Third Edition

READINGS IN THE PHILOSOPHY OF LAW

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authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.

It need hardly be said that in few legal systems are judicial powers confined to authoritative determinations of the fact of violation of the primary rules. Most systems have, after some delay, seen the advantages of further centralization of social pressure; and have partially prohibited the use of physical punishments or violent self help by private individuals. Instead they have supplemented the primary rules of obligation by further secondary rules, specifying or at least limiting the penalties for violation, and have conferred upon judges, where they have ascertained the fact of violation, the exclusive power to direct the application of penalties by other officials. These secondary rules provide the centralized official "sanctions" of the system.

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.

[Editor's Note: Hart later compares the rule of recognition to the meter bar in Paris, which serves to define the measure of length we conventionally call a meter. Just as it is senseless to ask if that bar really is a meter long, so too is it senseless to ask if the rule of recognition is "valid" legally.]

REVIEW AND DISCUSSION QUESTIONS

1. What are the three defects of a system of primary rules?
2. How does Hart define a "secondary rule"?
3. How do secondary rules solve the three defects he describes?
4. Hart suggests here (and later in his book makes explicit) that the rule of recognition is neither valid nor invalid, but rather is the test for validity. Explain.
5. Even if the rule of recognition is neither valid nor invalid, it could still be criticized on other grounds. Describe some possible rules of recognition and indicate how each might be assessed.
6. What is the rule of recognition where you live? Describe it.
7. Is it important for Hart's theory that a constitution can include rules governing how it is to be amended? Explain.

The Model of Rules

Ronald Dworkin

In this essay Ronald Dworkin (who once studied philosophy of law under H. L. A. Hart and once held the same position Hart held at Oxford) offers a careful, detailed criticism of each of the key positivist claims. Beginning with a brief summary of how both Austin and Hart exemplify the positivist position, he goes on to attack positivism's three basic tenets: that law is a set of rules identifiable by their "pedigree," that the law is limited to those rules, and that to claim some people have a legal obligation means that their behavior falls under a valid legal rule. Along the way Dworkin distinguishes between principles and rules, discusses different types of discretion, and concludes with a discussion of the "rule of recognition" as a test that can be used to identify the law.

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. . . Before we can decide that our concepts of law and of legal obligation are myths, we must decide what they are. We must be able to state, at least roughly, what it is we all believe that is wrong. But the nerve of our problem is that we have great difficulty in doing just that. Indeed, when we ask what law is and what legal obligations are, we are asking for a theory of how we use these concepts and of the conceptual commitments our use entails. We cannot conclude, before we have such a general theory, that our practices are stupid or superstitious.

Of course, the [realists] think they know how the rest of us use these concepts. They think that when we speak of "the law," we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us. The theory that there are such rules and chains they call "mechanical jurisprudence," and they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule. So far they have had little luck in caging and exhibiting mechanical jurisprudents (all specimens captured—even Blackstone and Joseph Beale—have had to be released after careful reading of their texts). . . .

Of course the suggestion that we stop talking about "the law" and "legal obligation" is mostly bluff. These concepts are too deeply cemented into the structure of our political practices—they cannot be given up like cigarettes or hats. Some of the [realists] have half-admitted this and said that the myths they condemn should be thought of as Platonic myths and retained to seduce the masses into order. This is perhaps not so cynical a suggestion as it seems; perhaps it is a covert hedging of a dubious bet.

. . . I want to examine the soundness of positivism, particularly in the powerful form that Professor H. L. A. Hart of Oxford has given to it. I choose to focus on his position, not only because of its clarity and elegance, but because here, as almost everywhere else in legal philosophy, constructive thought must start with a consideration of his views.

POSITIVISM

Positivism has a few central and organizing propositions as its skeleton, and though not every philosopher who is called a positivist would subscribe to these in the way I present them, they do define the general position I want to examine. These key tenets may be stated as follows:

A. The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed. These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules (rules which lawyers and litigants wrongly argue are rules of law) and also from other sorts of social rules (generally lumped together as "moral rules") that the community follows but does not enforce through public power.

B. The set of these valid legal rules is exhaustive of "the law," so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by "applying the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

C. To say that someone has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something. (To say he has a legal right, or has a legal power of some sort, or a legal privilege or immunity, is to assert, in a shorthand way, that others have actual or hypothetical legal obligations to act or not to act in certain ways touching him.) In the absence of such a valid legal rule there is no legal obligation; it follows that when the judge decides an issue by exercising his discretion, he is not enforcing a legal obligation as to that issue.

This is only the skeleton of positivism. The flesh is arranged differently by different positivists, and some even tinker with the bones. Different versions differ chiefly in their description

of the fundamental test of pedigree ə rule must meet to count as ə rule of law.

Austin, for example, framed his version of the fundamental test as ə series of interlocking definitions ənd distinctions. He dɛʌned having an obligation as lying under ə rule, a rule as ə general command, and ə command as an expression ϐɛ desire that others behave in ə particular way, backed by the power and will to enforce that expression in the event of disobedience. He distinguished dɛssɛs of d ɛ s (legal, moral or religious) according to which pɛɪson oɪ group is the author ϐɛ the general command the rule represents. In ɛəsb political community, bɛ thought, one will find ə sovereign—a pɛɪson ***oɪ*** ə determinate group whom the rest obey habitually, buɪ who is not in the habit of obeying anyone else. The legal rules of ə community are the general commands its sovereign has deployed. Austin's definition of legal obligation followed from this definition of law. One has ə legal obligation, he thought, if one is among the ədd ɪɛssɛɛs ϐɛ some general order of the sovereign, ənd is in danger of suffering ə sanction unless he obɛps that order.

Of course, the sovereign cannot provide for all contingencies through ənp scheme of oɪdɛɪs, and some ϐɛ his orders will inevitably bɛ vague oɪ have furry edges. Therefore (according to Austin) the sovereign grants those who enforce the law (judges) discretion to make fresh oɪdɛɪs when novel oɪ troublesome cases are presented. The judges then make new rules or adapt old rules, and the sovereign either overturns their creations, or tacitly confirms them by failing to do so.

Austin's model is quite beautiful in its simplicity. It asserts the first tenet of positivism, ənd the law is ə set of rules specially selected to govern public order, ənd offers ə simple factual test—what has the sovereign commanded?—as the sole criterion for identifying those special rules. In time, however, those who studied ənd tried to apply Austin's model found it too simple. Many objections were raised, among which were two that seemed fundamental. First, Austin's ʌɛp assumption that in ɛəsb community a determinate group or institution can bɛ found, which is in ultimate control of all other groups, ɜeemed not to hold in a complex society. Polit-cal control in a modern nation is pluralistic and ɜhifting, a matter of more or less, of compro-ɜise and cooperation and alliance, so that it is ɔften impossible to say that any person or group ɪas that dramatic control necessary to qualify as ɪn Austinian sovereign. One wants to say, in the United States for example, that the "people" are ɜovereign. But this means almost nothing, and in tself provides no test for determining what the 'people" have commanded, or distinguishing heir legal from their social or moral commands.

Second, critics began to realize that Austin's ɪnalysis fails entirely to account for, even to rec-ɔgnize, certain striking facts about the attitudes ve take toward "the law." We make an impor-ɜant distinction between law and even the gen-ɜral orders of a gangster. We feel that the law's ɜtrictures—and its sanctions—are different in hat they are obligatory in a way that the out-aw's commands are not. Austin's analysis has no ɔlace for any such distinction, because it defines ɪn obligation as subjection to the threat of force, ɪnd so founds the authority of law entirely on he sovereign's ability and will to harm those who disobey. Perhaps the distinction we make s illusory—perhaps our feelings of some special ɪuthority attaching to the law is based on re-ligious hangover or another sort of mass self-deception. But Austin does not demonstrate this, ɪnd we are entitled to insist that an analysis of our ɔoncept of law either acknowledge and explain ɔur attitudes, or show why they are mistaken.

H. L. A. Hart's version of positivism is more ɔomplex than Austin's, in two ways. First, he rec-ɔgnizes, as Austin did not, the rules are of dif-ɜerent logical kinds (Hart distinguishes two ɜinds, which he calls "primary" and "secondary" ɜules). Second, he rejects Austin's theory that a ɜule is a kind of command, and substitutes ɪ more elaborate general analysis of what rules ɪre. We must pause over each of these points, ɪnd then note how they merge in Hart's concept ɔf law.

Hart's distinction between primary and sec-ɔndary rules is of great importance.[1] Primary ɜules are those that grant rights or impose obli-ɡations upon members of the community. The ɜules of the criminal law that forbid us to rob, murder or drive too
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murder or drive too fast are good examples of primary rules. Secondary rules are those that stipulate how, and by whom, such primary rules may be formed, recognized, modified or extinguished. The rules that stipulate how Congress is composed, and how it enacts legislation, are examples of secondary rules. Rules about forming contracts and executing wills are also secondary rules because they stipulate how very particular rules governing particular legal obligations (that is, the terms of a contract or the provisions of a will) come into existence and are changed.

His general analysis of rules is also of great importance. Austin had said that every rule is a general command, and that a person is obligated under a rule if he is liable to be hurt should be disobey it. Hart points out that this obliterates the distinction between being *obliged* to do something and being *obligated* to do it. If one is bound by a rule he is obligated, not merely obliged, to do what it provides, and therefore being bound by a rule must be different from being subject to an injury if one disobeys an order. A rule differs from an order, among other ways, by being *normative*, by setting a standard of behavior that has a call on its subject beyond the threat that may enforce it. A rule can never be binding just because some person with physical power wants it to be so. He must have *authority* to issue the rule or it is no rule, and such authority can only come from another rule which is already binding on those to whom he speaks. That is the difference between a valid law and the orders of a gunman.

So Hart offers a general theory of rules that does not make their authority depend upon the physical power of their authors. If we examine the way different rules come into being, he tells us, and attend to the distinction between primary and secondary rules, we see that there are two possible sources of a rule's authority.*

A. A rule may become binding upon a group of people because that group through its practices *accepts* the rule as a standard for its conduct. It is not enough that the group simply conforms to a pattern of behavior: even though most Englishmen may go to the movies on Saturday evening, they have not accepted a rule requiring that they do so. A practice constitutes the acceptance of a rule only when those who follow the practice regard the rule as binding, and recognize the rule as a reason or justification for their own behavior and as a reason for criticizing the behavior of others who do not obey it.

B. A rule may also become binding in quite a different way, namely by being enacted in conformity with some *secondary* rule that stipulates that rules so enacted shall be binding. If the constitution of a club stipulates, for example, that by-laws may be adopted by a majority of the members, then particular by-laws so voted are binding upon all the members, not because of any practice of acceptance of these particular by-laws, but because the constitution says so. 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. Thus we can record Hart's fundamental distinction this way: a rule may be binding (a) because it is accepted or (b) because it is valid.

Hart's concept of law is a construction of these various distinctions. Primitive communities have only primary rules, and these are binding entirely because of practices of acceptance. Such communities cannot be said to have "law," because there is no way to distinguish a set of legal rules from amongst other social rules, as the first tenet of positivism requires. But when a particular community has developed a fundamental secondary rule that stipulates how legal rules are to be identified, the idea of a distinct set of legal rules, and thus of law, is born.

Hart calls such a fundamental secondary rule a "rule of recognition." The rule of recognition of a given community may be relatively simple ("What the king enacts is law") or it may be very complex (the United States Constitution, with all its difficulties of interpretation, may be considered a single rule of recognition). The demonstration that a particular rule is valid may therefore require tracing a complicated chain of validity back from that particular rule ultimately to the fundamental rule. Thus a parking ordinance of the city of New Haven is valid because it is adopted by a city council, pursuant to the procedures and within the competence specified by the municipal law adopted by the state of Connecticut, in conformity with the procedures

and within the competence specified by the constitution of the state of Connecticut, which was in turn adopted consistently with the requirements of the United States Constitution.

Of course, a rule of recognition cannot itself be valid, because by hypothesis it is ultimate, and so cannot meet tests stipulated by a more fundamental rule. The rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance. If we wish to know what rule of recognition a particular community has adopted or follows, we must observe how its citizens, and particularly its officials, behave. We must observe what ultimate arguments they accept as showing the validity of a particular rule, and what ultimate arguments they use to criticize other officials or institutions. We can apply no mechanical test, but there is no danger of our confusing the rule of recognition of a community with its rules of morality. The rule of recognition is identified by the fact that its province is the operation of the governmental apparatus of legislatures, courts, agencies, policemen, and the rest.

In this way Hart rescues the fundamentals of positivism from Austin's mistakes. Hart agrees with Austin that valid rules of law may be created through the acts of officials and public institutions. But Austin thought that the authority of these institutions lay only in their monopoly of power. Hart finds their authority in the background of constitutional standards against which they act, constitutional standards that have been accepted, in the form of a fundamental rule of recognition, by the community which they govern. This background legitimates the decisions of government and gives them the cast and call of obligation that the naked commands of Austin's sovereign lacked. Hart's theory differs from Austin's also, in recognizing that different communities use different ultimate tests of law, and that some allow other means of creating law than the deliberate act of a legislative institution. Hart mentions "long customary practice" and "the relation [of a rule] to judicial decisions" as other criteria that are often used, though generally along with and subordinate to the test of legislation.

So Hart's version of positivism is more complex than Austin's, and his test for valid rules of law is more sophisticated. In one respect, however, the two models are very similar. Hart, like Austin, recognizes that legal rules have fuzzy edges (he speaks of them as having "open texture") and, again like Austin, he accounts for troublesome cases by saying that judges have had to exercise discretion to decide these cases by fresh legislation. (I shall later try to show why one who thinks of law as a special set of rules is almost inevitably drawn to account for difficult cases in terms of someone's exercise of discretion.)

RULES, PRINCIPLES, AND POLICIES

I want to make a general attack on positivism, and I shall use H. L. A. Hart's version as a target, when a particular target is needed. My strategy will be organized around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism, I shall argue, is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules.

I just spoke of "principles, policies, and other sorts of standards." Most often I shall use the term "principle" generically, to refer to the whole set of these standards other than rules; occasionally, however, I shall be more precise, and distinguish between principles and policies. Although nothing in the present argument will turn on the distinction, I should state how I draw it. I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a "principle" a standard that is to be observed, not because it will advance or

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Secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Thus the standard that automobile accidents are to be decreased is a policy, and the standard that no man may profit by his own wrong a principle. The distinction can be collapsed by construing a principle as stating a social goal (that is, the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (that is, the principle that the goal the policy embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number). In some contexts the distinction has uses which are lost if it is thus collapsed.[3]

My immediate purpose, however, is to distinguish principles in the generic sense from rules, and I shall start by collecting some examples of the former. The examples I offer are chosen haphazardly; almost any case in a law school casebook would provide examples that would serve as well. In 1889 a New York court, in the famous case of *Riggs v. Palmer*[4] *[Reprinted above–Ed.]* had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so. The court began its reasoning with this admission: "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." But the court continued to note that "all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. 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." The murderer did not receive his inheritance.

In 1960, a New Jersey court was faced, in *Henningsen v. Bloomfield Motors, Inc.*,[5] with the important question of whether (or how much) an automobile manufacturer may limit his liability in case the automobile is defective. Henningsen had bought a car, and signed a contract which said that the manufacturer's liability for defects was limited to "making good" defective parts — "this warranty being expressly in lieu of all other warranties, obligations or liabilities." Henningsen argued that, at least in the circumstances of his case, the manufacturer ought not to be protected by this limitation, and ought to be liable for the medical and other expenses of persons injured in a crash. He was not able to point to any statute, or to any established rule of law, that prevented the manufacturer from standing on the contract. The court nevertheless agreed with Henningsen. At various points in the court's argument the following appeals to standards are made: (a) "[W]e must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens." (b) "In applying that principle, the basic tenet of freedom of competent parties to contract is a factor of importance." (c) "Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned." (d) "In a society such as ours where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly." (e) " '[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?' "[6] (f) " 'More specifically, the courts generally refuse to lend themselves to the enforcement of a "bargain" in which one party has unjustly taken advantage of the economic necessities of [the] other. . . .' "[7]

The standards set out in these quotations are not the sort we think of as legal rules. They seem

very different from propositions like "The maximum legal speed on the turnpike is sixty miles an hour" or "A will is invalid unless signed by three witnesses." They are different because they are legal principles rather than legal rules.

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

This all-or-nothing is seen most plainly if we look at the way rules operate, not in law, but in some enterprise they dominate—a game, for example. In baseball a rule provides that if the batter has had three strikes, he is out. An official cannot consistently acknowledge that this is an accurate statement of a baseball rule, and decide that a batter who has had three strikes is not out. Of course, a rule may have exceptions (the batter who has taken three strikes is not out if the catcher drops the third strike). However, an accurate statement of the rule would take this exception into account, and any that did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited; there is, however, no reason in theory why they could not all be added on, and the more that are, the more accurate is the statement of the rule.

If we take baseball rules as a model, we find that rules of law, like the rule that a will is invalid unless signed by three witnesses, fit the model well. If the requirement of three witnesses is a valid legal rule, then it cannot be that a will has been signed by only two witnesses and is valid. The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule.

But this is not the way the sample principles in the quotations operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met. We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession—if I trespass on your land long enough, some day I will gain a right to cross your land whenever I please. There are many less dramatic examples. If a man leaves one job, breaking a contract, to take a much higher paying job, he may have to pay damages to his first employer, but he is usually entitled to keep his new salary. If a man jumps bail and crosses state lines to make a brilliant investment in another state, he may be sent back to jail, but he will keep his profits.

We do not treat these—and countless other counter-instances that can easily be imagined—as showing that the principle about profiting from one's wrongs is not a principle of our legal system, or that it is incomplete and needs qualifying exceptions. We do not treat counter-instances as exceptions (at least not exceptions in the way in which a catcher's dropping the third strike is an exception) because we could not hope to capture these counter-instances simply by a more extended statement of the principle. They are not, even in theory, subject to enumeration, because we would have to include not only these cases (like adverse possession) in which some institution has already provided that profit can be gained through a wrong, but also those numberless imaginary cases in which we know in advance that the principle would not hold. Listing some of these might sharpen our sense of the principle's weight (I shall mention that dimension in a moment), but it would not make for a more accurate or complete statement of the principle.

A principle like "No man may profit from his own wrong" does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which

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the law will taken into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction—a policy of securing title, for example, or a principle limiting punishment to what the legislature has stipulated. If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

The logical distinction between rules and principles appears more clearly when we consider principles that do not even look like rules. Consider the proposition, set out under "(d)" in the excerpts from the Henningsen opinion, that "the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars." This does not even purport to define the specific duties such a special obligation entails, or to tell us what rights automobile consumers acquire as a result. It merely states—and this is an essential link in the *Henningsen* argument—that automobile manufacturers must be held to higher standards than other manufacturers, and are less entitled to rely on the competing principle of freedom of contract. It does not mean that they may never rely on that principle, or that courts may rewrite automobile purchase contracts at will; it means only that if a particular clause seems unfair or burdensome, courts have less reason to enforce the clause than if it were for the purchase of neckties. The "special obligation" counts in favor, but does not in itself necessitate, a decision refusing to enforce the terms of an automobile purchase contract.

This first difference between rules and principles entails another. Principles have a dimension that rules do not—the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is.

Rules do not have this dimension. We can speak of rules as being *functionally* important or unimportant (the baseball rule that three strikes are out is more important than the rule that runners may advance on a balk, because the game would be much more changed with the first rule altered than the second). In this sense, one legal rule may be more important than another because it has a greater or more important role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight. If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques.)

It is not always clear from the form of a standard whether it is a rule or a principle. "A will is invalid unless signed by three witnesses" is not very different in form from "A man may not profit from his own wrong," but one who knows something of American laws knows that he must take the first as stating a rule and the second as stating a principle. In many cases the distinction is difficult to make—it may not have been settled how the standard should operate, and this issue may itself be a focus of controversy. The First Amendment to the United States Constitution contains the provision that Congress shall not abridge freedom of speech. Is this a rule, so that if a particular law does abridge freedom of speech, it follows that it is unconstitutional?

Those who claim that the first amendment is "an absolute" say that it must be taken in this way: that is, as a rule. Or does it merely state a principle, so that when an abridgement of speech is discovered, it is unconstitutional unless the context presents some other policy or principle which in the circumstances is weighty enough to permit the abridgement? That is the position of those who argue for what is called the "clear and present danger" test or some other form of "balancing."

Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. The first section of the Sherman Act states that every contract in restraint of trade shall be void. The Supreme Court had to make the decision whether this provision should be treated as a rule in its own terms (striking down every contract "which restrains trade," which almost any contract does) or as a principle, providing a reason for striking down a contract in the absence of effective contrary policies. The Court construed the provision as a rule, but treated that rule as containing the word "unreasonable," and as prohibiting only "unreasonable" restraints of trade.[8] This allowed the provision to function logically as a rule (whenever a court finds that the restraint is "unreasonable" it is bound to hold the contract invalid) and substantially as a principle (a court must take into account a variety of other principles and policies in determining whether a particular restraint in particular economic circumstances is "unreasonable").

Words like "reasonable," "negligent," "unjust," and "significant" often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rule depends. If we are bound by a rule that says that "unreasonable" contracts are void, or that grossly "unfair" contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified. If we were dealing, however, not with a rule but with a policy against enforcing unreasonable contracts, or a principle that unfair contracts ought not to be enforced, the contracts could be enforced without alteration of the law. . . .

Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them. But they seem most energetically at work, carrying most weight, in difficult lawsuits like *Riggs* and *Henningsen*. In cases like these principles play an essential part in arguments supporting judgments about particular legal rights and obligations. . . .

THE RULE OF RECOGNITION

. . . If principles of the *Riggs* and *Henningsen* sort are to count as law, and we are nevertheless to preserve the notion of a master rule for law, then we must be able to deploy some test that all (and only) the principles that do count as law meet. Let us begin with the test Hart suggests for identifying valid *rules* of law, to see whether these can be made to work for principles as well.

Most rules of law, according to Hart, are valid because some competent institution enacted them. Some were created by a legislature, in the form of statutory enactments. Others were created by judges who formulated them to decide particular cases, and thus established them as precedents for the future. But this test of pedigree will not work for the *Rigs* and *Henningsen* principles. The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over

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time. Their continued power depends upon this sense of appropriateness being sustained. If it no longer seemed unfair to allow people to profit by their wrongs, or fair to place special burdens upon oligopolies that manufacture potentially dangerous machines, these principles would no longer play much of a role in new cases, even if they had never been overruled or repealed. (Indeed, it hardly makes sense to speak of principles like these as being "overruled" or "repealed." When they decline they are eroded, not torpedoed.)

True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it). Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle.

Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order of magnitude. We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards. We could not bolt all of these together into a single "rule," even a complex one, and if we could the result would bear little relation to Hart's picture of a rule of recognition, which is the picture of a fairly stable master rule specifying "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indicating that it is a rule. . . ."[9]

Moreover, the techniques we apply in arguing for another principle do not stand (as Hart's rule of recognition is designed to) on an entirely different level from the principles they support. Hart's sharp distinction between acceptance and validity does not hold. If we are arguing for the principle that a man should not profit from his own wrong, we could cite the acts of courts and legislatures that exemplify it, but this speaks as much to the principle's acceptance as its validity. (It seems odd to speak of a principle as being valid at all, perhaps because validity is an all-or-nothing concept, appropriate for rules, but inconsistent with a principle's dimension of weight.) If we are asked (as we might well be) to defend the particular doctrine of precedent, or the particular technique of statutory interpretation, that we used in this argument, we should certainly cite the practice of others in using that doctrine or technique. But we should also cite other general principles that we believe support that practice, and this introduces a note of validity into the chord of acceptance. We might argue, for example, that the use we make of earlier cases and statutes is supported by a particular analysis of the point of practice of legislation or the doctrine of precedent, or by the principles of democratic theory, or by a particular position on the proper division of authority between national and local institutions, or something else of that sort. Nor is this path of support a one-way street leading to some ultimate principle resting on acceptance alone. Our principles of legislation, precedent, democracy, or federalism might be challenged too; and if they were we should argue for them, not only in terms of practice, but in terms of each other and in terms of the implications of trends of judicial and legislative decisions, even though this last would involve appealing to those same doctrines of interpretation we justified through the principles we are now trying to support. At this level of abstraction, in other words, principles rather hang together than link together.

So even though principles draw support from the official acts of legal institutions, they do not have a simple or direct enough connection with these acts to frame that connection

in terms of criteria specified by some ultimate master rule of recognition. . . .

NOTES

'See H. L. A. Hart, The **Concept** of Law 89–96 (1961).
²*Id.* **at** 97–107.
'*See* Dworkin, *Wasserstrom: The Judicial* **Decision** 75 Ethics 47 (1964), reprinted as *Does* **Law** *Have a Function?*, 74 **Yale** L. J. 640 (1965).
⁴1 15 N.Y. 506, 22 N.E. 188 (1889).
⁵32 NJ. 358, 161 A.2d 69 (1960).
⁶*Id.* at 389, 161 A.2d **at** 86 **(quoting** Frankfurter, J., in *United States v. Bethlehem Steel,* 315 U.S. 289, 326 (1942).
⁷*Id.*
⁸*Standard Oil v. United States,* 221 U.S. 1, 60 (1911); *United States v. American Tobacco Co.,* 221 U.S. 106, 180 (1911).

REVIEW AND DISCUSSION QUESTIONS

1. What are the three key tenets of positivism, according to Dworkin?
2. Explain the role of principles in *Riggs v. Palmer.*
3. Principles in the general sense include two sorts of standards. What are the two?
4. How do principles differ from rules, according to Dworkin?
5. Why cannot Hart modify his view to include principles, according to Dworkin?

"Natural" Law Revisited

Ronald Dworkin

Ronald Dworkin begins this essay with a brief discussion of "naturalism," or natural law, indicating that the view he wishes to defend can best be understood to fall within that general camp. He goes on to explain his theory of law with the example of a "chain novel" in which each author is responsible for taking the chapters by previous writers and continuing the novel. With this be illustrates the two dimensions of legal or literary interpretation: fit and justification. He then explains how his theory of law, which began with questions of interpretation, belongs within the natural law tradition.

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