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This paper will address a discussion of “what is law” between two very influential philosophers in the 20th century. In this paper there will be three main sections, the first will be an analysis of both H. L. A. Hart’s view of positivism and Ronald Dworkin’s view on legal interpretivism. The second part will analyze *Cohen v. California* (1971), both the majority opinion written by Justice Harlan and the dissenting opinion written by Justice Blackmun. The third and final part will use Dworkin’s view to check if both opinions used principles to make their decisions or if their decisions came from judicial discretion. The third section will show how Dworkin’s view can be used in hard cases, and why it is the stronger of the two views presented in this paper.

Part I

H.L.A Hart, in *The Concept of Law* (1961), addressed the long standing question, what is law? Hart begins with an analysis of the view from a 19th century philosopher named John Austin. Austin’s view focused on sovereign’s coercive orders (Hart, 1961 p. 77) to explain a legal system. Hart believes that Austin’s view is over-simplified and misses key concepts essential to modern legal system. Specifically, Hart points out four ways in which Austin’s view failed to provide an adequate account of a good legal system. The first was, “...a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute nonetheless differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others” (Hart, 1961 p. 77). Secondly, Hart points out that some forms of law that we deem as law, are not backed by threat and it would be absurd to assume they were. “Thirdly, there are legal rules which are brought into being by anything analogous to explicit prescription” (Hart, 1961 p. 77). Finally, the idea of a sovereign does not fit in with the modern times. It does not, for example,

account for legislative authority. Hart uses these problems to construct his own more complex view, but like Austin's view, is also a positivist view. A positivist's view is one in which there is no legal precedent on how to decide the particular case. This is the idea that law can simply run-out and that there is no way to extend law without using discretion.

Hart's analysis distinguishes between two different types of rules in a modern legal system. First are what Hart calls "primary rules." Primary rules are those we see in action. These rules require humans to do or refrain from doing certain actions, whether they wish to or not. Primary rules "impose duties" (Hart, 1961 p. 79). The second type of rules Hart calls "secondary rules." The secondary rules are dependent upon primary rules because they "... provide for operations which lead not merely to physical movement or change but to the creation or variation of duties or obligations" (Hart, 1961 p. 79). Hart's addition of these secondary rules are what make his view stronger because it accounts for ways in which primary rules can be reviewed or changed. For Hart, the legal system is not static but rather can grow and adapt to changing issues in society. Hart states, "We shall not indeed claim that wherever the world 'law' is 'properly' used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word 'law' is used are not linked by any such simple uniformity, but by less direct relations, often of analogy of either form or content, to a central case" (Hart, 1961 p. 79).

Hart then discusses obligation and what it means to have a legal obligation. When we address whether someone has violated law, we look to whether or not the individual had an obligation to do or not to do something. Hart offers the "gunman" example. The example describes a situation where A orders B to hand over his money or else A will shoot B. If we continue with the idea of coercive orders from Austin's view, the situation represents the idea of

obligation or duty in general. In fact, we could say that B, if he obeyed, would be 'obliged' to hand over his money. But, if we had said that B 'had an obligation' or a 'duty' to hand over his money then we would be mistaking the situation. There is a clear difference between *was obliged* and *had an obligation*. It would be wrong to assume an obligation to do something or not do something simply based on the fact that some kind of threat or harm will come for not doing or doing an action. The importance of Hart's view is that B's, "...beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are *not sufficient* to warrant the statement that he had an obligation to do this..." (Hart, 1961 p. 81) This means that "...facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something" (Hart, 1961 p. 81).

Conformity and general acceptance of certain ways to act in a social group proves how important social pressure is to not deviate away from acceptable behavior. Social pressure should not be overlooked because it is a strong force as to whether or not something is an obligation or not. This idea of social pressure is the primary idea of obligation for Hart. Hart also discusses two other characteristics of obligation. The second idea is that restricting free use of violence should be part of obligation. Thirdly, that sometimes rules might be ones that some people wish to not follow, but they do in order to continue their life within the community. This shows that sometimes obligation involves sacrifice.

Hart next distinguishes the idea of 'internal' and 'external' points of view on law. The difference between the two points of view, for Hart, are that 'internal' means that you are a member of the group that accepts and uses the rules to guide your conduct, but 'external' view is being an observer who does not accept the rules of the group but merely observes them. For the 'external' view, Hart says that the external observer may, after some time, be able to make

assumptions of what will happen to a group member if they deviate from the group's rules, but this simply gives an empirical description of the group beliefs and dynamic. The observer may be able to live harmoniously, but only because he or she learned what not to do and what to do to not be punished. The observer, "...will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules..." (Hart, 1961 p. 87-88). This is the difference that leads to Hart's account of the 'internal' view. The 'internal' view is the way in which people who accept the rules and allow it to guide the way they behave in society. The 'internal' view gives reasons for why rules are the way they are, rather than just a prediction of if A then B. The importance of Hart's view is that he acknowledges that both points of view exist in a modern legal system and it is that the 'internal' view is essential to the operation of the legal system.

Hart also talks about the idea of a primitive community that has no legislature or officials of any kind. There seems to be certain conditions of human nature in general that these kinds of communities follow. First, there needs to be restrictions on the free use of violence and deception. This is a characteristic of human beings that must be repressed if there is to be a community where members live in close proximity to one another. Secondly, there will be tension between those that follow the rules and those that do not wish to follow the rules, but the ones who choose to follow the rules must be the majority. Hart makes a point that this type of society is found in close-knit communities and is much tougher in a society like the modern state.

Hart addresses three defects that happen in a primitive society, as well as, a way to remedy each defect. The first defect Hart calls the *uncertainty* defect. This defect comes about

because when the group who originally accepted the rules have disagreements about aspects of the rules, there is no definitive way to say who is right and who is wrong. The second defect is known as the *static* defect. This one involves the slow change of procedure or correct behavior in society. The only way the behavior that is deemed acceptable can be changed, is over time at a slow moving pace. The individual would simply have an obligation or duty to follow the rules that were already accepted by the community and would have little to no way of starting a change. The third defect is called *inefficiency* defect. This defect is simply that there would be trouble enforcing punishments because there would be no authoritative system to handle the punishing. This leads individuals in the community to enforce punishment which would seem a waste of time for each person to continually track down and punish offenders in the community.

Hart then considers the way in which these defects can be remedied. First, Hart introduces “rule of recognition” to help solve the *uncertainty* defect. The ‘rule of recognition’, “...is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts” (Hart, 1961 p. 92). These rules of recognition can come from long standing traditions in the community or a general characteristic that is commonly recognized by the community as being a rule. The remedy for the *static* defect is one that Hart names ‘rules of change’. This remedy allows for the changing and modifying of the rules that are in place. Both the ‘rule of recognition’ and the ‘rules of change’ will work closely together because, “for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation” (Hart, 1961 p. 93). The third and final remedy which deals with the *inefficiency* defect is known as the ‘rules of adjudication’. This remedy would, “... [empower] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has

been broken” (Hart, 1961 p. 94). The ‘rule of recognition’ will also play closely with these rules because in order for a decision to be made whether a rule has been broken, it needs to be clear what the rules are. Hart, like other legal positivists, still allows for judicial interpretation by whomever is making the decision as to whether a rule has been broken and what the punishment should be. Hart believes that understanding the legal system in terms of primary and secondary rules will ultimately tell what law is and how it operates.

Ronald Dworkin has very differing ideas on the topic of what is law, and directly uses Hart’s analysis to distinguish his view in his book, *Taking Rights Seriously* (1977). To begin, Dworkin brings up an issue on which Hart also worked. The issue is about obligation and whether or not we have an obligation in particular hard cases. In particular, Dworkin also talks about legal versus moral obligation and what that entails. Dworkin wants to address the issue of a case that is not as easily decided as others. How, he asks, should judicial systems go about deciding such a case and by what justification?

Dworkin addresses the three general ideas that most legal positivists endorse, including Hart. First, Dworkin calls this first idea of *pedigree*, or the way in which certain behaviors are thought of as rules for the particular community. This provides a reasoning for what are valid legal rules for the community and how they are formed. Secondly, it is necessary to have a theory in place to address when ‘the law’ doesn’t quite cover the case at hand i.e. a hard case. For Hart this is left up to strong judicial discretion, which Dworkin rejects this for reasons that will later be explained. Thirdly, legal positivism must have ‘legal obligation’ in its theory in order to have a valid rule that someone either follows or does not follow.

Dworkin analyzes Austin’s view very simply. Dworkin states that Austin’s view requires a sovereign, either an individual or a group of rulers, that sets the rules for everyone else to

follow but are above the rules themselves. This sovereign also gets to appoint enforcers of the law that can create new laws or rules if current ones are not able to decide the case. Dworkin rightfully says that Austin's view is simple and therefore many have found problems in this simplicity. First, Austin's view fails to recognize that in a pluralistic society a ruling class is harder to come by because the dynamic is constantly shifting powers. Secondly, the idea that to be a rule there must be threat of force or punishment seems absurd because how do we distinguish between "law" and commands made by outlaws? Austin does not provide an answer to this puzzle.

Dworkin moves into Hart's view by providing reasons that Hart's view is more complex than Austin's views. First, Hart separates rules into two different categories. Dworkin believes that this is the right move since there seems to be differing rules for behavior as well as how to change or interpret the rules about behavior. Secondly, Dworkin agrees that Hart's move to reject Austin's theory that a rule is a command is a more positivists look at what rules are.

Dworkin describes the possible ways Hart can say from where the source of a rule's authority comes. Since it would be wrong to say that authority comes from sheer physical power, then we want to say that authority comes from some other place. The first idea is that a rule is accepted by the majority of a group as standard practice in their community. This means that the rule becomes a justification for the behavior of those that agree with the rule and this gives justification for criticizing or punishing others behaviors who do not follow the rule. Secondly, Dworkin believes Hart also finds authority in secondary rules. The idea is that if a club has a constitution that claims any decisions decided by a small group within the club, these new rules must be adopted by the club entirely and not just those who decided on the new rules. Dworkin says, "We use the concept of *validity* in this connection: rules binding because they have been

created in a manner stipulated by some secondary rule are called ‘valid’ rules” (Dworkin, 1977 p. 20).

Dworkin then discusses Hart’s rule of recognition. Dworkin points out that this rule is dependent on the acceptance within the community. Observing the community is a way to learn what behaviors are accepted and which are condemned. Hart finds the justification for the rule of recognition by claiming that it’s the historical use of mutually accepted behaviors that dictate what rules are rules. This is different than Austin’s view that power simply comes from a monopoly institution. Dworkin does not, however believe that judges have right to make new law simply because they have the openness of a case that doesn’t have precedent. This is where Dworkin’s view comes most clearly to light. Dworkin uses the term ‘principle’ which he defines as, “...a standard that is to be observed, not because it will advance or secure an economic, political, or social situation or some other dimension of morality” (Dworkin, 1977 p. 22).

Dworkin analyzed the distinction between principles generally and using the example of *Riggs v. Palmer* (Dworkin, 1977 p. 23). In *Riggs v. Palmer*, a man murdered his own grandfather to gain inheritance. It would be wrong to allow someone to profit from their wrongdoing. However, the law on wills are clear and say that the inheritance is to be passed when the person the will belongs to passes away. The principle that Dworkin believes is used in this case is that, “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime” (Dworkin, 1977 p. 23). Therefore, the murderer was not permitted to receive his inheritance. Such principle for Dworkin are not ‘legal rules’ but something different. This type of idea is what Dworkin will refer to as ‘legal principles’ rather than ‘legal rules’. For Dworkin rules seem to apply in an all or nothing way while principles have weight. When the rule in baseball states that if you get three

strikes then you are out, then that is the rule. There can be some small exceptions to the rule, such as, if the catcher drops the third strike then you are not out. The same idea does not seem to work for principles because principles are more guidelines than regulations. When Dworkin states the principle, "...no man may profit from his own wrong..." this does not mean, "...the law never permits a man to profit from wrongs he commits" (Dworkin, 1977 p. 25). Dworkin makes the case that principles are meant to argue in a particular direction, but does not necessarily dictate a decision.

Dworkin briefly discussed the idea of weight that principles and rules carry in the legal system. When two rules contradict each other, then one of those rules is not valid. For example, Dworkin brings up the first amendment of the United States Constitution. If someone wanted to read the amendment as 'an absolute' then the amendment would be considered a rule. On the other hand, someone could read the amendment merely as a principle which could or could not be used in deciding a case depending on whether or not the situation permitted the limiting of speech in a valid way.

Dworkin addresses two ways in which legal obligation must account for principles helping judges reach particular decisions. First, "We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation" (Dworkin, 1977 p. 29). Secondly, Dworkin denied, "...that principles can be binding the way some rules are." (Dworkin, 1977 p. 29) This gives judges a consideration to use, but that they are not required to decide upon. Dworkin brings up the idea that sometimes people say 'make it a rule' when they loosely mean that someone does a certain thing but is not actually held to doing the behavior or else be punished. In the same way, principles can be looked at in two different ways. For instance, if in a

particular community judges ‘make it a rule’ not to enforce wills that do not have three signatures. If a judge here and there does enforce a will even without three signatures, this would not mean that the judge was wrong. On the other hand, if the community has a rule that judges may not enforce wills that do not have three signatures, then the judge that does enforce one of these wills would be the wrong. In the first sense the principle is a summary of what most judges do but allows for judges to also decide against the normal rule by reaching beyond. The other way is stricter in its application because it makes the judge who does not follow the standard wrong. Dworkin states that the difficulty comes when there is no clear rule for how a judge should decide the case. Positivists like Austin and Hart believe that is where judicial discretion is applied, but Dworkin doesn’t agree that judges should be creating new “law” but rather should be using these underlying principles that he sees as being the way to expand our understanding of the law. The expanding will allow for harder cases to be decided with a method rather than random discretion. This is important because modern legal systems should have a way of showing how they came to their decision by using the most transparent method.

Dworkin begins to dissect what the term discretion can mean in different contexts and which meaning Hart’s view encompasses when the term legal discretion is used. Dworkin works through two ‘weak’ senses to use discretion, but for argument sake, the meaning for discretion that Dworkin uses as the strongest meaning will be discussed in detail. The strong meaning is, “We use ‘discretion’ sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question” (Dworkin, 1977 p. 32). For example, a sergeant is given discretion to choose any five men for patrol. That statement is much different than if he was told to take the five most experienced men

because this statement seems to add a layer of authority over the sergeant's discretion. The way to think about the meaning of discretion that Dworkin uses is in the first statement. This does not mean that exercises of discretion are free of criticism, but rather that the criticism has to do with the way in which the discretion was exercised. This brings the discussion back to positivists who allow for judges to use legal discretion in making decisions. The issue is realizing whether judges are using a strong or weak meanings on the term discretion. Positivists seem to value this meaning of discretion in their own views because when there is a clear rule for deciding a case then the judge is expected to use that rule.

Dworkin makes sure to address when a judge is permitted to change existing rules of law. He speaks of two ways, the first being when it is necessary to do so. The judge may find that changing an already existing rule would be more beneficial for furthering some sort of principle that would be justified by being changed. Secondly, when judges want to change existing doctrine they must make sure to have important standards that argue for changing the rules. Principles, such as, 'legislative supremacy' and doctrine of precedent are examples of the types of standards that wish to keep the *status quo*, while allowing for discretion.

Dworkin returns to Hart's rule of recognition. Hart has a way to give weight to certain rules in a community, namely, from the majority acceptance and their internal view of such rules. This for Dworkin is not strong enough because it seems that there is the idea that legal principles are not just made through legislation, but also by a sense of appropriateness in that given time by the public. In order to help understand weight of legal principles, a person would mention all the cases that used the principle to make a decision and all the evidence of the principle that could be found would help create more weight for the principle. It would be absurd to say that there was a specific test for whether a principle should be used or not. Dworkin says, "Hart's sharp

distinction between acceptance and validity does not hold” (Dworkin, 1977 p. 41). This is because Dworkin doesn’t think Hart’s account fully grasps the idea of *customs* and has no real answer for how we validate principles that are not legislation. For Dworkin, there seems to be no ‘master rule’ for deciding what the complete set of principles and laws are for a community.

Dworkin states that, “Positivism, on its own thesis, stops short of just those puzzling, hard cases that send us to look for theories of law” (Dworkin, 1977 p. 45). Dworkin believes that by shaking loose of this model of rules that Hart and other positivists hold, there is a possibility to build a stronger more complex model that fits our own complex set of legal practices.

Ronald Dworkin in, *Hard Cases*, chapter 4 in, *Taking Rights Seriously*, gives additional insight into how these principles are found and how to use them in correct manner. Dworkin addresses the issue of how judges need to look at cases, but hard cases in particular. The idea is 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, not to invent new rights retrospectively.” (Dworkin, 1977 p. 81) Judges and lawyers are responsible for asking themselves the right questions when hard cases make an appearance in our legal system. Dworkin’s theory is known as the Right’s Thesis, which, simply stated, is the understanding that judicial decisions are enforcing existing political rights. Dworkin notes that judges have a responsibility to make decisions in cases that fit with other decisions and where the decision is justified in some sense within the current political theory. In part 3 of Chapter 4, Dworkin makes the distinction of rights from goals. Dworkin states, “Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals”. (Dworkin, 1977 p. 90) Dworkin needs to make this distinction

clear in order for his theory, that there are underlying principles that govern decision-making in our legal system, and that judges do not decide hard cases by solely experiencing strong discretion. Therefore, Dworkin talks about a background right being something like equality, where all those in the political arrangement have this particular background right. Then Dworkin distinguishes background rights from institutional rights which ride on background rights. Something like the equal protection clause that is found in the constitution. Additionally in the particular legal institution, rights, for Dworkin, can also be separated into abstract and concrete rights. Abstract rights are, "... general aim[s] to be weighed...in particular circumstances against other political aims". While concrete rights are, "... political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions". (Dworkin, 1977 p. 93) For Dworkin, abstract rights provide arguments for concrete rights, but that concrete rights are more definite than abstract rights. Concrete rights make the abstract more specific for the political arrangement and specific political theory that **of the institution Dworkin is interpreting.**

Concrete rights also have to be broken into two varying ideas. First, "They must be institutional rather than background rights and they must be legal rather than some other form of institutional rights". (Dworkin, 1977 p. 101) Dworkin notes this distinction because it would not be fair to have every person in our political arrangement wanting particular rights simply because they feel their virtue is better than someone else's. The institution must have rights so that the political arrangement can be talked about and understood. Institutional rights and background rights may diverge from one another. For example, a judge may feel a certain way or that an individual case should be decided in a certain way, but if the institutional rights do not allow for that to be made a decision, then the judge is stuck in a hard place. Without precedent, the judge

must find the underlying principle that allows for a ruling to be made in a way that background rights allow. Dworkin addresses how collective goals look at the history of the community, such as, the history of the United States has made for a collective goal to have civil rights laws.

Dworkin notes that this is exactly what judges are doing. Judges, for Dworkin, make decisions confirming or denying concrete rights. Judges are given abstract rights that may or may not yet have a particular concrete right attached to it. In hard cases, Dworkin thinks that judges should be taking abstract rights that each person subscribing to our political arrangement should have and the decision is whether the abstract right has a concrete understanding when looking at the case facts. Dworkin wants judges to ask why do we have a particular institutional right and if/how that right apply to the hard case at hand? This allows for judges to think about the norms and principles that each right has in the legal system.

Next, *Cohen v. California* (1971) will be analyzed. Both the majority and the dissenting opinion will be looked at and broken up into parts. This will allow for an easier time addressing whether the opinions used Dworkin or some other method in their determination of the holding in *Cohen*.

PART II

In *Cohen v. California* (1971), the facts are as follows: “A 19-year-old department store worker expressed his opposition to the Vietnam War by wearing a jacket emblazoned with “FUCK THE DRAFT. STOP THE WAR” The young man, Paul Cohen, was charged under a California statute that prohibits “offensive conduct.” Cohen was found guilty and sentenced to 30 days in jail” (*Cohen v. California*, 403 U.S. 15 (1971)). This case was originally decided by a California Municipal Court. The municipal court decided that Cohen was guilty of violating Penal Code 415 which prohibits, “maliciously and willfully disturb[ing] the peace or quiet of any

neighborhood or person... by... offensive conduct.” (*Cohen v. California*, 403 U.S. 15 (1971))

The case was then appealed to the California Court of Appeals which affirmed the prior decision made by the municipal court. Cohen then attempted to take his case to the California Supreme Court. The California Supreme Court declined to hear the case which meant for Cohen that he had taken the case as far as California appeals would allow. Cohen then appealed to the United States Supreme Court which decided to take the appeal. This was procedurally different because since the case was involving a California specific law, the US Supreme Court needed to take that into consideration when they heard the case. Eventually, the holding in *Cohen* was that the state of California needed a compelling reason for its action against Cohen. The First and Fourteenth Amendments are the rights that were addressed in *Cohen*. Eventually, because of the better arguments in defense of Cohen’s rights, The United States Supreme Court overturned the California decision.

Justice Harlan wrote the majority opinion. First, Harlan addresses the California Court of Appeals reason for upholding the conviction of Cohen. The term “offensive conduct” was the main reason the Court of Appeal used to justify their upholding of the decision. “Offensive conduct” means, “behavior which has a tendency to provoke *others* to act of violence or to in turn disturb the peace,” (*Cohen v. California*, 403 U.S. 15 (1971)). This idea of “offensive conduct” came from the facts of this case. The case was brought to the Court because Cohen believed that his rights were being infringed upon. The rights were those given to individuals in the First and Fourteenth Amendments of the Federal Constitution.

Justice Harlan then proceeded to address the arguments that were made by the California Court of Appeals in upholding the original decision and showed how the arguments were not sufficient to reach such a decision in this particular case. First, Harlan addressed the primary

reason for the conviction, which is offensiveness of the words Cohen used. Harlan noted that this is a punishment focused on communication so that means the conviction rests solely upon Cohen's speech. This means that the conviction was one that tried to regulate speech and thereby repress Cohen's ability to express himself (*United States v. O'Brien*, 391 U.S. 367 (1968)). Harlan notes that, "...the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed" (*Cohen v. California*, 403 U.S. 15 (1971)). There was no clear showing of intent to incite violence or disruption around him. "Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution..." (*Cohen v. California*, 403 U.S. 15 (1971)). Harlan made clear that the First and Fourteenth Amendments do not provide absolute protection to every individual when they speak, but rather in some circumstances, the state's purpose can be compelling.

Harlan then addresses the lack of clarity in the statute. It could not be clear to Cohen that this type of expression would be prohibited in a courthouse. Cohen could not have known that the term "offensive conduct" meant that in particular locations he had less rights. Harlan says, "...Cohen's arrest must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places" (See *Edwards v. South Carolina*, 372 U.S. 229, 236-237, and n. 11 (1963)).

Next, Harlan addressed the question of whether this is an obscenity case. He clarified that this means that, "...such expression must be, in some significant way, erotic" (*Roth v. United States*, 354 U.S. 476 (1957)). Harlan explained how unlikely it was that someone would begin to

feel vulgar stimulation because of the words on Cohen's jacket. This implies that the obscenity idea for limiting Cohen's speech was absurd.

Harlan proceeded to the "fighting words" argument. Harlan notes that this type of argument has to involve common knowledge to the public and would likely provoke a violent reaction. (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). Harlan made reference to the fact that the four letter word Cohen used can be considered provocative, but in the facts presented, the word as used by Cohen was clearly not, "directed to the person of the hearer" (*Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)). Harlan wrote, "There is, as noted above, no showing that anyone who saw Cohen was, in fact, violently aroused, or that appellant intended such a result" (*Cohen v. California*, 403 U.S. 15 (1971)).

The final argument made by the state that Harlan rejected stated, "...the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest" (*Cohen v. California*, 403 U.S. 15 (1971)). Harlan cited *Organization for a Better Austin v. Keefe*, in order to show that just the mere presumed presence of unwitting listeners is not a strong enough case to stop Cohen's speech. The government is not free to assert a moral grounding for laws or for stopping individuals from non-threatening speech protected by their rights. Harlan also stated, "...persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes" (*Cohen v. California*, 403 U.S. 15 (1971)). Harlan at the end of this argument made the statement against California for trying to use weak reasoning to punish Cohen. Harlan wrote,

“ [the state] acting as guardians of public morality may not properly remove this offensive word from the public vocabulary” (*Cohen v. California*, 403 U.S. 15 (1971)). Which it was clear to Harlan that the State should not base criminal offenses on morality of something that is non-violent or has any way of inciting violence.

Harlan then addressed California by stating, “At most, it reflects an “undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.” *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503”] 393 U.S. 503, 508 (1969). Harlan claimed that the reasoning behind California’s decision in *Cohen* was wrong because it is not, “...a governmental power to force person who wish to ventilate their dissident views in avoiding particular forms of expression” (*Cohen v. California*, 403 U.S. 15 (1971)).

Harlan notes that the First and Fourteenth Amendments do not entirely stop the State from regulating certain speech, but rather that in this particular case the facts do not allow the State to regulate. Harlan explained that the constitutional right of free speech, “...is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” Citing *Whitney v. California*, 274 U.S. 357, 375-377 (1927).

Summarizing, Harlan said, “First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word” (*Cohen v. California*, 403 U.S. 15 (1971))? The State has no way to cleanse the public debate and what if

anything can they say that some words are bad and others are not. The taste and style should, for the most part, be left up to the individual. Harlan said, "...it is nevertheless often true that one man's vulgarity is another's lyrics" (*Cohen v. California*, 403 U.S. 15 (1971)). Cohen had such immense feelings and emotions that the four letter word was the only word that could fully express everything he was feeling. If the State starts to ban particular words, this would cause particular views or ideas from being expressed. In our modern world, we are so diverse and this would mean that public debate was being regulated. Harlan added, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures and that means not only informed and responsible criticism, but the freedom to speak foolishly and without moderation" (*Cohen v. California*, 403 U.S. 15 (1971)).

In dissent, Justice Blackmun explained why he considered that the California decision should have been upheld. Justice Blackmun cited the California statute that the lower courts had used to sentence Cohen. The statute is as follows, "'Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court'" (*Cohen v. California*, 403 U.S. 15 (1971)). Blackmun explained two reasons for his dissent.

First, Blackmun wrote, “Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U. S. 576 (1969); *Cox v. Louisiana*, 379 U. S. 536, 379 U. S. 555 (1965); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 336 U. S. 502 (1949). Blackmun stated that this court’s agonizing over the First Amendment values was misplaced and unnecessary.

Secondly, Blackmun wrote that he dissents because during the time that the United States Supreme Court was hearing *Cohen*, the California Supreme Court heard a case, *Bushman*, much like *Cohen*. Blackmun noted that it would be better for the United States Supreme Court to send Cohen’s case back to The California Court of Appeals to be decided since *Bushman* was now decided by the California Supreme Court. The California Court of Appeals should have reconsidered *Cohen* in light of the new decision made in *Bushman*. This meant that Blackmun believed the California Supreme Court should hear *Cohen*.

The next section will take a look specifically at each opinion from the section above and those opinions will be judged according to whether they used the method Dworkin proposed, or if they are using more discretion than principles.

Part III

Justice Harlan’s opinion in *Cohen* exemplifies the way in which Dworkin would want a judge to look at a hard case. Harlan goes through all the prior ways in which the right of free speech has been rightfully limited in precedent. This leads Harlan to note how the facts in *Cohen* represents new kinds of free speech case that needs to be decided because no current precedent could answer the particular case facts that *Cohen* had. Harlan asks generally in his opinion, why do we have the right to free speech and what is the justification for free speech? *Cohen* was a

paradigm case for Dworkin's theory and Harlan executed the search for an underlying principle very successfully.

Harlan asserts the principle, "Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous a[s] ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decisions as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity..." (*Cohen v. California*, 403 U.S. 15 (1971) Harlan has now laid out the main reason that we have the freedom of speech as a right granted to us in the constitution. The reason the court allowed Cohen his 4 letter expletive was because it was well within the framework of his right to use it and to use it in a way that adds force to what his views were. Freedom of speech should allow for forceful political opinions to be spoken in the political arena.

Dworkin would have been proud of the way that Harlan went through the case and ultimately how the case was decided. The process that Harlan went through allowed for the institutional right of freedom of speech to be made more concrete by applying it to *Cohen* and finding particular case facts that should be protected, such as, the right to forcefully voice political opinion.

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