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Two Models of Legal Principles

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Do legal principles exist, and, if so, what theoretical account can we give of them? In order to answer these questions, it will be helpful to say something first about the nature of principles generally. Principles are one of several types of normative standard that figure in practical reasoning, that is, reasoning about what ought to be done. Their character is probably most readily grasped by comparison to another type of normative standard, namely, rules. I therefore begin with a discussion of the general relationship between rules and principles. Moving on to the specific case of law, I sketch two models of legal rules, and then show that associated with each is a corresponding model of legal principles. The first of these, which I call the rationalization model, characterizes legal principles in terms of the best justification that can be given for existing settled law. The second, which I call the primacy model, takes legal principles to be the upshot of a process that I label "epistemic entrenchment." This means that the reasoning in previous cases is to be treated by subsequent courts as presumptively correct, but the presumption can be rebutted if a later court is confident to a sufficient degree—that is, confident beyond an appropriate epistemic threshold—that the earlier court made a mistake. With the distinction between the rationalization and the primacy models in hand, I next present an intepretive overview of Ronald Dworkin's various remarks about legal principles. Finally, I discuss a recent critique of legal principles that has been advanced by Larry Alexander and Ken Kress.

I. Rules and Principles: General

For present purposes, three related points of difference between rules and principles should be noted. Because the status of principles is a less controversial matter in morality than in law, I shall assume for the time being that we are talking about moral rules and principles.

The first difference concerns the *logical character* of each of the two types of standard, by which I mean the formal role each plays in the structure of practical reasoning. As Dworkin pointed out in a famous early article,[1] rules operate in an all-or-nothing fashion. If the facts of a given

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1. *See* Ronald Dworkin, *Is Law a System of Rules?*, 35 U. Chi. L. Rev. 14, 22-29 (1967).

case are such that the conditions of application of a valid rule have been met, then the rule must be applied; the rule is, in those circumstances, "conclusive."[2] If, however, the rule's conditions of application have not been met, then the rule can contribute nothing to the resolution of the case. Principles, by contrast, possess what Dworkin called a dimension of weight or importance; a given principle inclines toward but does not demand a particular result, since it can be outweighed by principles that point in the opposite direction. Principles are, logically speaking, a species of what Joseph Raz calls first-order reasons for action.[3] They bear directly, albeit usually inconclusively, on the question of what ought to be done. Further, the principles that are relevant to a particular situation are assumed to be commensurable and capable of being aggregated, along their dimension of weight, so as to produce an overall balance of principles. The balance of principles, which is a special case of what Raz calls the balance of first-order reasons, yields an overall conclusion about what ought to be done.

The second difference between rules and principles concerns their *content*. Principles refer more or less directly to—indeed, they are often indistinguishable from—various values, interests, rights, policies and goals that are, given our assumption that we are dealing with moral principles, themselves moral in nature.[4] In Raz's terminology, principles are general first-order reasons that have been drawn from morality (as opposed to those that are based on, say, self-interest). Rules, by contrast, usually just specify a course of action to be followed in a particular type of circumstance. In other words, the explicit content of principles is value-oriented, whereas that of rules is action-oriented.

The third, related, difference concerns the *justificatory relationship* between rules and principles. Principles can justify rules, but not vice versa.[5] A (moral) rule is based on an all-in, conclusive judgment about

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reprinted as Ronald Dworkin, *The Model of Rules I*, *in* Taking Rights Seriously 14, 22-28 (rev. ed. 1977) [hereinafter Dworkin, Taking Rights Seriously].

2. I borrow this term from H.L.A. Hart, The Concept of Law 261 (2d ed. 1994).

3. *See* Joseph Raz, Practical Reason and Norms 36-37 (2d ed. 1990).

4. In addition to the rule/principle distinction, Dworkin also drew a distinction in his early work between principles and policies. The latter distinction cuts across the former, since it is concerned with different *kinds* of content that principles, understood in the sense of the rule/principle distinction, might have: principles were said by Dworkin to be concerned with individual rights, whereas policies were concerned with social goals. *See* Dworkin, Taking Rights Seriously, *supra* note 1, at 22, 82-84. In this essay I shall be discussing only the rule/principle distinction.

5. Principles are, as noted, first-order reasons that are moral in character; as such, they will necessarily possess some minimum degree of generality. Not all first-order reasons need be general; a reason of self-interest might be relevant only to a specific person on a specific occasion, for example. The generality of principles means that, given their value-oriented content, they will ordinarily be relevant to more than a single type of action; thus a single principle could figure in the justification of more than one moral rule. On the other hand a moral rule could, given its action-oriented content, conceivably be justified by more than one set of principles.

what ought to be done in a certain situation (more accurately, in a certain *type* of situation). One way that such a judgment can be justified is by reference to the balance of relevant first-order moral reasons, *i.e.*, by reference to the balance of principles: the weight of the principles that argue for a given course of action is aggregated and weighed against those that call for the opposite course of action. This is not necessarily the only way that rules can be justified—the Kantian categorical imperative presents a possible alternative, for example—but it is an important one. It is the only route to the justification of a rule that we will need to consider here.

It will be helpful to the discussion of legal principles below if we explore the theoretical nature of rules in somewhat greater detail. Bearing in mind that we are still concerned with the moral case only and not with law, what more can be said about the rules that are supposed to be justified by sets of principles? One answer to this question is offered by Raz, who claims that rules are instances of what he calls second-order reasons for action.[6] The most important category of second-order reasons is that of exclusionary (or peremptory) reasons, which are reasons not to act on one or more first-order reasons. On Raz's view a rule is justified by relevant first-order reasons, but it subsequently excludes, or preempts, those reasons' direct application to the type of situation the rule covers. This is the source of the rule's second-order, exclusionary aspect. At the same time, according to Raz, the rule replaces the first-order reasons that justify it and itself takes on the status of a first-order reason; thus the rule does not just exclude other reasons but functions in its own right as a reason for a particular course of action. It is Raz's claim that rules have a second-order, exclusionary dimension that will be of most concern to us here, however, since that is how Raz accounts for the defining logical characteristic of rules, namely, their conclusiveness.

Raz's account of rules is a particularly clear and precise version of a more general view which regards rules as operating at a certain normative distance from the principles that ultimately justify them. The claim is, in effect, that the rule is *adopted* by some person or group, although in the case of morality this process would presumably be a fairly informal one. After adoption the rule takes on a certain normative life of its own; in a large range of cases it can be followed or applied without reference back to the principles that were originally thought to justify it. Let me call this the *autonomous* conception of rules, the best-known exemplification of which is the type of rule associated with rule-utilitarianism. There are well-known reasons as to why one might want in this way to put a certain normative distance between rules and the principles that ultimately justify them. Because these reasons are given clear and general expression in Raz's theory of practical reasoning, I shall take the autonomous conception

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6. *See* Raz, *supra* note 3, at 39, 58-59, 78; *see also* Joseph Raz, The Authority of Law 16-19 (1979) [hereinafter Raz, Authority]; Joseph Raz, The Morality of Freedom 41-42, 57-59 (1986) [hereinafter Raz, Freedom].

of rules to be exemplified by Raz's particular version of that approach. Raz argues for the *normal justification thesis*, which forms part of a persuasive general theory of legitimate political authority. The basic idea is that it is both rational and morally appropriate to treat a rule as an independent reason if by so doing you are likely better to comply with the principles (or other reasons) that apply to you than if you tried to act on your own judgment of what the balance of principles (or balance of general reasons) requires.[7] Under certain circumstances, it is not only morally appropriate to treat a rule as an independent reason, but morally required.[8] Granting that it can at least sometimes be appropriate to rely on the autonomous conception of rules, the question I would like to consider next is this: is there a defensible conception of rules that does *not* assume that rules are normatively distanced from their justifying principles?

Imagine for a moment that morality was epistemically transparent, by which I mean that there existed some simple and almost-impossible-to-misapply decision-procedure for determining the answers to moral questions. There would be straightforward methods for determining the relevance of principles, summing their weights, and ascertaining what action was demanded by the resulting balance of principles. Let us assume further that all empirical matters that might affect the outcome of a moral question would also be capable of easy determination. Now there would undoubtedly still be a place for moral rules in such a world, if only because rules save time and effort; it is, among other things, *convenient* to have a set of guides to conduct that allows us to avoid repeating the same process of moral reasoning, however simple, on every relevant occasion. But these guides to conduct would not have to be rules in the autonomous sense, or at least not all of them would have to be.[9] In our own world, where morality is not epistemically transparent, there are presumably cases where the normal justification thesis applies simply because the rule-maker has greater moral knowledge, or at least greater knowledge about the empirical conditions under which moral principles are to be applied, than do the rule followers. In the epistemically transparent world this gap in knowledge could not arise, but even so it would still be useful to have rules to cover such situations. These rules would not, however, be independent reasons of the kind posited by the autonomous conception. They would

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7. *See* Joseph Raz, Ethics in the Public Domain 194-204 (1994); Raz, Freedom, *supra* note 6, at 38-69.

8. *See* Raz, Freedom, *supra* note 6, at 60.

9. There are certain cases where something like an autonomous rule would be necessary even in a world in which morality was epistemically transparent. These involve situations where the no-difference thesis, *i.e.*, the thesis that an exercise of authority should make no difference to what its subjects ought to do, does not hold. Raz gives three examples of such situations: first, where the precise action demanded by morality is underdetermined; second, where a convention is required to solve a coordination problem; and third, where an authoritative directive is required to solve a prisoners' dilemma. *See* Raz, Freedom, *supra* note 6, at 48-51; *see also* Andrei Marmor, Interpretation and Legal Theory 116-17, 176-81 (1992).

simply be statements of all-in judgments concerning what ought to be done, as determined by the relevant balance of principles; they would, as it were, summarize the aggregate upshot of those principles. Let me therefore refer to this alternative conception of rules as the *summary* conception.

Of course morality is not, for us, epistemically transparent, but that does not mean that we have no use for the summary conception of rules. This point will be illustrated by the discussion of law in the following section.

II. Rules and Principles: The Case of Law

We turn next to legal, as opposed to purely moral, rules and principles. Notice, to begin, that the autonomous conception of rules, when translated into the legal sphere, gives us an essentially positivist conception of law. The idea of adoption becomes, in this context, the notion of *enactment*: some appropriate person or body brings a new legal rule into being by invoking a more or less formal enactment procedure; the rule can subsequently be changed or abandoned, but to do so requires similar procedures of *amendment* and *repeal*. This model of legal rules fits certain types of laws better than others. In particular, it seems to provide a fairly accurate account of legal rules that are created by legislatures. For present purposes, however, I wish to focus on the law-making activities of courts, using Anglo-American common-law systems as my primary example. It is clear enough that common-law courts create law, in a form that seems properly described as consisting of rules. It is, however, less clear that these rules are best understood in accordance with the autonomous conception. It all depends on what point or purpose we think the common law serves.[10]

According to legal positivism, the most fundamental point or purpose of law is to provide publicly ascertainable guides to conduct for the population at large.[11] On Raz's view, the law claims for itself the exclusive authority to promulgate such guides because it implicitly regards itself as morally legitimated by the normal justification thesis; it claims, in effect, that citizens are more likely to comply with the reasons for action that apply to them if they obey the law than if they try to act on their own judgment. Of course this claim might be mistaken, but it is the fact that it is made at all that requires us, on a Razian view of the matter, to conceptualize all legal rules, including common-law rules, in terms of the autonomous conception.[12] For Raz, the autonomy of legal rules means that they must be *source-based*, that is, they must be identifiable as legal

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10. For a discussion of the methodological concerns in legal theory that make a discussion of point or purpose relevant, see Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, *in* Law and Interpretation 97 (Andrei Marmor ed., 1995).

11. *See* Raz, Authority, *supra* note 6, at 50-51.

12. *See* Raz, *supra* note 7, at 199-204.

rules solely by reference to social facts, such as the activities of legislatures and courts, without recourse to moral considerations.[13] The picture of the common law in particular that emerges is one in which judge-made law is theoretically similar to that created by legislatures: courts in effect formally enact rules, and if they later change their minds they amend or repeal them (say by distinguishing a precedent, or by overruling it). Common law legal rules are identifiable solely by reference to the law-making activities of the courts.

Suppose, however, that we think the point or purpose of the common law is not to provide guides to conduct as such, but rather to settle disputes in accordance with applicable principles of justice and other relevant aspects of morality.[14] Then we might think that judges should decide a torts case, say, or a restitution problem, on the basis of their best moral judgment at the time the decision has to be made: they should formulate the balance of *moral* principles as it then appears to them and decide the case accordingly. Because moral principles are general, the courts would almost inevitably express their conclusions in terms of general propositions that apply to a *type* of situation, and not just to the particular case. (The relevant "type" would be determined by what facts were and were not treated by the general proposition itself as relevant to the resolution of the case.) Such general normative propositions would be, in effect, rules in the sense of the summary conception. Because there is no assumption that these rules are posited or enacted in anything like the usual positivist sense, the resulting model of the common law is a nonpositivist one.

The main logical characteristic of rules is, as we saw earlier, that they are conclusive; if a particular fact situation falls within the rule's conditions of applicability, the rule must be followed. The summary rules described in the preceding paragraph would be conclusive in this sense *so long as the court did not change its mind about the underlying balance of moral principles.* This is because such rules represent all-in judgments about the proper moral disposition of a given type of case. However, in our nonepistemically transparent world, judges often do come to see the material issues in a different light; they regularly change their views about what the relevant balance of principles requires.[15] Summary rules would thus be continously modified as the courts' perception of the underlying balance of principles changed. Autonomous rules, on the other hand, would be retained even if the courts came to rethink what the balance of principles demanded, or at least they would be retained until such time as the courts were willing and in a position to invoke the procedures of amendment or repeal. (For example, only the higher courts might have this power.) There is thus an

13. *See id; see also* Raz, Authority, *supra* note 6, at 45-52.

14. *Cf.* Dworkin, Taking Rights Seriously, *supra* note 1, at 338, 346-48.

15. This might involve, among other things, a change in view about what the "type" of the case is; sometimes this is what is at issue when a prior case is distinguished, for example.

obvious sense in which autonomous rules are "more conclusive" than summary rules. Autonomous rules are not, by their very nature, as sensitive to changes in opinion about the underlying balance of principles: consequently, their applicability does not depend on any continuing assessment of what that balance requires.

It is an interesting question, and one by no means easy to answer, whether the best theoretical account of the common law depicts it in terms of autonomous rules, summary rules, or a combination of the two. I have argued elsewhere for an account in which summary rules predominate, and I shall not repeat that discussion here.[16] There is, however, one aspect of the common law about which I must say something before proceeding further, and that is its incorporation of a doctrine of precedent. It might seem at first glance that, because common-law courts claim to follow prior similar cases, the rules they formulate could not possibly be understood in accordance with the summary conception; the details of the doctrine of precedent must comprise, it might be thought, the common-law analogues of the legislative procedures of enactment, amendment and repeal.

This line of thought is too simple, however, because the values underlying a doctrine of following precedent, such as consistency and predictability,[17] are *themselves* principles in the logical sense defined earlier, and can—indeed, should—be taken into account by judges in determining what action, in the form of a judicial decision, the balance of moral principles requires. A summary conception of the common law in essence equates the law with conclusions about what ought to be done according to the current judicial perception of the overall balance of principles. But the balance of principles is not timeless and unaffected by the course of actual events; in the case of a social practice like law, it can, in particular, be influenced by prior institutional history. Principles which embody such values as predictability and consistency—let me refer to these generally as the "rule-of-law values"—incline towards taking the same action that the institution took in similar circumstances in the past; they are, in that sense, inherently conservative in nature. One form that a

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16. *See* Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 Oxford J. Legal Stud. 215, 234-55 (1987) [hereinafter Perry, *Judicial Obligation*]; Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. Cal. L. Rev. 913, 963-93 (1989) [hereinafter Perry, *Second-Order Reasons*].

17. There is an interesting debate as to whether consistency, understood not in loose pragmatic terms but rather as calling for equality of treatment among persons, is in fact a value to which courts should give weight. *See, e.g.*, Larry Alexander & Ken Kress, *Against Legal Principles*, *in* Law and Interpretation, *supra* note 10, at 279, 294-95, 305, *reprinted in* 82 Iowa L. Rev. 739, 754-55, 765 (1997). For reasons which I shall discuss in section VI, I believe that consistency is such a value. But even if I am wrong in this, the argument in the text remains unaffected. It is enough for present purposes that there be *some* set of conservative values (referred to later in the text as the rule-of-law values), that incline towards doing what has been done before. The most important and least controversial such value is the need for some degree of predictability or stability in the legal decision-making process.

doctrine of precedent might therefore take is simply to include the rule-of-law values in the overall balance of principles: the court decides whether to depart from or modify a past decision by weighing these values against other relevant principles that might call for change.

Without attempting to summarize the entire case for the understanding of the common law just sketched, let me just observe that the very metaphor of "giving weight" to prior cases, which is so often employed in descriptions of the doctrine of precedent, is more reminiscent of an understanding of precedent based on the summary conception of rules than it is of one based on the autonomous conception. This is because the summary conception does not take prior decisions into account by supposing that they generate all-or-nothing rules, as the autonomous conception would have it, but rather by balancing or weighing the values of consistency and certainty against principles representing other relevant concerns. The summary conception of legal rules is thus quite compatible with a practice of following precedent, in the sense of giving weight to what judges have done in the past. In fact, on a proper understanding of what should be taken into account in the balance of moral principles, it is reasonable to think that the summary conception calls for such a practice. Much more needs to be said, of course, about the precise form that such a doctrine of precedent could be expected to take. Some of the issues that arise in this regard will be addressed in the following sections.

III. Two Models of Legal Principles

We are now in a position, finally, to say something further about the nature of legal principles themselves. One possible understanding of legal principles that I will note but not discuss in detail holds that they must be completely source-based in Raz's sense. This means that their status as legal principles, their content, and their weight must all be determinable by reference to social facts alone, and hence without resort to moral argument. In the case of legal principles the most plausible thesis is that the relevant social facts involve either a rule of recognition embodying general criteria of validity that apply to principles, or else direct judical acceptance of individual principles on a case-by-case basis. Either way, we would be dealing with forms of judicial custom. As Dworkin pointed out early on, it is difficult to see how custom could be sufficiently nuanced as to be able to assign determinate weights to individual principles.[18] In a related vein he also argued, to my mind convincingly, that legal principles are in any event not treated by common-law judges as rooted purely in custom.[19] For present purposes I will accept that conclusion as having been established, and accordingly will not say anything more about the source-based model of legal principles.

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18. *See* Dworkin, Taking Rights Seriously, *supra* note 1, at 43-44, 64-65.
19. *See id.*

In the preceding section I distinguished two different models of common law legal rules, one based on the autonomous conception of rules and one based on the summary conception. Corresponding to those two models of legal rules are two models of legal principles. To see this, suppose first that the common law consists of autonomous legal rules which judges must, at least in certain contexts, treat as binding. (For present purposes we may ignore those contexts where judges have the power to amend or repeal the rules.) Imagine that a case not directly covered by any existing legal rule has come before Judge Julia. If we assume that consistency and equal treatment are legal virtues,[20] then one plausible approach Julia could take would be to decide the case in accordance with the set of principles that best justify the total set of relevant and binding autonomous legal rules.[21] If all those rules appeared to Julia to be morally correct, then the justifying principles would presumably also appear to her to be morally correct. It is likely, however, that she will be of the view that at least some of the autonomous rules binding upon her are, to some degree or in some way, morally mistaken. In that case she might think it appropriate to rely on what could be called second-best principles, by which I mean principles that would morally justify the standing autonomous rules if the latter were, contrary to what Julia and other judges will inevitably come to think, themselves all morally valid. Second-best principles provide the best available justification for the rules that the system insists Julia accept. As such, they would permit her to decide new cases, if not correctly (according to her current moral views), then at least consistently with the rules already in place. Let me call this the *rationalization* model of legal principles.

Assume next that the common law consists of summary rules. In that case it is principles rather than rules that are, normatively speaking, in the driver's seat. Rules are simply summary guides to current judicial moral thinking, by which I mean that they set out the normative conclusions yielded by the judges' best present understanding of the balance of moral principles. It is true that, because the balance of principles takes account of such matters as predictability and systemic consistency, such rules could acquire a certain identity and continuity over time that might seem to resemble the independent status of true autonomous rules. The reason for this is that the conservative "drag" of the rule-of-law values ensures that a given rule is not immediately modified or abandoned just because the judiciary's view of the relevant substantive principles has shifted.

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20. This is not an uncontroversial assumption; *see supra* note 17.

21. There is, of course, a problem of scope that arises here, which can be described in the following way: What exactly is comprehended by the phrase, "the total set of relevant and binding autonomous legal rules"? Is it the entire common law? Is it the entire common law together with all other autonomous legal rules, including in particular those created by legislation? Or is it perhaps some subset of the common law, such as, in an appropriate case, the law of torts? Or is it some still smaller set of rules? These are not questions that need to be addressed for present purposes. See further Ronald Dworkin, Law's Empire 250-54 (1986).

Nonetheless, the fact remains that the status and content of a summary rule at all times tracks the underlying balance of principles, where that balance is understood to embrace (among other principles) the conservatively-inclined rule-of-law values. Now it might seem that on this account of the role of principles in legal reasoning, the principles at stake are really moral, not legal, in nature. There is a sense in which this is true, but, as I shall shortly argue, there is also a sense in which the underlying principles are properly characterized as legal. For the moment, if only to ensure that we have a convenient label, let me call this the *normative primacy* model of legal principles, or the primacy model for short.

Notice that both the rationalization and primacy models of legal principles preserve the three general characteristics of principles that were noted at the beginning of Section I. These concerned, it will be recalled, the logical character of principles, their content, and their justificatory relationship with rules. Thus, in both models, principles possess the logical property of weight rather than that of conclusiveness. In both their content is value-oriented, although in the case of the rationalization model the relevant values might be, so to speak, second-best ones. And finally, in both models principles justify rules rather than vice versa. The difference between the two models concerns a further aspect of the relationship between rules and principles, which I will refer to as the issue of *normative priority*. The issue arises, in our nonepistemically transparent world, when the justificatory relationship that was previously believed to hold between a rule and the relevant balance of principles is no longer thought to exist. If a new justificatory relationship is to be established, there are two possibilities. The first is to retain the rule and modify the principles that figure in the balance of principles. The second is to give priority to (the current understanding of) the balance of principles, and to modify the rule accordingly. The rationalization model of legal principles, which goes hand-in-hand with the autonomous conception of legal rules, follows the first strategy. The primacy model of legal principles, which is the natural correlate of the summmary conception of legal rules, follows the second. The issue of normative priority is thus concerned with establishing a fixed starting point for rejigging the justificatory relationship between rules and principles. The balance of principles itself constitutes that starting point for the the primacy model, whereas for the rationalization model the starting point is the rule.

We now come to a crucial issue. How can it be said that, on the primacy model, we are dealing with principles that are properly regarded as legal, and not just moral, in nature? After all, the basic characterization of the primacy model seems to begin precisely with the idea of a balance of *moral* principles, where that balance is understood to include certain values, such as predictability and consistency, that favor the status quo. In order to answer the preceding question we need to ask the following one: how exactly do these conservative values figure in the balance of principles? Notice that they do not seem capable of being taken into account *directly*, because they do not have a determinate content of their

own. They do not, if you like, pull in a particular substantive direction. Consistency and predictability require a substantive content upon which to operate, and they are compatible with a wide variety of such contents. In legal reasoning they underpin the doctrine of precedent, which determines a content by focussing on institutional history. More particularly, precedent focuses on the reasoning in earlier cases and demands, in a commonly-employed idiom, that we attribute greater weight to that reasoning than we might otherwise be inclined to do.

I want to suggest that the idiom of attributing weight to the reasoning of past decisions is one that we should take seriously. One way to understand this notion is along the following lines. The principles that make up the doctrine of precedent are *second-order* principles that require a court to attribute a certain weight to the first-order principles that figured in previous legal decisions, even if the present court disagrees with how the earlier court reached its conclusion.[22] The reasoning employed in a prior case can still be modified or even rejected, but not as readily as it could have been if it had never been accorded judicial recognition at all. The first-order principles that figured in that reasoning are transformed, through this process of acquiring a certain official status, into *legal* principles. There are various ways to understand this process,[23] but the most plausible is an epistemic interpretation. On this view, the reasoning of the previous court is to be treated as presumptively correct, but the presumption is defeasible. (The summary rules that the reasoning is taken to justify then operate as defeasible presumptions themselves.) The present court is entitled to modify or reject the reasoning of the earlier court when it believes, with at least a certain degree of confidence, that the earlier

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22. *Cf.* Perry, *Judicial Obligation*, *supra* note 16, at 239-55.

23. *Cf.* Perry, *Second-Order Reasons*, *supra* note 16, at 932-36, 966-68. One way to understand the notion of a second-order principle is as a generalization of Raz's notion of a second-order reason. For Raz, a second-order reason is a reason to act on, or not to act on, a first-order reason. On the generalized understanding, a second-order reason is a reason to treat a first-order reason as having a degree of weight which differs from the weight one would otherwise attribute to it. The idea of "weight" can, however, be understood in either a substantive or an epistemic sense. The substantive weight of a principle is the weight that is attributed to it in practical reasoning, in the process of assessing the overall balance of reasons. Epistemic weight is the degree of confidence that one must have in one's belief that the principle has heretofor been incorrectly formulated before a presumption in favor of the principle's (moral) correctness can be rebutted. ("Moral correctness" concerns, in this context, both the content of a principle and its substantive weight.) On a "substantive" interpretation of the notion of a second-order principle, it is substantive weight that is assumed to be variable: thus an exclusionary reason is just the special case of a reason to treat a first-order reason as having zero weight. But an "epistemic" interpretation is also possible, since, as we shall see shortly, the required degree of confidence in one's own present moral beliefs can vary, so that it makes sense to speak of attributing a greater or lesser epistemic weight to the relevant principle. At one time it seemed to me that both the substantive and epistemic interpretations of the generalized notion of a second-order reason were possible: see *id.* However, I now have some doubts about the coherence of the substantive interpretation, and have therefore confined discussion in the text to the epistemic understanding.

court was in some respect mistaken. For example, the present court might have to be convinced that the earlier court was *clearly*, or *plainly*, wrong before it would be entitled to modify the latter's formulation of the balance of principles.[24] But in the absence of this degree of confidence, a mere belief that the earlier court reasoned mistakenly will not justify such a move.

We can refer to the degree of confidence required to rebut the presumption that the reasoning in an earlier decision is correct as the *epistemic threshold*. Because confidence in the correctness of one's present beliefs is a matter of degree, the epistemic threshold need not be regarded as fixed. In the legal context we could expect it to vary according to a number of factors, such as the status in the judicial hierarchy of the present court relative to that of the earlier court, the age of the relevant precedent, and the nature of the case.[25] Suppose, for example, that the older a precedent that has not fallen into desuetude is, and the more frequently it has survived earlier challenges, the more confident the present court must be that the reasoning underpinning the precedent is mistaken before it can revise or reject that reasoning. If that is true it makes sense to speak of the principles that figured in an earlier court's reasoning, as well as the summary rule that the reasoning is taken to justify, as becoming more and more entrenched over time. The idea that principles and rules become entrenched in the common law is a very familiar one among lawyers. It is an idea that, within the primacy model of legal principles, can easily be given an explication in epistemic terms, along the lines just sketched. I shall, accordingly, refer to this phenomenon as epistemic entrenchment. Although it is not my purpose in this essay

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24. See, for example, *O'Brien v. Robinson*, 1973 App. Cas. 912 (H.L.):

> While it would be open to your Lordships to do so, this is not, I think, a suitable case in which to exercise the recently asserted power of this House to refuse to follow one of its own previous decisions. An examination of the reasoning in the judgments in the cases on this subject during the last hundred years suggests that the law might easily have developed on different lines from those which it in fact followed. But, for my part, I am not persuaded that this development was clearly wrong or leads to results which are clearly unjust . . . .

Id. at 930 (Lord Diplock); *see also* Fitzleet Estates Ltd. v. Cherry, [1977] 3 All E.R. 996, 1000 (H.L.) ("If the decision in the *Chancery Lane* case was wrong, it certainly was not so clearly wrong and productive of injustice as to make it right for the House to depart from it.") (Viscount Dilhorne).

25. *Cf.* Perry, *Judicial Obligation*, *supra* note 16, at 241–42. In speaking of "the nature of the case," I have in mind two things. First, stability and predictability might be more important in some areas of the law than in others. Thus we should expect a higher epistemic threshold in contract cases, where legal rules are intended in part to facilitate the structuring of consensual relationships, than in tort cases (or at least in tort cases involving involuntary harm between strangers). Second, we should expect the epistemic threshold to vary inversely with the degree of perceived injustice of the present legal rule (or, alternatively, with the extent of the bad consequences for which it is thought to be responsible). Thus the threshold should, all things being equal, be lower for a rule that is thought to involve great injustice than for one that is thought to involve only some lesser degree of wrong.

to offer a detailed comparison of the primacy and rationalization models, it is worth remarking that, within the latter model, no comparably straightforward explanation of the manner in which principles become entrenched in the law appears to be available.

If we make the further, quite plausible assumption that on the primacy model the epistemic threshold will vary with the extent of the change in the law that the present court is contemplating, then that model can also readily explain the fact that, in the common law, low-level legal change occurs more or less constantly. Such change becomes possible, and indeed is to be expected, if a judge requires only a moderate degree of confidence in her present moral beliefs before she is entitled to introduce minor changes—involving, say, the modest expansion or restriction of the scope of a summary rule—into a prior line of legal reasoning. The existence of continual, low-level change is, however, very difficult to account for when, as on the autonomous conception of legal rules, analogues of the formal legislative notions of amendment and repeal must be invoked. These notions seem to be most at home when major change in the law, such as the overruling of an important precedent, is at stake. But while the positivist technique of constructing analogues of amendment and repeal is one way to analyze overruling and other major changes in the common law, it is not the only way. On the primacy model, an overruling can be characterized as a revision of the reasoning underlying a previous decision that is so extensive that even the result must be regarded as mistaken; if a similar case were to be heard now, the decision would go the other way. This kind of major change in the law is a relatively rare and significant event because, according to the model, the epistemic threshold that must be met in these circumstances is extremely high. In general, and all other things being equal, the greater the extent of the contemplated change in the law, the higher the epistemic threshold.

I have argued that the rule-of-law values do not pull in any particular substantive direction, and hence cannot be first-order principles in Raz's sense; rather, they must be second-order principles which operate parasitically upon the first-order principles that have figured in the reasoning of past decisions.[26] One might be tempted to make the following response to this argument.[27] Perhaps the rule-of-law values can

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26. An earlier formulation that I gave of this idea in Perry, *Judicial Obligation*, *supra* note 16, was criticized by Heidi Hurd on the grounds that it was just a variant on Raz's conception of justified authority, and hence vulnerable to a critique similar to one she had offered of Raz. *See* Heidi M. Hurd, *Challenging Authority*, 100 Yale L.J. 1611, 1639-40 (1991). But it was never my intention to offer an account of authority, either justified or de facto. The basic thesis has always been, rather, that certain values which ought to be taken into account in the balance of reasons, namely, the rule-of-law values, cannot plausibly be regarded as ordinary first-order reasons. These values are instead best understood as second-order reasons; they are, in effect, functions that take as arguments the first-order principles that have figured in judicial reasoning in the past.

27. *Cf.* Alexander & Kress, *supra* note 17, at 296, 309, *reprinted in* 82 Iowa L. Rev. 739, 756, 769 (1997).

be given effect through the *consequences* of prior decisions, and in particular through the expectations they generate and the reliance they induce. Both expectations and reliance involve a judgment that the future will follow a particular course; more specifically, in the judicial context, they assume that future decisions will (always, usually, or often) resemble past ones. Considered as reasons for action for judges, expectations and reliance, unlike the rule-of-law values standing alone, thus do pull in a particular direction. This suggests, in turn, that they are ordinary, first-order reasons. If that is so, however, then there seems to be no need to have second-order principles in the system: to the extent that the past has a bearing on what should be done in the present, this can apparently be accomplished if judges take direct account of expectations and reliance in the overall balance of first-order principles.

The problem with this response is that expectations give rise to legitimate first-order reasons only if they are justified; similarly, reliance creates reasons only if it is reasonable. Ordinarily, however, expectations are not justified, nor is reliance to be regarded as reasonable, unless the expectations were knowingly encouraged or the reliance deliberately induced. I may have an expectation that Judge Julia will always rule in my favor, and I may take action in reliance on the assumption that she will do so, but unless my expectation has been officially encouraged it should count for nothing in her reasoning. The judicial system encourages people to form expectations, and invites them to rely on those expectations, by means of the doctrine of precedent. That doctrine must therefore be formulated and justified, initially at least, independently of persons' expectations and the fact of their reliance. But this takes us right back to where we started. The only plausible justification that can be offered for a judicial practice of following precedent will look to the rule-of-law values,[28] and in a legal system based on summary rules those values take effect, I have argued, through the operation of second-order principles. Of course, once a practice of following precedent is in place, there may be a kind of feedback effect: the justified expectations and the reasonable reliance to which the practice gives rise are first-order reasons that should indeed be taken into account in the overall balance of principles. I discuss this further in the following section. The point to be noted for present purposes, however, is that without an independently-justified doctrine of precedent, these reasons will never be generated in the first place.

According to the primacy model, then, a legal principle begins its career in law as a mere moral principle, or, more accurately, as a standard of practical reasoning that relevant members of the judiciary regard as a correct moral principle. As a result of having figured in earlier legal reasoning, it becomes subject to a presumption in favor of its moral

28. It is important not to confuse expectations with the rule-of-law values of predictability and stability; the former are psychological states of persons, whereas the latter are general desiderata in a legal system.

correctness; "correctness," in this context, comprehends both content and substantive weight.[29] Because of the importance of such conservatively-inclined values as consistency and predictability, the presumption itself is generally assumed to be, and in basically just legal systems usually will be, morally justified. The epistemic strength of the presumption will vary with a number of different institutional factors, such as the number of times the principle has figured in prior judicial opinions, the seniority of the deciding courts, and the age of the precedents. The stronger the presumption, the greater the degree to which the principle can be said to be entrenched in the law.

It is the existence of the epistemic threshold, and the accompanying phenomenon of epistemic entrenchment, that makes it plausible to say that the principles described by the primacy model are legal and not just moral in nature. This is true for two reasons. First, the degree of entrenchment is a function of prior institutional history; it is a function, in other words, of specifically legal events that took place in the past. Second, the fact of entrenchment permits legal reasoning to be at least partially autonomous, by which I mean the following. While legal reasoning is, on the primacy model, supposed to track moral reasoning, it fastens on a particular instance of moral argumentation as the official form of reasoning to be applied in a given type of case. Subsequent courts must follow and further develop this form of reasoning, even if that is not what they would do if the matter were tabula rasa, so long as their disagreement falls within the bounds of the relevant epistemic threshold. It is important to emphasize, however, that on this view the autonomy of legal reasoning is only partial; if judges are sufficiently confident that an earlier court was mistaken, then they can, to an extent that will vary with the circumstances, rely on their present moral beliefs to decide the case at bar and, in the process, change the law. What such reliance involves can range from a minor modification of the existing formulation of the balance of principles to a complete repudiation of the earlier court's reasoning, of the kind involved in an overruling.

IV. An Example

This is all very abstract, so let me try to elucidate both the rationalization and the primacy models of judicial principles by way of an example. Suppose that, in a case of first instance, a judge has to decide whether to order a pregnant woman who is addicted to drugs to enter into a treatment program. To keep the example simple, I will assume that there are no relevant statutes and that the issue is to be dealt with solely as a matter of common law, understood in its broadest sense (*i.e.*, understood as including doctrines of equity and all inherent powers and prerogatives of the court). Let me further assume, again to keep the example simple,

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29. On the notion of substantive weight, see *supra* note 23.

that there are only three (potentially) relevant principles. These concern the mother's interest, the fetus's interest (if any), and the general community's interest (if any). The mother's interest, we may assume, is grounded in her autonomy: it is against her interest to be taken into care against her will. We shall further assume that the fetus's interest is in avoiding physical injury (which in this case would be caused by drugs). However, the existence of that interest, or at least its weight, depends on whether the fetus is a person; for the purposes of the example (as well as in real life), that issue is to be regarded as controversial. Finally, we shall assume that, so far as the general community is concerned, one of the following three possibilities holds, but it is controversial which one: (i) the community has no moral interest in the matter; (ii) the community has an instrumental interest only, predicated on a more basic interest in minimizing health care costs; or (iii) the community has an inherent interest in protecting not just actual but also potential human life from serious physical injury.

Suppose the case just described comes before Judge Jasper. The drugs the mother is taking give rise to a serious risk of severe brain damage at birth. Given our assumption that the case is one of first instance—I shall also assume, again for the sake of simplicity, that no relevantly similar issues have previously been dealt with by the court—Jasper must make a decision based on his assessment of the balance of moral principles. As the example has been set up, there are several controversial elements in that balance, so the decision could reasonably go either way. Suppose that Jasper believes very strongly that the fetus is not a person and that it therefore has no interest that can directly outweigh the mother's autonomy interest. But Jasper nonetheless decides that the mother should be ordered to enter treatment, on the grounds that the community has an interest in the matter in the sense of proposition (iii); in Jasper's opinion, that interest outweighs the mother's autonomy interest in the circumstances of the case.

On the rationalization model of legal principles, which is the flip side of the autonomous conception of legal rules, Judge Jasper's decision would be regarded as having created a new autonomous legal rule. Suppose the rule is: a pregnant woman who intends to carry her fetus to term, and who is addicted to drugs that pose a real risk of serious physical harm to the child when born, may be ordered by the court to enter a treatment program. Suppose now that a case comes before Judge Julia in which the addiction is to a less serious drug, one which threatens only a fairly remote possiblity of some hearing loss later in life. Julia's case does not fall within Jasper's rule, since the risk of injury is low and the injury itself less serious in character. Let me assume, again to keep the example as simple as possible, that Julia cannot overrule Jasper's decision. But, on the rationalization model of legal principles, her decision must still cohere with the rule he laid down, and this means that she must decide the present case in accordance with the principles that, in her view, best justify

the rule.[30]

Julia thinks the result in Jasper's case may or may not have been right, but at any rate she does disagree with his reasoning. In her opinion, it does not seem appropriate to say that the community has an interest in the matter in the sense of proposition (iii). This is because she does not believe that, morally speaking, the community could have standing to interfere except to protect actual, not just potential, human life. Julia feels even more strongly that the community has no interest at stake in the sense of proposition (ii); in her view, if financial cost to the community could ever outweigh the mother's autonomy interest, then the community would be justified in curtailing risk-taking as well as risk-imposing behavior (*e.g.*, by prohibiting dangerous sports because of the medical costs they might incur). But propositions (ii) and (iii) are at least intelligible to Julia, in the following sense. While her current thinking is that neither proposition is a valid moral principle, she does not hold that view so strongly that she believes she could not be mistaken; thus she regards both propositions as falling within the realm of *possible* moral principles. This means that if Julia had to treat either proposition as the best justification for Jasper's rule, she would have a fairly good idea of how to assign relative weights in specific circumstances. It is just that her current views lead her to think that the results would be inappropriate or unpalatable; if proposition (ii) had normative force, for example, it might mean that the state could prohibit people from engaging in dangerous activities. She is aware, however, that others might not look as askance on this state of affairs as she does.

Julia thus moves on to consider the possibility that the fetus is a person ("the personhood thesis"). As a moral matter she is rather inclined to doubt that this is true, but she is in a state of great uncertainty about the issue. She thinks it is at least arguable that the fetus is a person, and she has a fairly good idea of how that thesis could be made to cohere with her more firmly-held moral beliefs. Given that she regards the personhood thesis as morally more plausible than either proposition (ii) or proposition (iii), Julia concludes that it offers the best justification for the rule in Jasper's case and so holds in her judgment. According to the rationalization model of legal principles, the thesis that the fetus is a person emerges from Julia's reasoning as a *legal* principle. In the particular case before her, Julia holds that, while she must regard the fetus as a person, the mother's autonomy interest nonetheless outweighs the fetus's interest in avoiding a fairly remote risk of partial hearing loss later in life. Julia therefore rules that the mother cannot be ordered into treatment.

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30. For purposes of simplicity, I am assuming that the stated rule is the only autonomous rule that is both binding on Julia and relevant to the type of case in question, and hence the only member of the set of rules for which Julia must, within the rationalization model, find the best justification. On the notion of relevant and binding autonomous rules, see *supra* note 21.

Let us turn next to the primacy model of principles. In the original case described above, involving a mother who takes drugs that pose a serious risk of brain damage to her child at birth, assume that Jasper rules as before; he rules, that is, that the mother should be ordered into treatment because the community has an interest in protecting potential as well as actual human life, and that this interest is sufficiently strong to outweigh the mother's autonomy interest. Assume further that the second case, involving a remote risk that the child will suffer some hearing loss later in life, again comes before Julia's court. On the primacy model of principles, Julia is not conclusively bound by either the reasoning or the result in Jasper's case, but she must still give some weight to the rule-of-law values of predictability and consistency. Because these values do not, standing on their own, pull in any particular substantive direction, Julia can only take them into account by deferring to what Jasper did on the earlier occasion. The deference in question is, however, circumscribed rather than absolute. In practice, this means that Julia must treat the reasoning in Jasper's case as presumptively correct unless her confidence that he was mistaken exceeds a certain epistemic threshold.

Suppose the epistemic threshold that applies in the circumstances is that Julia must believe that Jasper was *clearly* wrong before she can make any major departures from his reasoning. Suppose further that Julia is not confident to that degree that Jasper's reasoning was mistaken, even though she does disagree with him. Then Julia must treat proposition (iii), which states that the community has an interest in protecting potential as well as actual human life, as a legal principle. (Notice that, on the primacy model, candidates for legal principlehood emerge from the reasoning of the *earlier* court, whereas, on the rationalization model, it is the reasoning of the *later* court that determines which principles will have legal status.) For purposes of legal reasoning—*i.e.*, practical reasoning in the context of formal adjudication—Julia must thus reason as though proposition (iii) were a sound moral principle possessing a certain degree of substantive moral weight. She can do this because the principle is, in the sense noted earlier, perfectly intelligible to her; once she accepts the premise that it has an official status in legal reasoning, she has a good sense of how to proceed. Thus she quite readily comes to the conclusion that the principle's substantive weight cannot plausibly be regarded as sufficient to defeat the mother's autonomy interest in the case at present before her. The community interest in protecting a potential human life from a fairly remote risk of partial hearing loss later in life cannot outweigh the mother's interest in not being forced into a treatment program against her will.

Suppose that, in order to make *minor* departures from Jasper's reasoning, the requisite epistemic threshold requires only that Julia be *fairly* confident that Jasper has made a mistake. Suppose further that, in the earlier case, Jasper had stated that proposition (iii) is a very weighty principle and, anticipating a future case like Julia's, opined that even if the

future risk to the fetus were remote, proposition (iii) would still outweigh the mother's autonomy interest and justify the court's requiring her to enter into a treatment program. Although Julia is not sufficiently confident of her own views to be able to say that Jasper was *clearly* wrong in treating proposition (iii) as a principle that has any application at all to this general category of cases, she is *fairly* sure that he at least overstated that proposition's weight. Thus she modifies the scope of Jasper's reasoning so that it applies more narrowly than on his own formulation. She holds that, when the only risk to the fetus is a remote risk of partial hearing loss later in life, the community interest in protecting potential human life from harm is not strong enough to justify forcing the mother into a treatment program against her will.

Up to this point I have been assuming that Julia disagrees with Jasper's reasoning in the earlier case, but does not strenuously disagree. She feels that, despite her disagreement, his decision in the actual case fell within what we might call an appropriate range of plausibility; she was thus required to treat proposition (iii) as a legal principle in relevantly similar cases. Suppose the summary rule that emerged from Jasper's decision (and from subsequent decisions along the lines of the one attributed to Julia in the preceding paragraph) is that a pregnant woman carrying her fetus to term may be taken into care by the state when her conduct poses a real risk of serious physical harm to the child after it is born. This rule operates not as a strongly conclusive norm, but rather as a presumption. That presumption will prevail so long as judges continue to regard the underlying reasoning as falling within the appropriate range of plausibility. Suppose now that Julia's disagreement with Jasper is more serious than was earlier assumed to be the case. Suppose she does not think that his actual decision fell within the appropriate range of plausibility; she believes, in other words, that he was clearly wrong in ruling as he did. Suppose, finally, that a case essentially similar to Jasper's original case, involving behavior on the part of the mother that poses a real risk of serious physical harm to the fetus, comes before Julia. She is faced with the question of whether she should overrule Jasper.

Before we consider what Julia ought to do in these circumstances, we should first make the following observation. In a hierarchical judicial system with different levels of courts, systemic consistency and predictability can only be maintained if there are limits on the extent to which judges are able, even within the epistemic restrictions already described, to reformulate the reasoning applicable to a given type of case. The most important such limit takes the form of what I shall call the overruling constraint: judges cannot modify the reasoning of previous decisions so severely that a case decided by a court higher in the judicial hierarchy—in some systems, at the same level—would be overruled. It will be recalled from the discussion in the preceding section that an overruling is best characterized, within the primacy model, as such a drastic revision of the principles informing a previous decision that even the result in the earlier

case must now be regarded as mistaken.[31] The overruling constraint can, perhaps, be regarded as the limiting case of an epistemic threshold: a judge who is bound by the constraint cannot overrule a case to which it applies even if he or she is absolutely certain that the earlier court was wrong. Let us assume, therefore, that Julia has the authority to overrule Jasper, so long as she is confident that he was *clearly* wrong in ruling as he did. She might have this authority either because she sits on a higher court, or because her legal system permits the overruling of decisions taken at the same level in the judicial hierarchy.

Recall that I am now supposing, contrary to what was assumed earlier, that Julia disagrees strenuously (together, let us say, with a majority of the other judges on her appellate-level court) with both the reasoning and the result in Jasper's case: she believes quite strongly that the fetus is not a person, and that the community has no interest, in the sense of either proposition (ii) or proposition (iii), in cases of the kind we have been discussing. That is not enough by itself to justify Julia in immediately overruling Jasper's decision, for there may be other morally relevant factors to be taken into account. Even though the appropriate epistemic threshold has been exceeded, Julia must still consider whether there are any justified expectations that Jasper's decision may have encouraged, or any reasonable reliance that it may have induced. As was noted in the preceding section, these are first-order reasons that may be generated by the very fact that the courts follow precedent. The existence of justified expectations or reasonable reliance cannot be determinative in itself, however, because the doctrine of precedent, in the form it takes on the primacy model of legal principles, is not absolute. It does not guarantee that prior decisions will be followed no matter what. Even so, it is proper for the legal system to recognize that people may in various circumstances have to commit themselves to a course of action on the basis of what they can expect the courts to do in the future, and this is a consideration that should be taken into account in the balance of first-order principles.

As it happens, this does not seem to be an important consideration in the case at present before Julia, as it is not clear how anyone could irrevocably commit themselves, in reliance on Jasper's case, in a way that would be morally relevant to Julia's decision. Perhaps as a result of the earlier case some pregnant women might have decided not to take drugs; but this is surely not a good reason to say that Julia should not now hold that women whose activities pose a risk for the fetus they are carrying nonetheless cannot ever be taken into care. Nor does the fact that the state

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31. It also bears mention that a sufficiently drastic reformulation of the underlying principles could lead to a redefinition of the relevant *type* of case. As was explained in Section II, a case's type is determined by the general summary rule—and hence, ultimately, by the principles underlying the rule—that we take the case to be governed by. The general rule has this effect because it treats only certain (types of) facts as material to the resolution of the case. If the characterization of relevant facts changes, so does the case's type. This is, however, a complication that for present purposes we may ignore.

has been led to expect that it will be able to force women into treatment seem to count for much morally, and the same is true of any expectations to this effect on the part of third parties. (There are also good grounds for thinking that the state is not the sort of entity whose expectations or reliance should ordinarily be given very much moral weight in any event.) So this case is quite different from, say, a contracts case in which the court is contemplating altering what counts as acceptance of a particular type of offer; in the latter situation, past reliance on a previously settled understanding of contract formation should count for quite a lot. It would thus appear that Julia is in a position to overrule Jasper's earlier decision and hold that no threat to the life or health of a fetus can ever give the state sufficient grounds to take a pregnant woman into care against her will.

V. DWORKIN ON LEGAL PRINCIPLES

The most powerful advocate of the thesis that legal principles have a role to play in law and legal reasoning has been Ronald Dworkin. Dworkin is usually taken, for good reason, to be a proponent of what I have been calling the rationalization model of legal principles.[32] In his article *Hard Cases*[33] and in his subsequent jurisprudential writings,[34] Dworkin has defended the thesis that legal principles are primarily determined by the role they play in the best justification of the settled law. The idea that such a justification must lie at the heart of a theoretical account of adjudication is one with which Dworkin is now closely identified. The principles that figure in the *Hard Cases* model are not necessarily morally correct principles, but rather the kind I earlier called second-best. In *Hard Cases* Dworkin also introduced the idea of judicial decisions having enactment force, which strongly suggests that such decisions are the source of autonomous legal rules. The idea that the settled common law consists of such rules is, as we have seen, a natural correlate of the rationalization model of legal principles. Dworkin does not insist that the best justification must fit *all* of the settled law, but only some rather vaguely defined proportion of it; in accordance with this requirement of fit some previous decisions, or the rules they "enact," can be rejected as mistakes. On one interpretation of Dworkin's version of the rationalization model, a decision or rule cannot be discarded simply because it is thought to be substantively wrong in its own terms. It can *only* be discarded on holistic grounds: to be treated as a mistake, the rule or decision must fall within that part of the settled law that is not justified by the best justification. This is an especially conservative understanding of the rationalization model, since it places a

32. *See, e.g.*, Alexander & Kress, *supra* note 17, at 283-85, *reprinted in* 82 Iowa L. Rev. 739, 743-45 (1997).

33. 88 Harv. L. Rev. 1057 (1975), *reprinted in* Dworkin, Taking Rights Seriously, *supra* note 1, at 81.

34. See particularly Dworkin, *supra* note 21, at 225-58.

very strong constraint on overruling. Whether it really is Dworkin's understanding is, however, a matter for debate. I will take up this point below.

While Dworkin has clearly come to defend *some* version of the rationalization model, his discussion of legal principles in his earliest work is in fact much closer to the primacy model. Thus in *The Model of Rules I* he distinguished between substantive principles, which might argue for a specific change in the law, and conservative principles, such as the doctrines of precedent and legislative supremacy, which would favor the status quo. Legislative supremacy was characterized as "a set of principles that require the courts to pay a qualified deference to the acts of the legislature."[35] The doctrine of precedent comprised "another set of principles reflecting the equities and efficiencies of consistency."[36] Dworkin then wrote as follows:

> Consider . . . what someone implies who says that a particular rule is binding. He may imply that the rule is affirmatively supported by principles the court is not free to disregard . . . . If not, he implies that any change would be condemned by a combination of conservative principles of legislative supremacy and precedent that the court is not free to ignore. Very often, he will imply both, for the conservative principles, being principles and not rules, are usually not powerful enough to save a common law rule or an aging statute that is entirely unsupported by substantive principles the court is bound to respect.[37]

Dworkin went on to suggest that "a legal obligation exists whenever the case supporting an obligation, in terms of binding legal principles of various sorts, is stronger than the case against it."[38]

Because principles clearly have normative priority over rules in this account of adjudication and legal reasoning, it seems fair to say that Dworkin is presenting us with instances of both the summary conception of legal rules and the primacy model of legal principles.[39] Moreover we have here fairly radical instances of the summary and primacy approaches, because apparently not even statutes are regarded as giving rise to truly autonomous rules: the principles constituting the doctrine of legislative supremacy require the courts to do no more than pay "a qualified deference" to the acts of the legislature. Yet, as we have seen, Dworkin's understanding of legal principles in *Hard Cases* seems to be much closer to the rationalization model, and, on at least one interpretation, to a rather

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35. Dworkin, Taking Rights Seriously, *supra* note 1, at 37.

36. *Id.*

37. *Id.* at 38.

38. *Id.* at 44.

39. Dworkin's version of the primacy model is not, however, the same as the one put forward in section III above: on Dworkin's account, the conservatively-inclined principles underlying the doctrines of precedent and legislative supremacy are not characterized as second-order in nature, nor are they said to take effect through the epistemic entrenchment of first-order, substantive principles.

conservative version of the model at that. What might have led to such a major change in view?

I shall argue below that this reorientation in Dworkin's thought may not have been as radical as the preceding paragraph suggests. Even so, it is clear, I think, that there was at least a shift in emphasis in his work. To understand why this might have happened, the key point to note is that throughout his jurisprudential career Dworkin has always emphasized that the principles that figure in legal reasoning must be conceived as *legal* rather than as purely moral in nature. Presumably he was concerned that if he maintained that principle-based reasoning was simply moral reasoning, then he would not be in a position to offer an *internal* critique of Hart's version of positivism, as he wished to do. He would simply be opposing Hart's positivism with a moral theory of adjudication which, Hart would claim, has no bearing on the content of the theory of law (or, at least, on the content of Hart's theory of law). The principles operative in legal reasoning thus had to be legal, not moral, principles. Dworkin initially suggested that their legal character derived, not from being posited or enacted, but rather from "a sense of appropriateness developed in the profession and public over time."[40] He went on to say that we would back up a claim that a particular principle was a legal principle by adverting to instances of "institutional support," such as its citation in previous cases, preambles to statutes, and legislative committee reports. But this suggestion was immediately seized upon by Joseph Raz and others as showing that principles were essentially an instance of custom, and hence could be traced to a positivistic social source.[41] If this was true, then principles were, contrary to Dworkin's central claim, vulnerable to being identified by a sufficiently sophisticated version of the rule of recognition.

Thus Dworkin seemed to be caught on the horns of a dilemma. If he said that the principles which figure in legal reasoning are moral in nature, then he would not be joining issue with Hart's positivist theory. (Hart could in fact have readily agreed that non-rule-based legal reasoning is simply moral reasoning, which Hart would characterize as the exercise of judicial discretion and nothing more.) If, on the other hand, Dworkin said that principles had their source in a form of custom, then he could be accused of merely offering up a modified version of positivism. Dworkin's eventual solution to this dilemma was to emphasize the idea that legal principles are those principles, moral in *form*,[42] that figure in the best justification of the settled law. Because legal principles thus understood are defined in part in normative terms, they do not have their provenance in social sources alone, and hence cannot be captured by a pedigree-based rule of recognition. The result was that Dworkin quietly shifted from a very radical theory of legal reasoning to what seems to be, at least on first

40. Dworkin, Taking Rights Seriously, *supra* note 1, at 40.

41. *See, e.g.*, Joseph Raz, Legal Principles and the Limits of Law, 81 Yale L.J. 823 (1972).

42. *See* Dworkin, Taking Rights Seriously, *supra* note 1, at 313.

impression, a very conservative one.

I want to suggest that another escape from the dilemma Dworkin faced was and is available, namely, endorsement of an appropriate version of the primacy model of legal principles. Recall that, according to this model, legal principles get their start in life as moral principles, or at least as standards of practical reasoning that some earlier court took to be correct moral principles. On the version of the model developed in this essay, they then become, through the operation of the second-order principles that comprise the doctrine of precedent, epistemically entrenched, to some greater or lesser degree, in the law. This entrenchment occurs because the reasoning of previous cases is treated as presumptively correct. The presumption is only rebutted if subsequent judges are confident beyond an appropriate epistemic threshold that the principle is not morally valid as it stands, and hence must either be modified or, in extreme cases, rejected outright. As we saw earlier, this means that the status of a principle as a legal principle is always dependent on its continuing to be perceived by judges as falling within a certain range of moral plausibility. A principle's legal status is admittedly grounded *in part* in a social source, since present judges must look to certain social facts concerning the reasoning of judges in the past. The requirement that principles, to be legal principles, must have figured in past judicial reasoning can be understood as a reconstruction of Dworkin's notion of "institutional support." At the same time, however, the legal status of a principle depends in part on a *normative* criterion requiring that the principle's content and weight fall within the appropriate range of moral plausibility. Present judges can only determine whether this criterion has been satisifed by consulting their own moral beliefs and sensibilities. They must, in other words, continuously engage in moral argumentation themselves, and not just look to social facts concerning the past moral reasoning of others.

Dworkin could thus have avoided the dilemma he faced without adopting the rationalization model of legal principles. In his early jurisprudential work he had, as we have seen, argued for something similar to the primacy model, and a sufficiently sophisticated version of that model would likewise have permitted him to sidestep the dilemma. But the bare fact that Dworkin came to advocate a version of the rationalization model does not, by itself, show that he had completely abandoned his earlier views about the nature of legal principles. This raises the interesting question of whether the rationalization and primacy models can be combined. Dworkin has sometimes been criticized for advocating too conservative a view of the common law,[18] and this criticism has most force

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18. I take this to be the gist of Larry Alexander's complaint that Dworkin's theory of law cannot overcome the problem of "bad beginnings," *i.e.*, the problem of moral errors in past judicial decisions. Since the theory must supposedly take all past decisions as constituting the settled law, whether those decisions contain moral errors or not, Dworkin's account of legal

if we assume that he has adopted a pure rationalization model of legal principles together with a strict version of the autonomous conception of legal rules (*i.e.*, a version that never, or almost never, permits cases to be overruled on discrete substantive grounds). But this assumption might be wrong. Because Dworkin does not explicitly distinguish the two models of legal principles we have been considering, he of course does not directly address the question of whether they can be combined. However, if it turns out that the two models are not wholly incompatible, that might provide some indirect evidence that Dworkin's mature views on adjudication and legal reasoning are less conservative than is sometimes supposed.

The rationalization model asks a judge to come up with a set of principles that comprise the best justification that can be offered for the settled law. The model thus requires a body of law that is, in fact, settled. On a pure rationalization model, one version of the "settled law" would consist of autonomous rules that must be regarded as categorically binding on all judges in the legal system. The only grounds for rejecting a previous decision would be the holistic grounds mentioned earlier, having to do with the requirement of fit. This strikes some commentators as an overly conservative approach to adjudication, since it presents the past as having a much stronger hold on decision-making in the present than seems to be morally warranted.[44] Notice, however, that regardless of which understanding of legal principles and rules we generally accept as correct, there will be circumstances in which a judge must treat a legal rule as binding even though he or she does not think it is morally valid. The most obvious such circumstance is one to which I have paid very little attention in this essay, namely, the case where the rule was enacted by a legislature. For good moral reasons having to do with democratic theory and relative institutional competence, we generally do not think that courts should be free to reject or rewrite legislation just because they disagree with it. That being so, it seems perfectly appropriate to interpret legislation in accordance with a rationalization model of legal principles, and to use that model to maintain consistency and equality of treatment among citizens by extending the spirit of the legislation to cases perhaps not strictly covered by it.

There are also, of course, many circumstances in which a judge must treat a common-law rule as binding despite thinking that it is morally wrong. This will clearly be true if the common law is comprised of autonomous rules, but it remains true even if we accept a characterization of the common law based on the primacy model of principles and the summary conception of rules. For example, a judge who is bound by the overruling constraint cannot reject outright a rule propounded by a court higher in the judicial hierarchy. This is the case, moreover, even though

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reasoning "requires that we justify the unjustified." Larry Alexander, *Bad Beginnings*, 145 U. Pa. L. Rev. 57, 84 (1996).

44. *See id.*

the rule is best regarded as a summary rule and hence as vulnerable to radical modification or repudiation by a more senior court. Further, a judge who is not bound by the overruling constraint vis-à-vis a given legal rule may nonetheless have to accept the rule and the core of the reasoning previously given in support of it because the extent of her disagreement does not exceed the applicable epistemic threshold; the judge might think the rule is wrong while still regarding it as falling within the appropriate range of moral plausibility. In such cases, the judge is still permitted, within limits, to modify the underlying reasoning, and hence to alter the scope of the rule. In doing so, it seems both inevitable and appropriate that she will be influenced by her own understanding of which set of principles would provide the best justification for the rule in question. It also seems desirable, for reasons having to do with consistency and equality of treatment among citizens, that any changes she introduces into the prevailing formulation of the balance of principles should cohere as much as possible with the entirety of the law that, from her point of view, must be regarded as "settled." In other words, even though the judge is not looking for the best justification as such for the settled law, it seems appropriate that she should reason, at least sometimes, in accordance with the spirit of the rationalization model.

The latter point is a general one within the primacy model of legal principles; it does not simply apply to judges who happen to be bound by a particular legal rule. Thus whenever a judge is free to introduce a change into the prevailing balance of principles, in doing so she should try to maintain overall consistency with as much of the settled law as possible ("settled law" meaning, here, law that the judge is not, for whatever reason, at the moment in a position to modify). This is as true with major changes, involving an overruling, say, as it is with minor ones. Overall normative consistency among the principles that underlie the law is, at the very least, a desideratum; to the extent that it is possible, the courts should speak with one, morally consistent, voice. This, I take it, is at least part of what Dworkin has in mind when he speaks of "integrity" as an independent political virtue.[45]

Consider also the following possibility. Assume as before that the primacy model of legal principles, together with the summary conception of legal rules, offer the best interpretation of the common law. There could well arise situations in which a court considering one or more relevant precedents thinks that the earlier courts were generally right in the results they reached, but quite wrong in their reasoning. So long as the appropriate epistemic threshold had been met, the present court would presumably respond to the problem by trying to articulate the correct set of moral principles applicable to the type of case in question. If it succeeds in this attempt, the principles the court articulates will justify the previous set of results as a matter of course. This is a perfectly appropriate move

45 *See* Dworkin, *supra* note 21, at 164-67.

within the primacy model, even though the court would be searching, in effect, for the best justification of "the settled law." The law, meaning now the results reached in one or more previous cases, is treated as settled because it is thought to be correct. A similar situation could arise regarding not just the bare results in preceding cases but also a previously enunciated summary rule that the present court regards as morally correct, but for reasons differing from those originally offered in support of it. In such cases, the rationalization model of legal principles and the primacy model in effect converge; each recommends essentially the same course of action to the present court. Many of the most famous cases within the common law, such as *MacPherson v. Buick Motor Co.*[46] and *Donoghue v. Stevenson*,[47] seem to be of this general type.

So far as the primacy model of legal principles is concerned, this suggests that legal reasoning involves a process somewhat analogous to—although by no means identical with—Rawls's notion of reflective equilibrium. Generally speaking, we can suppose that the courts aim over time to bring the settled rules of the common law as closely into line as possible with the balance of correct moral principles. Because the rule-of-law values cannot be taken directly into acount as first-order principles, the courts try to give effect to this aim by focusing on the balance of *legal* principles, *i.e.*, principles that at least at one time were regarded by the courts as morally correct and that as a result have become epistemically entrenched in the law. Sometimes the courts will be led to modify the existing formulation of legal principles because they think it is too far out of line with their best present understanding of the balance of moral principles (*i.e.*, first-order, *substantive* moral principles, which do not include the rule-of-law values). This will generally lead to changes in summary rules and to different results in some specific situations. At other times, however, the courts will be led to modify the existing formulation of legal principles—and even, in appropriate circumstances, to modify their present understanding of the balance of moral principles itself—because that formulation no longer seems capable of justifying the specific results in a set of earlier cases, or one or more specific summary rules, that continue to strike the courts as intuitively correct. Although the issue cannot be pursued further here, the fact that the primacy model of legal principles thus regards legal reasoning as involving a process similar to reflective equilibrium might well be thought to be a mark in its favor.

In the discussion in the preceding four paragraphs, I have been supposing that the primacy model of legal principles is primary in the common law and have then been asking, in effect, how legal reasoning might sometimes be expected to resemble legal reasoning under the rationalization model. Let me now suppose, presumably together with the later Dworkin, that the rationalization model is primary. Might it be the

46. 111 N.E. 1050 (N.Y. 1916).
47. 1932 App. Cas. 562 (H.L.).

case that legal reasoning would sometimes resemble the reasoning called for by the primacy model? Recall that the rationalization model of legal principles requires a body of settled law upon which to operate. It does not, however, itself specify how that body of settled law is to be determined. On a particularly conservative understanding of the rationalization model, the settled law will consist of autonomous legal rules that can only be modified in accordance with the holistic demands of Dworkin's requirement of "fit"; a particular rule could only be rejected if it fell outside that part of the settled law that was justified by the best justification.

There are, however, other possible characterizations of the settled law. Imagine that an epistemic threshold applied, not to the reasoning of a past judicial decision, but simply to the rule that that reasoning was supposed to justify. The question would thus be: does the rule fall within the appropriate range of moral plausibility, where this would be determined by asking whether there is *any* plausible justification that could be given for it. We would not, in other words, be limited to asking whether the reasoning actually offered in support of the rule in past judicial decisions was plausible to the requisite degree. The rules that fell within the appropriate range of moral plausibility would then constitute the core of the "settled law." Those rules that did not fall within this range would lose what Dworkin in *Hard Cases* called their gravitational force.[48] Moral theories offered as candidates for the best justification of the settled law would not have to take these rules into account at all, even on a prima facie basis. If such a rule were in its terms applicable to the case before the court, it would be vulnerable to losing its enactment force as well. In other words, earlier decisions that had either enacted or applied the rule would be liable to be overruled.

On the understanding of the settled law just sketched, the rules constituting the common law would be neither pure summary rules, since they would not be tied to a particular formulation of the balance of principles, nor pure autonomous rules, since they would be subject to a criterion of moral plausibility. This means, among other things, that they could not be characterized in wholly source-based terms. Dworkin agrees with Raz that the only defensible version of positivism requires valid law to be identifiable solely by reference to social sources; criteria that are wholly or partly moral in nature cannot form part of the rule of recognition.[49] It follows, given the possibility of interpreting the settled common law along the lines we have just been considering, that Dworkin does not have to regard his use of the rationalization model of legal principles as resting on a positivist foundation. He does not, in other words, have to regard the settled law as comprised of a source-based set of autonomous rules. In fact,

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48. *See* Dworkin, Taking Rights Seriously, *supra* note 1, at 111.

49. In Dworkin's terminology, positivism requires validity to be a matter of pedigree. *See* Dworkin, Taking Rights Seriously, *supra* note 1, at 17, 346–48.

the reconstruction of the rationalization model that this understanding of the settled law yields is not very far removed from the primacy model. The main difference is that, by insisting that common-law cases be decided in accordance with a single moral theory ("the best justification of the settled law"), it treats consistency in principle—the courts speaking with one, morally consistent voice—as a lexically prior goal in adjudication and not just as one desideratum among others. This, it seems to me, is very much in line with Dworkin's characterization of integrity in *Law's Empire*.[50] This reconstruction of the rationalization model also has the advantage of permitting us to reconcile Dworkin's reliance on that model in his later work with much of what he says in his earliest writings on jurisprudence. This is because, in line with his position in *The Model of Rules I*, the reconstruction regards legal rules not as autonomous norms but rather as the upshot of *some* plausible formulation of the balance of principles (although not, perhaps, of the formulation offered in the relevant precedents).

The account of the settled law suggested in the preceding paragraph is, in my view, truer to Dworkin's own understanding of that notion in *Law's Empire* than would be an account based on pure autonomous legal rules. I shall not, however, try to defend that conclusion here. Whatever Dworkin's own view of the matter might have been, the important point for present purposes is the following. It is possible to construe Dworkin's reliance on the rationalization model of legal principles in such a way as to allow for the judicial rejection of individual rules of law on discrete substantive grounds, and not just on holistic grounds having to do with the general requirement of fit. Understood in this way, the account of legal reasoning that Dworkin adopts in *Hard Cases* and then defends in a slightly different version in *Law's Empire* would not be vulnerable to the criticism that it is overly conservative in nature. Furthermore, since the individual components of the settled law would all have to be, to some appropriate degree, morally plausible, the principles comprising the best possible justification for the settled law could themselves be expected to fall within an acceptable range of moral plausibility. This, as we shall see in the following section, is very relevant to the critique of legal principles that has been advanced by Alexander and Kress.

VI. ALEXANDER AND KRESS'S CRITIQUE

In their interesting article entitled *Against Legal Principles*,[51] Larry Alexander and Ken Kress argue that legal principles, like the ether, do not exist. At the very least, they claim, legal principles are *res non gratae*, they are normatively undesirable entities. The core of the argument is straightforward. Beginning with the assumption that legal principles are

50. *See* Dworkin, *supra* note 21, at 164-67, 176-86.

51. Alexander & Kress, *supra* note 17, *reprinted in* 82 Iowa L. Rev. 739 (1997).

best characterized by reference to what I have been calling the rationalization model, Alexander and Kress maintain that such principles represent the worst of all worlds. Legal principles are appropriately compared to legal rules, on the one hand, and moral principles, on the other. Legal rules are posited and have been given a canonical formulation, thereby permitting them to provide relatively clear guidance for conduct.[52] Legal principles do not possess this virtue, since they are not posited and have no canonical formulation. Very often they will be controversial in their application, particularly given their dimension of weight. Moral principles, on the other hand, are also controversial in their application, but they at least have the virtue of being morally correct. Legal principles lack this virtue as well, however, since they are what I earlier called second-best; morally speaking, they can be no better than the settled law they justify. Alexander and Kress conclude that we would do best in adjudication to employ legal rules for clear guidance and moral principles for moral correctness. As for legal principles, assuming they even exist, we should simply banish them from the forum of legal reasoning altogether.[53]

Alexander and Kress supplement this core argument with a number of ancillary arguments. The most important of these for present purposes seem to me to be the following. First, we do not need legal principles as a means for extending equality, in the sense of consistency of treatment, from past judicial decisions into the future, because equality is a theory-dependent rather than a free-standing value; what constitutes a relevant similarity for purposes of treating like cases alike will vary from one moral theory to another. "Thus, there cannot be a coherent reason in terms of the true moral value of equality for ever departing from the requirements of the correct moral theory."[54] A second and related argument is the following:

> The best incorrect principles that fit past mistakes are morally correct principles with exceptions corresponding precisely to those mistakes. Such incorrect principles will be the practical equivalents of correct principles. Legal principles correctly derived will thus always collapse into moral principles.[55]

The set of incorrect principles here described, namely, the set of correct principles with exceptions corresponding to past mistakes, will generate its own conception of equality. Moreover, all litigants are being treated equally in the sense that our best view at the time of what is just will have been applied to each of them.[56] The third supplementary argument is

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52. Alexander and Kress clearly conceive of legal rules in terms of, to use my terminology, the autonomous conception of rules.

53. *See* Alexander & Kress, *supra* note 17, at 293-94, *reprinted in* 82 Iowa L. Rev. 739, 753-54 (1997).

54. *Id.* at 295, *reprinted in* 82 Iowa L. Rev. 739, 755 (1997).

55. *Id.* at 309, *reprinted in* 82 Iowa L. Rev. 739, 769 (1997).

56. *See id.* at 305, *reprinted in* 82 Iowa L. Rev. 739, 765 (1997).

that it is impossible to assign a weight to incorrect principles. Being incorrect they cannot have a real weight, so that any purported determination or assignment of weight will in the end be morally arbitary.[57] The fourth and final argument I will consider is that the moral effect of past, incorrect decisions is properly given consideration, not through legal principles, but rather by taking into account the reliance and expectations those decisions have generated.[58]

A preliminary difficulty with Alexander and Kress's critique of legal principles is that it looks solely to the rationalization model of principles and not at all to the primacy model, even though Dworkin's early work in jurisprudence is best understood by reference to a version of the latter approach. By focusing on the rationalization model, they are naturally led in their core argument to contrast the "incorrect" principles that no doubt figure in even the best justification of the settled law with the "correct" principles of ideal moral theory. Given a clear choice between correct and incorrect principles, how could anyone not agree with Alexander and Kress that we should go with correctness and repudiate incorrectness? The difficulty with this argument, of course, is that in the hard cases where reliance on legal principles is going to make a practical difference, we are almost never faced with such a clear choice. On the primacy model, at least, legal principles only come into being because of the need to inject some predictability and consistency into legal reasoning in the face of uncertainty and controversy over what the morally correct principles are and what their weight is. Morality is not, for us, epistemically transparent, although at crucial points in their argument Alexander and Kress seem to assume that it is.

Legal principles represent, on *both* the primacy and rationalization models, a trade-off between perceived moral correctness, on the one hand, and consistency and predictability, on the other. (The rationalization model emphasizes global, internal consistency much more heavily than does the primacy model.) In an epistemically nontransparent world, a trade-off of this kind is inevitable. Moreover, the primacy model effects this trade-off by permitting judges to modify or reject legal principles when a certain epistemic threshold is exceeded; when, in other words, the relevant principles no longer fall into an appropriate range of moral plausibility, as determined from the viewpoint of the present court. On the reconstructed version of the rationalization model sketched at the end of the preceding section, a similar point holds. The legal rules that constitute the settled law must fall within a certain range of moral plausibility, and when they do so the best holistic justification of those rules can itself be expected to be, to some appropriate degree, morally plausible. In any event, an admonition that the courts should rely on morally correct principles is, in the face of

57. *See id.* at 301-04, *reprinted in* 82 Iowa L. Rev. 739, 761-64 (1997).

58. *See* Alexander & Kress, *supra* note 17, at 296, 309, *reprinted in* 82 Iowa L. Rev. 739, 756, 769 (1997).

great moral uncertainty and controversy, not in the least helpful.

Alexander and Kress might, however, be taken as arguing that a court should rely on the principles that *it* perceives to be correct at the time of decision, regardless of what has been done in the past. The claim would be, in effect, that if a court always does this, then (a) equality of treatment will take care of itself (supplementary arguments 1 and 2), and (b) the demands of stability and predictability can be met by taking into consideration the reliance and expectations that past decisions have generated (supplementary argument 4). In other words, the trade-off between perceived moral correctness, on the one hand, and consistency and predictability on the other, can be met without invoking legal principles. Let us consider claims (a) and (b) in turn.

Alexander and Kress correctly point out that equality is a theory-dependent value, from which it follows that the only true conception of equality is the one associated with *the*, uniquely correct, moral theory. That does not take us very far, however, if we do not know what that theory is. What courts tend to face in hard cases is a number of *competing*, more or less plausible, theories or mini-theories, as the example discussed in Section IV illustrates. Each such theory will generate its own, more or less plausible, conception of equality. The claim of the primacy model is that, unless a court's confidence in the correctness of its present views exceeds the requisite epistemic threshold, it should stick with and further develop the principles accepted as correct by the earlier court. Those principles give rise, by hypothesis, to a conception of equality that falls within an appropriate range of moral plausibility. There is thus a reasonable chance that that is the *correct* conception of equality, even if the present court does not think so. If, however, the present court rejects the past judicial reasoning and strikes off on its own, then it can be certain that past and present litigants are being treated inconsistently. Contrary to what Alexander and Kress assert, there is no conception of equality associated with the theory that consists of "morally correct principles with exceptions corresponding precisely to [past] mistakes."[59] That is because this "theory" could not possibly be the correct moral theory, and hence could not possibly generate a plausible internal conception of equality. Because equality will definitely be compromised if the court departs from the mode of reasoning accepted in the past, it should not do so unless it is confident to an appropriately high degree that its present views are correct. Finally, by sticking with the principles accepted as correct by the earlier court, the present court is also, of course, giving effect to the values of predictability and stability.

It bears mention at this point that each of several competing, more or less plausible moral theories, in addition to giving rise to an internal conception of equality, will also contain its own internal conception of the relative weights to be attached to individual principles. This is the starting-

59. *Id.* at 309, *reprinted in* 82 Iowa L. Rev. 739, 769 (1997).

point of an answer to supplementary argument 3. On no such theory will the weights associated with individual principles ever be anything other than very rough and to some extent indeterminate assessments of relative importance. Not even the uniquely correct moral theory, whatever it is, will assign weights on the fine-grained cardinal continuum that Alexander and Kress seem at times to envisage.

This brings us, finally, to supplementary argument 4, which holds that stability and predictability can be taken into account by giving proper weight to the reliance and expectations that mistaken decisions have generated in the past. This argument was anticipated in Section III, where it was pointed out that a court should not take into account reliance unless it has previously induced that reliance, and that it should not take into account expectations unless they are justified. But expectations can only be justified, and reliance thereby induced, if the court has already announced that it will follow precedent. Unless the court adheres to a morally implausible doctrine of precedent that requires it to comply with previous decisions no matter how obviously wrong, it must, in following precedent, balance the rule-of-law values of consistency and predictability against substantive principles that might call for a change in the law. Because the rule-of-law values do not pull in any particular substantive direction, they must be regarded as second-order principles; they are, in effect, functions that take instances of past judicial reasoning as arguments. But to employ second-order principles in this way will have the effect of epistemically entrenching first-order moral principles upon which courts have previously relied. According to the primacy model of legal principles, those epistemically entrenched moral principles are nothing more and nothing less than legal principles.