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HARD CASES †

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

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

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

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

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I. Introduction

A. The Rights Thesis

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

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

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