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Jurisprudential oaks from mythical acorns: The Hart-Dworkin debate revisited

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Abstract. This article attempts to demonstrate, via the famous Hart-Dworkin debate on the nature and functions of judicial discretion, that substantial jurisprudential disputes as well as theories can, and do, arise from misconceived critiques, whether intended or otherwise. It also seeks to show that, whilst Dworkin's initial critique of Hart was misconceived, his theory of adjudication that arose as a result of responses to his initial views is a positive contribution to learning, although I argue that Dworkin's views are not, in the final analysis, sufficiently persuasive to constitute a radical departure from Hart's own views.

I. Introduction

The broader purpose of the present essay lies in an attempt to establish one simple, yet important, methodological point – that substantive jurisprudential disputes as well as theories can, and do, arise from misconceived critiques, whether intended or otherwise. I propose to illustrate this point by reference to one of the most famous jurisprudential debates in recent memory, viz., the debate between H. L. A. Hart and R. M. Dworkin on the nature and functions of judicial discretion (see, generally, Hart 1961, 1976, 1977; Dworkin 1978, 1986). The basic parameters of this debate are well-known, and I shall not be primarily concerned with the substance of the debate itself, save where recourse to it would aid in the illustration of the main point mentioned above. I do hope, however, that, in the course of more specific discussion, a further substantive aim may be realized, viz., to reinstate in proper context the views of Hart who has been most courteously restrained in his defence (see Hart 1976, 1977). It might be added that Hart's views in this particular sphere were, in any event, by no means his central concern, his contributions straddling, in fact, so many different and

significant areas that he may, without exaggeration, be considered one of the most important jurists in Anglo-American jurisprudence (for recent studies on Hart and his work, see Hacker and Raz 1977; MacCormick 1981; Martin 1987; and Leith and Ingram 1988).

I shall attempt to demonstrate, in as succinct a manner as possible, that Dworkin's initial critique of Hart was misconceived, and that his views are, in the final analysis, at best broadly similar to those propounded by Hart three decades ago. Dworkin's critique centred around what he perceived to be Hart's endorsement of judicial discretion in the penumbral area; Dworkin's views (later developed into a full-blown theory) are that judges do not, and ought not to, exercise discretion, save in a very limited manner (see, especially, Dworkin 1978, 1985, 1986). It ought to be mentioned, at this juncture, that such a critique ought, by its very terms, to have aroused *prima facie* suspicion about its appropriateness, for the passages that were the object of Dworkin's ire actually occurred in a chapter of Hart's book (Hart 1961, 121–50) which was, in part at least, a rather strong critique of American Realism[1] that (in its most extreme forms at least) connotes unbridled judicial discretion and fiat. One might perhaps argue that such an observation is inconclusive of the error of Dworkin's approach in so far as Hart did in fact allow for at least some judicial discretion, whilst Dworkin's thesis (as it later turned out) proscribed the exercise of judicial discretion altogether. This argument is perfectly valid, and I want, therefore, to argue the point in a more substantive fashion. I will first briefly outline Dworkin's dissatisfaction with Hart's views on judicial discretion. I will then proceed to set out key passages from Hart's own writings which clearly illustrate that Dworkin was wrong in giving the impression that judicial discretion (in the Hartian sense) was somehow illegitimate because it was undemocratic and unfair. I will then briefly examine the thrust of Dworkin's own writings in order to demonstrate that Dworkin has not only unwittingly "liberalized" his own views in substance but also that the strongest interpretation that can be taken of his (especially, latest) views places him in almost exactly the same position that Hart adopted initially many decades ago. I will then conclude by generalizing from the "Hart-Dworkin experience," and also argue why, despite somewhat colossal misinterpretations (as was the case here), jurisprudential theory is usually better off on the whole in any event.

II. Dworkin's Critique

As already alluded to above, Dworkin criticized what he perceived as Hart's advocacy of judicial discretion when no rule covered a "hard case."

[1] On the intellectual origins and development of American Realism, see, generally, Twining 1973; Purcell 1973; Kalman 1986. See, also, Taylor 1972; Livingstone 1988. A more recent writing by Hart in this context is Hart 1977. Hart also critiqued the other extreme, viz., formalism.

Dworkin was prepared to concede that some discretion in what he termed the "weak sense" inasmuch as *some* judgment had to be exercised by the judge whose decision might be deemed under law to be final (Dworkin 1978, 32; but cf. Tapper 1971, 633), but was totally opposed to discretion in the "strong sense" – which simply meant that the judge was *not bound* by standards set by the authority in question.[2] It is, I think, important to underscore the precise nature of Dworkin's argument. His argument is one that is not met by the fact that judges have guidelines that *may* be taken into account. In a later elaboration, Dworkin propounds the rationale for such a strict approach – to allow the judge free choice, so to speak, was to court the twin evils of undemocratic action (judges not being elected officials) and blatant unfairness (in so far as litigants have existing political rights which should be enforced, whereas judicial discretion allowed new legal rights to be imposed retroactively) (Dworkin 1978, 84–86). In his view, judges should decide on grounds of *principle* and not policy, the latter being within the legitimate province of only the legislature; and the concept of a "principle" was stated by Dworkin himself to constitute a standard which is observed ". . . because it is a requirement of justice or fairness or some other dimension of morality" (Dworkin 1978, 22). Dworkin's initial views (see, especially, Dworkin 1978, 14–80) generated a relatively large response in the form of rather persuasive critiques – all of which "forced" Dworkin, as it were, to propound a viable "no discretion" theory of his own, the main foundations of which are to be found in "Hard Cases" (Dworkin 1978), and are most fully developed in his latest book (Dworkin 1986). Before briefly considering the positive part of Dworkin's programme, I want to refer (as already mentioned above) to Hart's own writings – to demonstrate, in essence, that Dworkin's critique, as briefly outlined in the present section, was misconceived from its very inception.

III. "What Hart Really Said"

Dworkin's critique focuses, in the main, upon one particular section of Hart's book (see, generally, Hart 1961, 121–50) which, as already alluded to above, was a critique of both formalism on the one hand and rule scepticism (a direct reference to American Realism) on the other. It is true that Hart talks about the "open texture" of law in borderline cases and the consequent need for the exercise of judicial discretion. What Hart did *not*, however, argue for (as Dworkin states) is totally unconstrained discretion. If he had had that notion in mind, he would not have expended so much time and effort in refuting the sceptical premises of American realism in the first place. There is, however, at least one passage in the "offending" chapter which points to

[2] Such "standards" presumably refer to "principles": see *infra*.

the need for judicial *restraint*; in Hart's view, the predictive element in realism must have a proper basis and that ". . . the basis for such prediction is the knowledge that the courts regard legal rules not as predictions, but as *standards* to be followed in decision, determinate enough, in spite of their open texture, *to limit, though not to exclude*, their discretion" (Hart 1961, 143; emphasis added). What exactly are these "standards"? They seem to me to be akin, if not identical, to Dworkin's concept of "principles" referred to above.

The main linguistic support for the proposition that Dworkin's critique was misconceived is, however, to be found in *another* part of Hart's work – in a chapter entitled "Laws and Morals" (Hart 1961, 181–207). The actual passage in question is to be found in a discussion of (as Hart himself put it) "legal validity and moral value" (Hart 1961, 195–207), in particular the process of *interpretation*[3] wherein the choice between moral values is concerned. Hart refers, in fact, to the chapter which Dworkin fixes upon for critique, and rightly so, since the very nature of the discussion involved elements of judicial discretion in borderline cases. Hart, at this juncture, adopts, once again, a compromise approach between formalism on the one hand and rule scepticism on the other; and the crucial passage, which has, unfortunately, been little referred to, is (because of its great importance) set out in full as follows:

> At this point judges may again make a choice which is neither arbitrary nor mechanical; and here *often* display *characteristic judicial virtues*, the special appropriateness of which to legal decision explains why some feel *reluctant to call* such judicial activity *"legislative"*. These virtues are: *impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected*; and *a concern to deploy some acceptable general principle as a reasoned basis for decision*. No doubt because a *plurality* of *such principles* is *always possible* it *cannot* be *demonstrated* [emphasis here is the author's] that a decision is *uniquely correct*: but it may be made acceptable as *the reasoned product of informed impartial choice*. In all this we have *the "weighing" and "balancing"* characteristic of the effort to do justice between competing interests. (Hart 1961, 200; emphasis, except where otherwise indicated, mine)

Hart proceeded to argue that, although the elements mentioned in the quotation above were important in rendering decisions acceptable and could in fact constitute moral elements, they were *not* to be considered as evidence of the *necessary* connection between law and morals, simply because ". . . the same principles have been honoured nearly as much in the breach as in the observance" (Hart 1961, 200–1). Whilst the more general context of the passage quoted had therefore to do with the necessary connection (or otherwise) between law and morality, the specific context concerned the

[3] This was, in fact, the actual sub-heading utilized by Hart wherein the passage concerned occurs, and is of especial significance simply because this is the current linchpin of Dworkin's latest work discussed below.

process of judicial interpretation and the elements characteristically utilized. What can, in fact, be gleaned from the above-mentioned quotation? Careful analysis will, it is submitted, yield the following.

First, the "judicial virtues" Hart refers to are (as he points out) intended to *constrain* the discretion exercisable by the judge concerned. One ought, in this regard, to pay especial attention to the third element, viz., ". . . a concern to deploy some acceptable general principle as a reasoned basis for decision"; this element is, I submit, a clear reference to Dworkin's concept of "principles" – an argument which is further strengthened by the *context* in which this element is to be found having regard, in particular, to the other two elements which stress the need for a *reasoned* approach toward judicial interpretation as embodied in the quotation above. The *date* at which this was written ought to be re-emphasized because it is absolutely crucial to the central argument of this essay – Hart's views were unambiguously *prior* to Dworkin's critique which, on this score at least (with regard to Hart's alleged omission to consider the importance of "principles"), must, it is respectfully submitted, be rejected. It should also be noted that Hart did, in fact, reiterate his views in a contribution published some six years later (Hart 1967, 271). And Hart's most recent published views appear to support these arguments. It ought to be mentioned that these views occur, in fact, in an overview of his former views as well as an indication of his latest opinions, the elaboration of which is still eagerly awaited. On the critique of his work to the effect that "I thought that judges, when they reach a point at which the existing settled law fails to determine a decision either way, [they] simply push aside their law-books and start to legislate *de novo* for the case in hand without further reference to the law" (Hart 1983, 6–7), Hart argues that

> [i]n fact this has never been my view, and at various points in Essays 3 [Hart 1967] and 4 [Hart 1977] I show that among the features which distinguish the judicial from legislative law-making is the importance characteristically attached by courts, when deciding cases left unregulated by the existing law, to proceeding by analogy so as to ensure that the new law they make is *in accordance* with *principles or under-pinning reasons which can be recognized as already having a footing in existing law* (Hart 1983, 7; emphasis added)

He goes on to add that he does not, however, advocate or concede to "the correctness of a general holistic theory of law as a gapless system of entitlements, such as Dworkin has advanced" (Hart 1983, 7), and argues that

> though the search for and use of *principles* underlying the law defers the moment, it cannot eliminate the need for judicial law-making since in any hard case different principles supporting competing analogies may present themselves and the judge will have to choose between them, relying like a conscientious legislator on his sense of what is best and not on any already established order of priorities among principles already prescribed for him by the law. (Hart 1983, 7; emphasis mine)

Secondly, Hart acknowledges, however, that an element of discretion (albeit constrained in the manner described above) must *inevitably* exist in so far as it ". . . cannot be *demonstrated* that a decision is uniquely correct." This proposition contrasts, of course, with Dworkin's contention (to be discussed below) to the effect that there is one uniquely correct answer to every legal conundrum. Three comments should be made at this juncture. In the first place, the cumulative effect of both observations just made is that if Hart is accepted as subscribing to the concept of "principles" in the Dworkinian sense, then Dworkin was not, in fact, stating anything that would advance understanding of the process of judicial decisionmaking. Secondly, the difference between Hart and Dworkin is reduced to one basic issue: Given the existence as well as application of principles, do judges in fact exercise discretion in applying them? Hart's answer is obviously in the affirmative, whilst (as we shall see) Dworkin's answer is to the contrary. It is my view that, at this point, the ball is in Dworkin's jurisprudential court, so to speak; one major contribution, viz., that of reference to the significance of "principles" (which, incidentally, is expressly reflected in the title to one of Dworkin's books: see Dworkin 1985), is really not an advance on Hart's views at all. This does not, admittedly, answer Dworkin's main point, which is to the effect that judges do not, and ought not to, exercise discretion at all. It is my contention, however, that, at this point, the onus falls upon Dworkin to demonstrate that there is, indeed, a "no discretion" theory which is superior to Hart's views centring around the concept of "balancing" referred to above. And it will be my further contention that Dworkin does not succeed in this enterprise. I will attempt to demonstrate that Dworkin's theory is not without merits but that it does not, in the final analysis, state anything that cannot already be found in the views of Hart cited above. I will, in other words, seek to show that both Hart's as well as Dworkin's views are, in *substance*, the same. We have thus now to turn to Dworkin's own programme.

IV. Dworkin's "No Discretion" Thesis

Dworkin's "no discretion" thesis is, as mentioned above, in many ways, a logical development of responses to various criticisms of his initial ideas. It should be pointed out at the outset that although there have been many ostensible "versions" of Dworkin's thesis, the core and foundation of his thesis may, it is submitted, be traced to his seminal article, "Hard Cases" (Dworkin 1978, 81–130). In that article, Dworkin advanced his now-famous "rights thesis" constructed by his superhuman judge Hercules and premised upon the proposition that judges enforce *existing* legal rights in the context of institutional constraints to be found in the legal history itself – in

other words, that judicial decisions are, and ought to be,[4] premised upon principle and not (unconstrained) policy. Hercules must, in Dworkin's words, ". . . construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well" (Dworkin 1978, 116–17). The task is, of course, massive, involving both a vertical as well as horizontal ordering of principles as embodied within the totality of legal decisions (Dworkin 1978, 117). For completeness, Dworkin also provides for a "theory of institutional mistakes" (Dworkin 1978, 118–23). And at least in so far as the common law was concerned, Dworkin referred to the concept of the "gravitational force" of precedent where decisions were decided solely on the basis of principle (Dworkin 1978, 110–15; but cf. Pannick 1980).

Many criticisms have, in fact, been levelled against Dworkin's "rights thesis", too numerous to mention here (see, e.g., Cohen 1984). I will not attempt to retrace ground already well-covered by others but will focus upon what appears to me at least to be so crucial an objection to Dworkin's arguments that he ought ultimately be forced to accept the idea of restrained judicial discretion advocated by Hart in the preceding Section. Before proceeding to this particular critique, however, let us briefly describe Dworkin's latest views. As already alluded to above, it is my contention at least that these views do not add anything substantial to the arguments canvassed in "Hard Cases"; if nothing else, they tend to bring Dworkin's views closer to those of Hart's.

The first major piece after "Hard Cases" was "How Law is Like Literature" (Dworkin 1985, 146–66) wherein Dworkin drew upon the tradition in literary theory termed "interpretation." Building upon (but not detracting from) the main concepts first enunciated in "Hard Cases", Dworkin was of the following view:

> Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is. (Dworkin 1985, 159)

There were, according to Dworkin, two stages in the process of interpretation. The first pertained to what Dworkin termed the "dimension of

[4] It is not always clear whether Dworkin is advocating a descriptive or prescriptive theory. A close perusal of certain passages in his work suggests that he is advocating both, i.e., that judges do and, in any event, ought to decide in accordance with principle: see, e.g., Dworkin 1978, 123, 129–30. In so far as Dworkin's theory can only be administered by a superhuman judge (viz., Hercules), it is submitted that the theory is more normative in nature.

fit''; the judge, in other words, had to ascertain which of several competing interpretations sufficiently fit the legal history concerned. Secondly – and this was more particularly within the dangerous ''reach'' of judicial discretion – assuming that there was more than one interpretation that plausibly satisfied the requirement of ''fit'' just mentioned, the dimension of ''substantive political theory'' came into play, providing, as it were, a test of the ''merits.'' This process was not new, as already alluded to above, although in ''Hard Cases'' itself, Dworkin confined discussion in this context to the constitution (see Dworkin 1978, 106–7). The significant point for our present purposes was that by expressly advocating this dual process, Dworkin lay himself increasingly open to criticism simply because the very nature of Dworkin's approach appears to entail the exercise of discretion by the judge concerned.

Dworkin's latest work (Dworkin 1986) is a book-length elaboration of the ideas just described; he expanded upon the ''interpretive enterprise'' begun some years earlier, and advocated a preferred conception of law which he termed ''law as integrity'' (see, especially, Dworkin 1986). I shall not dwell at length upon these latest views simply because to do so would require an inquiry beyond the scope of this more modestly intended essay. It will suffice to state that any additions by Dworkin do not detract from the general thrust of his views on adjudication as delineated above, the only significant difference centring around the distinction between hard and easy cases. Dworkin appears to have dispensed with this distinction, his theory applying to easy cases as well (see, e.g., Dworkin 1986, 266, 354). This approach, it is submitted, accords with good sense, for a *general theory* (as presently advocated by Dworkin) *ought* to be equally applicable to easy cases.

It is admitted that the above-mentioned survey of the most basic thrust of the development of Dworkin's theory does not, by any means, do justice to the richness of argumentation and detail to be found in his work. I hope, however, to have set, as it were, the jurisprudential stage for the following comments that are related to the main focus of the instant article. It is, in particular, hoped that the reader would be able to discern, by now, a gradual shift toward what I have already termed a ''liberalization'' of Dworkin's views on judicial discretion. With his adoption of the concept of ''interpretation,'' Dworkin has, in fact, been compelled to emphasize the element of ''judgment'' on the part of the court – a point which he dealt with relatively briefly in his initial critique of Hart via the distinction between ''weak'' and ''strong'' senses of discretion. Quite apart from whether this distinction is viable in more than a semantical manner, there is a deeper, more potentially disturbing, problem which concerns the personality and convictions of the judge himself. In ''Hard Cases'', Dworkin acknowledged this problem, but did not, it is submitted, deal with it in a systematic fashion, as will be discussed below. On the whole, Dworkin, in responding to his critics, has had, in fact, his theoretical ground eroded even whilst in the process

of simultaneously constructing a larger thesis. He has, it is submitted, now been pushed to a very narrow theoretical ledge, so to speak, for the ultimate (and most fundamental) problem he has to face is, in my view at least, precisely this problem pertaining to the personality and convictions of the judge; if he fails on this point, the whole foundation of his "no discretion" thesis, it is submitted, collapses, regardless of the persuasiveness of his other arguments – for if different judges can, and do, arrive at different results based upon their own personal preferences and convictions, then there *cannot* be "one right answer" for every legal problem.

The manner in which Dworkin fends off, as it were, his critics at this crucial juncture is interesting. He utilizes a philosophical insight first developed by W. B. Gallie more than three decades ago (see Gallie 1956), viz., the argument centring around "essentially contested concepts." This argument has, in fact, appeared in the writings of many eminent philosophers – both intentionally (Atiyah and Summers 1987, 416–17) or otherwise (Rawls 1971, 5–6). It, however, finds, in my view, its most significant application (in so far, at least, as jurisprudence is concerned)[5] in Dworkin's work. It should, at this juncture, be noted that this insight does not form an express and major part of Dworkin's earlier work. In "Hard Cases", for example, strands of the argument are to be found scattered at various points in the chapter itself (see e.g., Dworkin 1978, 103, where incidentally Gallie is cited, 126, 128–29). The reason for this early reticence is somewhat puzzling, although it might support the speculation advanced above to the effect that this was intended only as an argument of last resort when Dworkin was pushed to the edge of his increasingly precarious theoretical ledge. It might also be mentioned that Dworkin's utilization of Gallie's argument has apparently received little treatment from other jurists (though see, e.g., Perry 1977) which, having regard to its pivotal importance as just mentioned, is unfortunate.

What, then, *is* this argument? To put it in a nutshell, Gallie's insight, as applied by Dworkin, focuses upon, as mentioned above, the argument pertaining to "essentially contested concepts" where the controversy is not about the concept itself (here, the law or the specific legal conundrum in question) but, rather, about different *conceptions* of *that concept*. The thrust of Dworkin's argument, therefore, when faced with the critique that judges do in fact exercise discretion because of different personal convictions and preferences and that there is thus no uniquely correct answer for a given legal conundrum, is simply that just because judges may (and even do) disagree about the correct answer to a legal problem (i.e., they have different conceptions of the same concept) does not necessarily entail the conclusion that there is no "one right answer" to the problem at hand. In other words, although there may be controversy as to what the "one right answer" is as

[5] For an example from political theory, see Gray 1977.

manifested in various competing or contesting conceptions, there is *nevertheless* one uniquely correct answer to any given legal conundrum.

As already alluded to above, this argument is not fully canvassed in "Hard Cases." It is interesting to note, though, that when Dworkin adopted the concept of "interpretation" in "How Law is Like Literature," this argument came more fully to the fore (see Dworkin 1985, especially 152–53). This approach was maintained, so to speak, in Dworkin's most recent and lengthiest work (Dworkin 1986), where special and express mention (see Dworkin 1986, 70–72) as well as application (see Dworkin 1986, 90–113) of Gallie's insight is to be found. It should finally also be mentioned that Gallie's argument probably also forms the premise underlying two earlier (but highly related) pieces Dworkin wrote between "Hard Cases" and "How Law is Like Literature" (see Dworkin 1977, 1985, 119–45).

Dworkin's use of Gallie's philosophical insight is, in my view, extremely ingenious. It is (save with perhaps one argument that will be mentioned below) virtually unanswerable, for it is impossible for the critic to refute Dworkin by demonstrating that there is *no* "one right answer," simply because arguing that there is more than one answer or interpretaton will not suffice in so far as Dworkin can argue that these are actually competing conceptions of the same concept, all of which may, in any event, be incorrect; in his (Dworkin's) view, however, these competing conceptions do not detract from his argument that there *is*, in fact, one uniquely correct answer waiting to be discovered. The critic might be tempted to argue that this is but a mere "resurrection," as it were, of the old and outmoded Blackstonian "declaratory theory" of the law – an "old friend" dressed up in new (but ultimately superficial) garb, so to speak. The critic might be further tempted to argue that such an approach is generally considered as outmoded simply because it is highly artificial – a fairy tale which, as Lord Reid points out, is no longer believed in anymore (Lord Reid 1972). We shall return to this more general point later, but, given the logical force of Dworkin's argument, it cannot be brushed aside on such general terms. Is, then, Dworkin's critic utterly stymied? Has he[6] been thwarted just as he has thought he has (if I may be permitted this rather crude terminology) "cornered his quarry"? It would appear so, but the critic could, it is submitted, equally well argue that Dworkin's approach is a double-edged sword in so far as the very existence of controversy could, in fact, indicate that there is *no* "one right answer." There would be, in short, an impasse between Dworkin and his critics. At this point, it is submitted that Dworkin's critics might be considered to have prevailed on an albeit technical ground inasmuch as Dworkin, having set out to *positively* demonstrate the nature and viability of his theory has, in fact, merely succeeded, in the final analysis, in showing that his theory is neither true nor false.

[6] The use of the masculine includes, of course, the feminine.

Dworkin's critics might, however, go further. They might argue that Dworkin's argument focusing upon "different conceptions of the same concept" must perforce fail simply because a uniquely correct answer is philosophically impossible. Such a skeptical approach is based, of course, on the perennial problem centring around the relativity or subjectivity of values.[7] Dworkin has, however, a ready answer to such an apparently devastating argument. He draws a distinction between "internal skepticism" on the one hand and "external skepticism" on the other (see Dworkin 1985, 1986, 76–86, 266–75). According to Dworkin, skepticism of the kind adopted by his critics is "external skepticism" which, in his view, is futile, for it does not provide a common forum for discussion at all; he does not, however, eschew "internal skepticism" which (in the instant situation) concerns skepticism *within* the enterprise of "interpretation." Dworkin's points on this score are persuasive, but the *fact* is that "external skepticism" *is* an at least possible position that may be adopted. This is, in fact, acknowledged by Gallie himself (Gallie 1956, 169, 191–92). Further, and utilizing (ironically) Dworkin's own approach, can it not be argued that both "external" as well as "internal" skepticism are different *conceptions* of the same *concept* of "skepticism," and that, therefore, both may be plausibly argued in their own right? I do not wish to belabour the point save to observe, once again, that what Dworkin terms "external skepticism," whilst infused with pessimism and despair, cannot be summarily dismissed; whether one subscribes to it is another matter altogether; that would, it is submitted, be a matter of personal taste and preference – a proposition that I am sure the "external skeptic" would surely agree with!

Before concluding this particular section of the essay, I want to consider one alternative argument that accepts Gallie's insight of "essentially contested concepts" but which nevertheless maintains that Dworkin's argument fails because he has (in the author's own terminology) to utilize a "stronger" (as opposed to a "weaker") version of Gallie's argument in order to succeed in his (Dworkin's) "no discretion" theory (see, generally, Perry 1977). This argument and distinction were utilized by Perry who argues that

> [i]f either the plaintiff or the defendant in a hard case is *actually to have* a right to a favorable decision, then there must *actually be* a uniquely correct conception, in the context of the case, of the contested concept or concepts involved (Perry 1977, 24–25)

This summarizes, in fact, Perry's "stronger" version of Gallie's argument. It should, however, be noted at this juncture that Perry admits (implicitly at least) that the argument of "essentially contested concepts" as *originally* formulated by Gallie does *not* go so far. There are, indeed, clear passages in Gallie itself which indicate that the argument centring around "essentially

[7] This is most evident in radical schools of jurisprudential thought: The main "representatives" in the Anglo-American sphere would appear to be the American Realists and the rather more recent Critical Legal Studies Movement. Cf., also, Hart 1977, especially 985.

contested concepts'' is *not* premised upon one uniquely correct answer (see, e.g., Gallie 1956, 189–95). Perry's argument is, in short, so strict as to ''cripple'' Dworkin's ''no discretion'' thesis right from the outset; in fact, as Perry argues,

> [t]he fact that different people *suppose* that there was a definite content covering the issue of this case, and argue for opposing views as to what that content was, does not show that it did have a definite content which resolves that issue one way or the other (Perry 1977, 33)

In fact, Perry argues that Dworkin ''does not seem to recognize that he is committed to using the 'stronger' notion of essentially contested concept rather than one like Gallie's'' (Perry 1977, 33). Perry is himself content with accepting that whilst there may be no ''one right answer'' in a substantive sense, there is always a best answer from a *procedural* point of view (see Perry 1977, 34–35). Whilst Perry's critique is not unpersuasive, it is submitted that Dworkin's ''no discretion'' theory can, in fact, be effectively criticized without attributing the strict requirements Perry imposes; this argument has, of course, been briefly set out in the preceding paragraphs of the instant section.

What, then, are we left with in so far as Dworkin's arguments are concerned? The result is simple – the strongest case Dworkin can make out is that neither he nor his critics can be conclusively proved to be correct. If one accepts Perry's argument, the argument against Dworkin's ''no discretion'' thesis is even stronger, even conclusive. If Dworkin persists in maintaining this stance with regard to his critics, it is submitted that, given the onus placed upon Dworkin to *positively* establish his own programme, his reliance on the notion of ''essentially contested concepts'' must be considered insufficient as a last-ditch effort to ward off his critics. At bottom, perhaps, Dworkin's arguments are intended to be *psychologically* persuasive, for who, after all, would advocate that judges not at least *attempt* to decide cases on the basis that there is ''one right answer.'' As an *attitude* of mind, this exhortation (see, e.g., Dworkin 1978, 130) is commendable, but fails to be convincing (in my view at least) at the level of practical description as well as application. In addition, even as an attitudinal approach, the commitment to ''law as integrity'' may, if taken too far, result in unwarranted dogmatism. Finally, even from a psychological perspective, there are, in fact, many legal personnel who *instinctively* perceive adjudication as involving not only an element of law-making but also incremental law-making. Who, then, is correct? I will not press my point, save to state that neither should Dworkin. Once, however, discretion (in the ''strong'' sense) ''infiltrates,'' as it were, Dworkin's thesis, what we are left with is an interesting reworking of a theory that argues the existence of institutional (here, legal) constraints on the judge. At this point, however, it is submitted that Dworkin's thesis is *no different* from Hart's in its *final result*; it is, in short, an eloquent statement utilizing different techniques as well as substance of jurisprudential analysis

resulting, however, in a similar conclusion. This is not, of course, to argue that Dworkin's theory is not a highly interesting as well as novel one in its own right, but it is, in the final analysis, just another route toward (as already mentioned) the same result. The only quarrel with Hart's theory, then, would be that he did not elaborate sufficiently his broad opinions with regard to judicial discretion. One has, however, to remember that that was not, in any event, the central concern of Hart, at least in so far as the work Dworkin focused his critique upon was concerned (see Hart 1961).

V. Conclusion

If I have been correct in my argument thus far, it would appear that Dworkin's critique of Hart is, in large part at least, misconceived, and that both their views are not really that dissimilar from a substantive point of view. As already alluded to above, however, the "Hart-Dworkin debate" has generated a veritable plethora of academic writings that literally defies enumeration and classification. Has all this writing, then, been an exercise in futility? It is submitted that it has not, simply because the vast majority of academic literature in this particular sphere has not centred around the actual "debate" between Hart and Dworkin. This is probably due to the fact (as pointed out above) that Hart has been extremely polite as well as restrained in his replies. Most writings have thus focused upon Dworkin's own views, especially his novel "no discretion" theory. It is interesting to note that Dworkin's theory was gradually developed as well as refined as he strove to defend his initial views. Dworkin's new theory, whilst unpersuasive as I have sought to argue above, is nevertheless a significant and novel contribution, in its own right, toward Anglo-American jurisprudential thought, developing not because of, but rather in spite of, its rather dubious beginnings.

On a more general level, this brief essay has, it is hoped, demonstrated that jurists can, and do, engage in critiques that may, on closer scrutiny, be somewhat off the mark. A similar illustration, if Taylor's perceptive article is persuasive (see Taylor 1972), concerns Hart's own critique of the American Realist movement (cf. also Livingston 1988). Be that as it may, all this does not necessarily entail an absence of substantive contribution to the corpus of jurisprudential learning, as Dworkin's work clearly demonstrates. It may, perhaps, be even desirable that jurists not be overly cautious in engaging in such interesting "forays," given such positive results that cannot but advance both scholarship as well as learning generally.

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