction between judicial rulemaking inspired or required by constitutional limitations on the power of government, and rulemaking that would merely grant to the government rights that it might legislatively create for itself.[264] The latter form of rulemaking was disfavored because of the constitutional conflict of interest which might arise if a court were to try to pass objectively on the constitu-

258. *See* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (Wright, C.J., concurring) (independent construction of state constitution by four-to-three vote). *Compare* People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974) (Wright, C.J., concurring) (federal construction governs state constitution by four-to-three vote) *with* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (independent construction of state constitution by four-to-three vote) *and id.* at 116, 545 P.2d at 281, 127 Cal. Rptr. at 369 (Wright, C.J., concurring).

259. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

260. Williams v. Florida, 399 U.S. 78 (1970).

261. 12 Cal. 3d at 842, 528 P.2d at 49, 117 Cal. Rptr. at 441.

262. *Id.*

263. *Id.* at 843, 528 P.2d at 50-51, 117 Cal. Rptr. at 442-43.

264. *Id.* at 845-46, 528 P.2d at 52-53, 117 Cal. Rptr. at 444-45.

tionality of any such procedure that might result.[265] By contrast, *Coleman* presented the opposite situation described in *Reynolds* as being appropriate for the court to fashion procedural rules decisionally in order to "effectuate the protections constitutionally guaranteed to an otherwise helpless accused."[266] This was the basis on which the court had promulgated its most famous supervisory rule: the exclusionary rule rendering inadmissible illegally seized evidence six years before that rule had been imposed on the states by the United States Supreme Court.[267]

The California precedent of using a supervisory rule to exclude illegally seized evidence made the formulation of a supervisory rule in *Coleman* all the more appropriate. The *Coleman* court had perceived in *McGautha*'s refusal to repudiate the result in *Simmons*, while simultaneously disavowing its rationale, the implication that *Simmons*, involving a trial in federal court, should have been premised upon supervisory powers rather than constitutional law.[268] Thus the decision of *Coleman* on supervisory grounds would lend it an appealing consistency; *Coleman* could be decided under the aegis of *Simmons* after all, notwithstanding *McGautha*'s conflict with that case.

C. The Rule of *People v. Coleman*

Chief Justice Wright accordingly announced "that clothing our adjudication of the issues before us in constitutional raiment would be not only unwise but also unnecessary."[269] The court could act on nonconstitutional grounds unavailable to federal courts so as "to insure that the administration of justice in California operates as fairly as is feasible, by insisting to the utmost practicable extent that arbitrary factors not be allowed to influence the judicial decision-making process."[270] Under the federal Constitution, "notions of federalism" might limit demands for procedural fairness to the rudimentary rather than the reasonable, but relief was to be accorded Coleman through the court's supervisory powers to the end that "our legal system realize its ideal, 'that the judicial should be equated with the just.' "[271]

The opinion then declared as a judicial rule of evidence that the testimony of a probationer at his revocation hearing and any evidence derived from that testimony were henceforth inadmissible upon timely objection at subsequent, factually related criminal proceedings; it was said that "[t]his exclusionary rule allows the state to continue to press for

265. *Id.* at 845-46, 528 P.2d at 52, 117 Cal. Rptr. at 444.
266. *Id.* at 847-48, 528 P.2d at 54, 117 Cal. Rptr. at 446.
267. *See* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
268. 13 Cal. 3d at 881, 533 P.2d at 1037, 120 Cal. Rptr. at 397.
269. 13 Cal. 3d at 886, 533 P.2d at 1040, 120 Cal. Rptr. at 400.
270. *Id.* at 888, 533 P.2d at 1041, 120 Cal. Rptr. at 401.
271. *Id.* (citation omitted).

revocation of probation either before or after a probationer's trial on related charges, but insures that this scheduling discretion will not be influenced by the illegitimate desire to gain an unfair advantage at trial."[272] By providing protection coextensive with the scope of the privilege against self-incrimination, the rule also permitted the court to leave unresolved Coleman's constitutional claims.[273]

The opinion concluded with highly detailed guidelines on the application of the new exclusionary rule. The prosecution must give advance notice of its intention to adduce possibly excludable evidence sufficient to permit objection before prejudicial exposure of the evidence to a jury.[274] In making his objection, the probationer-defendant must establish the connection between the criminal charges being tried and the "circumstances in issue at his probation revocation hearing";[275] the burden then shifts to the prosecution to establish by a preponderance of the evidence that the criminal and revocation proceedings are not so related. Similarly, if the objectionable evidence is not the revocation hearing testimony itself but is allegedly derived therefrom, the probationer-defendant must bear the burden of producing evidence of such derivation and the prosecution must then disprove that derivation by a preponderance of the evidence.[276] Although the opinion modeled these procedures after "those applicable to a claim that evidence has been gained directly or indirectly through an illegal search or seizure, a coerced confession, or some other sort of illegal or improper official conduct,"[277] it noted that this body of law was procedurally "somewhat vague, presumably because courts are more troubled by whether certain facts constitute legally proscribed official conduct, than by disputes as to what the facts are."[278]

Notwithstanding the procedural analogies to exclusionary rules which sanction improper official conduct, the opinion discussed at length one

272. *Id.* at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

273. *Id.* at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404 (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)). *Kastigar* held only that immunity from the use of statements (or evidence derived therefrom) was all that was required to compel such statements over assertion of the privilege against self-incrimination. By holding that the relief given Coleman by its supervisory rule made it unnecessary to resolve Coleman's federal constitutional claims, the court did decide, *sub silentio*, that Coleman's federal constitutional rights did not allow him to be free of the ancillary effect of revealing his defenses to a criminal charge as part of his defense in a pretrial probation revocation hearing on related charges, *see* Williams v. Florida, 399 U.S. 78 (1970), or to be free of having his revocation hearing testimony used for impeachment purposes, *see* Harris v. New York, 401 U.S. 222 (1971).

274. 13 Cal. 3d at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

275. *Id.* at 891, 533 P.2d at 1043, 120 Cal. Rptr. at 403.

276. *Id.*

277. *Id.* at 890, 533 P.2d at 1042, 120 Cal. Rptr. at 402.

278. *Id.* at 890 n.20, 533 P.2d at 1042 n.20, 120 Cal. Rptr. at 402 n.20.

respect in which the *Coleman* rule was said to be far less pervasive in effect.[279] Clearly inconsistent testimony which a probationer-defendant volunteers at his trial was made subject to impeachment or rebuttal by his revocation hearing testimony and its fruits:

> [t]he intent of our exclusionary rule . . . is to encourage the fullest possible *truthful* disclosure of relevant facts and circumstances at the revocation hearing by allowing a probationer who does testify at his revocation hearing nonetheless to enjoy unimpaired the full protection of the privilege against self-incrimination at his subsequent trial.[280]

Thus, if a probationer-defendant testified falsely at his revocation hearing, he risked impeachment and discrediting of his true testimony at trial if the latter was clearly inconsistent with his prior testimony; if he testified truly at his revocation hearing but falsely at trial, he risked rebuttal by introduction of his prior testimony.[281] Moreover, a probationer or other witness who testified falsely at either proceeding would be subject to a potential prosecution for perjury, since "[t]he exclusionary rule applicable to revocation hearing testimony of a probationer applies only to a prosecution *against that probationer* which concerns the *same conduct as was at issue at the revocation proceeding*."[282] This did not mean, however, that by giving any testimony at trial a probationer-defendant exposed himself to cross-examination concerning prior testimony at the revocation hearing; if the probationer-defendant's trial testimony did not refer to or contradict his prior testimony, the earlier testimony remained excluded from evidentiary use.[283] And indeed, if in some respect the prosecution was permitted to make use of

279. *Id.* at 893 n.21, 533 P.2d at 1044 n.21, 120 Cal. Rptr. at 404 n.21. The *Coleman* court cited as an example of a more pervasive exclusionary rule the *Miranda* rule, which requires that at least illegally obtained admissions themselves, as opposed to evidence derived therefrom, be excluded from "the prosecution's case in chief in any trial of the victim of the violation . . . ." *Id.* (citation omitted). *Compare* Miranda v. Arizona, 384 U.S. 436, 476, 479 (1966) *with* Michigan v. Tucker, 417 U.S. 433, 445-52 (1974) *and* the "vicarious" California exclusionary rule barring illegally seized evidence "from use against anyone," *see* 13 Cal. 3d at 893 n.21, 533 P.2d at 1044 n.21, 120 Cal. Rptr. at 404 n.21 (citing People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955)). The effect of the *Coleman* rule was analogized to the controversial federal rule of Harris v. New York, 401 U.S. 222 (1971), which held that admissions obtained in violation of *Miranda* could be used to impeach the inconsistent testimony of a defendant at trial. *See* 13 Cal. 3d at 893 n.21, 533 P.2d at 1044 n.21, 120 Cal. Rptr. at 404 n.21. Although the *Harris* rule was applicable in California as a matter of California constitutional law at the time *Coleman* was decided, *see* People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974), it was later repudiated on the strength of Chief Justice Wright's shift in view regarding the independent effects of the California Constitution. *See* People v. Disbrow, 16 Cal. 3d 101, 116, 545 P.2d 272, 281-82, 127 Cal. Rptr. 360, 369-70 (1976) (Wright, C.J., concurring). See also note 258 and accompanying text *supra*.

280. 13 Cal. 3d at 892, 533 P.2d at 1044, 120 Cal. Rptr. at 404.

281. *Id.* at 893, 533 P.2d at 1044, 120 Cal. Rptr. at 404.

282. *Id.* at 893 n.21, 533 P.2d at 1044 n.21, 120 Cal. Rptr. at 404 n.21.

283. *Id.* at 893-94, 533 P.2d at 1045, 120 Cal. Rptr. at 405.

the prior testimony, its origin could not be revealed in a fashion which would also disclose the probationer-defendant as a previously convicted felon.[284]

The opinion did leave a few matters unresolved, particularly those relating to the standard governing the "sound discretion" of a lower court to schedule a revocation hearing in advance of related criminal proceedings or to postpone the revocation hearing until after the criminal trial. Chief Justice Wright appeared to endorse as a general policy the postponement of probation revocation proceedings until after trial on any related charges, but he took note of the problems posed when a probationer has been arrested and remains in custody for a violation of probation. In such an instance, the probationer is entitled to an immediate prerevocation hearing to determine the validity of his detention.[285] It was determined to spare the state "the procedural burden of applying the exclusionary rule to testimony of a probationer adduced at this early stage of the probation revocation process."[286] The plenary revocation hearing must still be held reasonably promptly, however, and thus it was left to the lower courts to decide whether it was more appropriate to hold that hearing in advance of trial, or to subject the probationer-defendant to the possibly extended delay of a postponement until after trial.[287] Finally, the opinion held that its exclusion-

284. *Id.* at 889 n.19, 533 P.2d at 1042 n.19, 120 Cal. Rptr. at 402 n.19.

285. *Id.* at 894-95, 533 P.2d at 1045-46, 120 Cal. Rptr. at 405-06.

286. *Id.* at 896, 533 P.2d at 1046, 120 Cal. Rptr. at 406.

287. *Id.* at 896-97, 533 P.2d at 1046-47, 120 Cal. Rptr. at 406-07. After stating that it was a matter for the "sound discretion" of the trial court whether to permit probation revocation proceedings to commence in advance of the disposition of related criminal proceedings, or, once revocation proceedings have been commenced, to determine how long the formal revocation hearing may be postponed due to concurrent criminal proceedings, without violating the probationer's due process right to a reasonably prompt revocation hearing, the *Coleman* court added: "We do point out, however, that we view it as entirely consistent with the exclusionary rule announced herein and its underlying purposes for a probationer, if desirous of obtaining a speedy resolution of his probation status notwithstanding related criminal liability, to offer to waive the benefit of this exclusionary rule if the court will allow the probation revocation hearing to proceed in advance of disposition of the related criminal liability." *Id.* at 897, 533 P.2d at 1047, 120 Cal. Rptr. at 407. This aspect of *Coleman* has led a commentator to raise a critical eyebrow: "Remarkably, the court in *Coleman* suggested that a defendant could seek a prompt revocation hearing by waiving his right to the exclusionary rule!" *Supreme Court, supra* note 2, at 525 n.53. Presumably the author of the note was surprised that the trial courts, rather than individual probationers, were given the choice between a pre-trial revocation hearing under the *Coleman* rule or postponement until after trial. The *Coleman* opinion itself endorsed leaving revocation proceedings uninitiated altogether until after trial disposition of related criminal charges, and this was what Coleman himself had requested; see note 315 and accompanying text *infra*. If revocation proceedings were begun, however, and then postponed until after criminal charges were resolved, there would arise a new tension between constitutional rights. Lengthy postponement would impinge upon the probationer-defendant's right to a speedy determination of the revocation proceeding. The court did not determine in *Coleman* if this tension could ever reach constitutional proportions, given that no more than a 60-day delay in trial could occur without the probationer-defendant's waiver of his California constitutional

ary rule, having been fashioned in the interest of the sound administration of justice, should for that reason be given prospective effect only.[288] The order revoking Coleman's probation was reversed, however, without comment on this exception to the rule of prospectivity.[289]

D. Supervisory Discretion

The device of the supervisory rule has its origins in the common law of evidence, and hence in the simple necessity of courts to regulate the conduct

right to a speedy trial. *See* CAL. CONST. art. I, § 15; Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 90, 106 Cal. Rptr. 786 (1973). What it did say was that if a probationer felt prejudiced for lack of speedy determination of his probation status, he could increase his chances of convincing the trial court to order a pre-trial hearing by stipulating that this would not result in his subsequent contention at trial that adverse evidence was derived from his earlier testimony, with the prosecution thus subjected to the burden of establishing that its evidence was not so derived. *See* 13 Cal. 3d at 891, 533 P.2d at 1043, 120 Cal. Rptr. at 403; see text accompanying notes 275-76 *supra*.

This concern with the possible burden to the prosecution in proving that trial evidence was not derived from earlier revocation hearing testimony also led the court to make the *Coleman* rule inapplicable at "prerevocation" hearings to determine if an arrest for violation of probation was justified, even though an adverse ruling at such a hearing could result in a probationer's continued custody without the right to reasonable bail which would obtain if he had been arrested solely on new criminal charges.

From Dworkin's perspective, this solicitude for the prosecution's burden of complying with the *Coleman* rule might be subject to valid criticism, *if Coleman* had been decided on *constitutional* grounds. Some explanation would be necessary as to why probationers' moral rights against the state should vary according to the stage of the revocation process or the "sound discretion" of the trial court in scheduling the revocation hearing. Such a balancing of the burden to the state against the fairness to an individual is, of course, a large part of current constitutional law on prisoners' rights, *see, e.g.*, Wolff v. McDonnell, 418 U.S. 439 (1974), but this law may be ill-considered. More important to a Dworkinian analysis is the fact that the *Coleman* rule was promulgated as a matter of legislative discretion, not constitutional right, and, as such, the court was free to decide at what point the policies to be served by the rule justified limiting its applicability. See notes 295-303 and accompanying text *infra*.

288. 13 Cal. 3d at 897, 533 P.2d at 1047, 120 Cal. Rptr. at 407.

289. Had Coleman not been given the benefit of the court's new rule, the court would have had to resolve a ticklish question about whether that rule had indeed made it unnecessary to resolve Coleman's federal constitutional claims. The United States Supreme Court has always given the parties to a case breaking new constitutional ground the benefit of its holding, even if it is otherwise of purely prospective effect, but this practice is "rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies." Stovall v. Denno, 388 U.S. 293, 301 (1967). Since California courts are not constitutionally prohibited from rendering advisory opinions, this constraint had not bound them, and new rulings had frequently excluded even the parties to the cases in which they were announced from their immediate benefit. Just three days before *Coleman* was decided, however, the court changed course and began granting the parties to a case the benefit of its otherwise prospective ruling. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 829-30, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975); *id.* at 830-32, 532 P.2d at 1245-46, 119 Cal. Rptr. at 877-78 (Mosk, J., concurring and dissenting). The *Coleman* court thus did not need to consider whether Coleman would have been entitled to the immediate benefit of a ruling in his favor on federal constitutional grounds, even though his immediate benefit from such a ruling by a federal court would have been attributable in part to the jurisdictional structure of the federal judiciary rather than to the nature of Coleman's personal rights under the federal Constitution.

of proceedings before them in the absence of any other source of regulation.[290] For decades, however, the basic rules of evidence relating to such matters as relevance, reliability, privilege, and burdens of production and proof have been settled, and this has encouraged the codification of these rules in statutory or quasi-statutory form.[291] Courts have not, however, abdicated their own responsibility to control the conduct of judicial proceedings. As the rules governing the admissibility of evidence in terms of its substance have become codified, judicial attention has turned to the procedure by which that evidence has been obtained.

The most celebrated instances of judicial exclusion of otherwise admissible evidence have held that exclusion was a constitutional right of a person against whom the evidence was offered. Thus in *Weeks v. United States*,[292] evidence seized from the defendant by federal agents in violation of the Fourth Amendment was ruled inadmissible in a federal court; similarly in *Mapp v. Ohio*,[293] it was held that the Fourteenth Amendment, which had already been construed as making the Fourth Amendment applicable to the states, required the exclusion of illegally seized evidence from use in the prosecution of the victim of the Fourth Amendment violation. And in *Miranda v. Arizona*,[294] admissions obtained during custodial interrogation from an uncounseled suspect in the absence of prophylactic warnings were held inadmissible against that suspect on the basis of the Fifth, Sixth, and Fourteenth Amendments, even though the admissions might otherwise have been allowed in evidence under traditional constitutional and evidentiary standards of voluntariness.

The advent of nonconstitutional exclusionary rules promulgated pursuant to supervisory powers has accompanied the growth of these constitutional exclusionary rules. In the federal courts, supervisory rules became a favored means of establishing and maintaining "civilized standards" of procedure and evidence without imposing them upon state courts as a matter of constitutional due process.[295] Thus the United States Supreme Court justified the exercise of its supervisory authority over the administration of criminal justice in the federal courts on the theory that it had, since its inception, propounded rules of evidence to be applied in federal criminal prosecutions, and that "in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not

290. *See* 1 J. WIGMORE, EVIDENCE, § 8*c*, at 262 (3d ed. 1940).

291. *See generally* FED. R. EVID.; CAL. EVID. CODE (West 1976 & Supp. 1977).

292. 232 U.S. 383 (1914).

293. 367 U.S. 643 (1961).

294. 384 U.S. 436 (1966).

295. McNabb v. United States, 318 U.S. 332, 340 (1943). *See also* Rea v. United States, 350 U.S. 214 (1956) (federal court ordered to enjoin federal agent from testifying in state court as to fruits of illegal search).

limited to the strict canons of evidentiary relevance."[296] Similarly, the California Supreme Court employed a supervisory rule to exclude illegally seized evidence from use in California courts long before *Mapp* made this a federal constitutional requirement.[297] Supervisory powers have also been employed to require a complete retrial "to see that the waters of justice are not polluted" by the "impurity" of perjury,[298] to afford a defendant discovery of exculpatory documents possessed by the prosecution,[299] and to allow a new trial without any showing of prejudice in a civil case in which jury selection had been tainted by "class distinctions and discriminations which are abhorrent to our democratic ideals of trial by jury."[300]

All of these cases in which courts have invoked their supervisory powers to take action not otherwise required by constitution, statute, or common law rule have offered as justification not the rights of the parties before them, but "some strong social policy."[301] Although variously expressed, the central concern was for the integrity of the administration of justice. This required concern for the method of adjudication as well as its outcome;[302] its focus was on the institution of justice rather than on the participants.[303] As such, it was inescapably legislative in nature, and it was therefore inescapably discretionary.

There is no sound reason to object to this variety of judicial legislation. Since it involves matters of procedure rather than the substantive relations of parties outside the courts, it does not pose the ex post facto problems which Dworkin attributes to judicial decisions generated by concern for social policy rather than individual rights.[304] Since it involves only participants in the adjudicatory process, and principally in the criminal justice system, it affects the immediate interests of a very limited constituency about which

296. McNabb v. United States, 318 U.S. 332, 341 (1943).

297. People v. Cahan, 44 Cal. 2d 434, 442, 282 P.2d 905, 910 (1955).

298. Mesarosh v. United States, 352 U.S. 1, 14 (1956).

299. People v. Riser, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13-14 (1956).

300. Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 225 (1946). *See also* Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 124-25 (1956) (supervisory powers invoked to remand case to administrative board over which Court had appellate jurisdiction, for hearing on allegations of perjured testimony; it was said that "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Id.* at 124.).

301. On Lee v. United States, 343 U.S. 747, 755 (1952).

302. *See* McNabb v. United States, 318 U.S. 332, 344 (1943) (procedural requirement of prompt arraignment "constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.").

303. *See* People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955) ("Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' ").

304. *See* DWORKIN, *supra* note 3, at 85.

judges are particularly well informed. In this context the usual arguments of the superiority of popularly elected legislatures over panels of judges as mechanisms for balancing competing interests and making law have little force.[305] In a broader sense, of course, supervisory rules have a great impact on the public as a whole, insofar as they affect conviction rates, or litigation costs, or confidence in law and the courts. But this is hardly objectionable, given the independent constitutional status of the judiciary as one of the three branches of government, all of equal dignity.[306]

In Dworkin's view, judicial decisionmaking is generally neither legislative nor discretionary because it is addressed to arguments of principle, to

305. *See id.*

306. Indeed, it has been asserted that the principle of separation of powers is sufficient to create doubt whether supervisory rules, even though legislative in character, are subject to legislative repeal. Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 41-42 (1958). This seems to have been the view of Justice Roberts, who in a concurring opinion joined in by Justices Brandeis and Stone, declared that the doctrine of entrapment is not a defense dependent upon the intent of Congress, but is rather "a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring).

The issue of whether there is inherent judicial power to acquit an entrapped defendant has continued to divide successive generations of justices of the United States Supreme Court. In Sherman v. United States, 356 U.S. 369 (1958), Justice Frankfurter, joined by Justices Douglas, Harlan, and Brennan, expressly adopted Justice Roberts' position in *Sorrells* and cited the subsequently evolved doctrine of supervisory powers as the basis for the inherent power articulated by Justice Roberts. *Id.* at 378-85 (Frankfurter, J., concurring in the result). In United States v. Russell, 411 U.S. 423, 428-36 (1973), the Court held by a bare majority of five to four that Justice Roberts' arguments in *Sorrells* should not be adopted, and that the defense of entrapment was a creature of congressional intent rather than judicial authority. In *Russell*, however, Justice Rehnquist's opinion for the Court left open whether the conduct of the police might ever be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." 411 U.S. at 431-32 (citation omitted). When Justice Rehnquist sought to extend *Russell* to a per se rule that a defendant predisposed to crime could never invoke the entrapment defense, no matter how outrageous the governmental conduct encouraging the crime, he lost his majority. Hampton v. United States, 425 U.S. 484, 488-91 (1976) (plurality opinion). Justice Powell, joined by Justice Blackmun, insisted that it remained an open question whether due process rights or the Court's supervisory powers might be the basis for acquittal of even a predisposed defendant entrapped through outrageous police conduct. 425 U.S. at 492-95 (Powell, J., concurring in the judgment). Justice Brennan, joined by Justices Stewart and Marshall, expressly stated that the defendant in *Hampton* should be acquitted "under our supervisory power," without reaching whether the police conduct there in issue was foreclosed to the states under the due process clause. 425 U.S. at 500 n.4 (Brennan, J., dissenting). *Cf.* Esteybar v. Municipal Court, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971) (Wright, C.J.): "Since the exercise of a judicial power may not be conditioned upon the approval of either the executive or legislative branches of government," the California Constitution's guarantee of separation of powers did not permit the legislature to condition the power of a magistrate to reduce a charge from a felony to a misdemeanor only with the consent of the district attorney. *Id.* at 127, 485 P.2d at 1145, 95 Cal. Rptr. at 529.

the status of individuals vis-à-vis each other and the state, and because it strives for consistency in its treatment of individuals and in its reasoning about their rights.[307] Judicial exercise of supervisory powers does not depart entirely from this model. As *Reynolds* indicated, courts must be more concerned with ensuring fair treatment of individuals through supervisory rules than with ensuring fair treatment of the government, which has at its command the traditional legislative means to serve the interests of the public through the medium of the state.[308] While *Coleman* indicates that justification and consistency are still powerful and desirable influences on judicial rulemaking even in a legislative capacity,[309] this judicial gloss on judicial legislation cannot conceal its fundamentally discretionary aspect.

Although often inspired by constitutional values or statutory policies, supervisory rules by their very terms are ad hoc adjustments to the judicial process. There are obviously manifold areas where that process could be altered to yield more perfect justice. Every adjustment is not a matter of constitutional right; beyond some minimum, further improvement requires legislative judgment, a balancing of social cost versus social gain. We have always recognized a legislative capacity for court reform, from the Field Code of 1848 to today's small claim courts. When legislative reforms occur, the fact of the reform does not establish that its beneficiaries were entitled to it all along, or that the legislature was wrong for not enacting it earlier. This process of choice is the same when judges address the problem of court reform. Although the proper scope of their concern is far more limited, judges too must make choices and weigh alternatives when considering if action not otherwise required is in the interests of justice. As *Coleman* illustrates, such choices are not uncommonly posed by hard cases of criminal procedure, and Chief Justice Wright responded admirably.

When it is accepted that supervisory powers are discretionary, that they serve larger ends than the vindication of the immediate rights of the litigants before the court, the *Coleman* case can be fully appreciated. Its beauty is in its balance. The opinion itself styles its exclusionary rule as less than pervasive in effect by permitting use of revocation hearing testimony for purposes of impeachment.[310] In copious detail, however, the opinion imposes requirements of genuine and premeditated inconsistency before the exclusionary rule may be overcome.[311] Chief Justice Wright sets out at length the procedures governing its assertion and enforcement, demonstrat-

307. See text accompanying notes 81-85 *supra*.

308. Reynolds v. Superior Court, 12 Cal. 3d 834, 845-46, 528 P.2d 45, 52-53, 117 Cal. Rptr. 437, 444-45; see text accompanying note 264 *supra*.

309. *See, e.g.*, 13 Cal. 3d at 890 n.20, 533 P.2d at 1042 n.20, 120 Cal. Rptr. at 402 n.20.

310. *See* 13 Cal. 3d at 893 n.21, 533 P.2d at 1044 n.21, 120 Cal. Rptr. at 404 n.21.

311. *See id.* at 889, 893-94, 533 P.2d at 1042, 1044-45, 120 Cal. Rptr. at 402, 404-05.

ing their basis in precedent and explaining their operation in practice.[312] Notwithstanding this dedication to clarity, his opinion appreciates the burden it may impose upon the prosecution to show that its evidence was not derived from pre-trial revocation hearing testimony, and strives to reduce that burden by making the rule inapplicable to prerevocation hearings.[313] Finally, and most important, it leaves scheduling discretion to the trial courts.[314] Coleman himself had requested the creation of a per se rule requiring that revocation hearings be postponed until disposition of related criminal charges, and the court's failure to discuss this alternative has been justly criticized.[315] But as that commentary points out, important competing interests bear on the scheduling decision, and a per se rule would have prejudiced considerations of public safety and prosecutorial efficiency.[316]

All of these elements establishing a balance between fairness to probationer-defendants and to the public interest in an unburdened prosecutor would be cause for concern if *Coleman* had been decided on constitutional grounds, and if constitutional rights were in the balance rather than discretionary efforts to improve the machinery of justice. Use of the supervisory rule to serve such public as well as private purposes was familiar to Chief Justice Wright, however. He had previously ruled that admissions made in juvenile court proceedings were inadmissible in a related criminal prosecution, on the basis of a policy of encouraging the settlement of criminal cases through cooperation with juvenile authorities.[317] He had also propounded a judicially declared rule of criminal procedure entitling probationers to retained or appointed counsel to assist them at revocation proceedings, finding public as well as private interests served by the contribution of counsel to orderly and just proceedings.[318] Nor was he irrevocably committed to supervisory rulings only when they benefited defendants; a few months after *Coleman* was decided he was to write an opinion discarding a longstanding cautionary instruction reflecting adversely on the credibility of the prosecutrix in sex offense cases.[319] In all of these cases, as in *Coleman*, supervisory rules were employed to serve public policy as well as individual interests; in all of these rulings, as in *Coleman*, the court acted with authority, resolving hard cases and nagging problems without a single dissenting vote.

312. *See id.* at 889-92, 533 P.2d at 1042-44, 120 Cal. Rptr. at 402-04.
313. *See id.* at 896, 533 P.2d at 1046, 120 Cal. Rptr. at 406.
314. *See id.* at 897, 533 P.2d at 1047, 120 Cal. Rptr. at 407.
315. *See Supreme Court, supra* note 2, at 523.
316. *See id.* at 523-27.
317. Bryan v. Superior Court, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972).
318. People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).
319. People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

In these decisions, Chief Justice Wright and his colleagues displayed the informed discretion necessary to advance the cause of justice. These rulings demonstrate that one way to approach hard cases of criminal procedure is to formulate discretionary solutions through supervisory rules; they also demonstrate that Chief Justice Wright employed such discretion as the legislative instrument it is, balancing the advancement of social goals against newly created individual rights. But, one might ask, where is the valor which I promised to find in Chief Justice Wright's discretion?

Conclusion

This essay has not addressed whether judges deciding constitutional cases in a court of last resort have discretion in their decisions. Certainly their conduct is not unbridled. I doubt that Hart ever meant to suggest that it was, and Dworkin has demonstrated that it surely is not. But it is quite another matter to assert, as Dworkin has, that judicial obligation in deciding constitutional cases, no matter how doubtful, displaces all discretion. It is a moot point with regard to the *Coleman* case; I suspect for practical reasons that it is a moot point altogether.

It is useful to argue against discretion in order to impress upon judges their obligation to act in a conscientious manner, but it does not inform us how judges cope with their limitations as human beings possessing finite time and resources. Hard cases pose problems of judicial candor and institutional error which often control their outcomes, despite the best intentions of the deciding judges. The candor of judges in acknowledging the inconsistency of inconvenient precedent, to themselves as well as to the colleagues for whom they may be drafting an opinion, will have a significant impact on the decision of the court. The readiness of judges to declare precedent mistaken is equally significant and equally imponderable; when they give grudging interpretations to precedent they are unwilling to overrule forthrightly, they condone implicitly the tendency to disregard precedent. This subtle debasement of the concept of *stare decisis* increases the apparent discretion with which decisions are reached.

However debatable the propriety of judicial discretion in constitutional adjudication, and regardless of whether decisionmaking without discretion is considered the ideal of adjudication, it is indisputable that the perceived constraints of precedent and principle will shield no judge against public and political outcry at an unpopular decision. When judges do take rights seriously, as Chief Justice Wright did, they must truly possess courage as well as convictions. Chief Justice Wright's courage in constitutional cases is beyond dispute, and it was a courage born of a sense of duty. As he wrote after his decision invalidating the death penalty in California:[320]

320. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

> I do not claim the infallibility of court decisions that attack particular legislation. Some such decisions, I am certain, are written in good faith error, and men of integrity are always compelled to express their differing views on the merits of court action. Such attacks on the correctness of certain decisions invalidating legislation caution me to exercise great care but do not disturb me. I am disturbed, however, by attacks that go beyond the merits of issues and challenge the compulsion imposed upon the court and even the court's right to examine and reexamine legislation in light of prevailing constitutional tests. . . .
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> . . . You may, if you wish, disagree with us on the merits, but you should not challenge our right and our duty to make the determinations on the constitutional problem with which we were confronted.[321]

For Chief Justice Wright, then, the duty was to decide, to confront the issues, to measure them against precedent and principle and to rule as seemed fit. It was a process which could produce a "good faith error"[322] and called for an " 'ordeal of judgment [which] cannot be shirked.' "[323] Part of the process was to have the courage to take small steps when the footing was unsound. When rights were in doubt, it was necessary to resort to legislation, advancing the public interest in a balanced way when it could not or need not be decided that some improvement on justice was a matter of right instead of good sense and sound policy.

If there is anything Dworkin has shown, it is that the march of constitutional progress is taken one step at a time. Even when there is some signal advance, if it is appropriately justified in institutional history and political morality, it will proceed along stepping stones of precedent and principle already laid down in the flow of adjudication and the evolution of society. Cases such as *Coleman* fulfill this function well, advancing constitutional values with moderation and unanimity, treading softly to test new ground for support. If secure footing is found, what has proved reasonable and workable quite naturally acquires a vested status; possession of the new ground ripens into title and a claim once novel becomes a right.

That this is happening in the aftermath of *Coleman* is clear from two of Chief Justice Wright's final opinions. In *Allen v. Superior Court*,[324] the solicitude for Fifth Amendment values described in *Coleman* and *Reynolds* culminated in an independent construction of the state constitution to give greater protection against self-incrimination than that required by the federal Constitution. In *Daly v. Superior Court*,[325] *Coleman* was described as

321. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1262-63, 1274 (1972).

322. *Id.* at 1263.

323. *Id.* at 1275 (quoting Trop v. Dulles, 356 U.S. 86, 104 (1958)).

324. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).

325. 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977).

setting forth not a mere supervisory rule but a "judicial grant of immunity,"[326] a term of constitutional art which implies that *Coleman* is gaining constitutional standing. The time may be ripe to deal with the rights left dangling in *Coleman*[327]—the trail has been blazed.

Thus I conclude that Chief Justice Wright showed valor not only in the context of constitutional adjudication, where discretion is debatable, but also in his use of supervisory powers, where discretion is undeniable. The courage of conviction which he brought to constitutional cases cannot be minimized, but it was matched in his more subtle exercise of supervisory powers. Emboldened by a sense of duty and restrained by a sense of fallibility, patiently marshalling support for initiatives in the administration of justice, he used judicial legislation to test improvements in adjudicatory procedure, and carried the court with him through his reasonableness and humility. Dworkin's Hercules could learn from Chief Justice Wright, for his contributions to criminal procedure serve "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."[328] Chief Justice Wright is, in person even more than in opinion, a very humble man. That humility, more than his office, allowed his courage to be catching and inspired his colleagues to join in exploration of new paths in the law. He no longer controls the course of the law, but his opinions remain to beckon his successors in the right direction.

326. *Id.* at 146, 560 P.2d at 1202, 137 Cal. Rptr. at 23.

327. The *Coleman* rule appears to have had little effect in deterring the routine scheduling of revocation hearings in advance of trial on related charges. One court of appeal has gone so far as to state that the language in *Coleman* encouraging postponement of revocation hearings in such circumstances "is of little, if any, consequence" because the *Coleman* court did not make postponement mandatory. People v. Sharp, 58 Cal. App. 3d 126, 129, 129 Cal. Rptr. 476, 478 (1976). The same court went on to approve the practice of the San Francisco Superior Court of setting "virtually all probation revocation hearings prior to trial, without exercising discretion in each case." *Id.* at 130 & n.1, 129 Cal. Rptr. at 478 & n.1.

328. DWORKIN, *supra* note 3, at 130.