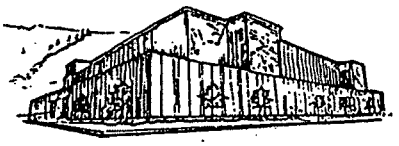
2005

Assessment of the Dworkin-Hart debate

Michael B. Williams
The University of Montana



An Assessment of the Dworkin-Hart Debate

by

Michael B. Williams

B.A. University of Florida, 2001

presented in partial fulfillment of the requirements

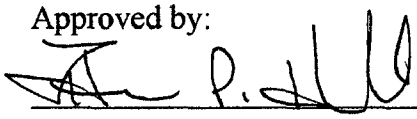
for the degree of

Master of Arts

The University of Montana

July 2005

Approved by:

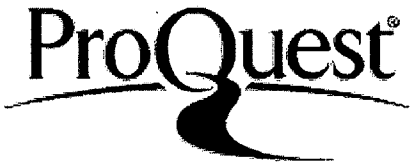


Committee Chairperson

Dean of Graduate School

8-2-05

Date



ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

Williams, Michael B., M.A., July 2005 Philosophy

An Assessment of the Dworkin-Hart Debate

Committee Chair: Dr. Thomas Huff

This essay seeks to describe the conclusions reached in a seminal debate within Anglo-American legal philosophy, specifically the debate between Ronald Dworkin and H.L.A. Hart. Historically this debate has been framed as a dispute over the necessity of conjoining the concepts of 'law' and 'morality.' My assessment of this debate is an attempt to acknowledge the substantial agreement found in the work of both theorists.

Drawing on an analysis of both *Taking Rights Seriously* and *The Concept of Law* this essay points out the shared commitment made by Dworkin and Hart to a liberal ideology. Both Dworkin and Hart maintain that some sense of justice in the application and generation of the law must exist and each rebuffs claims that broad moral discretion ought to be employed. This mutual foundation develops into two largely harmonious positions with only a narrow, though substantive, band of disagreement.

In the end, the important differences between Hart and Dworkin regard the scope of law's relationship to morality, not the coherence or necessity of such a relationship. Both Dworkin and Hart maintain that any legal system must reflect a minimum systemic morality. Dworkin suggests that this morality often develops into a substantive, though restricted, element of the law and Hart seeks to restrict moral content to strictly procedural issues.

Table of Contents

Introduction

In a recent paper on analytic jurisprudence Brian Leiter makes a case for the need to move discussion in legal philosophy away from what he calls the "Hart/Dworkin debate."[1] I agree and the topic of this essay is aimed at finally coming to a conclusion about the state of analytic jurisprudence. My intention here is to clarify the substantial agreement that exists in Anglo-American legal philosophy, specifically between H.L.A. Hart's positivism and Ronald Dworkin's early theory of law.[2] Contrary to Leiter's assertion that "on the particulars of the Hart/Dworkin debate, there has been a clear victor,"[3] I argue that the debate itself has been largely exaggerated on both sides. In my view, the liberal ideology that underlies both theories develops into largely harmonious positions with only a narrow, though substantive, band of disagreement. In the following pages, I will argue that the important differences between Hart and Dworkin regard the scope of law's relationship to morality, not the coherence or necessity of such a relationship. In the end both Hart and Dworkin maintain that any legal system must reflect a minimum systemic morality. Dworkin suggests that this morality often develops into a substantive, though restricted, element of the law and Hart seeks to restrict moral content to strictly procedural issues.

I address this debate in order to present a balanced description of the contemporary state of the analytic philosophy of law. Often the tendency is to sloganize philosophic or legal theory in an overly reductive manner. According to such reductive accounts, positivism radically separates morality and law, and Dworkin wants to inexorably conjoin the two in a grand sense. In fact, each side of this old debate has a position somewhere between these simplistic extremes. On my account, far from having

a clear winner, the Hart/Dworkin debate reaches an agreement of sorts on the necessity of some minimum moral content of a robust legal system.[4] This agreement stipulates the need for some sense of justice in application and generation of the law, but stops short of claiming that broad moral discretion ought to be exercised with regard to particular laws. The remaining dispute then is over the scope of moral discretion in adjudication. As will become clear, I favor Dworkin's position that a procedural morality often plays a substantive role in the interpretation of legal rules.

In an effort to make this case, I begin with an exposition of the positivist position as espoused by Hart. Hart begins by arguing that a sophisticated account of law (that is one capable of dealing with a pluralistic society) requires more than a system of primary rules backed by the enforcement power of a sovereign or the expectations of a community. On his account, a system of secondary rules is required to pick out what primary rules are recognized as carrying the obligatory force of law. Hart maintains that these secondary rules of recognition rest on their being a "proper way of disposing of doubts as to the existence of a rule."[5] Secondary rules pick out the ways in which laws are generated, applied and changed. Such secondary rules are necessary because they give body to "the reasons individual members have for acceptance" of a society's "various forms of pressure for conformity."[6] That is to say, secondary rules provide a necessary condition for general acceptance of a legal system, creating a legal duty to obey primary rules, but not stipulating morally what primary rules ought to be enacted.

Next I take up Dworkin's criticism of Hart, specifically that Hart stops short of realizing the full potential of a legal system founded upon agreement to some shared set of rules. If the system of secondary rules of recognition applies an obligating force to

law, it is only because there is an agreement to the principles which support these rules; that is, the principles of the rule of law e.g. like cases treated alike. The problem with positivism as Dworkin sees it is that the force of these liberal moral principles is neglected in all but their obligation giving function (and even there they are given a "whitewash.") Positivism has sought to use secondary rules to shield the process of adjudication from the morality always implicit in the system of laws, obfuscating systemic legal principles in a search for perfectly conclusive rules. Dworkin argues that a non-conclusive ethos pervades the system of legal rules and must be accounted for in legal reasoning and decision making.

In "Hard Cases"[7] Dworkin argues, in particular, that procedural morality plays more than a foundational function, it also plays an interpretive role through the formulation of legal principles. The idea is that the principles underlying rules can be applied to give content or a more full form to rules. Hart contends that when cases of gaps in primary rules arise, giving light to genuine ambivalence, secondary rules call for the generation of novel solutions. Dworkin suggests that the invocation of moral principles embedded in the law offers an important clarifying tool for primary rules and gives a more clear conception of the shape taken by the legal system. The move here is to draw upon Hart's notion that legal obligation requires some value-laden predisposition to a set of secondary rules, effectively bootstrapping this disposition into a meaning giving heuristic. In this sense Dworkin relies on Hart's requirements for obligation to offer a modification of the positivist notion that morality need not play a part in interpreting primary rules.

In Hart's Postscript reply to Dworkin he points out that there is in fact a good deal of agreement between the two and follows Elliot Soper referring to Dworkin as a "soft positivist."[8] Hart's contention here is that principles are just a complex version of what he had earlier called secondary rules. Here Hart assents to the importance of non-conclusive principles in legal reasoning, but claims such principles are merely broad versions of secondary rules. So where a secondary rule might clearly pick out a valid primary rule as anything written into the code of Hammurabi, a principle might less clearly identify a primary rule as maintaining the value of equality. In either case Hart believes the appropriate distinction between the two is a matter of kinds. His assertion is that, in the end, "there is no need to accept this sharp contrast between legal principles and legal rules."[9] I agree with Hart that there is no need for a rigid distinction, but argue that such a distinction can be maintained and it may even have advantages.

PART I. H.L.A. Hart

H.L.A. Hart argues for a moderate version of positivism's 'separability thesis,' which asserts that morality, as such, has no necessary role to play in understanding law. Here I point out that Hart's understanding belies a concept of law that takes as its root a social contractarian position, and as such a liberal legal morality. I will develop this position by contrasting Hart's position with that of his positivist predecessor John Austin, pointing out how Hart's positivism moves toward an *internal* social paradigm of law's authority. Hart's liberalism will be exposited through analysis of his distinction between primary and secondary rules, which ultimately complement the concept of law as espoused by liberal political theorist John Rawls.

Early in the 18th Century John Austin wrote, "Law... may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[10] On Austin's account, law has two distinct senses, natural law and positive law. Natural law on this account meant classical natural law, the theory that law was imposed from a God's will or outside of man's prerogative.[11] Positive law, on the other hand, is "set by men to men."[12] The aim of John Austin's work, following closely on the heels of Hobbes, was to distinguish sharply between positive law and natural law the proper realm of law as defined by the social contract. Austin of course endorsed the view of positive law as the appropriate method of understanding law as the concept is applied to the affairs of men engaged in social enterprise.

Austin held that the positive law of men to men represented the same essential structure held by classical natural law, except, rather than God imposing law on men, politically superior men imposed the law on other men. Law taken in this sense is broadly construed as a command from a superior authority to a subordinate. Austin applies this concept of law generally to social conditions of law when he claims,

> "In order that a given society may form a society political and independent... two independent marks... must unite. The generality of the given society must be in the habit of obedience to a determinate and common superior: whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders... a society political and independent."[13]

The idea here is that determination by some single sovereign person or body, which sets rules or the law of behavior to which the society at large is obliged to conform represents conceptual human law.

Austin's conception of law as the prerogative of a society's sovereign accords with the conception of a sovereign's authority as Hobbes envisioned it under his social contract. Hart, however, modifies Austin's 'command theory' of law transforming the manner in which the concept of law is understood and thus obfuscating the relationship between his own position and the political understanding of Hobbes' social contract. Hart argues that the command of a sovereign does not imply any duty on the part of political subordinates. On Hart's account, the command of the sovereign is much like the command of an armed gunman; one is "obliged" to obey but has no duty to do so. The important thing here is to flesh out just how Hart construes an individual's duty to obey the law as distinct from avoidance of the harm implied by the sovereign's command.

Recall that, on Austin's account, law is the positive and negative system of commands and punishment predicted by those commands. Hart contends that law as thus understood is really nothing more than a system predicting punishment, implying no duty on the part of the subject only a rational expectation of behavior. Hart points out the counter-intuitive ramifications of such an account writing that it would appear to be a contradiction to say that a citizen had an obligation but "there was not the slightest chance of his being caught or made to suffer."[14] This seems perfectly normal to our everyday usage of obligation, but would entail a contradiction on Austin's account. Such criticism of course does not logically preclude the validity of any particular system of law, it does however point out the difference between Austin's view of law and the common notion of legal accountability. The criticism Hart brings to bear on Austin's conception of law is that avoiding the consequences of a law does not remove the authority of that law.

Hart contends that the law implies some sort of obligation or duty by the subject, regardless of the applicability of the consequences. This is not to say that punishment and law are not linked for Hart, only that the ability to punish does not justify the authority of law; rather, authority flows in the opposite direction. Hart writes, "the fundamental objection (to Austin) is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow... they are also a reason or justification for such reaction."[15] The validity of the law, then, grants authority to punish the breaking of a law, rather than the authority to punish validating the right to make rules. The idea here is that obligation arises from within the system of rules, while only likely choices may be predicted by an outside analysis of the relationship between rules and punishment.

At the crux of Hart's understanding of law lays the tension between internal systems and external systems. External systems are those like Austin's that rely on an understanding of rules that limit the normative social system to the likelihood of behaviors occurring in response to possible punishment as viewed from without. "What the external view," according to Hart, "cannot reproduce is the way in which rules function as rules in the lives of those who normally are the majority of society."[16] Hart contends that from an internal perspective individuals often, and even usually, make decisions in accordance with rules of law not to avoid punishment but because they accept those rules as a guide to conduct. Thus, from an internal perspective "the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."[17] The key to law for Hart is that it creates a duty of

obligation, which when viewed from without may be seen as a merely predictable behavior, but to which members of a society feel bound.

Typically, Hart contends that this binding property of obligation associated with law is understood from the internal perspective, but this leaves room for the external perspective of both Austin and Hobbes. Rather than moving away from Austin's direct rendering of Hobbes' objective social contract theory of law, Hart is in effect filling in a missing element of the social analysis of law. Both Austin and Hobbes focus their concern on the structure of law as understood from the theorist's perspective; that is, understanding how authority works to coerce behavior. Hart merely points out that in fact the internal perspective of the same phenomenon, viz., the individual's agreement to or adoption of coerced behavior, must also be recognized to understand law. In acquiescence to his predecessors Hart writes, "any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not define one of them out of existence."[18]

In the end, it seems clear that Hart has in mind a fuller conception of law as understood from both internal and external perspectives. In reconstructing Hart's particular concept of Law, *vis a vis* his commitment to positivism, we will look to the complexities he describes in two sets of social mandates. In the most primitive lawful society there must, on Hart's account of lawfulness, exist some basic primary rules of obligation, which carry with them some threat of social enforcement. Primary rules are requirements of behavior, both positive and negative, such as restrictions on the harm of others and duties to aid the community. In small primitive societies, Hart contends, primary rules may themselves be enough to create a system of obligation based on a

shared standard of behavior. In such a system a shared morality is often at the core of the system of primary rules, but crucially the morality of the community is not identical with the law, but helps to structure primary rules.

Hart describes primary rules as the attitude of society "towards its own standard modes of behavior in terms of which we have characterized rules of obligation."[19] Primary rules then are the rules, often moral ones, a society will choose to govern the behavior of its members. These governing rules are not merely understood as "customary" but represent obligatory rules of behavior in society. Hart describes the primary rules of society as internally recognized by members of society and nearly universal owing to peculiarities about human nature and society. Among examples of primary rules are "restrictions on free use of violence, theft, and deception" as well as others "imposing duties to perform service or make contributions to the common life."[20] The essential character of primary rules is that they are obligatory social norms, which carry with them the enforcement power of social reprimand, not that they reflect a standard of morality.

Although all that Hart requires of a lawful community are primary rules, Hart sees such rules as systemically uncertain in any but the smallest of societies. Hart argues that a full concept of law in the Anglo-American tradition also includes secondary rules. Secondary rules supplement the uncertainty of obligation inherent in primary rules and thus complete the system of social obligation, as Hart understands law. Hart's understanding here reflects a liberal political ethic because it supposes the members of society hold belief systems so divergent that they are incapable of adhering to, or more importantly fully grasping, a social system of primary rules which is not clearly

illuminated by something more than a shared understanding. The idea here is that law is a system of obligation identifiable to the community at large so that in a diverse community law must be understood in more specific terms than social norms.

Social norms, even those that are widely enough accepted to carry with them the force of significant social pressure, fall short of representing law for such large, diverse communities, on Hart's account, in three key areas. Within a small and closely-knit community it may be clear what social expectations exist. One knows, for instance, what behaviors one's parents tolerate, but within an expanded community social norms may be quite unclear. Thus primary rules fail to offer the level of certainty implied by law. Secondly, altering primary rules to fit the changing circumstance of a society will require a gradual and seemingly unintentional altering of rules over time as society's members themselves change; otherwise the law will have an unacceptably static character. Finally, Hart contends the reliance on mere social determination of rules and enforcement creates inefficiency in the application of laws, i.e. the determination of when a law has been disobeyed, inconsonant with his greater conception of law. Hart purposes to solve these deficiencies in law as a system of primary rules of social obligation by including secondary rules.

In order to meet his first objection to primary rules, namely uncertainty, Hart introduces a secondary rule he calls a 'rule of recognition.' The rule of recognition asserts that there must be some specific "feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that a rule of the group is supported by the social pressure it exerts."[21] Recognition then may entail that a specific rule once merely socially understood is written down in a constitution or may broaden to

include a body of common law understood in terms of past decisions. The point is that there should be some way to authoritatively identify those rules that are in fact primary social rules. Without a rule of recognition, Hart contends there can always be dispute as to what primary social rules actually exist and what social norms are mere convention; in other words, a rule of recognition allows one to distinguish which norms carry the force of obligation and which do not.

With rules of recognition in place, the flux relied upon within community norms to meet changing circumstance can become static. In order to avoid this difficulty, Hart suggests that 'rules of change' be codified as a secondary rules. Rules of change are meant to allow for the introduction, revision and repeal of primary rules as changing circumstance warrants. As a general understanding, we may think of rules of change as the legislative or other rule making systems, whereby a society sets forth a body of law. Of course, "there will be a very close relationship between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules."[22] The point here is that a system including rules of change relies on those rules to provide a conclusive indication that the rule carries with it obligation and is not merely a general habit. Rules of change then underlie the rules of recognition in that they provide the groundwork for picking out what is to be recognized as a social obligation of the individual.

Once there is a method of determining what should be recognized as an obligation in society, the final difficulty to be overcome with primary rules, as Hart sees it, is determining when the rule actually has been broken. Although seemingly a straightforward enough matter, there is often disagreement amongst persons as to what

has occurred as well as applicability to the rule as presented. The remedy Hart offers is a secondary 'rule of adjudication' which "besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed."[23] The idea here is that a society confers decision-making authority on a judge or court, but moreover it sets the parameters for what will be considered an adequate method of judgment. The rule of adjudication thus also serves as a rule of recognition since judgments made in accord with it should have the force of law, while those in disaccord will not.

In summary, Hart's conception of law requires a system of social primary rules with the addition of three secondary rules, each aimed at clarifying the application of specific laws or rules. Hart's principal criticism of social norms as primary rules it that there is a lack of certainty as to what those rules are in fact. He argues that secondary rules of recognition, are supported by both rules of change and adjudication, and thus solve the problem of uncertainty.

The difficulty of uncertainty in law was also a subject of Section 38 of liberal theorist John Rawls' *A Theory of Justice*. In that section Rawls writes, "A legal system is a coercive order of public rules addressed to rational persons for the purpose of providing the framework for social cooperation."[24] Rawls argues for 'justice as regularity' by pointing out the sense in which obligation is justified in a liberal system only by an objective understanding of the law, which provides a framework for cooperation. That is, in order for law to entail obligation as Hart contends, it must be just in the sense that it is not a matter for subjective judgment, but an agreement by subjects to an objective rule. Hart himself defends this thesis of the justice of law implicitly when he claims that primary rules alone cannot constitute law in a large community. The intention of Hart's

secondary rules is in fact to assure a certainty or objectivity about law, and thus to allow obligation once social agreement is made. Hart's tacit contention is that social cooperation is only achievable with secondary rules identifying and clarifying primary rules.

While Hart maintains that he wants to describe law as it is, not as it ought to be, by describing law as reliant upon secondary rules he demonstrates an implied understanding of law as based on some of the values of political liberalism. Hart emphasizes the individual's right to know the law if it is to be obligatory, and thus attributes a specific moral content to the law, namely a principle of equality in application. The idea implicit in Hart's call for a rule of recognition imbedded in secondary rules of law is that for law to apply to persons it must be accessible by them. Here we see a separation of law from a robust moral content in the primary rules, but an acceptance of some minimal morality in the secondary rules. The minimal morality included by Hart's secondary rules is simply a means of addressing the morality implicit in the notion of an obligation to obey primary rules. In this sense then Hart's minimal moral content provides a moral justification for the system of rule creation and application, not for specific primary legal rules.

Hart's strong liberalism points toward a straightforward method of understanding law as including a series of secondary rules, which describe what a valid method of finding the law looks like. On Hart's account of law as a system of rules, primary and secondary, secondary rules pick out just what counts as a primary rule and how this is to be decided.

I am inclined to accept Hart's method of understanding law for the sake of clarity, but as Ronald Dworkin points out, Hart's thesis, "stops short of those puzzling, hard cases that send us to look for theories of law."[25] Dworkin's criticism of Hart is that in penumbral cases where the shadow of a law seems to apply, but the primary rule itself is ambiguous, Hart is unable to offer a secondary covering rule and must then reject the case as outside the scope of existent law. Hart claims that, in so called 'hard cases' a judiciary using individual prerogative or strong discretion is forced to create law. Dworkin, by contrast, argues that there are moral principles underlying primary rules that may be drawn out by the judiciary in hard cases so that rather than creating law, the judiciary in a sense discovers the law. Hart's theoretical understanding of law requires that the law be announced by rule, and while a secondary rule may be that judges create law in cases where there is none, without a specific primary rule with the appropriate pedigree under the rule of recognition, no primary law exists for hard cases.

I have already discussed the rule of recognition in Hart's theory of law, but I think it is important to more fully explicate this concept in connection with what Hart takes to be legal validity. A rule of recognition is meant to provide judges of law "with authoritative criteria for identifying primary rules of obligation."[26] Of course, the fact that a rule of recognition provides authoritative criteria does not imply that those criteria can be easily applied. Within a complex legal system, the rule of recognition is liable to be complex as well, often including reference to a written constitution, enactment by legislature and judicial precedents. An ordering system is required in such cases in order to determine which of these 'sources' of law is primary in the case of conflict. "It is in

this way that in our system 'common law' (judicial precedent) is subordinate to 'statute' (legislative and constitutional)."[27]

Importantly Hart wants to point out that judicial precedent, although subordinate, does not derive its authority from statute, but from a secondary rule of recognition that picks out judicial decisions as valid, though subordinate, sources of law. It is important for Hart to make this point clear in order to disabuse his reader of the notion that all law essentially comes from legislation and is merely interpreted by the judiciary. To the contrary, on Hart's account, a judge makes internal statements of the scope and nature of primary rules, statements that presuppose the external validity of the system and "constitute a *reason* for his decision."[28] The idea here is that a judge does not refer to the validity of legislative regulation, thereby justifying primary rules in an external manner as a fact of existence in a certain society. Rather, the judge determines if a primary rule meets the criteria of the rule of recognition presupposed to be valid for the society, and thus decides the case at hand in accordance with a rule whose existence is a matter of fact.

The rule of recognition is a manner of determining primary rules not in accord with their power to predict the behavior of society, but in accord with whatever system of validation is in fact applied by society. On Hart's account, judges using the rule of recognition demonstrate the rule without any justificatory aims and thereby pick out primary rules without demonstrating any validity to the rule other than its conforming to the rule of recognition. In instances where legislation, the primary source of law, is silent or ambiguous, subordinate sources of law such as the courts are recognized as having authority to create law. Yet, under the rule of recognition no appeal is to be made to an

external validation, rather the new primary rule is taken to be valid because it arises from a recognized source of law. In hard cases, Hart contends the judge has full discretion to rule in any manner not in conflict with other more primary sources of law, in virtue of being recognized as a valid source of law.

Hart is arguing for a method of understanding the laws solely in virtue of an internal perspective, which does not attempt to validate the system of rule recognition, but merely relies on it as a fact used to pick out primary rules. Rules on this account are a matter of fact in virtue of their adhering to the system of rules of recognition, and in that sense are essentially separate from any moral or justificatory claims made on their behalf. Unfortunately, these factual rules often provide no guidance in cases where legislation is vague or ambiguous, leaving subordinate sources of law free reign to dictate primary rules as they see fit in virtue of their position under the rule of recognition. Ironically, it is just this rule of recognition that is intended to provide the certainty in matters of law, which Hart would require to create a real obligation in persons.

PART II. Ronald Dworkin

In his *"Model of Rules I,"* Ronald Dworkin responds to Hart arguing that positivism's "central notion of a single fundamental test for law (the rule of recognition) forces us to miss the important roles of standards that are not rules."[29] Dworkin's position is that, by focusing exclusively on rules, positivism neglects the importance of standards of both policy and principle in constituting laws and thus unnecessarily binds the judiciary to exclude the moral standards implicit in the law. On Dworkin's account, there is a necessary moral element implicit in the law, which may be drawn upon in hard cases to shape understanding without creating new law. My claim here is that Dworkin's

reliance on moral principles implicit in the law includes the substantive moral principles of a liberal political state allowing an expansion of the foundational procedural values found in Hart.

Unlike Hart's position that law is a matter of fact picked out by rule, adjudication on Dworkin's account relies not on facts about the law but on a range of moral positions derived from the pertinent, extant body of law. Dworkin's idea is that there is an ethos of the law that is applicable to any particular situation. When clear rules do not apply judges then ought to look towards this ethos of the law for answers. I take myself to be reflecting Dworkin's more positivistic position from his 'Hard Cases' paper, rather than the weaker natural law position espoused in his reply to David Richards in the Appendix to *Taking Rights Seriously*.[30] Richards had argued that the particular political morality of a legal system is a matter of fact about which one may be either right or wrong, Dworkin's response claims that, in principle, nearly any morality is available to judges. I hold the view (which I believe to be Dworkin's earlier position) that the institutional political morality of a particular legal system is circumscribed by previous legislation and adjudication, but remains abstract enough to be a matter of interpretation rather than of fact. Such a reading is in line with the notion of a legal ethos, in that while a community may have an ethos, equally rational judges often interpret that ethos differently. For example, both Democrats and Republicans claim to have the moral pulse of America.[31] Likewise, distinct members of the judiciary may each claim to have the moral pulse of the law and the legal system.

Dworkin's suggestion that judges appeal to the ethos of a specific body of laws provides a sort of weak discretion. Judges on such an account do not create law; they

interpret the ethos of the law in adjudication claims not specifically covered by rule. This allows discretion because equally reasonable interpretations may differ, just as political judgments of the community's ethos may differ. Yet, the discretion here is clearly weaker than those supposed by Hart, because judges are constrained by the ethos implied by the rules of law and thus are not free to decide however they will. By allowing this weak discretion in legal interpretation, Dworkin confirms the need for consistency in understanding the law, thus maintaining Hart's criterion of obligation, while providing for a body of morality, an ethos, which may aid in the integration of the law and legal system.

In describing Dworkin's approach to understanding law, what we must do is decide just what he means by standards, describe how these standards augment law as a system of rules, and analyze how they allow for legal interpretation while constraining the judiciary to a standard of consistency.

Standards in Dworkin's terminology consist of principles and policies. A principle in this specific sense is "a standard that is observed... because it is a requirement of justice or fairness, or some other dimension of morality." A policy is a standard that "sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community."[32] This distinction is often collapsed since principles are sometimes construed as policies and vice versa, such as when the principle, "no man should gain from wrong doing," is stated in terms of the goal of society being to protect such a principle. While this distinction will prove important later, for now all that need be understood is that standards are distinct from the rules from which they are derived.

Standards deviate from rules in the following significant sense, "rules are applicable in an all or nothing fashion. A principle... does not even purport to set out conditions that make its application necessary."[33] If the circumstances a rule stipulates are present, and the rule is valid, then the determination dictated by rule must be accepted wholly. Dworkin takes as an example the 'three strikes and you're out' rule of baseball. If a batter takes three strikes in a game of baseball, the circumstance stipulated by rule is met. An official who takes the three strikes rule as a valid rule of baseball, which presumably all officials must, must then call the batter out. There is no room for deviation from the consequences stated by rule. On the other hand if a batter takes one or two strikes, the rule does not apply and in consequence, the rule provides no guidance for action.

Principles, or standards, on the other hand, state a general aim. In any circumstance where that aim is at all pertinent, the principle may be applied as a guide for action. We can think of principles then as key maxims that go into the make up of an ethos. Principles, that is, are the structure of an ethos, which lies in the law. As an ethos is not definitive or concrete, the application of principle is not wholly determinative of the outcome; it provides a reason for an outcome, which may be judged more or less compelling given other standards also germane to the decision at hand. Dworkin points to the famous decision in *Riggs v. Palmer*[34] as an example of judicial use of legal principle.

The crucial question in *Riggs v. Palmer* was, 'If one kills the owner of an estate to which he is heir does he still have a right to his inheritance?' The court in this instance states "statutes... if literally construed... give this property to the murderer." Thus by rule

the property ought to be given to the inheritor/murderer. In the opinion of the Court, Justice Earl claims, "all laws... may be controlled by general fundamental maxims of the common law."[35] The court claims that there is a general, fundamental maxim of the law that "No one shall be permitted to... acquire property by his crime."[36] Dworkin understands this fundamental maxim to be an example of a principle of law. In other words, the legal ethos behind rules about inheritance, murder, legal profits and harms etc. indicates the principle that one should not profit from inflicting illegal harm. This principle is not an explicit rule of law, but is a part of the spirit or ethos of the law.

According to Dworkin, "All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another."[37] The prefatory "all that" in Dworkin's claim may strike some as odd. It seems there is a rather large claim being made here, namely that judges must take into account principles gathered from the ethos of applicable law. It seems this places a burden on the judiciary to interpret in almost all instances the morality or ethos upon which the rule of law is seated. This is no mean feat, but Dworkin is correct in pointing out that the principle need not be decisive only that it must point in a direction.

So while Justice Earl, along with a majority of the Court, found that Elmer Palmer could not benefit from killing his grandfather, it could have been otherwise in spite of the principle used in the decision. If some other principle of law were found more weighty in the particular circumstance, Palmer may well prevail. Say that, for instance, the killer wrote a memoir detailing his grandfather's murder, intending it to prevent future murders. One might appeal to a principle that persons should gain from their attempts to prevent

wrongdoing, and allow the financial gain. Importantly, the existence of one applicable principle in law does not preclude the existence of other applicable and contradictory principles. A judge recognizing each principle is left with discretion to decide which principles, if any, is most weighty. Principles help judges reach an understanding of a system of law by offering a scale of the relative importance of conflicting claims on justice, but do not dictate necessary decisions as do rules.

Without the certainty of dictating necessary outcomes, it is hard to see how Dworkin's principles can be accorded with Hart's requirement of law, that it creates obligation in virtue of being applied *uniformly* through a rule of recognition. Indeed Dworkin himself argues that Hart's thesis of obligation must be rejected if his own account of principles in law is to be taken seriously. However, Dworkin here is assessing the strongest version of Hart's theory of obligation, particularly emphasizing the notion of uniformity or certainty.[38] I contend that, with a broader understanding of the term certainty in recognition, Hart's rule of recognition is not so restrictive that principles cannot be applied in various ways. Much of Dworkin's *"The Model of Rules II"* is spent refuting Hart's concept of obligation in strong and weak forms (never addressing the type of weakened sense of certainty I suggest.) Nevertheless, I will take some care to make this point clear.

Dworkin claims there are two senses in which one can consider principles for the purposes of reaching legal decisions:

> a) We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation...
> b) We might, on the other hand, deny that principles can be binding the way some rules are. We would say, instead that in cases like *Riggs,* the judge reaches

> beyond the rules that he is bound to apply for extra-legal principles he is free to follow if he wishes.[39]

On Hart's account of the rule of recognition, option b is perfectly viable; a rule may recognize the judge as a valid source of law on the judge's own terms. Any moral principles the judge sees fit to utilize then become law in virtue of judicial pronouncement, but must not be considered law in their own right. For Dworkin morality itself is part of the law and not legislated by the judiciary, but applied as in option a. Yet, if the application of morality as such is to be read as consistent with Hart's rule of recognition, there must be some socially agreed upon rule for how the obligating principles are to be distinguished from all others.

The key to understanding the rule for determining what constitutes a legally valid obligating principle is found in Dworkin's description of discretion. Judicial discretion, according to Dworkin in *The Model of Rules I*, "like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."[40] So unlike Hart's version of discretion wherein moral principles are to be applied in an unrestricted fashion by a judiciary empowered to create law, Dworkin's judge has the authority to apply moral principles according to his or her discretion, which means freely within some set of restrictions. These restrictions on judicial discretion represent what one could call a minimal rule of recognition. That is to say, there *is* a standard of what principles may be applied to a legal question at hand, and we may refer to whatever that standard is as a rule of recognition.

Recall that the rule of recognition is a supplemental device to primary rules intended to ensure objective certainty about law and thereby justify the obligation of citizens to that law. There is no requirement that the rule of recognition is simple or

direct, only that it authoritatively picks out what sort of argument counts as legally valid in virtue of pedigree. Dworkin's version of judicial discretion does not claim that judges are "simply not bound by standards,"[41] "only that his decision is not controlled by a standard furnished by the particular authority we have in mind."[42] On Dworkin's account, then, there is some standard for what makes a principle a legally valid standard of judicial decision-making. Further, Dworkin contends that the standard of judging legally valid principles has the same importance as a rule.

A judge who disregards applicable rules will most certainly be chastised for failing to fulfill his or her obligation to the law. Likewise, the judge who neglects applicable principles in making a decision may be criticized as being disobedient. If the Court in *Riggs,* for instance, had failed to take account of the principle that 'no man should profit from his own wrong doing,' the Court would have failed in its duty to consider the appropriate principle and the plaintiff had a right to have that principle considered. According to Dworkin, "We mean no more, when we say that a *rule* is binding upon a judge, than that he must follow it if it applies, and that if he does not, he will on that account have made a mistake."[43] The idea here is that those involved in the legal process should have some means of determining what are appropriate principles to be applied in a given circumstance.

The question, then, is what sort of standard Dworkin has in mind for understanding the restricted scope of judicial discretion in applying moral principle to the understanding of law. Dworkin's argument supposes that "no mechanical procedure exists for demonstrating the rights of parties in hard cases," and thus, "reasonable judges and lawyers will often disagree about legal rights."[44] Yet, if one party to the dispute has

a preexisting right to win, as Dworkin contends, and there should be admonishment of judges who fail to consider all relevant principles, then there must be some way to determine which principles are relevant and ought to be considered. Indeed, in his *"Hard Cases"* paper Dworkin outlines a conception of the ring of restraint that constrains judicial discretion in understanding the law, *vis a vis* standards or principles.

Dworkin invokes the distinction raised earlier between standards as matters of policy and standards of principle to begin the restraint of judicial discretion in a *certain* way. Policy based principles, recall, characteristically seek social, economic, or political goals. Judicial arguments of policy, then, would seek to justify legal decisions based on the advancement or protection of some collective goal of the community as a whole. Principles, on the other hand, that reflect a statement of fairness or justice observed by a society's morality seek to justify decisions based on respect for some individual or group right. Dworkin proposes the thesis that judicial decisions in hard cases "should be generated [only] by principle not policy."[45]

Dworkin's claim is that, in cases where there is no clear history of rule or judicial decision making to apply, a judge may rely on principle in formulating a decision. Principle here is not a code word for strong discretion, rather principle is understood as reflecting the institutional morality culled from behind historical rules such as legislation and common law. The ethos of the law is the driving force of such principles and on Dworkin's account ought not be confused with the policy direction of a community. The nature of an ethos is vague and here Dworkin is clarifying that legal decision making must rely on the ethos embedded in the law. This move takes the judge's discretion away from making localized political decisions and forces a circumspect attention to the ethos

of extant law. Principles, Dworkin argues, reference "the implications of trends of judicial and legislative decisions." In this sense previous law, implies principles, foreshadows them. Such previous implication seeks to satisfy Hart's condition that any legal system be consistent if it is to be obligatory.

If principles play a role in creating decisions, though, it seems there is a feedback loop in effect. Principles used in earlier cases, surely affect the outcome and trend of current legal decisions. Such a system seems likely to reinforce certain early moral features implied by the law, and thus may move toward alleviating Devlin's concern about a morally integrated society. Yet, Dworkin's system stops short of being an ossification of any specific morality. Principles reference each other in the loose sense that they are developed alongside other principles and often in response to them. But development of principles in response to others implies some dissention in the morality underlying the law. There is on Dworkin's account some reasonable moral disagreement within the law. Principles often conflict as rules never can, and in this sense "principles "hang together" rather than link together."[46]

Dworkin's position that standards of principle and not policy may be used to direct judicial discretion is based on what he calls a "rights thesis." The rights thesis is that "judicial decisions enforce existing political rights." Since rights act as a trump on the general welfare interests of policies, reliance on standards of policy for legal interpretation has the flaw of violating the rights of individuals. Dworkin argues that, courts have a responsibility to enforce the principles underlying law, which, as a matter of form in liberal states, act as a check on the majoritarian interest of policies. Principles, in Hart's terminology, reflect a preexisting obligation that corresponds to rights in the

rights thesis. Policies on the other hand are decisions about the present aims of a society and thus cannot be obligatory on Hart's account. In supposing judges ought to draw on principles and not policies Dworkin's "rights thesis" thus takes as its practice the liberal obligations Hart notes in legal decision making.

Principles as we have seen are not concrete decision-makers like rules; rather many competing principles may be applicable to a question of law and all Dworkin seems to require of a judge is that he or she consider and weigh these competing principles. The judge on Dworkin's account is required to argue for the supremacy of one principle to another. Crucially, for Dworkin the institutional history of rights does not oppose judicial discretion, it aids in the explanation of the disposition of present rights. According to Dworkin, "judges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past."[47] The idea here is that when judges look to applicable rule and precedent and find no judgment mandatory, as in hard cases, they must look beyond those rules and reflect on the institutional morality supporting them. It is only through such reflection that judges can, by exercising weak discretion, decide hard cases consistent with the rule of law.

In an effort to sort out just what position Dworkin takes (or at least which one I wish to endorse as a viable candidate for accounting for the important principles of both Hart and Dworkin) we should make clear the distinction between the Dworkin of Hard Cases and Dworkin of his Appendix Replies. To this end I will refer to Dworkin of Hard Cases as the early Dworkin and Dworkin's later incarnation as the late Dworkin. As a brief sketch we might say the early Dworkin requires that legal principles be constrained

in such a way that not any principle could count as implied by the germane body of extant law and the late Dworkin backs away from this level of restriction at the expense of his ability to provide a satisfactory rule of recognition.

In "*Hard Cases*" the early Dworkin argues that principles are implicit or embedded in earlier decisions and are legally binding if they figure into "the best justification"[48] of those decisions. "The judge very rarely assumes the character of independence," Dworkin claims, "He will always try to connect the justification he provides for an original decision with the decisions that others have taken in the past."[49] This connection, however, is not like the connection of rule; rather, it is the connection of a morality that hangs behind the system of rules. The idea, then, is that a judge should confront the myriad of possibly conflicting moral principles lying behind the system of rules, and weigh these rules against one another, ultimately using the principle that most consistently explains the system of law to decide the case.

The rights thesis of the early Dworkin demands an "articulate consistency,"[50] viz., principles must be built from institutionally preexisting rights, not abstracted from any broad background morality judges see fit to apply. In this sense, Dworkin has clearly met Hart's challenge of consistency for legal obligation. But the doctrinal requirement of articulate consistency appears to present a certain problem for the use of judicial discretion even in the weakened sense described above. The difficulty here is that a judge in a hard case may disapprove of past precedents that lean toward the elimination of the political rights of citizens. In such a case, the judge must take into account the misguided institutional morality and, it would appear, be constrained to perpetuate moral

injustice. In light of this difficulty the rights thesis appears committed to "a false opinion about what these rights are."[51]

The early Dworkin argues that rather than view the judge as entirely constrained by the interpretation of a past judiciary in further elucidating institutional rights, judges must be free to review the institutional moral reasoning implied by past precedent. Without such evaluation Dworkin believes the rights thesis must fail to truly protect the institutional political rights of citizens. In an effort to describe how such legal decision making might be both a consistent and accurate reflection of the institutional morality in such cases, a more detailed account of "the special qualities of institutional rights...and the particular qualities of legal rights, as a species of institutional rights"[52] must be offered. The aim of such an exposition is to develop in just what sense the early Dworkin views judicial discretion as a development of institutional rights and duties.

The rights thesis relies on judges to elaborate the specifically legal rights of citizens in hard cases. Yet, there are several other types of rights that might be confused with legal ones. For one, general background rights may appeal to a judiciary. Use of these rights would entail what we have called strong discretion. Background rights are outside of the institutional morality, and in this sense reflect general ideals of political philosophy. As an example, Dworkin uses the institution of chess. There are certain regulative rules that fix the rights of chess players. A direct appeal to general morality, or background rights, is insufficient to make a claim of institutional rights. Thus, in a chess match "no one may argue that he has earned the right to be declared the winner by his general virtue."[53] Each player has consented to abide by the rules fixed for the playing of chess and those rules alone constitute their respective institutional rights.

In hard cases, such as Russian grandmaster Tal's supposed intimidation of Fischer, the difficulty is deciding if the rule of forfeiture due to "unreasonable" annoyance applies. In such cases the chess referee must decide based on the character of chess, he must, that is, "construct the games character... not to supplement convention, but to enforce it."[54] The referee must ask herself what role psychological intimidation might play in an intellectual game. This will require decisions about the nature of psychological forces and intellectual activity, each specifically regarding the game of chess. The idea is that the referee must test answers to questions about intimidation and intellectual activity that oscillate between the appropriateness and inappropriateness of such activity to the game of chess. The rider "to the game of chess" requires that the referee draw out a particular conception of what intellectual activity is in terms of "the facts of the institution whose character he must elucidate."[55]

Crucially, in the above example, the autonomy of the institution of chess from external factors, like private morality, insulates the official's duty and the rights of participants. This insulation is complete in the case of chess since the institution itself is fully autonomous. Thus, the referee is required to interpret or elaborate the concept of unreasonable annoyance within this insulated institution, not amidst general background rights. The general justification of the institution itself is germane since it dictates the nature of the game as intellectual, but outside factors are clearly to be avoided since participants have consented only to the autonomous ground of the game.

The autonomy of legal rights, like chess rights, follows from the insulation of the activity from outside issues. Unlike chess, however, legal rights are, on the early Dworkin's account, only semi-autonomous. That is legal rights are connected to a

broader game than simply affairs of court. In particular legal rights are connected by their origin with political rights. Having sprung initially from political enactments, legal rights in hard cases "turn on contested [political] concepts whose nature and function are very much like the concept of the character of a game."[56] That is the nature of the political institution, like the nature of chess, must factor into the interpretation of rules of law, just as the character of chess as an intellectual game factors into an interpretation of what unreasonable might mean.

The early Dworkin relies on two primary bridges to span the divide between political character and legal rights; these are "the idea of the 'intention' or 'purpose' of a particular statute and "the concept of principles that underlie the positive rule of law."[57] In short, these 'bridges' are devices for applying a general political theory, a character of the game, to actual decisions in jurisprudence. If a judge does not accept the general political theory that justifies legal practice, she will not be able to appropriately exercise discretion in hard cases. Such a case would be like the chess referee who refuses to accept the nature of chess as an intellectual game, instead viewing as a game of chance, say, and yet proposes to elucidate a rule about what would be unreasonable. Such elucidation is impossible, or at least misguided, without the correct understanding of the character of the system within which such rules operate.

Broadly, the early Dworkin supposes that two main features of political rights figure into the character of the game within which legal rights operate. Legislation is that body of law created by some governing body, which is applied via the judicial system in the form of legal rights. The intent or purpose of such legislation then provides a bridge for the elucidation of these political characteristics in legal hard cases. The common law

is the other piece of preexisting political rights of which the judge in a hard case must take account. The common law in this sense provides a bridge to legal rights in the form of the principles that underlie previous jurisprudence. So the early Dworkin would have the description of legal rights in hard cases constrained by two central features of the political institution of which the legal system is a part.

In an effort to flesh out the process of interpretation via intent of legislation and the principles implied by the common law, Dworkin suggests a perfect judge, talented in all aspects of such interpretation, named Hercules. Hercules task is to develop a heuristic with which to interpret hard cases, which will, of course, involve an analysis of legislative intent and the principles of the common law. In analyzing intent, Hercules must address the various bodies of legislation, particularly the constitution (supposing there is one) and statutes. In providing a view of the principles of common law, Hercules task will be to derive moral context from precedent in a manner that forms the most consistent web, picking out only a few cases as past judicial mistakes.

In analyzing constitutional legislation Hercules "must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government."[58] So much like the case of chess, the judge must understand what justifies later rules in terms of the foundational justification of the entire game. If the constitution argues for a schema of representative democracy, this argument must be reflected in later decisions, just as a chess referee must use the intellectual character of chess in later arguments.

Legislative intent to generate principles of law is found in more specific bodies like statutes, which offer greater clarity that the broad justification provided by

foundational institutional documents, like constitutions. Moreover, Hercules must attend to intent of statutory legislation in light of its need to be consistent with the aforementioned understanding of the broader constitutional scope of legislation. When opposing interpretations of a statute might both be applied in accord with broader political rights, the key for Hercules will be to determine "which offers a better justification of the statute."[59]

It is important to note that, the idea here is that the judge ought to determine what interpretation of statute best fits into the justification given for the statute. In hard cases where such justification is ambiguous, the judge does not attempt to determine what the legislative body might say had they recognized this ambiguity. Rather, the judge in a hard case is obliged to determine which reading of the statute, as written, best fits into the broad justification for the constitutional or political system of which the statute is a part. In this sense the authority of a statute does not run out as Hart suggests, rather a judge must use arguments of political structure to determine what the legislator has done in drafting a statute within a particular political context.

So far, Hercules has developed a sense of the institutional political morality, the arguments that justify the state, embedded in its constitution and has used these arguments to determine what an ambiguous statute implies. Such a reading places the intent or purpose of legislation in the broader context of the arguments that support legislative authority to make such determinations. There is of course a decisive move away from reading intent as a historical fact about a legislative body in favor of viewing statutes as the development of a preexisting argument.

In developing principles within the common law, Hercules must maintain the methodology of advancing previous arguments. Unfortunately, previous legal decisions most often fail to offer the canonical form, however vague, offered in statutes. It will then prove difficult to determine "what parts of famous opinions should be taken to have that character."[60] In fact the decision itself and the principles which justify it, rather than its form as a statute are all that Hercules may have to appeal to in interpreting precedent. The enactment force of precedent then is not limited to its "linguistic limits" as is the force of a statute. Rather, the principles generated in precedent have a "gravitational force" that extends beyond the "particular orbit" of the initial case.[61]

The difficulty for Hercules will be to decide just how far beyond the orbit of the initial case, the *gravitas* of the principle present in precedent, will extend. In the end, Hercules must "limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions."[62] The rationale for the above claim is that, as we discussed earlier, arguments of policy can have no appeal to Hercules except in the enactment power of statutes. That is, policy concerns do not generate legal rights, as is the form of principles, rather they serve some collective goal. The principles behind earlier decisions, however, must be taken as part of the institutional morality Hercules is committed to elaborating as a method for adjudicating competing rights claims in hard cases.

The real difficulty for Hercules comes in the myriad of principles judges routinely see as embedded in the common law. If the rights thesis is to hold, Hercules must "construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents."[63] In other words, the jumble of principles

found in previous case law must be woven into a relatively seamless web of justifications that do not contradict one another. In order to form this seamless web the early Dworkin suggests that the principles developed be ordered vertically to provide distinctions of authority, determinations of rank of importance in the overall argument, and those at the same level must not be contradictory. The idea is that principles of the common law be developed in accord with one another, and in the case of disagreement there be an ordering principle that justifies why one principle takes precedent. Further, the ordering principle itself must be a non-contradictory argument within the overarching institutional structure.

On the early Dworkin's account, there may remain some disagreement between reasonable judges who have a different ordering structure in mind. In such cases divergent accounts of the hierarchy of principles, or even which principles are valid, may emerge. It is just such a disagreement judges often face in hard cases. The role of Hercules in such instances is to continue to develop a consistent picture of the relationship between principles in the form of the soundest argument. Over the course of time different judges elucidating principles of law will develop an increased understanding of the direction in which an argument ought to proceed in order to best justify the institutions political morality.

In reading the early Dworkin, we see a reliance on the notion of there being a best argument to be made. That is, it appears the early Dworkin is arguing for the possibility that one, albeit a "Hercules," could discover the best interpretation of principles embedded in the law and thus achieve the soundest argument for rights based on an institutional political morality. David Richards, takes the extension of the notion

that there is a best interpretation to mean that the morality of a system, the principles of law and the underlying institution, is a matter of fact to be discovered.[64] Richards supposes that Hart's positivism must make room for the "rich middle ground between rule and untrammeled discretion, namely, the judicial invocation of principles claimed to underlie previous precedents or encapsulated in the form of legal maxims."[65] This belief stems from the understanding of principles as matters of fact about legal systems, facts that must be allowed into Hart's rule of recognition. It is just this sort of view of principles as facts that might impose upon Hart an obligation to accept such principles. Yet the late Dworkin has rejected this understanding of principles as mere matters of fact.

The late Dworkin, in the Appendix to *Taking Rights Seriously*, points out that Richards understands principles to be a matter of deduction, so that, "if two lawyers disagree over whether a particular principle is 'legally binding,' one of them must be making a logical mistake."[66] This understanding is of course incorrect, given our earlier discussion of principles in which we saw that, "reasonable lawyers and judges may disagree."[67] It is not necessary that a logical mistake is being made, rather an incomplete image of the body principles may be at fault for the mistake. The point is that conflicting principles can both correctly be attributed to the same system, though not perhaps in the correct manner, or with the same weight.

Yet, in his Appendix reply, the late Dworkin seems to suppose that matters of fact "in the Humean sense" cannot be contradictory, and thus principles cannot be, matters of fact.[68] This rendering by the late Dworkin is clearly at odds with the early Dworkin who argued that it was the Herculean task of judges to arrange horizontal and vertical ordering principles for the alleviation of just such inconsistencies. Here the late Dworkin appears

to be shifting the essential character of legal principles away from their role as human constructions and rather towards their interpretation as brute facts of nature. It seems perfectly reasonable that contrary moral principles may as a matter fact be embedded in a single institutional morality. Such an institution would then be incoherent, only if there were no ordering principle sufficient to justify such an arrangement.

The late Dworkin does make a further move to justify his concern with Richards' reading of the early Dworkin as relegating principles to mere matters of fact. The late Dworkin points out that matters of principle in the law may depend on the background moral assumptions that give rise to these principles in the law.[69] In this respect the late Dworkin may be in accord with the early Dworkin since the background morality that justified a piece of legislation is not a matter of fact, but of individual morality. Yet, there is no serious challenge implied by such reconciliation for Richards' reading of the early Dworkin. Principles embedded in the law are still facts about the law, but it may be a contingent fact that they also reflect a general background morality.[70]

Perhaps the clearest statement of the late Dworkin's position comes when he writes, "I do not think that there are agreed criteria of superior theoretical explanation."[71] The implication is, of course, that no criteria for a better fit within the institutional morality can be found. Judges, the late Dworkin seems to be saying, do not, nor can they be expected to, share in any aesthetic preference for one argumentative style over another to figure the best justification for existent rights. He moves on to deny the claim that one must either, insist that the law is a matter of fact, or deny any distinction between law and morality. Yet, by supposing that no criteria can be established for choosing between

arguments of institutional morality, the late Dworkin appears to be taking a different position.

The late Dworkin appears to be making an attempt to highlight the notion that legal principles are not merely matters of fact, but also represent more thoroughgoing moralities. Unfortunately, the move to highlight this feature of legal principles takes him away from his earlier notion that some best fit could in fact be discovered outside of such general background moralities. There seems no reason Dworkin cannot maintain his earlier position that there is indeed a best way (although that way may only be revealed in hindsight) and simultaneously assert that this best way reflects a particular background morality.[72] In fact, that is just how we read the early Dworkin to account for the important point about the need for a common morality to integrate the law.

Without a convincing reason to suppose that legal principles are not at least in part matters of fact, we ought to continue to follow the early Dworkin in his pragmatic solution to the difficulties inherent in a separability thesis. For the early Dworkin, in hard cases the responsible judge confronts conflicting principles, weighing them in relationship to one another with an eye toward creating a consistent narrative about the morality of this legal system. Common law has often been described as a chapter play, where many participants tell a chapter of a story each building upon the others. Dworkin's early claim is that, in cases where conflicting principles must be weighed, that principle which is most consistent with the rest of the story as told by others should be chosen. Dworkin's narrative of principles told in connection with rules of law gives body to an intangible shared morality to which any notion of a robust legal system must appeal.

The web of moral principles Dworkin analyzes in *"Hard Cases"* is grounded in the principles developed by the society itself in the form of institutional rules. Judges then further develop this loose network of moral principles by attributing weight to them. Often the weighing process is done by method of trial and error. Judicial maneuvering is a process like the conversation surrounding the telling of a chapter play, there is a discussion during each new chapter about how it fits into the last, how this could be made better or worse. In the end there is a factual claim to be made about what changes make a chapter fit better or worse in the context of the overarching narrative, the institutional morality.

In the final sense, by using moral judgment as the arbiter of decisions of law, judicial discretion plays an important role in understanding law; this is why all societies seek genuinely wise people for the profession. Yet, one cannot be too quick to claim that judicial discretion alone creates the law. Dworkin argues for an enormous amount of restraint on, for example, legal moralism, including the founding of such morality in the institutional character of society and the use of rights conferring principles rather than broad social policy standards. Moral principles thus have a role to play in how we understand the law, but that role is still limited in liberal states to the liberal social aim of the law in the first place. In other words, while the law is undeniably understood in terms of moral principle, that understanding is restrained by the character or pedigree of the moral principles thought to be applicable in a particular liberal legal system.

Hart's requirement of obligation was that the law is understood to have some ultimate source of authority, appeal to which would render certainty of understanding to rules of law. Dworkin's appeal to consistency in interpretation, a consistency based on

the principles underlying rules themselves, offers an account of authoritative interpretation creating obligation. While the rule-based certainty Hart sought in final decisions is not present in Dworkin's method of understanding law, a certainty of method is, and this methodological certainty is all that Hart need require. By basing an understanding of the law in hard cases on the moral principles hanging behind legal rules in *"Hard Cases,"* Dworkin offers an account which provides the certainty needed to draw people into law's obligation and the moral narrative needed to continue the work of law. In the end, Dworkin's reliance on principles seems to affirm the important requirements of positivism and provide a sense of the minimum shared morality legal obligation requires.

PART III. Hart's Postscript Response

Hart replies to Dworkin in his postscript to the second edition of *The Concept of Law*, writing "Principles are an important feature of adjudication and legal reasoning." He continues, "Much credit is due to Dworkin for having shown and illustrated their importance... and certainly it was a serious mistake on my part not to have stressed their non-conclusive force."[73] Here Hart's 'their' refers not to principles, but to his conception of rules. While acknowledging Dworkin for the importance of pointing out the necessity of non-conclusive principles Hart also maintains that his earlier account of rules is not limited to binary conclusive applications as Dworkin maintained. Recall that Dworkin described rules as "applicable in an all or nothing fashion"[74] and claimed that such binary application created the consistency Hart used to justify obligation to a set of laws.

Dworkin's modification points out that consistency within a set of systematic values need not appear in the form of conclusive rules to be coherent. In fact such

conclusive rules alone relegate decision making in hard cases to such a degree of unpredictability that obligation seems jeopardized. On Dworkin's account, the coordination of legal principles underlying a system of rules into a broad picture of the law may create a system of consistency implying obligation without entailing only conclusive rules. Hart seems to agree with this basic picture of obligation, and makes a case for the flexibility of rules in this sort of context. Rules, Hart argues, are describable in identical terms to principles, only varying by a matter of degree and thus do not require any significant alteration.

Hart points out that for Dworkin legal principles have *weight*, that is, they count but may be non-decisive. In accord with this conception of principles, Hart claims "a valid rule determines a result in cases to which it is applicable, except where another rule, judged to be more important is also applicable."[75] Here Hart clearly embraces the notion of rules as non-conclusive, and seemingly loses some ground in his earlier argument for clarity and consistency in creating obligation. But if we suppose that he adopts the modification of positivism's theory of obligation suggested by Dworkin this appears to create no real trouble for his theory. Hart is, with such a modification, able to claim consistency in the same broad systemic way that the early Dworkin views principles as creating a coherent and consistent picture of a legal system.

Following on the heels of his apparent concession, Hart does however point out a criticism of Dworkin's strong distinction between rules and principles.[76] It is incoherent, he argues, for Dworkin to suppose that a legal system may simultaneously contain all-or-nothing rules and non-conclusive principles. Hart's contention is that in Dworkin's own examples of principles, such as the principle 'no one may profit from wrongdoing,' they

are in competition with rules over which carries more legal weight. The example found in *Riggs v. Palmer*[77] asserts that in at least some instances principles seem to have more weight then rules, since the "clear language of statutory rules"[78] is trumped by principle. This leads Hart to claim that "rules do not have an all-or-nothing character, since they are liable to be brought into conflict with principles which outweigh them."[79]

At the broadest level, Hart seems to be claiming that any competition between rules and principles indicates an assignment of weight to rules, which indicates a non-conclusive status to rules. This seems to me a serious challenge to the notion of all or nothing rules, but it is not in itself a devastating critique. It seems perfectly consistent to say that rules both have weight and are applied in an all-or-nothing fashion. All this sort of move requires is that rules each carry the same weight so that two valid rules cannot be brought into conflict. Then rules either apply or do not and no conflict between them can be settled based on their relative weight, only their terms of applicability. In relationship to other rules this would indicate an all-or-nothing character and seems to represent the sort of certainty Hart earlier sought in his theory of rules.

Yet, Hart presents a possibility beyond the confrontation of rules with other rules by stressing the possibility of principles confronting rules. The possibility of principles outweighing rules confirms Hart's argument that rules cannot have an all or nothing character, because even when they apply they may still fail to be decisive in light of an overriding principle. In such an instance the weight of a rule, not its terms of applicability, is decisive and thus the rule must be considered against countervailing pressures and is not applicable in an all-or-nothing fashion.

One might wish to maintain the strong distinction between rules and principles as a matter of efficiency in the production of certainty and obligation. It seems the more we are able to limit standard cases of adjudication to binary determinates like the standard conception of rules the less we must rely on the admittedly difficult interpretive task of evaluating weight as in the case of principles. In this light it seems to me there is a clear avenue of response to Hart's weakening of the rule/principle distinction. On Hart's own account principles contribute to the justification of rules and in so doing it seems they distinguish themselves fairly straightforwardly from rules.[80] But, more to the point, as foundational to rules, principles provide the possibility of a rules legal status, so that if the principle justifying a rule is overridden by another principle the rule not only doesn't apply, it doesn't exist.

The claim here is that a conceptual "stacking" orders operations in such a way that the resolution of conflicting principles occurs prior to the justification of a rule. In such a case a rule may exist in a constitution say, and some secondary rule may pick it out as valid, but without the support of principle these are insufficient conditions to entail obligation to the law. Hart gestures at this counter-argument when he writes "on this view a rule will fail to determine a result in a case to which it is applicable according to its terms if its justifying principle is outweighed by another."[81] What Hart fails to notice is that while the rule may still appear applicable on certain terms it will nevertheless have been rendered so only in an extralegal sense. That is without a justificatory principle the rule does not carry the weight of law, at best it carries the threat of enforcement. So while there may be an artifact indiscernible in form from a legal rule, the moral force of

law's obligation would be missing from a rule without a justificatory principle of dominant weight.

Hart's second criticism of Dworkin concerns the manner in which one might identify a legal principle and thus provide justification for legal rules. On Hart's account, the operation of secondary rules of recognition makes possible the identification of legal principles. On Dworkin's account, "the hidden structure" of law is revealed by the construction of legal principles into a holistic picture of legal history including secondary rules. Hart's argument is in two parts, first, he claims that secondary rules of recognition can often point out precisely what principles are elements of law, and second, in instances when secondary rules cannot precisely pick out legal principles they must still be relied on in the process of constructing such principles.

Hart's first contention, that a principle, or non-conclusive legal standard, may be picked out by pedigree in the manner commonly attributed to secondary rules seems relatively unproblematic. As an example Hart cites Dworkin's argument that the Constitution's First Amendment is not a rule but a principle. Hart contends that if the First Amendment is a principle, then clearly "a statute may be taken as intended to operate in the non-conclusive way characteristic of principles."[82] From this proposition Hart wants to conclude that legal principles are identifiable in virtue of their being things like statutes. This of course is problematic in so far as not all statutes are principles; even on Hart's account some quite (though not perfectly) conclusive rules are identified by secondary rules in virtue of their inclusion in statute.

The real thrust of Hart's first point comes when he claims that "some legal principles...such as that no man may profit from wrongdoing, are identified as law by the

'pedigree' test in that they have been consistently invoked by courts in a range of different cases."[83] Here Hart is indicating that in each relevant new case a court must consider previous exposition of legal principles in their decision making. In so doing the court identifies principles not through any holistic interpretive act, but in virtue of a secondary rule of recognition. So, for example, the principle that no one should profit from wrongdoing is accepted as a legal principle not because it best fits the institutional history of the American legal system, but because this principle has been identified by recognized sources of legal authority.

We might still abandon rules of recognition by claiming that some holistic interpretation of principles, including the one about profit and wrongdoing, becomes revived in the training of each generation of lawyers. In this instance we would not find the use of legal principles an assent to some secondary rule with independent authority, but the memory of an interpretation already made (in law school perhaps). I think this position is defensible but in the end it seems to be working toward the reduction of a jurisprudential "toolkit." Moreover, if each generation of lawyers is simply indoctrinated into some previous interpretation, it seems as though accordance with earlier interpretation becomes the secondary rule that picks out legal principles.[84] If an institutional memory takes the place of actual interpretation, that memory carries the force of law only in virtue of a rule of recognition and not because it coherently describes the body of extant law.

Having made his case for pedigree as a standard of picking out legal principles, Hart turns to those novel cases in which "principles cannot be so captured."[85] Hart maintains that some principles may "have no other feature that would permit their

identification other than belonging to that coherent scheme of principles which best fits the institutional history."[86] Yet, on Hart's account, even these principles rely indirectly on rules of recognition. Hart claims that the content which identifies some principles as such independent of their pedigree is in fact only accessible because of rules of recognition. Hart's claim is that since some legal principles owe their status "to their content serving as interpretation of settled law"[87] the identification of such principles requires some independent rule of recognition that defines what counts as "settled law."

The identification of principles in the first instance does seem to require some method of recognizing what counts as established law. If there is no way of determining what a legal system has done, or even how it is constructed, I think Dworkin is obliged to agree that the task of picking out its systemic principles is impossible. As Hart points out Dworkin is committed to a "preinterpretive law"[88] in which some source of law is authoritative in virtue of a consensus on assumptions or a shared paradigm of judicial reasoning. Hart I think rightly claims that in this much each "explanation of judicial identification of the sources of law is substantially the same."[89]

Conclusion

The persistent difference between Hart and Dworkin is that Dworkin supposes that the process of interpretation is consistently more morally involved than Hart is willing to admit. Hart wants to argue that the identification of principles within the law takes place as "a method of law recognition required by a mere conventional rule accepted by the judges and lawyers of a legal system."[90] In this sense any given legal system has some foundational pre-legal conventions, which admittedly are value-laden, from which arise value-neutral rules and principles that justify these rules systemically

based on the system's values. On this account simple rule application infers principles from the minimum moral content of any legal system.

Dworkin essentially agrees that any legal system is based, as an initial matter, on a set of value-laden presuppositions. Where Dworkin represents a conceptual split from even the Postscript is in rejecting the idea that all principles or justificatory interpretations spring unaltered from the initial presuppositions of a legal system. The early Dworkin seems to argue that inconclusive moral principles require a level of interpretation that goes beyond a static nearly conclusive reference to originating principles. Dworkin appears to be arguing that the moral principles of a system develop internally as they are used and applied within a legal system. Hart rejects this sort of organic evolution of the internal moral foundations of a legal system.

Unlike the late Dworkin, who would seemingly argue that even external and novel moralities might appear in the form of legal principles, the early Dworkin is limited to saying that some development of initial moral foundations are discoverable through judicial interpretation. Hart rejects even this sort of development of moral principles within a legal system and argues that beyond the necessity of a founding moral content all interpretation takes the form of rules. On Hart's account, a rule-like necessity entails the outcome of interpretation based on the initial conditions of a legal system. Interpretation for Dworkin is more robust than this, and indicates the tracing of moral development from within a system.

In its applied context, Hart's Postscript seems to maintain his earlier position that judges in hard cases are compelled to create new law. Hart's argument to the effect that secondary rules condition the interpretation of principles points out his continued

commitment to restricting moral development within legal standards. Dworkin, while constrained to accept many of Hart's conclusions about the necessity of secondary rules, seems to consistently maintain the appropriate role of judicial discretion. For Dworkin the emphasis need not be on the importance of rules in the continuing process of interpretation, rather he is free to emphasize the development of principles as they are applied and reapplied. In emphasizing the minute shifts in context implied by each contingent application, Dworkin may agree that rules condition the interpretation of principles while acknowledging the developmental role played by the judiciary.

In the final analysis the difference between Dworkin and Hart seems to be far less substantial then their ground of agreement. Each theorist wishes to maintain that the law has a moral character implied by the procedural mechanisms employed in its justification. Whether called rules or principles both Hart and Dworkin also agree that the application of law is a less than precise operation requiring the weighing of various important legal standards. Hart simply wants to collapse the legal rules and principles into a single kind in order to fend off the intrusion of a moral character into the interpretation of law. Interpretation he argues is matter of applying standards and not an illumination of a legal system's broad character.

I have argued that Dworkin may be forced to concede that the interpretation of legal principles does require some nearly conclusive standards on what counts as legal. But once consensus about such standards is reached there is no reason to suppose legal principles will advance in an unaltered state. Remember, rules on Hart's account are *nearly* conclusive so even a strict reliance on rules in the interpretation of principles allows space for development. In this sense then legal rules and principles are distinct in

their capacity for content development. Legal principles reflect the morality of a legal system and as the system removes, replaces, or instantiates new rules the weight associated with corresponding principles is changed. Rules may not apply in an all or nothing fashion but their weight does not change with respect to one another, principles on the other hand reflect a growing momentum in which relative weight shifts as the legal system develops.

Finally, since the weight of legal principles shifts, the process of judicial interpretation must, to be consistent with these shifts, involve some regard for the development of the procedural morality reflected by legal principles. That is to say, the moral underpinnings of a legal system must have a substantive impact on decisions within that system if the common law is to develop consistently. I have not attempted to shown that Hart is required to agree to this contention, but he is certainly taking steps down this road when he assents to the need for interpretation of non-conclusive rules. Overall Hart's acceptance of Dworkin's emphasis on legal principles moves the discussion of morality and the law forward and for that we can be grateful.

[1] Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," p.1.
[2] Earlier here is used to demarcate two distinct positions I attribute to Dworkin at different times in his career. Specifically, by earlier I mean the Dworkin of "Hard Cases" and "A Model of Rules," and by later Dworkin I refer to the Dworkin of his Appendix replies in *Taking Rights Seriously*.
[3] Leiter, p. 2.
[4] In light of the generally shared conception of law's moral methodological underpinnings, it seems to me future debate for legal philosophy might find more ferrite ground in discussion of the impact of such moral preconditions. Specifically, it seems appropriate to discuss the effect such foundational moral assumptions have on substantial issues in law, and to what extent such a feedback loop is antithetical to the moral principles which ground the systematic development of substantive legal rules. This discussion is in my estimation an important one, but may only be adequately addressed after getting clear on the development of legal systems.
[5] H.L.A. Hart, *The Concept of Law*, 2nd ed., (New York: Oxford University Press, 1997) p. 95.
[6] Hart, p. 255.
[7] Ronald Dworkin, "Hard Cases," reprinted in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).
[8] Hart, p. 265
[9] Hart, p. 261
[10] John Austin, "The Providence of Jurisprudence Determined," reprinted in *Legal Philosophy*, ed. Larry May, et. al., (Mountain View, CA: Mayfeild Publishing Co., 2000) p. 72.
[11] There is some slight discrepancy in my use of classical natural law and Austin's conception of law, insomuch as Austin narrows the scope of law to be applicable only to entities with a will, thus negating natural law in the classical scientific sense. I ignore this difference in our respective terminology in the interest of rhetorical clarity.
[12] Austin, p. 72.
[13] Austin, p. 79.
[14] Hart, p. 84.
[15] Hart, p. 84.
[16] Hart, p. 90.
[17] Hart, p. 90. The emphasis is original.
[18] Hart, p. 91.
[19] Hart, p. 91.
[20] Hart, p. 92.
[21] Hart, p. 94.
[22] Hart, p. 96.
[23] Hart, p. 97.
[24] John Rawls, *A Theory of Justice*, (Cambridge, MA: Belknap Press, 1999) p. 207.
[25] Ronald Dworkin, "The Model of Rules I," reprinted in *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1978) p. 45.
[26] Hart, p. 100.
[27] Hart, p. 101.
[28] Hart, p. 105. The emphasis is original.
[29] Ronald Dworkin, "The Model of Rules I," reprinted in *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1997) p. 22.
[30] Ronald Dworkin, *"Richards and Positivism Revived,"* in the Appendix to *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1978) pp. 338-345.
[31] See the controversy over end of life ethics involved in the recent case of Terri Schiavo.
[32] Dworkin, p. 23.
[33] Dworkin, p.24-26.
[34] *Riggs v. Palmer*, 115 N.Y. 506.
[35] Ibid. p. 509.
[36] Ibid. p. 511.
[37] Dworkin, p. 26.
[38] Ronald Dworkin, *"The Model of Rules II"* reprinted in *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1978) p. 48.

[39] Dworkin, p. 29.
[40] Dworkin, p. 31.
[41] Dworkin, p. 32.
[42] Dworkin, p. 33.
[43] Dworkin, p. 35.
[44] Dworkin, p. 81.
[45] Dworkin, p. 84.
[46] Dworkin, p. 41.
[47] Dworkin, p. 87.
[48] Dworkin, p. 340, quoting himself in *"Hard Cases."*
[49] Dworkin, p. 112.
[50] Dworkin, p. 88.
[51] Dworkin, p. 89.
[52] Dworkin, p. 90.
[53] Dworkin, p. 101.
[54] Dworkin, p. 103.
[55] Dworkin, p. 103.
[56] Dworkin, p. 105.
[57] Ibid.
[58] Dworkin, p. 107.
[59] Dworkin, p. 109.
[60] Dworkin, p. 111.
[61] Dworkin, p. 111.
[62] Dworkin, p. 113.
[63] Dworkin, p. 116.
[64] David A. J. Richards, "Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication," *Georgia Law Review,* Vol. II, p. 1069.
[65]Richards, p. 1092.
[66] Ronald Dworkin, Appendix to *Taking Rights Seriously,* (Cambridge, MA: Harvard University Press, 1978) p. 340.
[67] See above, note 59
[68] Dworkin, p. 342.
[69] Dworkin, p. 342.
[70] The late Dworkin himself points out that the non-factual component of a principle, "is never identical with... what background morality requires" p. 342. It is difficult to see how Richards is really wrong in calling legal principles mere facts, but it seems reasonable to assent to Dworkin's claim that they also reflect something different than a fact.
[71] Dworkin, 341.
[72] Unless, of course, he also holds some belief about what that morality must be. But Dworkin is clear throughout his work that the law need not represent any specific or good morality.
[73] Hart, p. 263.
[74] Dworkin, p. 24.
[75] Hart, p. 261.
[76] Hart points out that he has already made these points at pp. 130-134, yet this non-conclusive version of rules seems to present a clear difficulty to his own theory of obligation. Since this difficulty is resolved more clearly in Dworkin, I use the phrase seeming concession as an indication of the value added by Dworkin's contribution.
[77] Cf. notes 33 and 36.
[78] Hart, p. 262.
[79] Ibid.
[80] Hart, p. 260.
[81] Hart, p. 262.
[82] Hart, p. 264.
[83] Hart, p. 265.

[84] This relies on the conception of a lawyer's education as indoctrination, as opposed to critical evaluation, but most legal professionals and law school admissions counselors seem to agree with this characterization.
[85] Hart, p. 265.
[86] Ibid.
[87] Hart, p. 264.
[88] Hart, p. 266.
[89] Hart, p. 267.
[90] Ibid.