

SOME FORMAL ASPECTS OF RONALD DWORKIN'S RIGHT ANSWER THESIS

JACOB PAUL JANZEN*

It is commonplace that judges make law. Not always, of course. Often cases before the court can clearly and unambiguously be brought under a body of law clear in its meaning and effect. But often, the cases before the court can be brought under no existing body of law, or if they can, the applicable law is vague or ambiguous. It is in these latter circumstances, circumstances in which existing law provides no clear answer to the question that the court is called on to decide, the so-called "hard cases", that judges legislate.

That judges legislate, if they do, is a fact that makes for difficulty, however. It makes for difficulty in the first place because it offends against a fundamental tenet of democratic theory. According to the catechism of that theory, we are to be subject only to laws made by ourselves or, failing that, our elected representatives. But if judges make law, they not being our representatives, we are subject to laws not of our own making. It makes for difficulty, in the second place, because it offends against our common sense of justice and fairness. To apply rules retroactively to a situation, to reward or penalize according to rules created after the event, is manifestly unfair. But if judges make law, this is just what happens — a rule of law is created on the occasion of litigants coming before the court and this rule is then applied retroactively to the event giving rise to the litigation.

One response to this dilemma is to regard the fact of judicial legislation, if it is one, as regrettable.¹ Another, perhaps the more common one, is to regard it as inevitable; the nature of the beast requires it.²

Dworkin's Thesis

Ronald Dworkin thinks neither response apposite. He adopts the provocative position that judges virtually never make law; they virtually never legislate; that virtually every legal question that arises has a uniquely right answer.³

I concede that principles of law are sometimes so well balanced that those favoring a decision for the plaintiff will seem stronger, taken together, to some lawyers but weaker to others. I argue that even so it makes perfect sense for each party to claim that it is entitled to win, and therefore each to deny that the judge has a discretion to find for the other . . . I insist that the process, even in hard cases, can sensibly be said to be aimed at discovering, rather than inventing, the rights of the parties concerned . . .⁴

Dworkin's strategy is essentially this. Let the area of judicial discretion be defined by the difference between the number of legal questions on the

* Student, Faculty of Law, University of Manitoba.

1. Expressions of regret are likely to be found in the opinions of courts of high authority, e.g., the British House of Lords.
2. For an expression of this view, see L. Brilmayer and J.W. Nickel, Book Review (R. Dworkin, *Taking Rights Seriously*) (1977), 77 Colum. L.Rev. 818.
3. Dworkin had been pointing toward this position in R. Dworkin, "Judicial Discretion" (1963) 60 J.Phil. 624. It is adopted explicitly in R. Dworkin, *Taking Rights Seriously* (1977) [hereinafter cited as *T.R.S.*], ch. 13. And see R. Dworkin, "No Right Answer" in P.M.S. Hocker and J. Raz (eds.), *Law Morality and Society* (1977) [hereinafter cited as *N.R.A.I.*]. This latter paper is reprinted with revisions as "No Right Answer?" (1978), 53 N.Y. Univ. L.Rev. 1 [hereinafter cited as *N.R.A.III.*]
5. *T.R.S.*, *supra* n. 3, at 279-80.

one hand and the number of legal answers on the other. Those who contend that judges legislate think this "gap" rather large. Dworkin argues that this is to take too narrow a view of the resources available to a judge when arriving at a decision. He argues that these resources are extensive, and that when the nature and scope of these resources is properly appreciated, the gap between questions and answers all but disappears.

The present paper is a critical look at some formal features of what may be dubbed Dworkin's Right Answer Thesis. The paper divides into two parts. In the first, I describe what must be presupposed by this thesis, doing so by developing his theory of truth in the law. In the second I assess Dworkin's main line of argument in favour of his Thesis. My central point is that the way in which Dworkin seeks to defend his thesis is incoherent at its core.⁵

The Theory of Truth in the Law

A theory of truth in the law will specify necessary and sufficient conditions for the truth of a proposition of law. Here are two of Dworkin's attempts to describe such a theory.

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.⁶

A proposition of law . . . is true if the best justification that can be provided for the body of propositions of law already shown to be true provides a better case for that proposition than for the contrary proposition . . . but is false if that justification provides a better case for that contrary proposition than for it.⁷

There are differences between these two accounts, but we may put them aside for the moment, reckoning them verbal rather than substantial. What is of interest is the similarity. Both accounts, as accounts of a theory of truth in the law, share a common defect: both are too niggardly in apportioning truth.

Take the proposition, "A valid will requires two witnessing signatures." If there is a proposition of settled law, this is one.⁸ Is it true? That is, in the words of the first of the above two accounts, is it more consistent than is its contrary ("A valid will does not require two witnessing

5. The thesis has already spawned a considerable body of literature. See H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" (1977), 11 *Geo. L.Rev.* 969; "Dworkin's 'Right Thesis'" (1976), 74 *Mich. L.Rev.* 1167; L. Weinreb, "Law as Order" (1978), 91 *Harv. L.Rev.* 909; K. Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges" (1975), 75 *Colum. B.Rev.* 359. These discussions while attempting to show that Dworkin's thesis must be wrong, tend to skim over the actual argument Dworkin deploys to establish his thesis. The present paper attempts to remedy that neglect.

6. *T.R.S.*, *supra* n. 3, at 283.

7. *N.R.A.II*, *supra* n. 3, at 28.

8. What is settled law? A ready characterization is that settled law includes all legislative law together with the ratio decidendi of decisions in courts of high authority.

signatures'') with the theory of law⁹ which best justifies settled law? Well, not really. It is itself a proposition of settled law and, hence, the question of whether it is more consistent than is its contrary with the theory of law which best justifies settled law does not arise. But if this is so, then the proposition, "A valid will requires two witnessing signatures," is *not* true, and if not true, then the legal question, "How many witnessing signatures does a valid will require?," has no right answer. It follows that no legal question which has a proposition of settled law as its answer has a right answer.

The defect just described may be diagnosed thus: the first account makes no provision for the truth of propositions of settled law.

Take next the proposition "A man may not profit by his own wrongdoing," a proposition which Dworkin describes as a *principle* of law¹⁰ and a proposition which we might expect to appear in any theory of law. Is it true? Well, being a proposition *in* the theory of law, the question of whether it is or is not more consistent than is its contrary with that theory cannot arise and, therefore, its truth is undefined. Therefore, it is not true. It follows that no legal question which has as its answer a principle of law¹¹ has a right answer.

This defect may be diagnosed thus: the first account makes no provision for the truth of legal principles.

There are two ways in which these deficiencies might be repaired. The first would be to argue that, as truth is defined by the relation "more consistent with" with relata "settled law" and "theory of law", propositions of settled law are *a fortiori* more consistent than are their contraries with the theory of law which best justifies settled law; and legal principles are *a fortiori* more consistent than are their contraries with the best theory of law. Hence, both settled law and legal principles would be true after all. Though theoretically impeccable, this first way is precarious for reasons to be described presently. The second way, less elegant but safer, would be to take a clue from Dworkin's second account quoted above and simply stipulate the truth of settled law and legal principle. The second account does no better than the first by legal principles, but it does do better than the first by settled law: it more or less stipulates its truth, or at least if we identify settled law with those propositions "already shown to be true." Adopting this strategy, we may describe this general theory of truth:

9. What is a theory of law? A theory of law, in the sense relevant here, is any proposition or set of propositions which justifies (explains) any proposition or set of propositions of settled law. Thus, to use a serviceable example, the proposition "Punishment must fit the crime" might be a simple theory of law; simple because it is a single proposition; a theory of law because it (allegedly) justifies or explains a set of propositions of settled law, namely those propositions describing increasingly severe punishment for increasingly severe crimes. The question receives elaborate treatment in *T.R.S.*, *supra* n. 3, ch. 4.

Theory of law in the sense just described is to be distinguished from theory of law in the sense made familiar by the work of H.L.A. Hart, *The Concept of Law* (1961). A theory of law in this sense is a general account of what propositions are propositions of law, who is entitled to make law, who is required to obey law, what is the character of legal obligation, etc.

There is plainly a connection between these two senses. The idea that propositions in a theory of law (in the first sense) are propositions of law rather than, say, merely propositions of morality, already presupposes a substantive theory of law (in the second sense).

10. *T.R.S.*, *supra* n. 3, at 23. A discussion of principles and how they are to be distinguished from rules on the one hand and policies on the other dominates much of Dworkin's earlier work. Most of this discussion can be bypassed by stipulating (as I do) that principles simply are propositions in theories of law. Nothing substantial is lost thereby.

11. On the assumption, of course, that we tag along with the stipulation made in n. 10.

- (T) A proposition of law is true if and only if (a) it is a proposition of settled law, or (b) it is a proposition in the theory of law which best justifies settled law, or (c) it is a proposition more consistent than is its contrary with the theory of law which best justifies settled law.

This may now be regarded as Dworkin's theory of truth in the law.

With (T) in hand, "Dworkin's Right Answer Thesis" can be described with a considerable gain in precision. It can be defined crisply in the following way:

- (RA) Almost every legal question has an answer which is true under (T).

It is now also possible to isolate three presuppositions of this thesis. First, suppose that there is no settled law. In that case no propositions are true under (T)(a). But propositions true under (T)(b) are so only relative to propositions true under (T)(a). Hence, if no propositions are true under (T)(a), no propositions are true under (T)(b). But propositions true under (T)(c) are so only relative to propositions true under (T)(b). Hence, if no propositions are true under (T)(b), no propositions are true under (T)(c). Therefore, in the absence of a body of settled law, *no* legal question has an answer which is true under (T). Therefore, (RA) presupposes that there exists a body of settled law.

Secondly, suppose there is a body of settled law but that there is no theory of law which best justifies settled law. In that case, no propositions are true under (T)(b). But then, as per the above argument, no propositions are true under (T)(c) either. Therefore, in the absence of a theory of law which best justifies settled law, the *only* legal questions which have a right answer are legal questions which have an answer which is true under (T)(a). The "No Right Answer Thesis" holds for all other legal questions. Therefore, (RA) presupposes that there exists a theory of law which best justifies settled law.

Actually, this argument needs a bit of shoring up. For it might be imagined that *most* legal questions have an answer which is a proposition of settled law and, thus, that almost all legal questions have an answer true under (T), even without the existence of a theory of law which best justifies settled law. This would be sufficient to sustain (RA).

We spoke earlier, in an introductory vein, of the "gap" between the number of legal questions and the number of legal answers as defining the area of judicial discretion. Suppose, now, that this theory of truth in the law were proposed:

- (T') A proposition of law is true if and only if it is a proposition of settled law.

Where there is no best theory of law, (T') and (T) are materially equivalent — whatever is true under one is true under the other. Thus, where there is no best theory of law, the "gap" between questions and answers, be it large or small, will be the same whether one opts for (T) or (T'). (T) fails to narrow it. But (T') will be recognized as being roughly the theory of truth favoured by those who think judges often legislate; judges legislate precisely because legal questions outdistance answers provided by settled law. What this means is that where there is no best theory of law, (RA) is in-

distinguishable from Dworkin's opponents' "No Right Answer Thesis". This plainly would not be acceptable to Dworkin. So (RA) presupposes after all that there exists a theory of law which best justifies settled law.

It is in this connection that it also becomes plain why Dworkin ought not adopt the first of the two ways described earlier to repair his theory of truth. Under that first proposal, *all* legal truth would be defined relative to (i.e., "more consistent with") the existence of a best theory of law. Thus, in the absence of such a theory, *no* proposition of law would be true. (T) is of course less daring; settled law remains true whether or not there exists a theory of law which best justifies it.

There is a third presupposition of (RA). Dworkin always allows that *sometimes*, however rarely, a legal question will have no right answer. It follows from the earlier two presuppositions that the scope of any such qualification is strictly confined to a failure of (T)(c) to have application. That is, that there are some legal propositions which are such that neither they nor their contraries are more or less consistent with the best theory of law. Dworkin is himself not always clear that this is the character of his commitment.

We must concede the theoretical possibility that the political theory that provides the best justification for the settled law is for some reason entirely neutral on the question whether, in some particular case, an exchange of promises must be taken to constitute a contract or not. We must also concede the theoretical possibility that two different political theories, which suggest different answers to that question, for some reason each provide exactly as good a justification of the settled law as the other.¹²

If the two possibilities adverted to here are offered as equally available alternative explanations for the 'almost' qualifier in (RA), then Dworkin is mistaken. He cannot afford to have the second possibility actualized.

But this does suggest a final hurdle. A moment ago it was imagined that (RA) might be true even without a best theory of law. Now it might be imagined that (RA) might be false even *with* a best theory. Perhaps the number of questions on which the best theory of law is "entirely neutral" is large, perhaps very large. In that event (RA) would be false despite the existence of a best theory of law. Nothing Dworkin says dispels this possibility.

But, in fact, there is good reason for thinking that the number of questions on which the best theory of law is "entirely neutral" is rather small. It happens this way. There are various grounds on the basis of which theories, be they legal or physical, are to be assessed. A theory may be more or less general, more or less simple, more or less fertile.¹³ The greater the extent to which a theory exhibits any of these features, the better a theory it is. Take generality, for instance. One theory of law will be better than another, other things being equal, if it is more general than the other, that is, if it justifies more settled law than does the other.¹⁴ Thus, the very simple theory of law, "Punishment must fit the crime," is a better theory than is "The greater the

12. *N.R.A.I*, *supra* n. 3, at 83.

13. These criteria receive lively discussion in an accessible little book, W.V. Quine and J.S. Ullian, *The Web of Belief* (1970).

14. Generality is discussed by Dworkin under the head "dimension of fit" in *N.R.A.II*, *supra* n. 3, at 30.

theft, the greater the punishment" — better because it justifies more settled law, even if not a great deal. What this illustration also shows is that the features described may not always pull in the same direction; the simplest theory will not be the most general. Nevertheless, and this is the important observation, any theory which is the best, be it legal or physical, will be bound to exhibit each of these features to a high degree.

This brings us to fertility.¹⁵ One legal theory will be richer than another to the extent that it settles more disputes, decides more controversies. Contrariwise, one legal theory will be poorer than another to the extent that it leaves controversies undecided, remains "entirely neutral" with respect to a large number of propositions. Accordingly, as the best theory of law will exhibit the feature of fertility to a high degree, the number of undecided controversies should be small. So if there is a best theory of law, (RA) will surely be true.

Is There a Best Theory of Law?

Thus, the vindication of (RA) reduces in substance to the question of whether or not there exists a theory of law which best justifies settled law. Dworkin sees the main challenge here to come from those who would argue thus: it is controversial that there exists a best theory of law, controversy drives out truth, hence, it is not true that there exists a best theory of law.

I shall now consider what I think has been the most influential argument in favor of the . . . no-right-answer thesis, even though this argument has not always been recognized or clearly set out in the thoughts of those whom it has influenced. The argument may be put in the form of a doctrine which I shall call the demonstrability thesis. This thesis states that if a proposition cannot be demonstrated to be true, after all the hard facts that might be relevant to its truth are either known or stipulated, then it cannot be true. By "hard facts" I mean physical facts and facts about behavior (including the thoughts and attitudes) of people. By "demonstrated" I mean backed by arguments such that anyone who understood the language in which the proposition is formed must assent to its truth or stand convicted of irrationality.¹⁶

What motivates the thesis is the conviction that if some proposition is true, then intelligent, informed people should eventually be able to agree that it is. The alternative is to allow that there are truths which are such that they are forever inaccessible to us.

Now, against this thesis Dworkin deploys two styles of argument. In the first style, he attempts to enmesh the "Demonstrability thesis" in paradox: if controversy drives out truth, then it also drives out the "no right answer" answer. A Professor Munzer is the target in this passage

Munzer apparently assumes that if two lawyers sincerely disagree, and neither can convince the other, that is evidence for the fact that both are wrong, because neither side can then have even marginally the better case. But Munzer himself would, presumably, have trouble convincing *either* of the two lawyers that *that* lawyer is wrong, and the disagreement between Munzer and him would be persistent and possibly even heated. Does it follow, on Munzer's assumption, that Munzer is wrong in his *third* view as well? That would leave him with exactly nothing at all.¹⁷

15. The importance of fertility in ethical theory, if not in legal theory, figured large in John Stuart Mill's classic *Utilitarianism*.

16. *N.R.A.11*, *supra* n. 3, at 23.

17. R. Dworkin, "Seven Critics" (1977), 11 *Ga. L.Rev.* 1201, at 1245-46.

This seems to show that if the "demonstrability thesis" is adopted, then the "No Right Answer Thesis" would be wrong, and, hence, that (RA) is right and that there exists a best theory of law.

But this is a Pyrrhic victory. It does not give to Dworkin what it takes from Munzer. Suppose that it does follow that none of the three participants in this debate, Munzer and the two lawyers, are right. From this it does *not* follow that the legal question over which they are contending has an answer which is true under (T). Indeed, since *ex hypothesi* the two lawyers are both wrong, what follows is that the legal question over which they are contending does positively *not* have an answer which is true under (T). So Dworkin's argument, even if sound, would leave him exactly with what it leaves Munzer: nothing.

There is another argument of the same character which might tempt: if "no right answer" is the right answer to some legal question, then that legal question does have a right answer (namely "no right answer") and (RA) is vindicated after all. But this is also mistake. If "no right answer" is the right answer to a legal question, then the legal question does *not* have an answer true under (T). But it is just this that Dworkin requires.

In the second and main style of argument, Dworkin attempts to show that there are more facts than hard facts alone. (We may conveniently dub these additional items "soft facts"). He does this by the development of an elaborate literary analogy.¹⁸ Imagine a group of Dickens scholars discussing David Copperfield. Among the propositions that could be asserted of David would be those asserted explicitly about David by Dickens in *David Copperfield*. Thus that David was schooled at Salem House. But also among the propositions that could be asserted of David would be those that *explained* in a satisfactory way what David was explicitly asserted by Dickens as doing, saying, or thinking. Thus, to use Dworkin's own example and terminology, the hypothesis that David had a homosexual relationship with Steerforth would be assertible if it was more narratively consistent than its contrary with what David did and thought.¹⁹

The legal analogue would have lawyers and judges asserting not only propositions of settled law (analogous to the propositions explicitly asserted by Dickens) but also propositions which might justify or explain parts of settled law (analogous to the propositions which explain what Dickens explicitly asserted).

Dworkin next maintains that the enterprises he has described are successful. That is participants in these activities believe that some hypotheses or explanations are better than others, they can give reasons for their beliefs, and when they disagree they nevertheless understand each other.

Suppose that the exercise proceeds with fair success. The participants often agree, and even when they disagree they understand the arguments on both sides well enough to rank each set, for example, in a rough order of plausibility.

. . . .

It is very likely that if he [the skeptic about narrative consistency, that is, the existence of soft facts] is asked to take part in the exercise he will find, at least after

18. The literary analogy figures large in both *N.R.A.I* and *N.R.A.II*, *supra* n. 3.

19. *N.R.A.II*, *supra* n. 3, at 25.

listening to the group for a while, that he himself will have beliefs of narrative consistency, and that he will be able to provide arguments that others recognize as arguments, and so forth.²⁰

Dworkin also presses for the legal analogue.

Suppose the judges persuade the philosopher to attend law school for the standard period of three years, and then himself to take up a position on the bench for a period of several years thereafter. He will find that he himself will be able to form judgments of the sort he believes rest on a mistake. He will find that one theory of law seems to him to provide a better justification of settled law than competitive theories. He will be able to provide reasons for that belief, even though he knows that others will not find these reasons conclusive.²¹

Now for the denouement of Dworkin's argument. He contends that the success of the enterprise shows that there really are soft facts, that what the participants believe is true.

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

. . . .

We might now assume the offensive against the philosopher and argue that the fact the enterprise succeeds in the way it does is a reason for supposing that there are facts of narrative consistency about which the participants debate. [emphasis added]²²

Having reached this point, Dworkin proceeds with scarcely a wave of the hand to the conclusion that it is extremely unlikely that there exists no best theory of law.²³

The following seems a fair sketch of Dworkin's argument:

1. The enterprise of constructing theories of law is successful, i.e., participants in the enterprise believe that there are theories, that one theory is better than another, and they believe they have reasons for these beliefs.
2. This success is best explained by the hypothesis that what they believe is true.
3. Therefore, there are theories of law, some are better than others, and there are reasons for this being so.
4. If there are theories of law, if some are better than others, and if there are reasons for this being so, then it is extremely unlikely that there is not a best theory of law.
5. Therefore, it is extremely unlikely that there is not a best theory of law.

It is worth observing, initially, that proposition (3), the proposition Dworkin struggles so hard to establish, is already widely accepted, at least with respect to the physical sciences. Dworkin's "demonstrability thesis" with its insistence on hard facts, had adherents through the '30's, '40's and into the 1950's. But today few would insist that only hard facts are relevant. This change of heart was brought about by the realization that theory con-

20. *Id.*, at 25-26.

21. *T.R.S.*, *supra* n. 3, at 283.

22. *N.R.A.II*, *supra* n. 3, at 26.

23. *Id.*, at 30.

struction was as integral a part of the physical sciences as any so-called "hard" fact.²⁴ What might be insisted on today would be that if a proposition is true, it must be in principle possible to demonstrate that it is after *all* the facts, hard and soft, are in. Thus there is no real difficulty in holding that "soft facts" are relevant, that the enterprise of legal theory construction is legitimate.

This fact marks the transition from proposition (3) to proposition (5), the conclusion, as a bit hasty. And so it is. In the alleged parallel case of literary criticism the transition looks inapt. Thus one might imagine a sagacious critic of *David Copperfield* maintaining that it is a merit of the work that it can be explained by several mutually irreconcilable theories, this fact being a sign of Dickens' genius. Nor is the transition warranted by the fact that legal theories can be graded as better or worse. Thus, while it may be possible to grade the Posner theory better than the Goodhardt theory, it may not be possible to grade the Posner theory as better or worse than the Holmes theory. The possibility of ranking theories and giving reasons for that ranking is compatible with no theory being the best nor being actually ranked best. Numbers can, after all, be ordered as higher and lower, yet there is no highest.

More seriously, the transition so confidently presented runs directly counter to the position Willard Van Orman Quine — perhaps the most influential contemporary American philosopher — takes toward theory in the physical sciences.

[S]till there is trouble in the imputation of uniqueness ("the ideal result"). For . . . we have no reason to suppose that man's surface irritations even unto eternity admit of any one systematization that is scientifically better or simpler than all possible others. *It seems likelier*, if only on account of symmetries or dualities, *that countless alternative theories would be tied for first place.* [emphasis added]²⁵

Perhaps a simple example can induce a taste for Quine's position. The example concerns controversy over the nature of light. One theory, tracing its origin to Sir Isaac Newton, had it that light consisted of particles, tiny projectiles hurled with extreme speed. Another theory, this one tracing its origin to Christiaan Huygens, had it that light consisted of waves. Some experiments seemed to confirm the former theory, thus the "photo-electric effect". Other experiments, however, seemed to confirm the latter theory, thus electron diffraction experiments. So what is really light's nature: is it particle or wave? Here, then, are two optic theories tied for first place.

Example apart, it lies beyond the scope of the present paper to describe why it is that Quine takes this position, but it is emphatically not because Quine is an enemy of theorizing. So, minimally, Dworkin owes an explanation of why it is that legal theory should be so much better placed than physical theory, that whereas there is no best physical theory (as Quine thinks), yet there is a best legal theory.

But the most interesting feature of Dworkin's argument is the transition from propositions (1) and (2) to proposition (3). For it is here that Dworkin exposes his Achilles Heel.

24. These developments are carefully chronicled in C. Hempel, *Aspects of Scientific Explanation* (1965).

25. W.V. Quine, *Word and Object* (1960) 23.

In order to move from (1) and (2) to (3), Dworkin exploits an entirely acceptable style of inference,²⁶ namely,

p.

q is the best explanation of p.

Therefore, q.

But it is a necessary condition of any such inference that it also be the case that:

If q, then p.

Accordingly, in order to use this inference pattern in the way in which he does, it must be the case that Dworkin takes the view that: If there are theories of law, and if some theories are better than others, and if there are reasons for this being so, then participants in the enterprise of constructing theories of law believe that there are theories of law, that one theory is better than another, and they believe they have reasons for this being so.

This might strike some as a curious doctrine, that reality should thus depend on what is believed. But, in fact, the doctrine is an instance of a perfectly respectable general theory of truth²⁷, namely,

(TT) If p is true, then everyone (of a certain description) will believe that p. Not only is (TT) respectable, it will be recognized as a general version of truth of which the "demonstrability thesis" is an instance. For recall that the "demonstrability thesis" states that if some proposition is true, then it can be demonstrated to be so, where the meaning of this latter phrase is that rational persons will believe that p is true.

So it is that we reach the startling result that Dworkin's argument to the conclusion that there exists a best theory of law, far from defeating the "demonstrability thesis", actually depends on a version of it.

But now the jig is up. Recall that Dworkin regularly allows, even insists, that the question of which theory of law is best is a matter of controversy.²⁸ That is, for any theory of law X, it is controversial whether it is or is not the best. Given Dworkin's reliance on (TT), it now follows that, if it is controversial that X is the best theory of law, then X is not the best theory of law. And of course, it follows from this that, if it is true of no theory of law that it is the best, then no theory of law is the best.²⁹

This is Dworkin's dilemma: his argument to the conclusion that there exists a best theory of law rests on (TT). But from (TT) together with his insistence that controversy must continue it follows that there is no best theory of law. The next move is Dworkin's.

26. See G. Harman, "The Inference to the Best Explanation" (1965), 74 *Philosophical Rev.* 88.

27. It is, for example, a theory of truth that C.S. Pierce would have endorsed. See M.J. Speziale "By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law" (1978), 9 *Man. L.J.* 29, at 42.

28. As a purely empirical matter, this seems hard to deny.

29. That is, if it is true of no one in the room that he is a spy, then no one in the room is a spy.