

# THE MODEL OF PRINCIPLES

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*H.L.A. Hart's work has dominated much of current jurisprudential discussion. In a recent article evaluating Hart's conclusion that the law consists of sets of rules in the application of which judges often have a large measure of discretion, Professor Dworkin of Yale concluded that judges do not in fact possess any such discretion because the judicial application of legal rules is controlled by what he calls legal principles. The author takes exception with Dworkin's conclusions and attacks the analytical framework of rules and principles upon which it is based.*

**I**N *The Model of Rules* which was published recently,<sup>1</sup> Professor Dworkin expands a theory of judicial discretion which he had previously announced a few years ago in describing the nature of a judicial decision.<sup>2</sup> His thesis then was that it is wrong to say that a judge is ever free to decide cases any way he wishes even in those cases when there seems to be no binding authority on the point at issue. In his recent article he elaborates this contention in the course of criticizing the legal positivists' notion of judicial discretion. I believe that Professor Dworkin's theory of judicial discretion, which he has presented with great clarity, ability, and persuasiveness, is founded upon a faulty analytical base, and that whatever germ of truth his theory may or may not have, Dworkin has thus far been unable to supply any support for it. In the present article, I propose to demonstrate why my conclusions are justified. I must first, however, describe the context out of which Professor Dworkin has developed this theory and then try to state Dworkin's interesting theory of judicial discretion as succinctly as I can.

## I. THE POSITIVIST THEORY OF JUDICIAL DISCRETION

Any discussion of legal positivism must begin with a reference to the work of John Austin. For Austin all positive law could be recognized

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<sup>1</sup> Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

<sup>2</sup> Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963); cf. MacCollum, *Dworkin on Judicial Discretion*, 60 J. PHILOSOPHY 638 (1963); Dworkin, *The Case*

as being the command, either tacit or express, of the sovereign.<sup>3</sup> The sovereign, in turn, was the uncommanded commander, *i.e.*, that determinate person (or persons) who was habitually obeyed by the bulk of a particular political society and who in turn was not habitually obedient to any other determinate person (or persons).<sup>4</sup> The purpose of Austin's analysis was to provide an empirical test whereby rational men could agree on what was and what was not the law in any particular political society at any particular time. The difficulties in Austin's theory of the sovereign, in his theory of law as a set of commands, and in his concurrent theory of sanctions, which Austin viewed as an essential part of each individual law,<sup>5</sup> have been so often explored in the legal literature that no more than a passing reference to that literature is now required.<sup>6</sup> To meet these difficulties, while at the same time accomplishing the same purpose for which Austin's theory was designed, namely to provide an objective means of determining what is and what is not the law in a given political society, Austin's greatest and most sympathetic modern critic, Professor H.L.A. Hart, has put forward a theory which has dominated much of recent scholarly discussion on the nature of law.<sup>7</sup> Professor Hart rejects the notion that law is best viewed as a series of commands. The essential characteristic of any functioning legal system, he maintains, is not so much that people generally obey the law, but that they feel bound by the law. Professor Hart thus distinguishes between what he calls being *obliged* to obey the law—*i.e.*, the idea of being forced to obey the law that is connoted in the command/sanction theory of law—and what he

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*for Law—A Critique*, 1 VALPARAISO U.L. REV. 215 (1967). For further insights into Dworkin's views about the nature of the judicial process, many of which I share, see Dworkin, *Does Law Have a Function?*, 74 YALE L.J. 640 (1965), originally published as *Wasserstrom: The Judicial Decision*, 75 ETHICS 47 (1964).

<sup>3</sup> J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9-33 (Library of Ideas ed. 1954). For the sake of conciseness I have had to compress a great deal of Austin's description of the law to arrive at the statements in the text. With regard to the particular point being made in the text at this note, it should be indicated that not all commands of the sovereign, but only those *general* commands requiring the acts or forbearances of a *class*, are law. *Id.* at 19, 24. Particular commands are not law. For the statement that commands can be tacit see *id.* at 32.

<sup>4</sup> *Id.* at 193-94.

<sup>5</sup> *Id.* at 14-17.

<sup>6</sup> See H. HART, *THE CONCEPT OF LAW* 1-76 (1961). See also A. HAGERSTROM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* 20-35 (Broad transl. 1953); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 30-32, 62-64 (Wedberg transl. 1961). There are many more references to Austin and discussions of his theory in the works of Hagerstrom, and particularly Kelsen, cited herein.

<sup>7</sup> H. HART, *supra* note 6.

calls having an *obligation* to obey the law.<sup>8</sup> Hart finds this idea of acceptance, or of felt obligation, in the notion of rules. Rules not only prescribe what people are supposed to do, but, to those who accept the validity of a particular rule or system of rules, they provide a reason for acting in accordance with a particular rule over and above the unpleasant consequences that might result from a failure to observe or obey the rule.<sup>9</sup>

Hart therefore believes that the legal system of any reasonably advanced society can be best described as the union of what he calls primary and secondary rules.<sup>10</sup> Primary rules typically prescribe what the citizens should or should not do, such as pay their taxes and not murder one another or smoke in a department store.<sup>11</sup> Secondary rules, on the other hand, prescribe how primary rules are to be changed or interpreted or applied. Secondary rules typically are concerned with the allocation of basic political power in a society. They prescribe who can make law, who can amend law, and who can adjudicate disputes arising under a legal system. The fundamental secondary rule in a society Hart calls a rule of recognition.<sup>12</sup> It prescribes who is the ultimate lawmaker (or law making body) in the society and the conditions under which he (or it) can make law. The authority of all subordinate lawmakers must be traced back to the rule of recognition. Similarly, the validity of all other rules in the legal system must be traced back to this same rule of recognition in the sense that (1) they must be made by someone whose authority can be traced back to the ultimate lawmaker described in the rule of recognition and (2) their content must not contravene some prohibition contained in the rule of recognition that limits the content of the valid rules of the legal system. The validity of the rule of recognition, of

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<sup>8</sup> *Id.* at 79-88.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 89-96.

<sup>11</sup> In Hart's analysis primary rules probably also prescribe how citizens go about doing certain things such as making wills or adopting children, *id.* at 94, although they are concerned with powers, the characteristic of secondary rules, rather than obligations, which are the overriding characteristic of primary rules. *Id.* at 78. Nevertheless, when dividing the rules of a complex functioning legal system, the powers conferred by rules prescribing how wills are to be made are too trivial to be classed with the secondary rules of recognition, change and adjudication. Hart is criticized for using these somewhat differing methods for distinguishing between primary and secondary rules, *i.e.*, for shifting from a power creating-obligation creating distinction to something like a constitutional law-ordinary law distinction. See Sartorius, *The Concept of Law*, 52 ARCHIV. FÜR RECHTS-UND-SOZIALPHILOSOPHIE 161, 165-68, 175 (1966).

<sup>12</sup> H. HART, *supra* note 6, at 97-107.

course, cannot be determined by reference to any other higher rule. Rather, its validity must depend, in the last analysis, upon its acceptance by the people living in the particular society under the legal system generated by the rule of recognition. In other words, when the word validity is applied to the rule of recognition, we are not asking a question about the internal relations of a system of rules but a question of fact about the rule's acceptance. Moreover, since the validity of the rule of recognition depends upon its acceptance by at least the bulk of the individuals comprising the society, and since one can never be certain of exactly what it is that most of those individuals actually accept, any statement of the rule of recognition prevailing in any particular society will be hypothetical in nature. It will be an attempt to express, for the purpose of explaining the legal system of a given society, the ultimate organizing principle of that society.<sup>13</sup>

But to state that the legal system of a society is best considered as the union of primary and secondary rules does not exhaust the range of

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<sup>13</sup> *Id.* at 106-07. See also *id.* at 144-50. It should be emphasized that Hart's rule of recognition is itself a rule of law, the existence and content of which must be shown, and not a juristic hypothesis, such as Kelsen's *grundnorm* or basic norm, the validity of which is pre-supposed. See H. KELSEN, *supra* note 6, at 115-16. As a rule of law, it presumably must also, as discussed in the text, be able to pass the test of validity. Because there is no consistent test of validity which can be used to test both the rule of recognition and the rules of law derived from it, Hart's theory has been attacked as both incomplete and inaccurate. See Sartorius, *supra* note 11, at 180-81. This criticism has been given impetus by Hart's concession that the term "validity" is properly applied in describing relationships within a system and not in describing the relationship of the system or some part of it to external phenomena. He does not use the term validity when discussing the rule of recognition but talks instead in terms of its acceptance. See H. HART, *supra* note 6, at 105-06. While I would disagree that it is incorrect usage to describe this latter relationship in terms of validity—at the very most it is an uncommon use of the term validity—I believe Sartorius' criticism is unfounded for more basic reasons. When using the term validity within a system, we mean, under Hart's theory, that a rule is *accepted* as being part of the legal system because it is *derived* from the rule of recognition. When we say that a rule is the rule of recognition of the legal system of a given society we mean that it is *accepted* as such by the members of that society. What Sartorius seems to be saying is that one cannot use two tests of acceptance (or validity) in the same theory. I frankly see no reason why this must be so. I believe that part of Sartorius' problem arises from his belief that Hart's rule of recognition in the United States would be almost exhaustively stated by the description of what we would call American constitutional law and is thus valid in the same manner that other law is. Sartorius, *supra* note 11, at 186-90. I do not believe that Hart would agree (see citations at the beginning of this note), and I certainly do not. There are vast and important areas concerning the authority of the executive and of the Congress that have never been the subject of litigation and as to which people's beliefs about the scope of the powers involved are far more relevant than the already decided cases.

relevant discussion. What is it that a judge does when, in the course of being called upon to adjudicate a dispute arising under the legal system, he applies the law? Since, under the usual positivist view, the law consists of a set of rules, the judge must obviously apply one or more of these rules to the dispute before him. According to Hart these rules have in varying degrees a central core of meaning but are also open-textured.<sup>14</sup> The further the factual nature of the controversy departs from the factual situation subsumed under the core meaning of the rule, the more debatable is the conclusion that the judge can decide the dispute before him merely by applying any pre-existing rule. In these situations most positivists, including Professor Hart, would say that in the exercise of power validly delegated to him, the judge must make law and in effect function as a legislator. Putting the matter another way, the judge in these circumstances is said to have the discretion to decide the case as he wishes or, perhaps more correctly, to have the discretion *within limits* to decide the case as he wishes. It is this point which Professor Dworkin wishes to contest. He denies that in such circumstances the judge has discretion, in any nontrivial sense of that term, to decide the case in any manner he wishes.<sup>15</sup> It is not that Dworkin believes the judge's discretion in such situations to be more limited than the positivists maintain—and Dworkin uses Hart's theory as the most coherent positivist view—but rather that it is just plain error to say, in any nontrivial sense, that the judge has discretion to decide the case as he will. And this is so even when it is impossible for outside observers to predict, before the fact, how the judge will decide the case. Because Dworkin believes any theory maintaining that judges do have such discretion to be wrong, he therefore concludes that a theory such as Hart's, which attempts to elucidate the notion of a legal system exclusively in terms of a set or sets of rules, however large, is incomplete and inadequate. For Dworkin believes that the demonstrably false notion that judges have discretion in a strong or nontrivial sense is a logical consequence of any theory of law that focuses exclusively on rules.<sup>16</sup> Hence in *The Model of Rules* he concludes that “[i]f we shake ourselves loose from this model of rules, we may be able to build a model truer to the complexity and sophistication of our own practices.”<sup>17</sup>

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<sup>14</sup> H. HART, *supra* note 6, at 120-32.

<sup>15</sup> Dworkin, *supra* note 1, at 31. *See also id.* at 39-40.

<sup>16</sup> *Id.* at 39-40.

<sup>17</sup> *Id.* at 46. For a somewhat similar but less rigorous and in many ways less objectionable criticism of Hart, see Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968). Hughes feels that Hart is restricted to a narrow notion of

## II. THE MODEL OF JUDICIAL DISCRETION

Professor Dworkin distinguishes two weak or trivial senses of discretion from the strong or nontrivial sense mentioned above.<sup>18</sup> One of these trivial senses of the term would be used to describe the situation in which a sergeant was ordered by his lieutenant to choose his five most experienced men for a patrol. Since in the context it might be difficult to decide who the sergeant's five most experienced men are, we might wish to recognize this fact by stating that the sergeant's orders left him some discretion in the matter. If the choice were unusually difficult we might want to say that the sergeant's orders left him a great deal of discretion. We would use the second weak or trivial sense of discretion if we wished to describe the position of the umpire behind home plate in a baseball game. The rules of baseball prescribe quite explicitly what is a ball and what is a strike. The umpire behind home plate not only calls the balls and strikes, but he is also the umpire-in-chief. Consequently, his decisions as to what are balls and what are strikes are final. We might therefore wish to recognize this fact by stating that the calling of balls and strikes is left to the discretion of the umpire. In both these situations the judgment of the official in question, in one case the sergeant and in the other the umpire-in-chief, is governed by precise standards. In the one case, however, it is difficult to apply this standard in a particular context and in the other, whether the application of the standard is difficult or not, the official's decision is final and not subject to review. Dworkin asserts that it is certainly true that judges often have discretion in these two weak senses, but, in the stronger sense of discretion which is presented in a case where our sergeant is ordered to send five men on patrol and he is free to choose any of his men, Dworkin denies that judges have such discretion. In other words, the fact that judges can be wrong or that their decisions may not be completely predictable does not mean that judges have discretion to decide as they wish, nor does the fact that judges are often the final arbiters of particular issues mean that they have such discretion.

To explain why Dworkin reaches this conclusion, which to many lawyers may seem counter-intuitive, requires some reconstruction of how

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what rules are and ignores the vagner principles and still vaguer maxims which are also rules and which are often intertwined in the statements of the narrower rules with clear core meanings with which Hart is concerned. *See id.* at 424, 436-37.

<sup>18</sup> Dworkin, *supra* note 1, at 32-34.

Professor Dworkin views the legal system. Dworkin agrees that, whatever else a legal system may include, it contains rules. More crucial for the present discussion is Dworkin's notion as to what legal rules are. They are, first of all, legal prescriptions such that, if they are applicable to the facts of a controversy before a judge, they are binding upon him.<sup>19</sup> In other words, they must either be applied whenever they are applicable or else overruled. Secondly, Dworkin postulates that it is always possible to state whether or not a rule is applicable and therefore binding in a particular case. For this reason he maintains that it must be practically possible, albeit often difficult, to state exhaustively a legal rule, that is, to include within the statement of the rule all of its exceptions.<sup>20</sup> Dworkin's sources of rules are the traditional ones, namely statutes and precedents.

The crucial question for purposes of an examination of the notion of judicial discretion is what happens when, using Dworkin's concept of rules, (1) we determine that no discoverable rule is applicable, *i.e.*, is binding upon the judge in the particular case under consideration or (2) a judge wishes to overrule a rule which he has determined to be applicable and thus binding upon him. Since Dworkin rejects the notion that judges have discretion in the strong sense, they cannot, in the absence of applicable rules, decide the case as they wish. How then is their decision circumscribed? Or, to put the matter another way, how is their discretion in such a case turned into a weak sense of the term discretion? Since we spoke in terms of a weak sense of discretion when a decision had to be made in accordance with standards (*cf.* the sergeant and the umpire), we obviously need to discover some applicable standards. Dworkin believes that he has discovered these applicable standards in what he calls principles.<sup>21</sup> For Dworkin, principles, like rules, are entities that antecede the particular cases in which they are applied—they have a source external to the deciding judge. Furthermore, the principles a judge might use in justifying a decision have usually received varying degrees of legal recognition in statutes and in past cases. It is not essential, however, that they have received any such recognition although the degree of weight that a principle carries as a reason for decision will be very vitally affected by the degree of official recognition it has received in the past.<sup>22</sup> The important thing for Dworkin is that principles are different than rules.

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<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.* See also *id.* at 26 (where principles are distinguished from rules).

<sup>21</sup> *Id.* at 22-31.

<sup>22</sup> See *id.* at 41-42. See also *id.* at 22-31.

They cannot be exhaustively stated as can rules and (therefore?), unlike rules, they do not absolutely control the judge's decision.<sup>23</sup> In other words, to say that a principle is applicable is only to say that it is relevant.<sup>24</sup> *Quaere*, is a judge bound to appreciate that a particular principle is applicable in a given case? If the retreat to a higher level of abstraction in order to show that a judge's choices are always controlled is accepted, it would seem that a judge *is* bound to appreciate the applicability of relevant principles.

The important remaining question for Dworkin is deciding the comparative weight of competing principles cited to and used by a court. For, unlike rules again, two or more principles can and almost certainly will be applicable to any particular case. Dworkin admits that this is a difficult case.<sup>25</sup> Even if his theory is otherwise true, it will thus founder unless he can demonstrate how we are to decide the weight to be assigned different principles. Presumably in his forthcoming book, of which *The Model of Rules* is a chapter,<sup>26</sup> he will provide some enlightenment on that subject. Whether or not Professor Dworkin will be able to come up with an acceptable theory for assigning weight to competing principles, however, is not the point I wish to pursue in this article. I reject his distinction between rules and principles and particularly the analysis upon which it is based. I hope to justify this rejection in the discussion which follows. If I succeed in so doing, I shall then have shown that Dworkin has not proved his case that judges cannot be said ever to possess discretion in the strong sense, since he rested that case on a clear-cut logical distinction between rules and principles. At the very most an examination of his theory may lead us to question whether any theory which looks at law exclusively or primarily or even partially as a collection of rules is adequate. But this is another matter and that the law can at least be partially, although not completely, described in terms of rules is a proposition which Dworkin is not disposed to question.

### III. THE EVIDENCE EXAMINED

Dworkin's analysis is based on two very basic assumptions about the nature of legal rules neither of which I think is justified. The first is that it is possible, although perhaps often difficult, to state a legal rule

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<sup>23</sup> *Id.* at 25-26. See also *id.* at 35-36.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> *Id.* at 27.

<sup>26</sup> *Id.* at 14 (unnumbered footnote).



completely so that its statement includes all situations to which it is applicable and excludes all situations to which it is not applicable.<sup>27</sup> In other words, the complete statement of a rule must and can include a statement of all exceptions to the rule. Principles are distinguished from rules in that they cannot be so stated. I think this view as to the nature of rules is clearly erroneous. Dworkin gives no examples of the complete statement of a legal rule but assumes it can be done. But what are legal rules? They are nothing but abstractions which scholars writing articles, lawyers arguing cases or preparing opinions, and judges deciding cases formulate as a result of examining the past cases and statutes on point. There are no authoritative statements of the rules of the common law, let alone any complete statements of such rules, authoritative or otherwise.<sup>28</sup> Even the so-called rules of real property law in the heyday of Blackstone and Kent were never complete statements of when and where they were applicable and it is extremely doubtful that it ever was possible so to state them. There were exceptions to the Rule in Shelley's Case and it was never possible to state with certainty the complete class of these exceptions.<sup>29</sup> Indeed, in a case involving the so-called Rule of Shelmor's

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<sup>27</sup> See note 20 *supra*.

<sup>28</sup> As for that chimaera the *ratio decidendi* of a case, the best minds in the profession have joined in the search for it, but they have disagreed among themselves even with respect to what it is they are searching for. Cf. G. WILLIAMS, *LEARNING THE LAW* 71-77 (7th ed. 1963). Compare Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161 (1930), with Gooderson, *Ratio Decidendi and Rules of Law*, 30 *CAN. B. REV.* 892 (1952). For a general review of the subject see J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 267-80 (1964). See also K. LLEWELLYN, *THE BRAMBLE BUSH* 56-69 (1951 ed.); Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, *OXFORD ESSAYS IN JURISPRUDENCE* 148 (1961).

<sup>29</sup> A modern attempt at the statement of the Rule in Shelley's Case is contained in *RESTATEMENT OF PROPERTY* §§ 31, 312, and 313 (1936). In the principle section, Section 312, the very lengthy statement of the Rule is stated to be subject to the exception of "when the estate for life is subject to a condition precedent which does not also attach to the remainder." In a Caveat at the end of Section 312 the following appears: "The Institute takes no position as to the set of facts excepted from the rule stated in Subsection (1) by the words, 'except when the estate for life is subject to a condition precedent which does not also attach to the remainder.' The authority upon this set of facts is insufficient to permit the statement of a rule applicable thereto." In a special note to this same section the American Law Institute also pointed out that its statement of the Rule in Shelley's Case was only applicable when the ancestor is given a life estate. Earlier authorities had said the rule applied whenever the ancestor was given a freehold interest, but the Institute declared that an absence of American authority on point and the Institute's desire "to expend its energies in the restating of the living law, where its efforts may be helpful to the profession, have caused the statement of the rule in the Blackletter in the limited

case which concerned the meaning to be given to the word "money" in the construction of a will, the House of Lords criticized the attempts by past judges to enunciate some complete rule on the subject when faced with the need to construe some particular will.<sup>30</sup> When one leaves the fields of real property and of wills, any attempt to state completely some rule of the common law is hopeless. Every attempt to state an inclusive rule for when a man will be held to have negligently injured another has foundered. The Restatements of Law were never intended to be complete statements of the law in this sense, either as it was, is, or should be.<sup>31</sup> Witness the Restatements' frequent use of caveats to make this clear in many particular situations. Furthermore, the Restatements of Law were never intended to be enacted into law to serve as codes for the field of contracts or of torts or of real property. Finally, even in the case of statutes which are officially enacted in a particular verbal form, no one can pretend that he is able to state their complete meaning. First of all, the language of any statute is, in varying degrees, vague.<sup>32</sup> This vagueness is almost never completely resolved by the course of judicial interpretation. In the second place, courts are continually reading exceptions into statutes and it is impossible to state that the range of possible exceptions has been exhausted. Returning to Dworkin's precise point, one can never state with any degree of confidence, let alone certainty, exactly what at any particular moment is and is not within the coverage of the statute.<sup>33</sup>

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form." Thus, leaving aside the exceptions, there was still some small doubt as to what exactly was the core of the Rule.

<sup>30</sup> *Perrin v. Morgan*, [1943] A.C. 399, 408 (speech of Viscount Simon, the Lord Chancellor). See also Mr. Justice Harlan writing for the Court in *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 88 S. Ct. 733 (1968): "[T]he error made by the Court of Appeals was precisely its reliance on formulas extracted from their contexts rather than on pragmatic analysis. . . ." *Id.* at 743 n.16.

<sup>31</sup> To pursue the purpose behind the Restatements in depth one should start with the materials and citations contained in H. M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 748-71 (tent. ed. 1958). Leaving aside the problem that the various Reporters were obliged to choose between competing authority and sometimes to state a coherent rule where none was stated in the authorities, it was finally decided, when the initial Restatements were prepared, only to restate existing law which was admittedly fragmentary and incomplete. Since 1953, the American Law Institute has adopted the policy of actually reflecting the state of the authorities, and whatever conflict there was in the policies and rules, in the comments to each section of the Restatements.

<sup>32</sup> See Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885 (1964).

<sup>33</sup> In *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), a statute unqualifiedly forbidding the importation of contraceptive devices into the United States which had been on the books in substantially the same verbal form since 1873 was construed to prohibit such importation only when it was for "immoral purposes."

The second erroneous assumption about the nature of legal rules develops out of the first. Dworkin contends that not only can we completely state a legal rule but that we can definitely ascertain when that rule is applicable to a given set of facts and when it is not.<sup>34</sup> This assumption is essential, for it is only after we have ascertained that a given factual situation is not covered by any existing rule, or someone has raised doubts as to whether as a matter of policy that factual situation should be covered by a particular rule which does apply, that Dworkin's principles come into play. Principles in short are used to decide cases not covered by existing rules, or when we wish to overrule existing legal rules. In all other situations the applicable legal rule must be applied because, as already noted, an applicable rule is binding and we can definitely ascertain when a rule is or is not applicable. As a corollary to these views Dworkin does not concede that two or more *valid* legal rules can be applicable to the same factual situation.<sup>35</sup> Only one such rule can be valid and presumably it is the duty of the judges to determine which rule this is and then to apply it to the case in question.

Dworkin's assumption that the applicability of particular relevant rules to particular sets of facts can be definitely ascertained, and that the important issue before the courts is whether to apply the applicable rule or to create a new one, is the most counter-intuitive of all his points. To most people schooled in the law the major and by far the most important and difficult part of most law suits is determining whether some asserted statute, precedent, or what some people call a rule, is in fact applicable. In relation to this problem the other problems involved in litigation seem relatively easy to analyze. Dworkin, however, appears to believe that determining the applicability of a given rule to a particular factual situation is not an especially difficult task, but rather one that can be done relatively mechanically.<sup>36</sup> I think this is clearly shown by Dworkin's analysis of the cases he cites in support of his overall conclusions about the model of rules and the nature of judicial discretion. It is to these cases that I shall now turn.

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Importation by physicians was held *not* to be for "immoral purposes." This and other examples are discussed in Christie, *supra* note 32.

<sup>34</sup> Dworkin, *supra* note 1, at 25.

<sup>35</sup> *Id.* at 27.

<sup>36</sup> Dworkin recognizes that the application of a *known* rule to a set of facts covered by the rule can be difficult, *id.* at 37, but the possible difficulty of deciding whether a rule is applicable to a given set of facts in the first place is never adverted to.

To demonstrate his point, Dworkin analyzes two well-known cases decided in different eras, one in 1889 and the other in 1960. If these cases supported his thesis, Dworkin could argue with some persuasiveness that he had succeeded in presenting some valuable insight into the fundamental and essentially timeless nature of the law. Unfortunately, neither case supports his thesis. The earlier of the two cases discussed by Dworkin is *Riggs v. Palmer*.<sup>37</sup> In that case Elmer Palmer, who was the major beneficiary under his grandfather's will, murdered his grandfather in order to inherit the old man's property. There was some evidence that the grandfather, who was a widower and who had remarried subsequent to making the will, had expressed some intention of changing his will. In Dworkin's view:<sup>38</sup> (1) This was a case which was covered by applicable legal rules, to wit, the statutes relating to the making, revoking, and probating of wills. (2) These legal rules, because they were applicable, were binding, unless changed. (3) These legal rules bound the New York Court of Appeals to uphold Elmer Palmer's claim under the will. (4) The Court of Appeals rejected Elmer's claim and thus changed the law applicable to Elmer's case. (5) This change in applicable legal rules was justified by an appeal to principles, the chief one of which was that no man should profit by his own wrongdoing. (6) Therefore, the case supports Dworkin's distinction between principles and rules. With all due deference, I must submit that Dworkin's analysis of *Riggs v. Palmer* is quite inaccurate.

The crucial first step in Dworkin's analysis is that the statutes governing the making, the revoking, and the probating of wills established a rule that a beneficiary who murders a testator can nevertheless receive a bequest under the testator's will and that this rule stated the law at the time the action in *Riggs v. Palmer* was commenced. Where was this rule stated? There never had been a previous reported case such as this in New York. The statutes in question talked about the number of witnesses necessary to make a valid will and similar matters. Nothing remotely connected with what happens if a beneficiary murders a testator was contained in the statutes. What is more to the point, the New York Court of Appeals never for one moment conceded that these statutes created a rule of law that beneficiaries who murder testators can nevertheless take under

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<sup>37</sup> 115 N.Y. 506, 22 N.E. 188 (1889). The portions of this case quoted in the text are taken from the official report as the Northeastern Reporter's version differs from the official report in paragraphing and other small technical respects.

<sup>38</sup> The case is discussed in a number of places in Dworkin's article, the principle pages, particularly for my purposes, being Dworkin, *supra* note 1, at 23-24, 38.

the testators' wills. It is true, as Dworkin quotes the court to prove his point, that the court did say,

It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.<sup>39</sup>

But even taken alone and completely out of context this statement does not support Dworkin's conclusion that there was a pre-existing rule of law that beneficiaries who murder testators can nevertheless take under the testators' wills. Furthermore, the statement just quoted was not made in isolation and the context conclusively shows that the court rejected Dworkin's view as to what the pre-existing rule of law was. The court declared that it could never have been the intention of the lawmakers to permit the beneficiary to take in these circumstances.<sup>40</sup> It noted what Aristotle and others had said about the inevitable deficiencies in any attempt at a general statement of legal norms and the duty of judges to supply these deficiencies. It also adverted to one of the oldest maxims of statutory interpretation in existence, namely that statutes are not to be construed to produce absurd results, and it referred to collections of cases where general language in a statute was given a limiting construction by the courts. The court then concluded:

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.<sup>41</sup>

The court then went on in a passage partially quoted by Dworkin:

Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime.<sup>42</sup>

It should be noted that the court did not say *even if* there were a rule of law that . . ., it said *besides* . . .

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<sup>39</sup> 115 N.Y. at 509, 22 N.E. at 189.

<sup>40</sup> *Id.* at 509-11, 22 N.E. at 189.

<sup>41</sup> *Id.* at 511, 22 N.E. at 190.

<sup>42</sup> *Id.*

After this general discussion the court became more specific. It noted that the Supreme Court of the United States had held that, sanctity of contract or not, the beneficiary of a life insurance policy who had murdered the insured could not recover the proceeds of the insurance.<sup>43</sup> The court then went on to point out that it had long since been held that, statutes on the making, revoking, and probating of wills notwithstanding, a will procured by fraud could be avoided.<sup>44</sup> In the light of these cases how anyone could assert that there was a settled pre-existing rule that beneficiaries under wills who murdered testators could still inherit under the will is beyond me. The dissent in *Riggs* asserted that there was a rule<sup>45</sup> but it never came to grips with the exception for fraud which, as the majority noted,<sup>46</sup> had been recognized in England and other common-law jurisdictions with a statutory framework similar to that in New York. In my judgment the dissent's failure to distinguish the fraud exception from the murder exception makes its assertion about *the settled* pre-existing law difficult to accept.<sup>47</sup> At any rate the majority never accepted that assertion for a moment.

The second case cited by Dworkin to illustrate this point that there is a qualitative difference between principles of law and rules of law, that principles are not a vaguer or more general type of rule but something entirely different, is *Henningsen v. Bloomfield Motors, Inc.*<sup>48</sup> This was a very complex case with considerably more issues than were involved in *Riggs v. Palmer*. The facts were as follows:<sup>49</sup> Mr. Henningsen and his wife visited an automobile dealer's showroom to look at new Plymouths. Mr. Henningsen wished to buy his wife a car as a Mother's Day present, and, according to the Henningsens, this intention was communicated to the

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<sup>43</sup> *New York Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591 (1886).

<sup>44</sup> 115 N.Y. at 512, 22 N.E. at 190.

<sup>45</sup> *Id.* at 515-16, 22 N.E. at 191.

<sup>46</sup> See note 44 *supra*.

<sup>47</sup> Before *Riggs v. Palmer*, a cautious man could have said at most that New York's law on the subject was uncertain. The approach to statutory interpretation taken by the court in *Riggs*, as well as the result it reached, was criticized in Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382-83 (1907). Pound is in turn sharply criticized in H. M. HART & A. SACKS, *supra* note 31, at 97-102. Hart and Sacks also point out—and the cases they cite fully support their assertion—that English courts have had no trouble denying murderers the proceeds of the deceased's insurance policies or benefits either under the deceased's will or from the deceased's intestacy, and that the English cases have been followed in Australia and Canada. *Id.* at 96.

<sup>48</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>49</sup> See *id.* at 364-69, 161 A.2d at 73-75.

automobile dealer. After the Henningsens selected a car, a purchase order was prepared which only Mr. Henningsen executed. The provisions of the purchase order were printed in various sizes of type with the smallest type reserved for a statement to the effect that the purchase order comprised the entire agreement between the parties and that no other agreement or understanding of any nature "has been made or entered into, or will be recognized." Provisions which were more to the interest of the dealer, such as that only cash or certified check would be accepted in payment for the car and that the agreement would not become binding upon the dealer until accepted by an officer of the company were printed in larger type on the same page. The other side of the purchase order was described by the court in the following terms:

The reverse side of the contract contains 8½ inches of fine print. It is not as small, however, as the two critical paragraphs described above. The page is headed "Conditions" and contains ten separate paragraphs consisting of 65 lines in all. The paragraphs do not have headnotes or margin notes denoting their particular subject, as in the case of the "Owner Service Certificate" to be referred to later. In the seventh paragraph, about two-thirds of the way down the page, the warranty, which is the focal point of the case, is set forth.<sup>50</sup>

The court then quoted verbatim the warranty paragraph. The first sentence stated that no warranties express or implied were made by either the dealer or the manufacturer except as stated in that paragraph. In the succeeding sentences the manufacturer warranted each "new motor vehicle (including original equipment placed thereon by the manufacturer except tires) . . . to be free from defects in material or workmanship under normal use and service."<sup>51</sup> The manufacturer's liability under its warranty was then expressly limited

to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle *to the original purchaser* or before such vehicle had been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose *to its satisfaction* to have been thus defective. . . .<sup>52</sup>

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<sup>50</sup> *Id.* at 367, 161 A.2d at 74.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (emphasis added).

Finally any other warranties express or implied were again disclaimed as were all other obligations and/or liabilities. At trial the manufacturer and joint defendant, the Chrysler Corporation, apparently had the temerity to argue that this warranty only ran to the original purchaser, to wit, Bloomfield Motors, the dealer.<sup>53</sup> Returning to the factual background, the car was delivered with an Owner Service Certificate in it to Mr. Henningsen two days later. The Owner Service Certificate contained the same provisions as those set forth on the back of the purchase order except that an additional paragraph was added by which the court declared "the dealer extends that warranty to the purchaser in the same manner as if the word 'Dealer' appeared instead of the word 'Manufacturer.'" <sup>54</sup> Less than two weeks later, while Mrs. Henningsen was driving on a smooth stretch of four lane highway, the car suddenly veered sharply to the right and crashed into a highway sign and then into a brick wall. No other vehicle was in any way involved.

At the trial an experienced insurance appraiser testified that there must have been a mechanical failure in the steering mechanism. The trial court felt that there was not enough evidence to permit the case to go to the jury on a theory of negligence but did submit the case to the jury on the theory of implied warranty of merchantability, *i.e.*, that the car was not reasonably fit for the general purpose for which it was sold. The jury returned a verdict against both the dealer and the manufacturer, and the defendants appealed from the judgment entered thereon. The plaintiffs, Mr. and Mrs. Henningsen, thereupon cross-appealed from the dismissal of their claim based upon negligence.

The great number of important legal issues involved in this case is apparent. Were there any warranties running from the manufacturer to Mr. Henningsen, the purchaser, and if so did they also run to Mrs. Henningsen, the ultimate user for whom the automobile was bought? What

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<sup>53</sup> I think this is the fair purport on the court's finding that, despite the fact the franchise agreement between Chrysler and its dealer expressly declared that the dealer was not its agent, the dealer nevertheless acted as its agent to extend the warranty to Henningsen. This finding was premised on a declaration that the courts look to the factual relations between the parties in deciding whether an agency relationship exists. To support this position the court cited several cases in other states which had held that "original purchaser" meant "the purchasing member of the public." See *id.* at 373-75, 161 A.2d at 78. This portion of the court's opinion would make no sense unless Chrysler had asserted in the trial of the case that the manufacturer's warranty which ran to the "original purchaser" did not run to the first purchasing member of the public.

<sup>54</sup> *Id.* at 368, 161 A.2d at 75.



was the effect of the disclaimer of all other express and implied warranties, and of imposing a limitation of liability under all warranties made *to the original purchaser*? What warranties were made by the dealer and to whom? If there was an implied warranty of merchantability was there sufficient proof of its breach? The plaintiffs' cross-appeal raised the further issues of whether their complaint stated a cause of action for negligence, and, if so, whether there was sufficient proof to take the case to the jury. The single issue upon which Dworkin focused was the effect of the disclaimer of all warranties express or implied other than those stated in the purchase order and in the Owner Service Certificate.<sup>55</sup> This was not necessarily the most important or difficult point before the court, but that of course is beside the point. Dworkin claims that at the time the *Henningsen* case was brought there was a definitely ascertainable pre-existing rule of law which provided that, on the facts of the *Henningsen* case, the disclaimer was effective to prevent the arising of any implied warranty of merchantability. Dworkin did not put the matter quite so affirmatively. Rather, as he stated the issue, the plaintiffs were arguing that, at least on the circumstances of their case, the manufacturer ought not to be protected by this limitation, but plaintiffs were "not able to point to any statute, or to any established rule of law, that prevented the manufacturer from standing on the contract."<sup>56</sup> This obviously amounts to saying that there was a pre-existing rule of law that on these facts the manufacturer could rely on the disclaimer. Otherwise one would be forced to conclude that there was no applicable pre-existing rule of law, and the context makes perfectly clear that this is not what Dworkin is saying. Indeed, later on in his article, when referring in capsule form to his discussion of the *Henningsen* case, Dworkin specifically states "in *Henningsen* certain rules about automobile manufacturer's liability were *altered* on the basis of the principles and policies I quoted from the opinion of the court."<sup>57</sup> Because the rule that the disclaimer was effective existed and was applicable, under Dworkin's analytical scheme the court was bound to apply it or change it. From the court's failure to apply the rule, Dworkin invokes his familiar notion of principles, the content of which he takes from the court's general statements about public policy, to justify the departure from what he considers the accepted pre-existing rule of law on the subject.

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<sup>55</sup> See Dworkin, *supra* note 1, at 24.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 38.

Again, I submit that this analysis is seriously inadequate and inaccurate. I do not believe any experienced lawyer examining this case could conclude that on any issue involved there was or was not a clearly applicable pre-existing legal rule. If anything, this case demonstrates that looking at the facts of a case does *not* permit the conclusion that there is only one valid legal rule applicable to the case—all other asserted rules being invalid—and that the rule can be exhaustively stated. Indeed, on every point at issue there was authority pointing both ways, and the New Jersey court did a superb job of marshalling the authorities. The court pointed out, in regard to the issue of privity, how that concept had been extended to include contemplated users of foodstuffs and to persons like the Henningsens who bought the item in question partly as the result of advertising representations made by the manufacturer directly to them over the radio, television, and other mass media.<sup>58</sup> Indeed, on all the disputed issues I believe most sophisticated observers would have said that the plaintiffs' case was the stronger. Returning, however, to the specific point put in issue by Dworkin, the pre-existing legal effect of the disclaimer, the court never for one moment agreed that there was a pre-existing rule of law that, on the facts before it, the disclaimer was effective. No New Jersey case had ever so held. There was a New Jersey case which stated what the *Henningsen* court called a general principle, but what Dworkin would probably call a rule of law, to the effect that in the absence of fraud one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.<sup>59</sup> Leaving aside that under conventional case analysis broad statements such as this are only dicta, there was authority in New Jersey to the effect that, even in the absence of fraud, contract disclaimer clauses could be avoided. This authority appeared subsequent to the formulation of the so-called general rule which Dworkin seems to think stated the New Jersey law on the subject, but well prior to the *Henningsen* case. In 1911 the Court of Errors and Appeals in New Jersey had thrown out a disclaimer on a baggage check that limited the liability of a common carrier for loss or damage in transit.<sup>60</sup> In 1951, in a case decided on other grounds, the Appellate Division of the New Jersey Superior Court had questioned the validity of clauses on stop

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<sup>58</sup> See 32 N.J. at 378-84, 412-17, 161 A.2d at 80-84, 99-101.

<sup>59</sup> *Id.* at 386, 161 A.2d at 84. The case was *Fivey v. Pennsylvania R.R.*, 67 N.J.L. 627, 52 A. 472 (E&A 1902), and it involved the effect of a release given by a worker who had received benefits from a "relief fund."

<sup>60</sup> *Hill v. Adams Express Co.*, 82 N.J.L. 373, 81 A. 859 (E&A 1911).

payment orders exonerating the bank from liability.<sup>61</sup> In the light of this New Jersey authority as well as the many, many cases in other states involving these and other types of contracts of adhesion where the public has no option but to use a printed form prepared by the disclaiming party,<sup>62</sup> it is extremely difficult to understand how anyone could categorically assert the validity of such clauses as a pre-existing rule of New Jersey law. If one could have stated anything on the point beforehand it was that, in the absence of proof that the clause had been brought to plaintiffs' attention, the disclaimer would most probably be held invalid. What would have been difficult to predict is whether the disclaimer would be held invalid because it was not brought to the Henningsens' attention or because, in the context in which it was procured, it was unfairly obtained. There was authority for both positions. The New Jersey court chose the latter. Of course the court referred to public policy. There was no reason why it should not have. But that reference was not because it lacked sound narrow "legal" grounds as well for its decision. Indeed, the court cited reasons which would have entitled it to throw out the disclaimer on other grounds as well. Not only was there an apparently conscious attempt to bury it and the warranty in a maze of print, but the warranty to which the disclaimer was attached was worded to confuse the purchaser. The warranty from the manufacturer was apparently drafted to run only to the original purchaser. No attempt was made to explain to prospective purchasers, such as the Henningsens, that this did not include them, but only the dealer. Furthermore, the manufacturer was obliged to honor its limited warranty only after the original purchaser had at his own expense shipped the part (the whole car?) back to the factory and proved to the *manufacturer's satisfaction* that the part was defective as to material or workmanship. Such provisions raise serious mutuality problems, to say the least. As against the dealer, the plaintiffs' case was stronger because the single relevant piece of paper that Mr. Henningsen actually signed—the purchase order—only contained a disclaimer by the manufacturer and none by the dealer whose own disclaimer was contained in the Owner Service Certificate which was on the front seat of the car when it was delivered.

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<sup>61</sup> Reinhardt v. Passaic-Clifton Nat'l. Bank & Trust Co., 16 N.J. Super. 430, 436, 84 A.2d 741, 743-44 (App. Div. 1951), *aff'd per curiam*, 9 N.J. 607, 89 A.2d 242 (1952) (release held invalid because given without consideration).

<sup>62</sup> These cases are copiously cited by the *Henningsen* court. See 32 N.J. at 388-98, 161 A.2d 86-91.

## IV. CONCLUSION

While one must apologize for this long discussion of the cases, it was essential to demonstrate not only their failure to support Dworkin's thesis but also to show that Dworkin's analysis is just plain wrong. One cannot exhaustively state legal rules so that the statement of the rule includes the complete statement of its exceptions. Furthermore the decision as to when a legal rule is or is not applicable is a very difficult one. I would say it is the most difficult task in the law. As a corollary, two or more different but not necessarily contradictory rules are often apparently applicable to the same situation, and this overlapping is not always solved by the invalidation of one such rule. There are a lot of things wrong with the Model of Rules. One is that trying to state what the rules are in sufficiently precise terms is an impossible task. Rules are helpful tools if one does not take them too seriously and expect too much of them. Whatever defects are contained in the Model of Rules are not, however, cured by the assertion of a sharp distinction between rules and principles, which are not vague rules but something different. In fact one might say that Dworkin's principles are themselves closer to what most people would call rules. The sharp distinction between principles and rules that Dworkin draws is simply not supported by the cases. Without this support his two level decision-making procedure, advanced to show that judges never have discretion in the strong sense when, according to the positivists, the legal rules in point are open-textured, collapses. The cases show rather that questions of policy and questions of the applicability of so-called legal rules are decided together and not separately.

Nevertheless, the crucial inquiry which Dworkin has very ably isolated is how much leeway if any do judges have in the decision of cases, particularly the so-called difficult cases where one is inclined to say that different judges might for a variety of reasons, including those of personality, decide the case differently. Dworkin suggests that in such cases judges could decide the case wrongly and, given a particular constitutional framework, the decision whether right or wrong could be unreviewable and thus final. So far we would all agree. Dworkin goes further, however, and states that it is error to conclude, even within limits, that judges can decide such cases as they wish. We are waiting to see how or why this is so or even whether it should be so. It is certainly not because there is a clear-cut distinction between rules and principles so that, when rules conflict or are inapplicable, we can retreat to a different logical level

where judges' choices are still controlled and decide the case on principle.

If the positivists have said anything it is that as we leave what most of us would agree is the "core" meaning of any rule, precedent or statute, we have difficulty applying the rule, precedent, or statute. Dworkin ignores this question and implies that it is easy to answer. But how do we answer this almost insoluble question occasioned by the vagueness of language and the perfectly natural human impulse to attempt to generalize our experience and expectations? *A la* Dworkin we might point to things called principles which are just vaguer examples of the same type of entities. Thus, to take the case of rules, since we have difficulty in formulating and applying rules because of the vagueness of language, we look for even vaguer rules called principles to help us out of our difficulty. Presumably, if we have difficulty in applying principles we would look to still vaguer rules, which we would perhaps call maxims or second-order principles, and so on *ad infinitum*.<sup>63</sup> This may be in fact what courts do, but to assert that this process shows that courts are not free to decide at least some cases in accordance with individual predilections is a non sequitur. If anything, it shows the opposite to be true. The broader the inquiry made by the judge the easier it is to find support for any of a number of possible decisions in any given case. The principle of "freedom of contract" is countered by the principle of "unjust bargain" which in turn is countered by the principle or maxim of "primacy of the legislature in making changes in the law," and so on. In sum, if we wish to show that judges are circumscribed in the results they can reach even in the so-called difficult case, we may have to try a fresh approach. A legal universe of rules and principles will simply not do the job. Perhaps the answer is to abandon the attempt to define or analyze law in terms of either rules or principles or both together and try another tack. My own belief is that this is precisely what will have to be done to make any progress in this direction.

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<sup>63</sup>This is how Professor Hughes looks at the operation of the legal system. See note 17 *supra*.

