DWORKIN, HART, AND THE PROBLEM OF THEORETICAL PERSPECTIVE

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The following article analyzes the dispute between legal philosophers Ronald Dworkin and H.L.A. Hart over the nature of legal rights. The author argues that central to this dispute is a pervasive methodological problem of social theory, the "problem of theoretical perspective." He makes use of a distinction between "internal" and "external" perspectives to defend what he conceives to be Hart's more fully social approach to the conceptualization of legal rights.

I. INTRODUCTION

Since its publication in England in 1961, H.L.A. Hart's *The Concept of Law* has aroused the antagonism of America's leading legal philosophers. Undoubtedly the most persistent of the antagonists has been Ronald Dworkin, Hart's successor to the Chair of Jurisprudence at Oxford University and a legal philosopher with an exceptionally high "recognition factor" on both sides of the Atlantic. Dworkin's interest in the central theses of *The Concept of Law* has lasted for over fifteen years, and his repeated attempts to define and defend his disagreements with them constitute the core of his contribution to legal philosophy.

In philosophical terms, the controversy is a "conceptual" one, about the "nature" of legal rights. Such disputes are sometimes dismissed as mere "terminological debates," quibbles about the proper use of words, something the more practical-minded solve by stipulation so they can get on with the real business of research and evaluation. (Criminologists will recall the debates about the "meaning" of "crime," that is whether it includes all "deviance" or just "illegal" deviance.) Of course, the problem with characterizing conceptual disputes in this way is that it fails to account for their intensity and the intellectual rigor with which they are often carried on, unless

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recourse is had to often fantastic and ultimately unsatisfying theories about the supposed pathological *motives* of the disputants.[1]

In fact, conceptual debates have a deeper level of significance of which the terminological question is only the surface. The one between Dworkin and Hart, as I hope to demonstrate, is actually about nothing less than what is *important* in the study of law as a branch of social theory. To ask the nature of legal rights in this context is in fact to ask what about legal rights *matters*—what is worthy of attention and inquiry, whether empirical, moral, political, or historical. It is even to ask *who counts* out of all the possible social actors and to whose concerns attention should be given in the understanding of legal rights.

It has recently become easier to appreciate and, I believe, to resolve the Dworkin/Hart controversy at this level because, in a flurry of recent writings, Dworkin (1977a: 58-84; 1977b; 1977c; 1977d: 279-290, appendix to paperback ed., 291-368) has directed his mind to methodological questions and has finally hit upon what I conceive to be the central issue between Hart and himself. This is what I shall call "the problem of theoretical perspective," a pervasive methodological problem of social theory fundamental to the philosophy of law. It can be brought out in the following way.

It is a familiar feature of human, not merely academic, experience that people disagree. They disagree not only over questions of morality (for example, should the police be allowed to break the law for reasons of "national security"?) and questions of fact (for example, did the police break the law?), but also over the proper characterization of events, enterprises, and institutions (for example, when the police break the law in order to disrupt radical political groups, can they be said to be breaking the law for reasons of "national security"?). Often this latter sort of disagreement seems to depend not on some *error* on the part of one of the disputants, but rather on their different *perspectives* (for example, the police "view" of "national security" *vs.* the radical view). Both sides seem right, though only partially right and, therefore, partially wrong. It depends on the way you look at it, we might want to say.

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[1] See, for example, A.A. Ehrenzweig, *Psychoanalytic Jurisprudence* (1971: 51-72) for such a theory of the Hart/Fuller debate. A good discussion of the "place of goals and motives in philosophy" may be found in J.O. Wisdom, *Philosophy and its Place in our Culture* (1975: Ch. 22).

But what should the approach of the social theorist be to the *object* of this sort of dispute (assuming it is worth theorizing about in the first place)? From whose perspective is it to be represented? Is one superior to all others? How is this to be decided? Or should everybody's perspective be included? How can this be done? Do the perspectives of the disputants, or indeed any of the participants, exhaust the perspectives available to the theorist, or can there be a distinct "theoretical" perspective?

This, then, is the problem of theoretical perspective. It arises as an issue between Dworkin and Hart in the context of "hard" or "controversial" legal cases. Dworkin points out that lawyers often argue and judges often reason as if there were a single right answer to a question of law, even when there is no statute or binding decision which clearly governs the case at hand and even when there is a deep division in the legal community as to what the answer is. They may disagree over *the* answer, but they seem to agree (at least if one restricts reference to official statements in briefs, oral argument, and reasons for judgment) that there is *an* answer. They assume, in other words, that there can be and are legal rights and duties in controversial cases. More or less because of this, Dworkin takes the same position. On the other hand, Hart argues in *The Concept of Law* that legal rights and duties exist only when they are *manifestly accepted* by the bulk of the relevant community, in the sense that they flow either from rules which are themselves accepted or from rules which are valid according to other, accepted rules (see Hart, 1961: Ch. IV-VI). This seems to exclude them from controversial cases for the very reason that there is a controversy. This will be so even though there may be agreement in the community on the question of whether there is *a* right answer, as long as there is disagreement about what the answer actually is. Thus, Dworkin seems to adopt a view that is consistent and Hart a view that is inconsistent with that of the participants. Of course, Dworkin will disagree with some, perhaps all, of them over what the answer is, but Hart seems to disagree with all of them over whether there is an answer at all. To complicate matters further, each of these positions comes to us as an analysis of the concepts of law, legal right, legal duty, etc.

The most direct way out of this entanglement, it seems to me, would be to say that Dworkin is concerned with the concepts of legal right and legal duty as questions *of* law, viewed *internally*, from within a given legal system, and that

Hart is concerned with them as questions *about* law, viewed *externally*, from outside any given legal system. This dichotomy of perspective between "internal" and "external" would be similar, but not identical, to the familiar dichotomies of theory/practice and official/unofficial.[2] The difference would be that while Dworkin's concerns correspond to official theory, Hart's include *both* official theory and unofficial practice. A spatial metaphor seems appropriate to distinguish between the worlds of the "insiders" (the legal profession, lawyers, and judges using their special techniques of argumentation and justification) who make up Dworkin's reference group and the "outsiders" (everyone else) who also figure in Hart's system. We might further mark the distinction by calling Dworkin's concerns the "lawyer's" concerns or the concerns of legal "theory," represented by the question, "What is the law?" and Hart's concerns the "philosopher's" concerns or the concerns of legal "philosophy," represented by the question, "What is law?" Having thus marked out these distinct (though partially overlapping) terrains, we could then ask whether either Dworkin or Hart told us something true and valuable, though we would hardly call any differences between them a "debate," or even a "disagreement," any more than we would say that there was a "disagreement" between the watchmaker and the philosopher over the nature of time.[3]

The problem with this way of resolving matters is that, if it were correct, it would not look very good for Dworkin, who has proceeded all along on the basis that there is a genuine disagreement between Hart and himself and, in any event, has tried to demonstrate that Hart's view of legal rights in controversial cases is wrong, not just different. Now there are two ways in which Dworkin could resist this unfortunate (for him) resolution of the controversy. On the one hand, he could argue that, based on a proper interpretation of *The Concept of Law*, Hart really meant to view rights in controversial cases from the same internal-question-*of*-law perspective that he (Dworkin) does. For reasons which will appear below, this argument is not really available. Failing this, Dworkin could argue that whatever perspective Hart *meant* to adopt, the only

[2] The notion of an internal and external perspective will be familiar to students of ethics. A recent example of its use is the discussion of the institution of promising in Mackie (1977: 66-73).

[3] When I was a child waiting outside a movie theatre one Saturday afternoon I asked a ragged passerby something like "Hey Mister, what's the time?" to which he replied in measured tones, finger upraised, "*Time is the space between two thoughts!*" There is much in the Dworkin/Hart dispute which resembles this exchange.

one that he *could* adopt would be an internal one, because *there is no external perspective*. At least where legal rights in controversial cases are concerned, the question for the philosopher can be no different from the question for the lawyer. Legal philosphy is co-extensive here with legal theory, and the answer to the question "What is law?" is exhausted by the answer to the question "What is *the* law?"

Dworkin has begun to mount this second defense in his most recent writings. Although he has not yet attempted to generalize it beyond the question of legal rights in controversial cases, it is in fact impossible to stop it there. At the very least, it entails the exclusion of any external perspective from the concepts of law, legal right, and legal duty altogether. But it threatens to lead even further, to the point where legal philosophy is swallowed up entirely by legal theory, at which its only concerns are the lawyer's concerns with internal questions of law. We have, in effect, a bid for conceptual monopoly by the legal profession. By "taking rights seriously," Dworkin really means us to take *lawyers* seriously.

I will argue here that Dworkin fails in his attempt to exclude all external perspectives from the concept of law. In doing so, I will defend what I consider to be Hart's more fully social theory of law. This is important for scientific, moral, and political reasons shortly to be outlined. But it is also crucial for legal philosophy itself. Indeed, though this may seem curious at this point, the main reason why Dworkin fails is precisely the importance of an external perspective for the enterprise of philosophizing about law.

II. DWORKIN'S VIEW OF RIGHTS IN CONTROVERSIAL CASES

Dworkin's first explicit consideration of the problem of theoretical perspective can be found in the two contemporaneously published essays, "No Right Answer" and "Can Rights be Controversial?" Now most of the discussion in both of these essays is taken up with the issue of whether there can be rights in controversial cases *as an internal question of law*. Dworkin argues that it would be both logically possible and rational for a legal system to so provide in its "ground rules." Consequently the claim that there *cannot* be legal rights in controversial cases, when "construed as a claim within the enterprise" is false. I do not propose to review these arguments, as I believe them to be correct and nothing turns on them for present purposes.

Dworkin also argues, though much less elaborately, that the ground rules of "our own legal system" (by which, apparently, he means the legal systems of the United States and Great Britain; see 1977b: 32) do provide for rights in controversial cases and that we should expect all "modern, developed, and complex legal systems" to do so (1977a: 84). Consequently the claim that there *are not* legal rights in controversial cases again *when construed as a claim within the enterprise*, is also false. Here Dworkin relies largely on a theory most fully developed in his own "Hard Cases" (see 1975: 1057; also 1977d: 81-30). Again, I believe that he is largely correct in this contention, though the specific theory offered in "Hard Cases" would seem to need much more research as a description of the way judges characteristically justify decisions and much more argument as a "normative" theory about the way they should make them. In any event, nothing turns on this either for present purposes.

Dworkin's third and final contention, the one that puts him in direct contradiction with Hart and which raises the issue with which I am concerned, is made toward the end of each essay. It is that the claim that rights cannot or do not exist in controversial cases *must be construed* as a claim made from within the enterprise: "We can *only* make sense of [a] philosopher's claim if we take it to report the special truth conditions of an enterprise" (1977d: 289). "The philosopher's claim . . . is a claim that can only be made from within the enterprise" (1977a: 81; 1977b: 28).

In "No Right Answer" this final thesis is put forward in the form of an allegory about "a group of Dickens scholars" convened "to discuss David Copperfield as if David were a real person" (1977a: 73). In "Can Rights be Controversial?" this literary community becomes a convention of judges determined to apply the theory of judicial decision making Dworkin advanced in "Hard Cases," summarized as follows:

> A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law. It may be denied as false if it is less consistent with that theory of law than the contrary (1977d: 283).

It will simplify matters if we accept provisionally that this is an accurate account of "our own legal system" and resolve Dworkin's literary club and judicial convention into an actual community of judges carrying on their daily work.

Dworkin supposes that the legal community is visited by a philosopher who subscribes to the "demonstrability thesis."

> This thesis states that if a proposition cannot be demonstrated to be true, after all the hard facts that might be relevant to its truth are

> either known or stipulated, then it cannot be true. By "hard facts" I mean physical facts and facts about behaviour (including the thoughts and attitudes) of people. By "demonstrated" I mean backed by arguments such that anyone who understood the language in which the proposition is formed must assent to its truth or stand convicted of irrationality (1977a: 76).

This philosopher, sometimes referred to as an "empiricist philosopher" (1977a: 78), because he is supposed to subscribe to "a strict form of empiricism in metaphysics" (1977a; 77), proceeds to tell the legal community that "they have made a very serious mistake"—that in assuming the existence of rights in controversial cases, they are accepting a "myth" (1977d: 283). It is a myth even though it conforms to the ground rules of their enterprise, because any enterprise with such ground rules must be "based on an illusion" (1977a: 81). The members of the community, says Dworkin, will properly reject the philosopher's remonstrances for a number of reasons.

In the first place, the enterprise "succeeds" in the sense that the participants are in fact capable of making judgments about the right answer to controversial cases, the very judgments which the philosopher claims are "mistaken" (1977a: 78-79). In the second place, if the philosopher is persuaded to undergo legal training and then take up a position on the bench, "he will find that he himself will be able to form judgments of the sort he believes rest on mistake" (1977d: 283). He will in fact have beliefs about the answers to controversial cases, and he will be able to provide reasons for them. "So the philosopher's own capacities will embarrass him" (1977d: 284; see also 1977a: 79). Third, if he then claims that he has merely been "seduced" by the training and that an untrained "independent observer" would find it impossible to make such judgments, the participants will properly doubt whether he (the independent observer) has the capacity to judge their debates because it is "neither surprising nor relevant" that an untrained person is "incompetent" to make such complicated judgments (1977d: 284). Finally, if the philosopher claims that the illusion of the enterprise is the supposition that the judgments made by the participants are judgments about "the external world," they will answer that they never made any such supposition, that the enterprise does not seek "to increase our knowledge of the external world" but rather to fulfill a different sort of purpose (1977a: 81). It is the enterprise which gives sense to their judgments; and if the enterprise serves a worthwhile purpose and does so better than a revised form of the enterprise, that is all it is designed to do.

These are not the only elements of the dialogue between the philosopher and the judges, but they are the main ones. The important thing to note about them is the iron conceptual control which Dworkin accords to the enterprise itself. This is symbolized by the situation of the entire exchange on the judges' "turf." In order to make his claim even intelligible here, the philosopher must respect the enterprise's own purposes, limits, and conventions. Indeed, the only possible sense which the judges are able to make of the philosopher's claim, if he is not to be taken as reporting the ground rules of the judicial enterprise at hand (or of some other actual judicial enterprise), is to interpret it as calling for the *reform* of the enterprise, which in this context must mean a change in the ground rules governing controversial cases. Thus, instead of making his claim at large, as philosophers usually do, the philosopher directs his claim *to the judges*: " . . . we may take it as a claim external to all such enterprises, as a claim about facts of the real world which *judges . . . must in the end respect*" (1977d: 284; emphasis added). He asks them to *alter their practice*, because their practice is said to be based on an illusion. Yet the philosopher can come up with no concrete reform, and, so says Dworkin: "If no reform would be justified, what is the illusion?" (1977a: 80-81).

With this, Dworkin sends the philosopher packing. The claim that there are no legal rights in controversial cases must be construed as a claim made from within the enterprise and, for reasons given earlier, must therefore be false. The external perspective either does not exist or, in what amounts to the same thing, has no bearing on the concepts of legal right, legal duty, or, presumably, any other questions of legal philosophy.

III. HART AND THE "EXTERNAL POINT OF VIEW"

Dworkin has left very little elbow room for the philosopher wishing to deny that there can be legal rights in controversial cases. He or she must cast the claim as either a report of the ground rules of an enterprise or a call for their reform. In the first case the philosopher's claim is false. In the second, it calls for a change from a system in which the judge is to strive for the right answer (conceded to exist) to one in which the judge is to forsake the quest (though the right answer is still conceded to exist) at the first sign of controversy and either deny the claim or exercise his or her "discretion." This seems silly.

But why should we think that philosophers who deny that there can be legal rights in controversial cases want to make

either of these types of claims? If we take Hart to be a representative philosopher who adheres to a version of the "demonstrability thesis" (in the sense that his concept of law is constructed entirely of what Dworkin calls "hard facts"), we see immediately that these concerns are not his. For one thing, if there is any reformism in *The Concept of Law*, it is *theoretical*, not legal, reformism. On the very first page of the book, Hart declares that it is "concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy" (1961: vii); and every following page bears this out. One would search *The Concept of Law* in vain if one hoped to find anything resembling the dialogue Dworkin sets up between the philosopher and the judges.

Second, only by ignoring a central distinction in his book could one conclude that Hart intended his concept of law to do no more than report the ground rules of legal systems. I am referring to the distinction between the "internal" and "external" "aspect," "attitude," or "point of view," which is at least as close to the core of Hart's theory as the distinction between primary and secondary rules. According to Hart, the concept of law, like the concept of a rule, involves a *combination* of these two aspects, each as essential as the other.

The external aspect of a rule, it will be remembered, is the mere regularity of behavior which is common to both rules and "habits" (1961: 55-56). And the external attitude is the attitude of those "who are only concerned with [the rules] when and because they judge that unpleasant consequences are likely to follow violation" (1977a: 88). Of course, Hart was not the *advocate*, in *The Concept of Law*, of the external point of view. On the contrary, this was the tradition he received from, among others, Austin and Holmes and which he sought to revise. If one conceptualized law with Austin in terms of "commands" and "habits of obedience" or with Holmes as "prophecies of what the courts will do in fact," one would not only miss an important feature of the way law operates in the lives of many, perhaps most, people, but one would also be at a loss to explain certain salient features of law, if not how law could exist at all.

Yet Hart did not seek to abolish the external point of view, merely to supplement it with an internal one. The internal point of view or attitude is that of those who regard legal rules not merely as a prediction of what might befall them if they behave in a certain fashion, but as accepted standards of behavior to which they conform for other reasons and to which

they demand conformity in others. The internal attitude has to exist because there has to be *somebody* concerned with the rules for nonpredictive reasons; otherwise the rules would not be applied to nonconformity and could hardly be said to exist at all. So where one has law, one will have the internal attitude, at least on the part of officials and perhaps, but not necessarily, on the part of others. But where one has law, one will just as necessarily have the external attitude, for without it law would have neither purpose nor effect:

> At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence (1977a: 88).

It is necessary to distinguish here between what Hart calls the "external point of view" and what I have been calling the "external perspective." For Hart, the "external point of view" is not intended to represent a theoretical perspective distinct from the perspective of the participants in the enterprise, but rather to reflect faithfully the perspective of one representative group of those participants. In order to "do justice to the complexity of the facts" the concept of law has to include the perspective of both representative groups, internal and external attitude holders. But the point is that in doing so it can wholly conform to neither. And it is this which logically entails for Hart a distinct *theoretical* perspective, the "external perspective" in the sense in which I have been using it.

Dworkin, of course, faces no such predicament, because he restricts his view to internal attitude holders only. His frame of reference is the official realm of lawyers arguing points of law and judges justifying their decisions. There is no room here for an external attitude (in Hart's sense). And unless one admits of such an external attitude, which must then be reconciled somehow with the internal attitude, there is no need for the philosopher to adopt an external perspective (in my sense).

Moreover, it is with the inclusion of an external attitude and the adoption of an external perspective that the concept of law necessarily becomes more than just a "report" of the official ground rules of legal systems. Those with the external attitude are concerned with "what the courts do in fact," not merely with what official theory says that they ought to do.

IV. OTHER CRITICS OF HART'S WORK

Dworkin is not the first of Hart's critics to attempt to define the external perspective "out of existence." In an essay entitled "Revolutions and Continuity of Law," J.M. Finnis (1973: 44-76) did much the same thing, though in a rather more self-conscious and deliberate manner. Finnis approached the question indirectly, as a critique of the quality of Hart's internal attitude. For Finnis, it was not enough to exclude from this attitude the attitudes of those who "regard the law as a reason for acting simply out of one's short-term self-interest in avoiding sanctions" (1973: 73)—that is to say, who regard the law purely predictively—while leaving in virtually every other motive (for example, "mere wish to do as others do," "an unreflecting inherited or traditional attitude," and "calculations of long-term self-interest"):

> Once one abandons, with Hart, the bad man's concerns as the criterion of relevance in legal philosophy, there proves to be little reason for stopping short of accepting the morally concerned man's concerns as that criterion . . . . There is no distinct "theoretical purpose" of the "scientific observer" which could be set over against the "practical purposes" that the [mature man] has in drawing the boundaries of concepts by using them in his life in society (1973: 74-75).

So Finnis concluded that "law can only be fully understood as it is understood by . . . those who accept it as a specific type of moral reason for acting" (1973: 74).

Of course, this would be the natural position for Finnis to adopt, given the concrete question he was seeking to answer—namely, what the ethical duties of citizens were in relation to the laws of the old and new regimes after a *coup d'état* had taken place. But he himself seems to have recognized that there could be other sorts of questions that were the concern of legal philosophy when he wrote: "Analytical jurisprudence is intrinsically subalternated *either to history or* to ethics or to both, and cannot be an independent discipline, with a viewpoint of its own" (1973: 72). Now if there can be other sorts of questions, it is not unreasonable to suppose that there might also be other perspectives. And, if we take "history" to stand for the other social sciences (as I think we can, in the context in which Finnis mentioned it), including sociology, we might find it interesting to recall that Hart described *The Concept of Law* as "an essay in descriptive sociology" (1961: vii). We might also want to recall that though, as Finnis pointed out, Hart did abandon the "bad man" as "*the* criterion of relevance in legal philsophy," he did not abandon him as *a* criterion. Was he wrong not to have done so?

Finnis was correct when he suggested that analytical jurisprudence could not stand on its own, and for this reason he was also correct to reject as an argument for his specific solution to the problem of revolution that it might conform to "the ordinary man's point of view" or a "general consensus of lay and professional opinion" (1973: 65). There seems no reason for the philosopher to bother with analysis as an end in itself—that is to say, for the sake of identifying usage. As C.H. Whiteley has pointed out, this "is the job of lexicographers" (1969: 6). Indeed, if this were not the case one would be hard-pressed to find a criterion by which to rule out such familiar and well-established usages as those of Austin and Holmes. So, to quote Whiteley's pithy prose again, one cannot answer the question of whether an analysis is adequate "until one knows what purpose the analysis is to be adequate for" (1969: 7).[4]

A good example of the relevance of purpose to analysis can be found in *The Concept of Law* (1961: 202-207) itself in the context of the well-known debate between Hart and Lon L. Fuller on the conceptual connection between law and morals. Fuller had argued, in effect, that some "laws" were so morally iniquitous that they were not law at all. In other words, he would have excluded from the concept of law those norms which had all the attributes of law except moral acceptability. Hart rejected this position in favor of a "wider" concept which included morally iniquitous laws, but he did not do so on the "purely analytical" ground that this wider concept better comported with "ordinary English usage," which was not entirely clear in any event. Instead, he argued for the wider concept on *prudential* grounds. First, nothing was to be gained and much lost in "the theoretical or scientific study of law as a social phenomenon" if the narrower concept were adopted; it was more rational to study together the use and abuse of a specific method of social control than to split it up into two different disciplines. Second, in order that people would be better equipped to resist iniquitous rules, "they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience." Finally, "to withhold legal recognition from iniquitous rules may grossly oversimplify the variety of moral issues to which they give rise" (as in the case under discussion of a person who

[4] See also MacPherson (1978: 201): "Political concepts are generally shaped by theorists who are not simply grammarians or logicians but who are seeking to justify something."

relied on a norm which was enforced at the time but was later retroactively declared invalid on the grounds of moral iniquity).

The merits of the Hart-Fuller debate are not, of course, at issue here. In fact, both were arguing "externally" in that neither of them regarded the internal ground rules of any actual legal system as the final test of the question which they were debating. Nevertheless, as will shortly be seen, there are strong similarities between the Hart-Fuller debate and the Dworkin-Hart debate. More important for now is Hart's purposive approach to analysis and the question of whether it can be applied to the problem of theoretical perspective and, in particular, to the question of rights in controversial cases.

V. BACKGROUND OF THE DISPUTE

We might begin by asking how the trouble with rights in controversial cases arose in the first place. It will be remembered that Dworkin began the first of his series of pieces on the subject, "The Model of Rules," (1967; also 1977d) under the heading of "Embarrassing Questions."[5] It seems that even then Dworkin considered the most "embarrassing" feature of the prevailing "positivist" (Hartian) theory of law to be its treatment of the controversial case. As I pointed out earlier, Hart adopted what might be called a "wait and see" approach to the controversial case in the sense that unless or until the behavior of the relevant (judicial) community manifested acceptance of a rule providing for the right in question, it could not be said to exist. According to Dworkin, this meant that where no settled rule clearly governed the case, a judge would have to decide the matter by exercising his or her "discretion" (1967: 31-39). What "embarrassed" about this state of affairs was its retroactivity:

> [If we accept the positivist thesis], we must acknowledge that the murderer's family in *Riggs*[6] and the manufacturer in *Henningsen*[7] were deprived of their property by an act of judicial discretion applied *ex post facto*. This may not shock many readers—the notion of judicial discretion has percolated through the legal community—but it does illustrate one of the most nettlesome of the puzzles that drive

[5] An earlier essay, "Judicial Discretion" (1963), contains many of the ideas of Dworkin's later work in embryo. However, they are kept within somewhat more modest confines. There is no attack on Hart or on "positivism" or any pretension to a "theory of law" as opposed to a theory of the judicial decision. This piece was not included in the collection *Taking Rights Seriously*, (1977d) which begins with "The Model of Rules I."

[6] *Riggs* v. *Palmer* (115 N.Y. 506 [1889]); murderer of testator held incapable of inheriting under will.

[7] *Henningsen* v. *Bloomfield Motors, Inc.* (32 N.J. 358 [1960]); manufacturer held liable for personal injuries due to defective goods in spite of contract limiting liability.

> philosophers to worry about legal obligation. If taking property away in cases like these cannot be justified by appealing to an established obligation, another justification must be found, and nothing satisfactory has yet been supplied (1967:30).

Of course, if one accepts the view that there are rights in controversial cases (which Dworkin has since been at pains to demonstrate), this problem seems to be solved, because there can be no retroactivity in enforcing a *pre*-existing (if not altogether pre-*established*) right.

Another troublesome aspect of "discretion," raised this time in "Hard Cases," (1975; see also 1977d: 81-130) was its inconsistency with democratic notions of the separation of powers. Only elected officials, at least those without the security of tenure granted to judges, are supposed to "make" law. Judges are supposed merely to "apply" it:

> [A] community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law (1977d: 84).

The legal theory of controversial cases, therefore, could be consistent with democratic theory only if judges could be conceived of as enforcing pre-existing rights, or at least as enforcing rights which did not depend on the personal preferences of the judge deciding the case (1977d: 85).

So Dworkin's theory (and the perspective adopted by it) provides conceptually reassuring answers to these two embarrassing features of controversial cases, and Hartian positivism is incapable of doing the same. If neatness were the test of philosophical validity, there is no question but that Dworkin would win. The problem, of course, is that beneath the neat conceptual surface Dworkin provides, the controversial case still leaves plenty to be embarrassed about.

The main reason why people object to legal retroactivity is that it renders the full implications of their actions *unpredictable*. And whether or not there is a uniquely correct answer to any given point of law, the implications of an action touching on that point of law will remain unpredictable to the extent that one cannot be sure what it is and, more importantly, that the judge who ultimately decides the case will in fact reach it. By definition, the more controversial the case, the less sure one can be. Similarly, it is no answer to the objection from democratic theory that a judge can be conceived of as merely "applying" the law *if* he or she reaches the right conclusion unless the right conclusion is in fact reached. To the extent that the conclusion which a judge in fact reaches depends on which judge ultimately decides the case, the

objection from democratic theory still holds. Again by definition, the more controversial the case, the more the outcome will in fact depend on which judge decides the case.

It seems, then, that the "embarrassing" features of controversial cases remain even after Dworkin's theory is taken into account. That they are not eliminated by Hart's theory cannot, therefore, count against it and in favor of Dworkin's. But it should not surprise anyone that neither theory could get rid of them, because they cannot be gotten rid of. The most that could be hoped for is a theory or argument that would *justify* them. To do this, it would have to show that the system of deciding legal cases is in fact as predictable and impersonal as it possibly could be without sacrificing other, more important values. This would include showing, among other things, that judges are as well equipped and inclined to determine the right answer to questions of law as is humanly possible and that the structure of the legal system enables and encourages them to do so better than any alternative structure could. Neither Hart nor Dworkin has attempted to carry out such a programme.

There is, however, one very important difference between the two theories which bears on these questions. It is that the *elements* of Dworkin's theory (lawyers' legal arguments and official justifications of judicial decisions) systematically *exclude* these embarrassing features, whereas the elements of Hart's theory (official and unofficial behavior and the internal and external attitudes manifested by that behavior) systematically *include* them. The choice, then, is between a theory which builds in the problematic aspects of the controversial case and one which builds them *out*.

It is important to notice that though Dworkin's theory excludes the problems of predictability and judicial lawmaking as elements of the concept of legal rights in controversial cases, it does not, on its face, make them irrelevant or otherwise exclude the possibility of their being raised at all. We are not prevented, for example, from noting the divergence between official theory and practice, or from pointing out how unpredictable legal decisions may in fact be in a given legal system, or even from generalizing this into a critique of a whole system of adjudication if we are so minded and can back up our claims empirically. All we are prevented from doing is characterizing them in a particular way. Specifically, we are not to deny the status of a legal right to a claim on the sole ground that it cannot be predicted with confidence that it will

be recognized by a court. Instead, we are to say such things as "X has a legal right, but it is not possible to predict whether he or she will be able to enforce it," and "Judge Y has a legal duty to decide this issue in that way, but there is no telling whether he or she is willing or able to do so" (presumably, we are to say such things even when we have good grounds for believing that a claim will be denied).

This manner of speaking is familiar enough, at least to lawyers. It is not without its dangers, however, and they are of a kind very similar to those which Hart pointed out in Fuller's "narrow" conception of law discussed earlier. I have in mind the possibility that people will mistake their legal rights for their enforceable claims or the way judges justify their decisions for the way that they actually reach them. This would have the effect of inspiring a confidence in and lending a legitimacy to the legal system when it perhaps deserved neither. It may be that Dworkin's way of conceptualizing things does not enhance the likelihood of this happening,[8] but it is worth noting that he himself seems to make precisely this sort of error in "Hard Cases."

It will be remembered that the "Rights Thesis" presented in that article claims not only to prescribe how judges ought to decide controversial cases but also to *describe* how they actually *do* decide such cases. According to Dworkin, his theory is concerned with "judicial practice" and "explains the present structure of the institution of adjudication" (1977d: 123). It argues that "judicial decisions . . . in hard cases, characteristically are . . . generated by principle. . . ." (1977d: 84). And it is said to provide a more adequate "phenomenological account of the judicial decision" (1977d: 86) than other suggested theories. But of course, it does no such thing, because the only evidence offered for the thesis (and there is very little of it at that) is officially reported *justifications* of judicial decisions. Thus unless we assume, as if the Realists never existed, that judicial justifications

[8] Though if Dworkin's empirical observation at the beginning of "Judicial Discretion" (1963: 624) is correct, one wonders where "the layman" got his ideas:

> To the layman a lawsuit or a trial is an event in which a judge determines a controversy by application of established principles, rather than new principles invented to dispose of the case. He knows that individual judges may fail this ideal of justice; but he believes such failures to be aberrations, their occurrence marking injustice rather than its opposite. To him judges should and in general do, in the words of the admittedly metaphorical maxim, find the law and not make it. The layman's respect for law is founded in large part on his view that this is a fair method of deciding controversies.

accurately describe how judges actually reach their decisions, this Rights Thesis is only a theory of how judges characteristically *justify* decisions, not how they reach them. Whether Dworkin makes such an assumption or merely considers the question irrelevant is impossible to tell.

Another disturbing aspect of "Hard Cases" is the way in which the issue of the predictability of judicial decisions gets submerged in the principle of "articulate consistency" (1977d: 87-88).[9] Now it is clear that there is a moral value in treating like cases alike, but there is also a moral value in making judicial decisions predictable. Occasionally, for example in controversial cases, these principles will conflict. This should call for some hard moral balancing, but for Dworkin it does not seem to do so, because predictability does not seem, for him, to have a separate moral value. In controversial cases, one of the opposing claimants will have to be taken by surprise, but all this means for Dworkin is that one of the claimants will have been *unjustified* in his or her expectations[10]—unjustified in the sense that the expectations were not in accordance with the principle of articulate consistency. Apparently, one should not expect what one does not deserve. Maybe so, but people (if only the "bad men" among us) do have a tendency to rely on "hard facts," and the question of whether the legal system should strive for greater predictability as an end in itself deserves at least some attention. It is not unreasonable to postulate that Dworkin's refusal to give it any stems from his preoccupation with the internal point of view to the exclusion of everything else.

These political and moral dangers inherent in Dworkin's theory of controversial cases lead to a final point. It is that a concept of legal rights in controversial cases which pushes from center stage the question of enforceability is not only dangerous, but also rather uninteresting from a scientific point of view. Legal rights only become interesting when they have some impact on human existence. Why anyone (aside from judges professionally concerned with putting their decisions on

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[9] Articulate consistency is a demand of "the doctrine of political responsibility." It requires that judges and other political officials make only those decisions which they can justify within a political theory which also justifies the other decisions they have made or propose to make. Dworkin uses it to explain "the special concern that judges show for both precedents and hypothetical examples." This is why, according to Dworkin, judges treat the actual holding of a case with more respect than the reasons given for it.

[10] "If . . . the plaintiff's claim is doubtful, then the court must, to some extent, surprise one or another of the parties; and if the court decides that on balance the plaintiff's argument is stronger, then it will also decide that the plaintiff was, on balance, more justified in his expectations" (1977d: 86).

an acceptable footing) would want to study "legal rights" divorced from the question of whether they make any difference to the outcome of cases is more than a little puzzling. Even advocates, though they naturally will be concerned with the proper way to frame their arguments in court, will want also to know the likely impact of their arguments on the actual outcome of cases if they are to be of any use as advisers to prospective litigants.

But judges, lawyers, and even litigants are not the only ones with interests in controversial cases. For the legal, political, or social theorist—indeed for anyone concerned with the human condition—the importance of the controversial case is that it signals a sort of crisis in the legal system. The crisis may consist of a contradiction between accepted past practice and what seems appropriate in the instant case or between opposing factions of the official community or both. In any event, it differs in character from the ordinary conflict of claims between representative claimants under settled rules with which a legal system deals every day, because it occurs at the *official level*. It is the way in which this crisis is resolved and the role official justification plays in its resolution that are the scientifically interesting things about it, not the internal consistency of the justification standing on its own. A concept of legal rights in controversial cases that is restricted to the internal consistency of official justification is of no use in investigating these questions. Worse than that, it actually obliterates the uniqueness of the controversial case by denying that the existence of a crisis can ever be anything more than apparent. Every case has a correct answer; it is just that in some cases the right answer is not widely recognized.

If all this seems rather abstract, perhaps an example will help to clarify matters. In one of the most controversial cases of recent American constitutional jurisprudence, *Regents of the University of California* v. *Bakke*, 1978, the Supreme Court of the United States struck down the admissions program of a California medical school which had reserved a quota of its places for historically deprived racial minorities. In a split decision, the Court ordered that Bakke, a white who had been refused admission under the program, be admitted. Before the case was decided, Dworkin had argued quite convincingly that Bakke had "no case" either morally or (therefore) legally (1977e: 11). After it was decided, Dworkin argued with impeccable lawyer's skill that, technically speaking, the *Bakke* decision did not even settle the question of whether the precise

program involved in the case is forbidden under American law (1978a: 20).

How would Dworkin have us describe the post-*Bakke* situation? Shall we say, as his theory seems to dictate, that in the United States all schools (including the school involved in *Bakke* itself) have the legal right to do what was forbidden in *Bakke*? Shall we leave this statement unqualified by the impossibility of predicting how the next case will in fact turn out? Would such an unqualified statement be of any value, except to mislead, outside of a courtroom? If not, shall we not follow Hart and say that *in theory* there is such a right but we shall have to wait and see whether it becomes a *reality*?

It should be clear by now that what is necessary is a concept of legal rights in controversial cases that makes such issues as enforceability and the interplay between legal theory and legal practice as important as official justification, a concept that includes both the internal and the external points of view. In other words, it makes all the moral, political and scientific sense in the world for legal philosophy to deny the status of legal rights to those claims for which it cannot be predicted with confidence that they will actually be enforced even if, according to the ground rules of the legal system concerned, or any other normative system, they *ought* to be enforced.

VI. THEORETICAL PERSPECTIVE BEYOND THE CONTROVERSIAL CASE

At the beginning of this essay, I suggested that though Dworkin has developed his attack on the external perspective for the narrow purpose of defending his theory of legal rights in controversial cases, it is in fact impossible to restrict it thus. This is partly for the obvious reason that a theory of legal rights in controversial cases logically entails a whole theory of legal rights and also a whole theory of law. But it is also because the same methodological issue of theoretical perspective which arises on the "micro" level of controversial cases also arises in connection with the larger questions which have traditionally been of concern to legal philosophers. In fact, it is at the "macro" level that the inadequacies of a theory of law based on a purely internal perspective manifest themselves most clearly for the same political, moral, and scientific reasons which counsel against the exclusion of the external perspective from the issue of legal rights in controversial cases. Again, it is not merely that there are

important questions which need to be asked about law, apart from internal questions about *the* law of any given legal system; it is that these questions can best be asked through the vehicle of a concept of law which includes both internal and external perspectives.

I want briefly to allude to three types of issues which illustrate this point. None of them, it will be noticed, can do without answers to the internal questions of what *the* law is; but, equally, none of them can do without an external perspective.

The first is a variation on the theme of the divergence between theory and practice mentioned earlier. It is a widely acknowledged contribution of the so-called American Legal Realist school of jurisprudence to have drawn attention to the fact that officially stated rules and justifications of judicial decisions do not always correspond precisely to the actions taken in their name. Indeed, some of the types of reasons given by common law judges for their decisions have been found to be *incapable* of motivating those decisions (cf. Stone, 1964: 240-280). Naturally, if one were to restrict the study of law to these rules and justifications, one would not be aware of this rather important fact. This is not, of course, an objection to Dworkin's position. For, as was mentioned earlier in connection with controversial cases, there is nothing in it to prevent one from noting the degree to which theory is not actually applied in practice or from making this the subject of scientific study and theoretical debate. Of course, in Dworkin's view we would have to call the theory "law" and the practice something else, but this too would be all right, as long as the point was merely that in *some* legal systems on *some* occasions practice did not accord with theory.

Where Dworkin's point of view proves inadequate is in the realm of the more fundamental claim that the divergence between theory and practice is an *inevitable* feature of law in general and not just a problem of some legal systems. This, it seems to me, is the most important aspect of such statements as "the constitution is what the judges say it is." Such statements emphatically draw attention to the personal responsibility of the officials of any legal system for their actions and oppose the ideology of complete impersonality which many legal systems seem to have found useful. A theory of law which adopts a purely internal point of view is dangerous, because it sidesteps such claims *a priori* as theoretical misconceptions instead of meeting them head on

and, to the extent necessary, accommodating them. Furthermore, insofar as such claims are true, "law" is artifically divorced from the real impact of legal systems on the lives of the people subject to them and ceases to be an object of interest outside of legal trade schools.

Leaving room within the concept of law for an analysis of the divergence between theory and practice is also necessary in order to appreciate the full range of *interplay* between the two, especially the role which theory seems to play in the legitimation of practice. From Dworkin's purely internal point of view, one must take theory ("law") on its own terms. It can be right or wrong (that is to say consistent or inconsistent with conventional and institutional morality) in the abstract, but it can have no other function than to motivate practice. This, after all, is how judges present the doctrine they write: as "reasons" for making the decisions they make. On the other hand, to conceive of official doctrine and legal theory as rationalizing practice or rendering it acceptable requires an external perspective. Consequently, a claim that an important function of theory in any legal system is ideological and that this is an essential feature of law in general, an aspect of its "nature," cannot be made within Dworkin's conceptual framework, no matter how strong the basis for the claim.[11]

The divergence between theory and practice on the one hand and their interplay on the other might be characterized as "formal" issues in that they are not directly concerned with the "content" or substance of law. Yet there are substantive issues, too, for which a concept of law restricted to an internal perspective is inadequate. The one I want to mention here, generally associated with Marxism, though not restricted to it, concerns what might be called the "historical nature of law."

Many claims can be made (and, if true, accommodated) within a theory such as Dworkin's about the historical *role* of *laws* or even of certain legal systems from time to time and place to place. They may be said to have promoted justice or injustice, happiness or unhappiness, or even to have benefited one class at the expense of others. The problem arises, as usual, with claims of a more fundamental sort—for example, the cluster of Marxist claims (roughly) that the content and form of law vary according to certain definite historical

[11] In Raz's taxonomy of the functions of law, this figures as an "indirect social function." Of the general category, Raz writes: "the indirect effects of the law as conceived here are far from being relatively unimportant by-products of the law. They are part of its essential function in any society" (Raz, 1973: 299).

developments in the mode of material production; that, indeed, the very existence of law depends on the division of society into classes; and that, consequently, the achievement of a classless society upon the demise of the capitalist mode of production will lead to the disappearance of law altogether.

No doubt these are very controversial claims, and it is not my intention to defend them here. I merely want to point out that they are absolutely incompatible with a concept of law restricted to the internal perspective, that is to say restricted to the *self-concept* of legal systems.[12] No theory which seeks to transcend or oppose this self-concept, to regard it critically as merely an aspect of law and not the whole story, can even be articulated within a concept of law that excludes the external perspective.

It bears emphasizing that the necessity of including an external perspective in the concept of law does not depend on claims of the general sort just discussed being true, merely on their being arguable. And if it is arguable that laws and legal systems are not all or only that which they themselves claim to be, then, to paraphrase Hart, there is nothing to be gained and much lost in conceding by definition that they are.

VII. DWORKIN AND HIS CRITICS

Since writing "No Right Answer" and "Can Rights be Controversial?" Dworkin has had some further thoughts on the methodological issues which I have been discussing. Though admittedly incomplete, they bear brief mention if only to

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[12] Cf. Marx, 1859, reprinted in Bottomore and Rubel (1964: 51-52):
> At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then occurs a period of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations the distinction should always be made between the material transformation of the economic conditions of production which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophical—in short ideological—forms in which men become conscious of this conflict and fight it out. *Just as our opinion of an individual is not based on what he thinks of himself, so can we not judge of such a period of transformation by its own consciousness*; on the contrary, this consciousness must rather be explained from the contradictions of material life, from the existing conflict between the social forces of production and the relations of production. (emphasis added)

confirm the importance of the problem of theoretical perspective to an understanding of his work.

In a reply to an article by Stephen R. Munzer, (1977c: 1060-1068), Dworkin brings to life the imagined dialogue between the "empiricist philosopher" and the judges, discussed earlier (1977c: 1246-1250; see also 1978b: 331-338). Munzer had argued that even if there were a unique right answer to controversial questions of law, it would still be incorrect to claim that when judges decide hard cases the rights announced in their opinions exist before their decisions are handed down. This was because the only practical interest attaching to the classification of a right as either pre-existing or newly created concerned whether or not there was advance notice of the right, "an important aspect of fairness." Since "controversial rights" could not give notice by definition, then they should not be classified as pre-existing.

Munzer did not relate his point to a general theory of theoretical perspective; so Dworkin, like the judges, saw only two alternatives. Either Munzer was saying, as an internal statement of law (or morals), that only those rights exist which are uncontroversial or clearly identifiable in advance, or he was calling for the "reform of our legal system" and "proposing a new theory of legal rights, according to which a party simply does not have a legal right unless he is able to demonstrate to the satisfaction of all reasonable lawyers that he does" (1977c: 1249). But it seems obvious that Munzer did not want to make either of these points but rather to argue, as I argued earlier, that the classification of a legal right or duty as "pre-existing" *from the standpoint of legal philosophy* requires consideration of factors outside of the official theory of the system in question. One such factor is the degree to which the right or duty could have been ascertained in advance, because one of the main reasons people concern themselves about the pre-existence of rights and duties is to evaluate the fairness of official action. It counts against the fairness of an action if those affected by it were not given sufficient advance notice to organize their affairs in light of it.

More significant than Dworkin's reply to Munzer are more recent remarks provoked by an article by E. Philip Soper (1977: 473).[13] In them, Dworkin reflects for a few brief pages on just

[13] Dworkin's methodological comments do not seem connected to any of the arguments made by Soper, so they (the arguments) will not be repeated here. Dworkin's reply is in "A Reply to Critics" (1978b); and the passage with which I am concerned commences at p. 350.

what it is that he is trying to do with the non-normative side of his Rights Thesis. He denies that it is merely "empirical generalization, linguistic study [or] linguistic exhortation." Nevertheless he says that it is "conceptual" like other "theories of law" in the sense that it is a defence of "a particular conception of a concept." While he says that he does not "pretend to have yet given an adequate or even clear account of that activity," he elaborates it in the following way:

> We all—at least all lawyers—share a concept of law and of legal right, and we contest different conceptions of that concept. Positivism defends a particular conception, and I have tried to defend a competing conception . . . I concentrate on the details of a particular legal system with which I am especially familiar, not simply to show that positivism provides a poor account of that system, but to show that positivism provides a poor conception of the concept of a legal right . . . . Positivists and I do not dispute about details of practice that could be settled by looking more carefully to see what is said in books, or by framing more intelligent questionnaires for judges. We may disagree about matters of that sort, but this disagreement is not fundamental. We fundamentally disagree about what our practice comes to, that is, about which philosophical account of the practice is superior (1978b: 351-352).

One hesitates to read very much into a passage so tentatively expressed. However, it does seem to mark a departure from the methodological dogmatism of "No Right Answer," "Can Rights be Controversial?" and Dworkin's reply to Munzer. It is at least clear that Dworkin now recognizes that some of the issues between himself and his philosophical opponents are methodological ones.

Of course, Dworkin has not yet suggested how these issues might be resolved. He does seem to rule out, under the heading of "linguistic exhortation," the suggestion that "positivism . . . *proposes* that legal concepts should be used in a certain way, for clarity, convenience or for some political motive" (1978b: 351). But this may merely mean that Dworkin does not take the claim of positivism to be a call for the reform of lawyers' language for any of the reasons mentioned; certainly, this interpretation would be consistent with the emphasis on "linguistic" and the deprecating phrase "simply hortatory." However, it may mean that in the choice of a conception of law (including its theoretical perspective) clarity, convenience, and politics are all irrelevant. If this is Dworkin's point, one wonders what criteria that leaves with which to defend his own choice.

VIII. CONCLUSION

The problem of theoretical perspective is not peculiar to the philosophy of law. It can be found at the threshhold of all

social theory, arising as it does from the inevitable variation in meaning which social events have among the different participants in them. No doubt the range of possible perspectives is infinitely more varied than the simple dichotomy made use of here between "internal" and "external."[14] But this only serves to emphasize the main point, which is that the proper perspective for the theorist to adopt is not predetermined. It remains a matter of choice, or, as F.E. Sparshott has written:

> This compound problem, of the nature of man and of his world, is not a factual one but deliberative: one to be settled, that is, not by finding things out but by making up one's mind. There are, of course, hard facts that determine what answers to the question are admissible, but it is not these facts that are in question. There are many ways in which, many aspects under which, we men can think about ourselves, and about the world considered as our environment, without committing detectable errors of fact. So the question "What is man?" becomes "What shall we make of man?" (1972: 110-111).

Of course, we are not entirely free, even within the limits of the hard facts, to make what we will of "man" or of the world. On the contrary, we are everywhere hemmed in by moral, political, and scientific considerations of the sort I have relied upon here to make out the case for an external perspective in the concept of law. Indeed, this is what was meant by the statement made earlier that Dworkin fails in his attempt to exclude the external perspective *because* of its importance for the philosophy of law. What we make of the concept of law is a matter of choice, but we cannot afford to choose as Dworkin does.

All of this is not to say that a perspective such as that adopted by Dworkin may not suffice for some legitimate concerns about laws and legal systems. But it is clear that for many it will not. Dworkin's mistake is to assume that his concerns are the only ones worth having.

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[14] Unger draws the distinction between "the standpoint of the agent [and] the perspective of the observer—subjective and objective meaning" and analyzes the problem of theoretical perspective in this way:

> If we disregard the meanings an act has for its author and for the other members of the society to which he belongs, we run the risk of losing sight of what is peculiarly social in the conduct we are trying to understand. If, however, we insist on sticking close to the reflective understanding of the agent or his fellows, we are deprived of a standard by which to distinguish insight from illusion or to rise above the self-images of different ages and societies, through comparison. Thus, subjective and objective meaning must somehow both be taken into account (1976: 15, 19).

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* These articles are included in *Taking Rights Seriously*, 1977.

** This article is included in the 1977 paperback edition only, under the title "A Reply to Critics."