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Professor Dworkin has proposed that hard cases, those where no settled rule dictates a clear decision, should be decided by an analysis of the rights to be accorded to each of the parties. Judges, in these situations, are not making new law or policy decisions but are determining the rights of the parties according to existing principles of law. Dworkin's thesis asserts that one of the parties has a right to win depending on the principles involved. However, he qualifies this theory with regard to criminal cases. "The accused . . . has a right to a decision in his favor if he is innocent, but the state has no parallel right to a conviction if he is guilty." Dworkin bases this exception to the rights thesis on his concept of individual versus majority rights. To weigh individual rights against the rights of the majority will always result in the displacement of individual rights. Therefore, majority rights cannot be used to justify overruling individual rights. Only the competing individual rights are to be considered.

The author generally acknowledges the correctness of the rights thesis, but disputes the criminal exception. He does this by analysis of the very cases on which Dworkin relies and by raising questions as to the nature of criminal prosecution. If the state represents the victim as an individual, there are substantial individual rights to be considered on the prosecution's side, which if the accused is guilty, would give the victim a right to a conviction.

Professor Dworkin has offered the view that judges should de-

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cide and do decide "hard cases" *i.e.*, those where no settled rule disposes the issue through a process of discovering what the "rights" of the parties are. This is done primarily on the basis of "existing principles" within the legal system which must be identified, evaluated and competitively weighed to determine who will be the successful party.[1] Central to the position advanced by Professor Dworkin is a classically *liberal* preoccupation with "individuals" whose rights are to be protected by the application of these legal principles. Accordingly, therefore, arguments of "policy" which characteristically "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole"[2] do not and should not govern the judicial resolution of civil cases.[3]

The application of principles descriptive of individual rights involves a rigorous process necessitating resort to a judicial "Hercules"[4] for the achievement of the "articulate consistency" required by Professor Dworkin's theory.[5] The rights thesis forms the spearhead of a philosophical and jurisprudential attack,[6] directed against Professor H. L. A. Hart's positivist concept[7] of the imputed role of judicial discretion when the rule for deciding a case is unclear. This assault has already provoked an impressive array of analysis and criticism by legal philosophers.[8] The purpose in this analysis, however, is not to offer either an explanation or a critique of the rights thesis as an overall concept. Rather, this writer wishes to proceed on the unproved assumption that Dworkin's rights thesis is basically valid, and is partially invalid with regard to the exception allowed in the application of his notion of

1. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977) [*hereinafter* cited as TRS].

2. TRS, *supra* note 1, at 82.

3. *Id.* at 84.

4. *Id.* at 105.

5. "Consistency here, of course, means consistency in the application of the principle relied upon, not merely in the application of the particular rule announced in the name of that principle." *Id.* at 88.

6. That is, Professor Dworkin means to demonstrate not only the theoretical superiority of the rights thesis at a normative level but to show that it also provides a better account of the reality of judicial decision-making. *Id.* at 84.

7. H. L. A. HART, THE CONCEPT OF LAW (1961).

8. This criticism has been both gentle and probing: *see* Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3 (1977); Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977). Other criticisms have been somewhat more vituperative. *See also* Greenawalt, *Policy, Rights and Judicial Decision*, 11 GA. L. REV. 991 (1977); Richards, *Taking Rights Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U.L. REV. 1265 (1977). Professor Dworkin has recently replied to prominent detractors in Dworkin, SEVEN CRITICS, 11 GA. L. REV. 1201 (1977), and in a new appendix to TRS, *supra* note 1, entitled R. DWORKIN, TAKING RIGHTS SERIOUSLY (Paper ed., 1978).

entitlement (i.e., a right to a decision in one's favor) in criminal cases.

THE DISPUTED EXCEPTION

Dworkin interjects a qualification to his theory at the conclusion of a discussion concerning explicit judicial references to economic policy underlying particular decisions.[9] He notes "a certain limitation of the rights thesis":

> It holds in standard *civil* cases, when the ruling assumption is that one of the parties has a right to win; but it holds *only asymmetrically* when that assumption cannot be made. The accused in a *criminal* case has a right to a decision in his favor if he is innocent, but the state has no parallel right to a conviction if he is guilty.[10]

This writer wishes to dispute the proposition that, as a general rule "the State has no parallel right to a conviction." It is this writer's view that such a conclusion involves an assumption concerning the nature of criminal prosecutions that ignores a fundamental aspect regarding who and what the State represents in a criminal trial.

In support of the declared exception, Dworkin cites the United States Supreme Court decision in *Linkletter v. Walker*.[11] He also makes reference to the earlier decision in *Mapp v. Ohio*.[12] Dworkin views *Mapp* as an example of an instance where "[t]he court may therefore find in favor of the accused, in some hard case testing rules of evidence, for example, on an argument of policy that does not suppose that the accused has any right to be acquitted."[13]

It is possibly quite true that Mapp had no "right" to be acquitted on the basis of the evidence brought against her, since the Supreme Court merely extended the operation of an exclusionary rule already established for federal courts.[14] "All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court."[15] At

9. TRS, *supra* note 1, at 94-100. He attempts in particular to reconcile Learned Hand's theory of liability for negligence as enunciated in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); *see also* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

10. TRS, *supra* note 1, at 100.

11. 381 U.S. 618 (1965).

12. 367 U.S. 643 (1961).

13. TRS, *supra* note 1, at 100.

14. Weeks v. United States, 232 U.S. 383, 391 (1914).

15. 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949), insofar

first glance it would appear that the decision in *Mapp* reinforces the point Professor Dworkin wishes to make without otherwise affecting his thesis. However, he chooses to rely on the decision in *Linkletter* for support by explaining the earlier decision. This is an analytical device which does not effectively convey that which Dworkin wishes to assert.

In *Linkletter* the Supreme Court considered the sole question of whether the newly created rule in *Mapp* should be applied retroactively to state court convictions which had become final before its rendition. The court held[16] that the *Mapp* rule did not operate retroactively even though the unlawful seizure of evidence in the case antedated a similar violation in *Mapp*. Unfortunately for Linkletter, the Louisiana courts were more prompt in rendering judgment than were the Ohio courts, and it was that date which the court viewed as determinative of the issue.[17]

What is interesting and somewhat puzzling in view of Dworkin's reliance on *Linkletter* is that the Court appears to apply a policy rationale having an effect opposite of that in *Mapp*; it upheld the conviction and denied the accused the right to an acquittal. The majority perceived the primary purpose of *Mapp* to be the enforcement of the fourth amendment through the inclusion of the exclusionary rule within its rights, and this purpose would not be advanced by making the rule retroactive."[18] Professor Dworkin might reply that such an observation missed the point,[19] that Miss Mapp had no right to an acquittal and that the same observation would apply to Mr. Linkletter under the circumstances of his conviction. However, given that both cases involve the assertion of an existing right to protection under the Constitution, such a view appears troublesome in the context of Dworkin's thesis as a whole.

One writer has taken Dworkin to task for his apparent tolerance of prospective overruling in criminal cases in an attempt to demolish the rights thesis, at least insofar as it claims to "describe" how judges decide cases.[20]

> If judges do in fact adhere to the rights thesis, their attitude towards retroactivity should be clear: all decisions should be given full retroactive effect because they reflect the rights that litigants have always had and because there can be no reason for distinguishing between the litigant presenting the case [*Mapp v. Ohio*] in which the decision is made and the

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as that decision left the admissibility of evidence obtained in violation of the fourth amendment within the discretion of state courts.

16. Clark, J., Black, J.; Douglas, J., dissented.

17. 381 U.S. 618, 639 (1965).

18. *Id.* at 618 (headnote); *see also* 381 U.S. at 636, 637.

19. TRS, *supra* note 1, at 100.

20. Brilmayer, *The Institutional and Empirical Basis of the Rights Thesis*, 11 GA. L. REV. 1173, 1190-1196 (1977).

> person whose conviction is final [*Linkletter v. Walker*] but is seeking collateral relief.[21]

Professor Brilmayer appears to believe that Dworkin allows for an exception to the rights thesis in an attempt to escape an inconsistency created by the retroactivity issue,[22] as exemplified by *Mapp*, which was clearly premised on a policy of deterrence.[23] Moreover, Brilmayer asserts that this attempt fails.[24]

Brilmayer makes a good argument as it demonstrates that Professor Dworkin's exception to the rights thesis "cannot explain why prospective overruling should be used [by states] in civil cases . . . prior to *Linkletter*."[25] In support of this proposition, Brilmayer cites United States Supreme Court decision in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*[26] That case upheld a refusal by the Montana Supreme Court to apply its ruling retroactively with regard to impugned freight tariffs that had previously been valid under state law.

Delivering the opinion of the Court in *Sunburst*, Mr. Justice Cardozo found as a preliminary matter that "[b]y implication of law there had been written into the statute a notice to all concerned that payments exacted by a carrier in conformity with a published tariff were subject to be refunded if found thereafter, upon sufficient evidence, to be excessive and unreasonable."[27] Thus, in the view of the Court, "prospective overruling on these facts involved no unfair surprise to either party in the dispute."[28]

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21. *Id.* at 1190.

22. In support of a limited retroactive application of constitutional decisions and of the legitimacy of prospective overruling, *see* Mishkin, *The High Court, the Great Writ and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); *contra* to the effect that all newly declared constitutional rights should be given retroactive effect, *see* Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

23. Brilmayer, *supra* note 20, at 1193, *citing* Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 659 (1962). The "sole rational justification (of the exclusionary rule) is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers.' As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964).

24. *See* note 20 *supra*, at 1194-95.

25. *Id.* at 1194.

26. 287 U.S. 358 (1932).

27. *Id.* at 362.

28. *Id.* at 364. "There, the technique (of prospective overruling) is justified on the ground that some judicial lawmaking is desirable but that it should be done in

Having identified the "tentative character" of the party's rights, Mr. Justice Cardozo affirmed the decision of the Montana Supreme Court denying retroactivity[29] stating as follows:

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions . . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited will be viewed as if it had never been, and the reconsidered declaration as law from the beginning . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.[30]

The Court in *Linkletter* expressly adopted the foregoing analysis of the retroactivity issue,[31] but applied it only after taking care to demonstrate that "no distinction was drawn between civil and criminal litigation . . ."[32] in taking this approach regarding the problem at hand.

Mr. Justice Clark then elaborated on a matter that Professor Dworkin would find difficult to characterize as other than a policy rationale for electing between alternatives in deference to a "collective goal" of the community.

> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures.[33]

Logic dictates that Dworkin should be disturbed by this judgment and the context in which it arose. However, in setting forth the proposition that the rights thesis applies asymmetrically in criminal cases, he ignores the context in which the Court saw no

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a way which does not disappoint expectations." *See also* Brilmayer, *supra* note 20, at 1195.

29. 91 Mont. 216, 7 P.2d 927 (1932).

30. 287 U.S. 358, 364-65 (1932).

31. 381 U.S. 618, 629 (1965).

32. *Id.* at 627, citing James v. United States, 366 U.S. 213 (1961); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); United States v. Schooner Peggy, 1 Cranch 103 (1801); State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).

33. 381 U.S. 618, 629 (1965)

> [W]e must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp* . . . *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action . . . We cannot say that this purpose would be advanced by making the rule retrospective . . . .

Id. at 636-37.

distinction for its reasoning between a criminal case and "standard civil cases" where the rights thesis allegedly holds.[34]

It is noteworthy that Professor Dworkin qualifies his acceptance of the authorities he cites, a policy that he doubtless would continue in reply to the present argument:

> I do not mean that a constitutional decision on some grounds is proper, or even that the Court's later description of its earlier decision is accurate. I mean only to point out how the geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds symmetrically.[35]

Even so, in offering proof of the "descriptive validity" of his assertions, Dworkin must take the cases as he finds them. Given this reality, Dworkin nonetheless overlooks the implication of *Linkletter* to his theory—that the civil/criminal distinction collapses upon the same reasoning Dworkin cites for its existence. Thus, there must be a fallacy either in the rights thesis itself, as Brilmayer suggests, or in the created exception, which Dworkin does not adequately explain. The remainder of this paper discusses the view that the error lies in the "exception" and not the rule.

An Alternative View to Questioned Assumptions and Omissions

The basic character of the rights thesis perhaps suggests why Professor Dworkin concedes the existence of, yet does not elaborate upon, that which he perceives to be an appropriately asymmetrical application of the theory to criminal prosecutions. Indeed, he elaborates only to the extent necessary to reconcile difficult case law with the descriptive aspects of his theory. In Dworkin's view, "[a] political right is an individuated political aim" whereas "[a] goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals."[36] Thus, while he would "count legal persons as individuals" and allow for special "group rights,"[37] the

34. TRS, *supra* note 1, at 100.
35. *Id.*
36. *Id.* at 91.
37. "I count legal persons as individuals, so that corporations may have rights; a political theory that counts special groups, like racial groups, as having some corporate standing within the community may therefore speak of group rights." *Id.* at 91 n.1.

instrumentality of the state, which represents society as a whole, cannot have rights under the concept Dworkin has framed.

Dworkin emphasizes the point by again displaying a classically liberal sensitivity to the untrammeled power of the state. Hence, he speaks of "rights against the Government," the existence of which

> would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done. If we now say that society has a right to do whatever is in the general benefit . . . and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.
>
> In order to save them, we must recognize as competing rights only the rights of other members of the society as individuals. We must distinguish the 'rights' of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of members of the majority, which might well count.[38]

It follows, therefore, that if the state represents only society as a whole, then society does not have rights in the same sense as an accused individual in a criminal prosecution. It is at this point that Dworkin makes a critical error by apparently ascribing this singular role to the state in criminal cases.

A crime must be understood as an offense against society for which society, in turn, prescribes some penalty or punishment once the offense is proven. But it is also true that most crimes,[39] certainly those we regard as serious crimes, characteristically involve "individuals (victims of the alleged criminal activity who are, by virtue of their injuries, distinguishable from the accused and from society as a whole.) Thus, even if one accepts Dworkin's argument that the rights of society are not rights in the true sense, one can still speak of the rights of a particular victim of the alleged crime which *can* be said to compete with the perceived rights of the accused. The fact that the rights of the victim are not advanced by him *personally* would not appear to be decisive of the issue one way or another. The point is that, "if individuals have rights against other people, and if the state has or has not assumed the obligation to enforce these rights, then it may have

38. *Id.* at 194.

39. The writer recognizes that there are also victimless crimes in the sense that no particular individual is harmed by the conduct of the accused, such as a speeding violation where no one is injured on the highway or a case of defrauding the government. It would appear that offenses of this sort provide a better fit for Professor Dworkin's declared exception to the rights thesis than those such as assault, rape, fraud (against a private individual or other legal person) and libel where the injury or potential danger to a particular individual is readily perceived and indeed, basic to the instigation of criminal proceedings against the accused.

rights as a representative of the persons it protects."[40]

Dworkin states that it is important to "distinguish the 'rights' of the majority as such, which cannot count as a justification for overruling individual rights, and the personal rights of members of a majority, which might well count."[41] It is puzzling, therefore, that having recognized the nature of the distinction implicit in the identification of a dual role for the state in criminal cases, Dworkin neglects to consider the rights of *victims* when justifying the denial of any competing right of the state to a conviction in a criminal case. Indeed, it may be argued that this failure to distinguish the rights of victims from the instrumentality of the state in a criminal prosecution is fundamentally inconsistent with Dworkin's own perception of what the rights thesis is required to embody.

A basic norm or right which Dworkin incorporates in his theory of rights is "that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them,"[42] or, in another context, that "the right to treatment as an equal, which is the right not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else."[43] This basic principle of equal respect and concern would appear to be squarely at odds with the notion that a state, in its representative capacity concerning an aggrieved individual, does not have any competing right to a conviction in a criminal proceeding. Presumably, the victim of a crime possesses basic rights, as does the accused. Moreover, neither the burden of proof that the state must satisfy to prove its case nor exclusionary rules of evidence which may inhibit this process will abrogate the rights of the victim. While the resources and power of the state may require it to meet a more rigorous standard of proof than an accused individual who has the benefit of a basic presumption of innocence in his favor, such matters should be distinguished from the right of the victim (through the instrumentality of the state) to a conviction, provided the required standard is met.

In fairness to Professor Dworkin and perhaps in anticipation of

40. Nickel, *Dworkin on the Nature and Consequences of Rights*, 11 GA. L. REV. 1115, 1137 (1977).
41. TRS, *supra* note 1, at 194.
42. *Id.* at 227.
43. *Id.* at 273.

a counter-argument that he may wish to make with regard to these apparent inconsistencies in his theory, it is admitted that his comments upon which the attack centers were phrased primarily in the context of what he would describe as rights againt the state. However, considerations of equal respect need not be limited to rights of this type. Indeed, according a specific role to the victim of a criminal act violative of his rights merely places him in the position of one who has "rights against fellow citizens" as in an ordinary civil case.[44] This line of argument suggests a partial collapse of the distinction Dworkin draws between these two species of rights: that "[t]he former (rights against the state) justify a political decision that requires some agency of the government to act; and that the latter (rights against fellow citizens) justify a decision to coerce particular individuals."[45] However, the strength of the argument necessarily depends on the validity of the rights-possessive role ascribed to the victim in opposition to that of the individual accused of a crime.

This disagreement with Professor Dworkin concerning the exception he allows for the asymmetrical application of the rights thesis in criminal cases necessarily involves further assumptions about the nature of criminal law and its purpose in society. The focus on victims of crimes, which underlies the attack on this limited aspect of the rights thesis, presupposes some affinity for what are usually described as retributive notions of justice, that is, the sense that the criminal law imposes a *punishment* on an individual for his acts against others. No such concern arises if the criminal law is viewed in terms of fulfilling collective goals such as the rehabilitation of offenders[46] or simply in terms of the prevention of crime through the deterrence of future criminal acts.[47]

John Locke once observed that "the right to punish" or power to retribute consisted in a right to impose "what is proportionate to [the] transgression, which is so much as may serve for Repara-

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44. *Id.* at 94.

45. *Id.*

46. Rehabilitation theories in criminal law have been generally refuted in recent writings on criminal sanctions. *See* E. VAN DER HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, DOING JUSTICE (1976); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); Wilson, *The Political Feasibility of Punishment*, JUSTICE AND PUNISHMENT 107 (Cederblom and Blizek ed. 1977).

47. H. L. A. HART, THE CONCEPT OF LAW 181 (1961). "For Hart, the case for punishment as a general social practice or institution, rests on the prevention of crime; it is not to be found either in the inherent appropriateness of punishing wrongdoing or in the contingently 'corrective' or rehabilitative powers of fines or imprisonments on some criminals," Wasserstrom, *Some Problems with Theories of Punishment*, JUSTICE AND PUNISHMENT, *supra* note 46, at 188.

tion and Restraint."[48] Obviously, there are problems with the notion that punishing one person through a criminal sanction serves to compensate the person who has been harmed by a criminal activity.[49] Indeed, while this writer does not mean to give a full account of the complexities of retributive or other theories of punishment, these concepts must be grappled with insofar as they may underlie Dworkin's attitude toward criminal cases and the present questioning of his position on how the rights thesis should apply to them.

Whatever its limitations, retributivism recognizes the rights of victims in a fashion akin to that identified by the primary argument, if only because of "the importance it places on the concept of the person."[50] In so doing, it offers a characteristically "moral" point of view[51] which is clearly in step with the rights thesis, provided that the position that victims have rights amenable to representation by the state is valid.

Professor Dworkin does not explicitly relate his view on criminal justice and punishment in the context of the rights thesis. It is suggested, however, that these views are, to employ the terms of one writer's classification, "liberal" and "suspect centered". It is further suggested that he is one of "those whose interest in criminal justice has been chiefly directed at enlarging the range of procedural and substantive protections afforded those suspected of, charged with and penalized for a crime."[52] Should this classifi-

48. II TWO TREATISES ON GOVERNMENT § 8 (1690), *cited in* Bedau, *Concessions to Retribution in Punishment*, JUSTICE AND PUNISHMENT, *supra* note 46, at 51.

49. On this view, retribution in punishment consists of two things: making adequate reparation to the victim and making sure the offender commits no further crimes. No doubt there is an etymological tie among "retribution", "restitution" and "reparation". But there is no other general connection between putting the victim back on his feet (restitution or reparation) and inflicting a deprivation on the offender (punishment), and so there is no way in general to explain the latter even in part by reference to the former.

50. Wasserstom, *supra* note 47, at 187.

51. Professor Hart has delineated the following model of a retributive theory illustrative of the point. "Such a theory will assert three things: first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offense; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good." H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1968). This is not to suggest, however, that Professor Hart himself subscribes to such a model. *See* note 46, *supra*.

52. Wilson, *supra* note 46, at 107. The same writer labels the "victim centered" approach as "conservative" in the name of those "who have chiefly sought to en-

cation substantially reflect Dworkin's viewpoint, it might serve to explain his apparent desire to eliminate the entitlement of the state to a conviction in a criminal case, notwithstanding the rights the victim of a criminal act may possess.

Regardless of whether or not a retributivist account of criminal cases serves to justify an asymmetrical application of the rights theses as in civil cases, it is important to recognize that very little actually separates the two. "What distinguishes a criminal from a civil sanction and all that distinguishes it," writes Professor Henry M. Hart, "is the judgment of community condemnation which accompanies . . . its imposition."[53] This distinction, while certainly significant, at the same time fails to preclude the notion of competing rights as between victim and accused. In this regard it is further suggested that the sanction imposed, which in a criminal case consists of an at least temporary incarceration of the accused,[54] is to be further distinguished from the determination of criminal liability wherein the evaluation of the competing rights between victim and accused would take place. Thus, a competing right of the state (in its representative capacity) to a conviction does not necessarily extend to the state an entitlement to a sentence.[55] Indeed, the situation is analogous to a civil proceeding where the determination of liability and the assessment of damages are similarly separate questions. In his argument of individual rights against the state, Professor Dworkin admits that, "[c]itizens have personal rights to the state's protection as well as personal rights to be free from the state's interference, and it may be necessary for the government to choose between these two sorts of rights."[56] In this instance Dworkin was citing the law of

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hance the powers of order maintenance and penalty imposing institutions in order to protect society." *Id.* at 108. What the latter classification ignores, however, is that a victim centered approach—at least in a retributivist mold—accords primacy to the individuals involved and not to the goals of society.

53. Hart, *The Aims of the Criminal Law*, 23 LAW AND CONTEMPORARY PROBLEMS 401 (1958), *cited* in J. FEINBERG, DOING AND DESERVING 99 (1970).

54. Professor Dworkin is assumed to be of the view that an individual has a fundamental right not to be incarcerated by the State. "We might come to accept . . . the *principle* that men should sometimes be made to be free." TRS, *supra* note 1 at 156. Such a right the individual may lose only in consequence of valid statute declarative of a community policy upon which the right may be denied in response to a prevailing social goal: *e.g.*, public safety; however, a judge may deal with the issue as one of principle, appreciating the distinction Dworkin makes between "concrete" rights and "competing claims of abstract rights", recognizing that "the weight of a competing principle may be less than the weight of the appropriate parallel policy." TRS, *supra* note 1, at 93, 100.

55. An entitlement to a conviction of the accused for murder does not necessarily mean that a state may also prescribe the death penalty. See Furman v. Georgia, 408 U.S. 238 (1972); *but see* Gregg v. Georgia, 428 U.S. 153 (1976), upholding the same Georgia statute amended after the decision of the Court in *Furman*.

56. TRS, *supra* note 1, at 193.

defamation to illustrate the notion of competing rights. However, if the foregoing arguments have any validity at all, then Dworkin has failed to explain why a similar notion should not govern equally in the judicial consideration of a criminal case.

CONCLUSION

The foregoing discussion has been an attempt to demonstrate how Professor Dworkin's asymmetrical application of the rights thesis to criminal cases is not generally supported by the examples he employs; the case law cited in reliance for his position, notwithstanding the reservations Dworkin places upon it, in fact destroys rather than preserves the distinction between civil and criminal cases which he advocates; accordingly, the created exception to the overall application of the concept undermines the rights thesis as a whole. It remains unclear whether Dworkin views the exception he perceives as one he feels compelled to make so that his theory may retain descriptive accuracy, or whether he considers it to be a desirable anomaly in the light of his primary concern for the rights of individuals against the powers of the state. It is reasonable to assume, however, as suggested by some of the discussion concerning statements made by Dworkin elsewhere in his book, that the concession was enthusiastic rather than grudging.

It may be that Professor Dworkin will choose to reconsider the criminal cases exception to the rights thesis. In that result, it is hoped any such reconsideration will display a greater sensitivity to that category of individuals with which this article has been concerned.