

Taking Dworkin Seriously

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Introduction

Acting as legal prisms of sorts through which general policies, principles, precedents, and foundational theories justifying the entire legal system travel, judges can, do, and should discover the rights of the litigants; all such factors relevant to a particular case, even hard cases, converge and illuminate the rights of the parties. And these rights, even if based on a legal rule articulated for the first time, can be seen as pre-existing rights, since the judge has not gone beyond what can be viewed as the law. The idea set forth here is Dworkin's (although the metaphor is mine), and is identified by him in his *Taking Rights Seriously*¹ as his *rights thesis*.

The thesis is Dworkin's answer to legal positivism, which holds, in part, that the legal system is a set of identifiable legal rules, that when a judge must decide a case for which no existing legal rule applies, he is to use his discretion and lay down a just rule, thus inventing the rights of the litigants. Dworkin introduces his thesis regarding the judge's role of discovering pre-existing rights early in his book and formally introduces the phrase, "rights thesis," by his fourth chapter, "Hard Cases." The rights thesis is then referred to often, and further developed.

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¹ R. Dworkin, *Taking Rights Seriously* (1977) (hereinafter cited as Dworkin).

With his notions of the *right answer* and the *right to win*, when used in the proper context, Dworkin is able to restate the rights thesis. When he says that the judge has arrived at the right answer in a case, he means that the judge has acted in accord with the rights thesis. And when he says that the judge has declared that the plaintiff has a right to win, he means, again, that the judge has acted in accord with the rights thesis, that he has discovered the rights of the parties involved.

Now Dworkin attaches much significance to his concepts of the right answer and the right to win. He employs them not only to restate his rights thesis but also uses them in his recent analysis of when it is fair for a state to enforce a judgment, and ultimately in integrating aspects of his entire theoretical structure. In the final chapter of *Taking Rights Seriously*, which is one of the two chapters appearing in print for the first time, we find that necessary conditions for a state to enforce a judgment fairly are that a litigant have a right to win and that there be a right answer in each case.² The importance of these concepts in Dworkin's philosophy becomes apparent, and it is thus a project of no little worth to inquire into the clarity of these concepts, especially when, as will be brought out, there is some *prima facie* evidence indicating that these concepts are less than clear. In analyzing these concepts, I point to textual evidence which indicates that Dworkin expects the right to win and the right answer to perform in a more versatile fashion in his overall script than merely to act as substitutes for the rights thesis. I identify ambiguities in these concepts and confusions surrounding them. Based on that, I ultimately conclude that Dworkin's architectonic, as it presently stands, is in need of foundational repairs.

Analysis and Evaluation of Dworkin's Right Answer

Dworkin's Use of the Right Answer

Let us begin our analysis of Dworkin's concept of the right answer with a look at how he uses the notion. Within a short span of pages, Dworkin offers conflicting claims about the right answer. "My arguments suppose that there is often a single right answer to complex questions of law and political morality."³ "The 'myth' that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth."⁴ And finally, Dworkin seems to have no quibble with his opponents attributing to him the view "that there can be a right answer in a hard case."⁵ Dworkin's claims that there is, there often is, and there can be a right answer are quite different claims, and, when

² *Ibid.* at 279-90

³ *Ibid.* at 279.

⁴ *Ibid.* at 290.

⁵ *Ibid.* at 287.

looked at jointly, lead to confusion over his view. I take this as *prima facie* evidence that something may have gone awry in Dworkin's analysis and that some investigation is warranted either to dispel these confusions or to show where Dworkin has gone wrong.

As pointed out, Dworkin, at times, merely restates the content of his rights thesis by saying that the judge has found the right answer. Dworkin likens the manner in which judges following the rights thesis proceed to the manner in which a referee in a chess game operates, and it is with this analogy that he suggests this restatement. And, as we shall see, the discovery of this right answer seems to be primarily the result of a gestalt-like perception by the experienced judge, and in this consists the first sense of the right answer which I wish to identify.

The setting is this. It is the Russian grandmaster, Tal, versus the American, Bobby Fischer, at chess. Tal persists in displaying an unnerving grin during the game. We are asked to suppose that there is a rule of chess that "the referee shall declare a game forfeit if one player 'unreasonably' annoys the other in the course of the play."⁶ Dworkin elaborates how the referee in such a situation might construct the game's character to aid in deciding whether Tal loses. Given that chess is an intellectual game, the referee might ask whether the intellectual nature of chess is more like poker, where psychological intimidation might be seen as part of one's intellectual prowess, or mathematics, where it clearly plays no role. Dworkin qualifies this by pointing out that the seasoned referee already will have developed a sense of the game's character, which he will employ in deciding the case; the referee actually will not construct the game's character as described above, but such a description, Dworkin thinks, makes clearer how that character bears on particular issues. Dworkin then draws some conclusion about the referee's decision making in chess which we assume are applicable, with the necessary changes, to a judge's decision making:

Once an autonomous institution is established, such that participants have institutional rights under distinct rules belonging to that institution, then hard cases may arise that must, in the nature of the case, be supposed to have an answer. If Tal does not have a right that the game be continued, it must be because the forfeiture rule, properly understood, justifies the referee's intervention; if it does, then Fischer has a right to win at once. It is not useful to speak of the referee's "discretion" in such a case... they [the parties] are... entitled to his best judgment about which behavior is, in the circumstances of the game, unreasonable; they are entitled, that is, to his best judgment about what their rights are. The proposition that there is some "right" answer to that question does not mean that the rules of chess are exhaustive and unambiguous; rather it is a com-

⁶ *Ibid.* at 102.

plex statement about the responsibilities of its officials and participants.⁷

Early in the quotation we find mention of there being an answer in a hard case. From here Dworkin proceeds to speak of the rights of the parties, how the concept of the referee's discretion is not useful in deciding the hard case, and how the referee has a responsibility to give his judgment on what the rights of the parties are. From this I gather that, when the referee has concluded what the rights of the parties are, we say he has found the right answer. Analogously, when the judge has discovered what the rights of the parties are, we say he has found the right answer. Now, since the rights thesis "provides that judges decide hard cases by confirming or denying concrete rights,"⁸ it seems that we may say that, when judges act in accord with the rights thesis, judges find the right answer in hard cases. We thus see how Dworkin's rights thesis can be stated in terms of the right answer. Further, we are led to believe from this analysis that a primary element in the judge's arriving at the right answer is his "seeing" just what such norms as legal rules, principles, and precedents add up to for the resolution of the controversy.

Another of Dworkin's portrayals of the judge arriving at the right answer suggests that the essential ingredient is the judge's *evaluating and ranking arguments* on both sides of a case. It is in Dworkin's rejection of the "strongbox theory of the law," which holds that "there is always a 'right answer' to a legal problem to be found in natural law or looked up in some transcendental strongbox,"⁹ that we can gather more information on this second view of a right answer. He suspects that he may be accused of subscribing to the strongbox theory of the law, given that he has made room for one's "making judgments about what the law requires, even in cases in which the law is unclear and undemonstrable."¹⁰

To such an allegation Dworkin responds, perhaps uncharitably, to natural law theorists:

The strongbox theory of law is, of course, nonsense. When I say that people hold views on the law when the law is doubtful, and that these views are not merely predictions of what the courts will hold, I intend no such metaphysics. I mean only to summarize as accurately as I can many of the practices that are part of our legal process.¹¹

Dworkin then proceeds to describe some of these processes. Again, it seems reasonable to suppose that in that description, Dworkin is giving us more information on his theory of a right answer. For one thing, he has just rejected what the strongbox

⁷ *Ibid.* at 104.

⁸ *Ibid.* at 101.

⁹ *Ibid.* at 216.

¹⁰ *Ibid.* at 216.

¹¹ *Ibid.* at 216.

theorists understand by a right answer. Further, the entire discussion has arisen in a context similar to that where Dworkin previously discussed right answers, namely, in the context of there being opposing, yet plausible, arguments for a difficult legal issue. What, then, are these practices that Dworkin speaks of, the description of which might reasonably be construed as providing further information on his notion of a right answer?

Lawyers and judges make statements of legal right and duty, even when they know these are not demonstrable, and support them with arguments even when they know that these arguments will not appeal to everyone. They make these arguments to one another, in the professional journals, in the classroom, and in the courts. They respond to these arguments, when others make them, by judging them good or bad or mediocre. In so doing they assume that some arguments for a given doubtful position are better than others. They also assume that the case on one side of a doubtful proposition may be stronger than the case on the other, which is what I take a claim of law in a doubtful case to mean. They distinguish, without too much difficulty, these arguments from predictions of what the courts will decide.¹²

If we take the passage above as an adumbration of what Dworkin means by a right answer, we find that the discovery of the right answer now essentially involves ranking arguments in strength. At first glance, this seems to be circumscribing a notion of the right answer quite different from Dworkin's earlier portrayal of it.

The notion that the right answer is arrived at when the judge discovers the rights of the litigants via his well-seasoned sense of the nature of the legal enterprise seems to draw primarily on the judge's experience. On the other hand, we seem to have come upon a sense of the right answer, the discovery of which primarily involves the judge acting as a rational and impartial arbiter and evaluator of arguments, with the focus on his powers of analysis and reasoning. In the light of this, it seems important to further explore, explicate, and evaluate this latter sense of the right answer and its relation, if any, to our original understanding of the right answer.

Clarification, Reconstruction, and Evaluation of this Latter Sense of the Right Answer

If I am reading Dworkin correctly, I believe he is saying, and I am here drawing on the quotation above, that the right answer in a hard case, one where there are competing arguments on both sides of a doubtful proposition, lies in the stronger case, and in that lies the successful claim of law. Further, I assume that Dworkin will allow that there is usually more than one argument on each side of a hard case. Accordingly, it would seem that this comparing process would involve one not only

¹² *Ibid.* at 216

identifying which side of the hard case ultimately has the stronger position or argument, but also evaluating the various arguments on each side of the case. With the promise that I will make all of this more concrete with an example, let me continue with this explication of the model which Dworkin seems to have in mind for the right answer.

Let us call the doubtful proposition, for which there may be plausible arguments, both for and against it, P . And let us refer to its denial, not P , as $\neg P$. We may then call the various arguments supporting P : $Y_1, Y_2, Y_3, \dots, Y_n$, and those supporting $\neg P$: $S_1, S_2, S_3, \dots, S_n$. From those arguments supporting P , some will be seen by the judge as better than the others; thus he may make a judgment that Y_1 and Y_2 and Y_3 best support P , and that they are better than Y_4, Y_5, \dots, Y_n , and that they constitute the case for P . And a similar selection will occur when the judge evaluates those arguments in favour of $\neg P$. He sees some as better than others in providing support for $\neg P$. Now Dworkin says not only that judges can evaluate the arguments for doubtful propositions, but also that they can evaluate which case on each side is stronger. And we assume that the decision as to which side is stronger results in the right answer.

Consider, for example, the recent Supreme Court decision in *Commissioner v. Kowalski*.¹³ In this case, one can view the contrary propositions being argued before the Court as these: cash payments designated as meal allowances to Kowalski, a state police trooper in New Jersey, are included in gross income under section 61(a) of the Internal Revenue Code of 1954, P , and such payments are not so included, $\neg P$. The respondent, Kowalski, argued for the latter proposition, $\neg P$, in these ways (for our illustration we shall consider only the main point made by three of these arguments): that there was a specific exemption for such payments under section 119,¹⁴ which we can call argument S_1 for $\neg P$, that regardless of whether section 119 provides an exemption, there is an exemption in lower court and administrative rulings¹⁵ (S_2 for $\neg P$), and that it would be unfair if the respondent were not able to exclude his payments from income when military members are allowed to exclude their subsistence allowances¹⁶ (S_3 for $\neg P$).

Now the Court does not explicitly rank these arguments; it does proceed, in fact, to refute each of them. But for the purposes of constructing this example, let us speculate as to which of the points argued for one might consider the strongest, and let us here assume that the logic in support of each is equally compelling. I think it could be agreed that S_1 is the strongest. It is the only direct argument for $\neg P$. S_2 and S_3 enter the picture only if it is conceded that there is no specific

¹³ (1977), 98 S. Ct. 315.

¹⁴ *Ibid.* at 319.

¹⁵ *Ibid.*, at 319.

¹⁶ *Ibid.* at 325-26.

exemption under section 119. S_2 and S_3 would contribute nothing further to the debate if S_1 were accepted. And one might even see S_2 and S_3 as weakening S_1 , since they admit of the possibility of S_1 being erroneous.

What of the force of the arguments for P , that the payments are income? Again let us restrict our consideration of them to three: Y_1 – regardless of whether there is an exception under section 119, the respondent has left out some vital evidence, namely evidence showing that the allowances were necessary for the respondent properly performing his duties;¹⁷ Y_2 – there is no specific exemption under section 119; and Y_3 – the respondent's argument of fairness can carry little weight – “arguments of equity have little force in construing the boundaries of exclusions and deductions from income many of which, to be administrable, must be arbitrary.”¹⁸ Again, assuming that the logic for each of these arguments is equally compelling, let us consider which might be considered best. It might be noted that arguments of the sort of Y_2 and Y_3 cannot independently establish that the respondent's payments are income. Y_1 , on the other hand, is much closer to operating independently, since it tells us that a necessary condition for claiming an exemption has not been met by the respondent, so that even if there is an exemption, the respondent's payments will have to be treated as income. For this reason it might sensibly be asserted that Y_1 is the best of this set of arguments.

This then pits Y_1 , that there is vital evidence lacking, against S_1 , that there is a specific exemption. And the Court may sensibly assert that Y_1 is better than S_1 in ultimately deciding the case, since the force of Y_1 stands even if S_1 is granted. But look what has happened. We were forced into an unrealistic showdown between Y_1 and S_1 . It may very well be that if Y_1 were pitted against S_2 , then the outcome would be quite different. Y_1 only says that the evidence for a section 119 exemption is lacking, whereas S_2 asserts that notwithstanding a section 119 exemption, there is an exemption in the lower courts. It can easily be seen that, granting the equal force of Y_1 and S_2 , the judge would most likely select S_2 , since Y_1 offers no challenge to it, and under these circumstances, the outcome would be different. Dworkin's model closes off the full scope of the competition of arguments presented for the judicial decision and is too restrictive. Furthermore, it becomes apparent that Dworkin is relying on two senses of “better than” or “stronger than.” The judge determines which arguments for P are “better than” other arguments for P and which for $-P$ are better than other arguments for $-P$; let us call this sense₁. The judge is also to determine whether the argument(s) for P is/are “better than” the argument(s) for $-P$; let us call this sense₂. On the one hand, we are ranking arguments for the same position,

¹⁷ *Ibid.* at 325.

¹⁸ *Ibid.* at 326.

whereas on the other hand, we are ranking arguments for different positions. The very fact that the judge is making evaluations and comparisons of two quite different kinds is both interesting to note and important to bring out in any adequate description of the legal reality. This leads to a second, related, and more important point. Given that two notions of "better than" are being used, we should at once be very suspicious that any transitivity will carry through to Dworkin's right answer. More specifically, while it may be that Y_1 for P is better than (sense₁) Y_2 and Y_3 for P , and S_1 for $\neg P$ is better than (sense₂) S_2 and S_3 for $\neg P$, and further that Y_1 for P is better than (sense₂) S_1 for $\neg P$, it does not necessarily follow that Y_1 for P is better than (sense₂) S_2 or S_3 . S_2 or S_3 may have lost out in the competition with S_1 , but they have never competed with Y_1 . Given the possibility that S_2 or S_3 for $\neg P$ may be better than (sense₂) Y_1 for P , it seems that Dworkin's model may channel us into an answer for a hard case that is not necessarily the right answer. And if this analysis can be seen as a further explication of, and a consideration of the implications of the second sense of a right answer that we have been considering, it can be concluded that that sense of the concept is confused and inadequate to capture whatever Dworkin wishes to convey.

We need to hear more from Dworkin as to precisely how he wishes to delineate one's arrival at the right answer or how he proposes to clear away the confusions and inadequacies pointed to. Further, it is not at all clear whether Dworkin has changed his mind about what the right answer involves, given that we have isolated two senses of it, or whether the latter sense is in some way an attempt to spell out further what the underlying structure of a judge's intuitive insight is. Whatever the case, it seems that the lack of clarity surrounding Dworkin's concept of the right answer is sufficient to warrant our having reservations already about his analysis of when it is fair for a state to enforce a judgment.

Analysis and Evaluation of Dworkin's Right to Win

Interesting parallels can be drawn between Dworkin's notions of a right to win (or a right to a decision in one's favour) and of the right answer. As brought out earlier, Dworkin employs his concept of the right to win, in some contexts, to state in an alternative fashion, what the rights thesis asserts. At other times it is clear that Dworkin is departing from that usage and seems to be positing a substantive right on the part of the litigants. Again, our strategy here will be to analyze these senses of the right to win as to their conceptual clarity and merits and their contribution, if any, to Dworkin's overall project. As with Dworkin's concept of the right answer, I ultimately conclude that the right to win is ambiguous and in need of clarification.

Dworkin's Use of the Right to Win

Let us first look at how Dworkin employs his concept of the right to win as a means of restating his rights thesis. Dworkin tells us early in his work that he "shall argue that even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of the parties are."¹⁹ Here it is clear that we speak of one party or the other as having a right to win, even in hard cases; that the right is already existing; and that the judge is to discover it. This accords with, and is the thrust of, the rights thesis. Further, it is clear that Dworkin is not claiming here that the right to win is any right over and above the substantive right that the plaintiff or defendant may be asserting, e.g., that the plaintiff has a right to recover for damages resulting from the defendant's negligent infliction of mental distress. The judge's conclusion that the plaintiff has such a right to recover, we suppose, is tantamount to his saying that the plaintiff has a right to win. For if it is denied that the plaintiff has a right to win when one asserts that the plaintiff has a right to recover damages, one is, in effect, saying that the plaintiff does and does not have a right to recover damages, which is obviously contradictory. For these reasons, then, it appears that Dworkin is aligning his notion of the right to win with his rights thesis and is not describing anything further with the notion than the content of the thesis itself; *he is not postulating here some special right over and above the substantive rights of the parties whose rights the judge is to discover*. It may be an odd way of asserting what the rights thesis describes, but philosophers have stated their claims in stranger ways.

Towards the end of *Taking Rights Seriously*, however, we find Dworkin speaking of the right to win in quite a different way. Dworkin tells us, in the context of discussing a hard case where lawyers' perceptions of the plaintiff's position may vary, 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."²⁰ Note how the notion of the right to win is used here in contrast to its use above. Above we saw the judge declaring who had the right upon his discovering the parties' substantive rights in accord with the rights thesis. Here, however, the opposing parties can each assert, "I have a right to win." And we are told they can "sensibly" do so. It now seems that the right to win has entered the domain of substantive rights which the litigants can assert, and that it is not simply a phrase of art to restate the rights thesis. Let us explore this latter sense of the right to win and consider if there is any means of clearly explicating such a substantive right in a manner that is consistent with Dworkin's views.

¹⁹ Dworkin at 81.

²⁰ *Ibid.* at 279-80.

Analysis and Evaluation of this Latter Use of the Right to Win

Now, Dworkin may be claiming that the very reason why the assertions of the litigants with regard to their right to win is sensible is that, in a hard case, it may not be immediately clear to the judge which party has the right. In the context of the judge saying "Defendant may have the right" and "Plaintiff may have the right," why cannot *each* assert, "I have the right"? But it is difficult to see why the judge's present uncertainty should provide any ground for what the plaintiff and defendant can assert. For it would seem that any cogency of their utterances wrongfully draws on the judge's present ignorance. The situation is similar to one where an instructor who has not yet examined his students mentions to the class, "I wonder which of you are my A students," and each responds, "I am."

Now it may be that each is asserting that because of the present situation, "It is possible I am your A student." One may at this point wonder whether Dworkin means only this, that when each party sensibly asserts his right to win, he is only saying that it is possible that he has a right to win. This alternative seems unlikely, given that the claim is so terribly weak. My assertion that I possibly have a right to be the first man on Mars is so innocuous that few would quibble over whether I may be correct, yet add, "But what of it?" It would seem that rights are either asserted or not, and that the asserter is saying, if his claim is to make any sense, "It is true that I have a right to X and not merely that it is possible that I have a right to X."

Is there any other sense in which the litigants might assert a right to win as a substantive right? The rights thesis, in its descriptive and normative aspects, tells us how judges do and should act, respectively. In its normative aspect, it sets out the obligations of judges based on the justification of how the system operates.²¹ If a judge deviates from the descriptive aspect of the thesis, we might tell him that he ought to conform to it, given that our entire system rests on, or is justified by, the system's operating in accord with the rights thesis. Could Dworkin be saying that this in itself is a sufficient ground for our saying that a citizen has a *right* to have the rights thesis followed, given that this is how things should be, and in *this* consists the right to win? More specifically, is it the case that because judges have a certain duty to follow the rights thesis, do litigants thereby have a corresponding right, call it the right to win, to have judges act in this way?

An affirmative answer would be highly dubious. While some jurisprudents, like Hohfeld, have asserted that rights and duties are invariably correlative,²² others, such as Feinberg,

²¹ *Ibid.* at 123.

²² See W. N. Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (1919).

have cogently challenged the claim.²³ And even if there is a right corresponding to the judge's duty to act in accord with the rights thesis, it does not follow that the citizens, as litigants, are the bearers of the correlative right. We may see the right, if there is one, as vesting solely in the state, where the state is given power to remove judges unwilling to conform to the rights thesis. And clearly, under these circumstances, it would not make sense to call the right a right to win.

Even if we discard the talk of correlative rights and duties, it may still be the case that Dworkin wishes to unpack the concept of the right to win as the litigant's right to have the judge act in accord with the rights thesis. And there is some reason for thinking this is so. He does speak of there being a right to a right answer, and, as we saw, the right answer, in one sense, is arrived at when the rights thesis is followed. In other words, Dworkin does recognize a right to have the rights thesis followed; and this is the right he may be referring to when he claims that litigants can sensibly assert a right to win. Further, we might recognize that Dworkin is merely making an observation about the legal reality when he says that litigants can sensibly assert a right to win; he is not trying to *prove* that there is such a right or to create new rights.²⁴

²³ See Feinberg, *Duties, Rights and Claims* (1966), 3 *American Philosophical Quarterly* 137.

²⁴ In considering whether Dworkin can *establish* that a citizen has a right to win, understood as the right to have the judge follow the rights thesis, one might inquire whether any of Dworkin's general definitions of a right, of which he offers a number, in any way help to posit such a right. For it may be that some special and justifiable understanding of Dworkin's of what a right is allows us to sensibly say that litigants have a right to win. Some of Dworkin's definitions do not seem at all applicable to the instant situation. For example, we find that some of the definitions proceed in terms of a citizen having a right to do something which seems most applicable to *activities*, such as those protected by the first amendment (Dworkin at 188, 269). Such definitions I shall pass over. Others, however, are colourable as candidates for help. Consider: "An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served" (*ibid.* at 91). This definition seems to help little in establishing any right to win, in the sense of a litigant having a right to have the rights thesis followed. Assume that the opportunity or resource or liberty involved is that of living under a legal system in which the rights thesis is in force. Further assume that the political decision here is one of a judge, where he declares, "Plaintiff wins and my decision reflects my discovery of his rights in accord with the rights thesis." Now, clearly the judge's decision may contribute to furthering that state of affairs where the rights thesis is in operation. But it would be begging the question, as to whether a litigant has the right to have the judge act in this way, to continue, as Dworkin does, to speak of furthering the state of affairs in which the individual *enjoys the right*; Dworkin analyzes the notion of a right with the notion of a right. The judge may be furthering the state of affairs which he is obligated to further, but it may be that the citizens may only be the beneficiaries of his acting in this way without their having a right to it. This definition, then, helps little in establishing a right to win. Dworkin also defines a right in this way: "a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so" (*ibid.* at 139). Now we find Dworkin aligning the concepts of right and wrong with that of a right, a dubious alignment. A testator may be doing a wrong to one of his relatives by disinheriting him over a minor quibble, but the disinherited one has no corresponding right against the testator. And there is no reason to think the situation is essentially different with the state. It may be that the state, through one of its agents, a judge, can be seen as having wronged the citizen, because the judge has not executed his duty of following the rights thesis. But again, all of this can occur within a context where there is no corresponding right on the part of the citizen or litigant to have the judge follow the rights thesis.

But even if Dworkin is positing a substantive right to win, understood as a right to have the rights thesis followed, as a matter of descriptive fact, he still needs to answer important questions as to who has the right, when it obtains, and what the scope of the right is.

Now, Dworkin speaks of a *litigant* asserting a right to win. If we do understand that right as the right to have the rights thesis followed, does this mean that a *citizen* has no right to have the rights thesis followed unless he is a litigant? Does it mean that when the plaintiff files his original petition for relief he can thereby sensibly assert the right, given that he is now a litigant? And does this mean that at that same time, the defendant, now a litigant, can assert the right? Or must the defendant first be served with process? Must we say that the defendant can sensibly assert the right even if he admits his liability and is willing to settle out of court? When Dworkin asserts that the litigants can sensibly assert a right to win, understood as a right to have the judge follow the rights thesis, is Dworkin just saying that *if* the litigants were familiar with the rights thesis, they *would* have the right? Are we to inform students in civics classes of the thesis and the right to win along with our other liberties and rights? Can a litigant any longer sensibly assert a right to have the rights thesis followed after he has lost his case, given that he is no longer a litigant? Does his decision to appeal reinstate the right?

We are able here only to raise doubts as to whether there is such a thing as a substantive right to win in our legal reality and call upon Dworkin to submit such details of this right as why it must obtain, who the bearers of it are, and when one has the right.

Finally, Dworkin tells us that "an individual has a *right* to a particular political act, within a political theory, if the failure to provide that act, when he calls for it, would be unjustified within that theory even if the goals of the theory would, on the balance, be disserved by that act" (*ibid.* at 169). Suppose I as a litigant call upon the judge to follow the rights thesis and his failing to do so at that time would be unjustified. Does it make sense to say that I have a right to have him follow the rights thesis under these circumstances? It may make sense if the judge could be justified in acting otherwise before I made a claim on his activity. But we know that, according to Dworkin, judges have an ongoing duty to follow the rights thesis, and thus any failure *at any time* would be unjustified. Thus, his failing to follow the rights thesis is not unjustified under the circumstances *because* I called upon him to follow it. Regardless of my assertion, his failure would be unjustified. It would hardly seem, then, that I am asserting any right here. Again, the situation seems to be one where the judge has a duty, but there is no corresponding right on the part of the litigant. The situation boils down to one in which I am merely reminding the judge of his duty, although I have no right to have him execute his duty. And this is not an uncommon situation. A fellow lawyer may remind me of my duty to make no mention of what the law is when I write a demand letter to my client's debtor, and I may be unjustified in going ahead with writing a letter that mentions what the law governing the matter is. However, the other lawyer has no right to have me act in accord with my duty. The State Bar, on the other hand, if informed of my misconduct, may take steps to punish me for breaching my professional responsibilities. Similarly, it is not here denied that litigants can sensibly assert that a judge ought to follow the rights thesis, to do his duty; what has been questioned is whether they have a substantive right to have the judge do so. To this point we have been exploring whether any of Dworkin's definitions of a right might help to justifiably posit a right to win, understood as a right to have the judge follow the rights thesis. We turned to this inquiry having found that other senses in which Dworkin seemed to be employing the right to win were unintelligible. As the result of our inquiry, however, we found that none of the definitions that were entertained provided any assistance.

Concluding Remarks

The foregoing inquiry led us first to recognize the critical role the concepts of the right answer and the right to win play in aspects of Dworkin's jurisprudence. He employs these notions, we saw, to restate his rights thesis, which is the cornerstone of his philosophy. He also relied heavily on them in his recent deliberations over the conditions under which it is fair for a state to enforce a judgment. From there we looked closely at each of these two concepts and detected ambiguities, confusions, or lack of clarity in each. We saw, for example, that, at one point, Dworkin seemed to unpack the right answer in terms of a judge's ranking of the strength of arguments. But after analyzing his guidelines for the judge so ranking the arguments, we recognized the difficulties of Dworkin's construing the right answer in this manner. We also noted how this rendering of the right answer differed from Dworkin's other portrayals of it, where it appeared that the experienced judge arrived at the right answer more through intuitive insight than by a ranking of arguments. As for the right to win, we saw that, at times, Dworkin wished only to restate his rights thesis with it, without positing any substantive right, while at others, he did intend to posit such a right. Upon analysis, we found we were without sufficient guidance from Dworkin to cognize the nature and dimension of such a substantive right. It thus becomes apparent that if we are to understand Dworkin's analysis of when it is fair for a state to enforce a judgment and, ultimately, the full scope of his rights thesis, we are in need of far clearer accounts of the right answer and the right to win than we have thus far received. And until we do hear more from Dworkin on such matters, it seems fair to hold suspect any of his discussions which hinge on these less than clear concepts.