

## Session 4 Dworkin, selections from *Taking Rights Seriously*

### *Dworkin on Hart's Model of Rules*

Dworkin identifies these three propositions as forming the core of the legal positivist position:

- (1) The law of a community is a set of special rules used to determine what kind of behavior will be punished or coerced by the state; these rules can be identified by tests having to do not with their *content* but with their *pedigree* (the manner in which they were adopted or developed).
- (2) The set of these rules is exhaustive of the law. And case not clearly covered by them must be decided by a judge or official "exercising his discretion", which requires him to reach beyond the standards established by law itself. (In a system that recognizes judicial precedent as a proper pedigree for law, this means the judge will be making *new law from the bench*.)
- (3) When no clear and valid legal rule covers a case, and the judge must exercise his discretion, he is not enforcing a legal right and or a legal obligation.

### *Rules v. Principles*

Dworkin begins his case against Hart's positivism by drawing a distinction between two kinds of considerations judges often take into account when deciding cases: *rules* and *principles*. Some differences:

- (1) Rules are applicable in an all-or-nothing way: when they apply to a case, they determine its outcome.
  - Example: the three strikes rule in baseball – an umpire couldn't acknowledge the validity of the rule and still decide that in this case, the batter should get a fourth strike. Rules may have exceptions built into them (e.g., the catcher drops the ball), but these could in theory all be spelled out in a complete statement of the rule. Two fully-spelled-out, conflicting rules cannot both be valid.
- (2) Principles are exceptionless, and needn't determine the outcome of a case even where they're acknowledged to be applicable. Conflicting principles might both be applicable to a particular case.
  - Question: in what sense might principles *conflict*?
- (3) Relatedly, principles, unlike rules, *have weight*, and two valid principles may weigh in different directions on one case. In applying principles, we must assess their weight. Dworkin sees principles as functioning like *reasons*.
- (4) Example of a rule: A valid will must have three witnesses.  
Example of a principle: No man may profit by his own wrong.
- (5) How would we react differently to a conflict of rules v. a conflict of principles?
- (6) Two kinds of principles: principles *proper* are principles of justice or fairness, which protect *rights*, as opposed to being aimed at achieving particular goals; *policies* aim at achieving particular goals (e.g. economic efficiency, the prevention of automobile accidents, etc.) *Question*: can this distinction be maintained? (It will be important

later, when Dworkin argues that we have more reason to be concerned about judicial appeal to policy than to principle.)

So: one problem with Hart's model of rules is that it cannot accommodate an important part of the law: the role played by principles.

Two ways of accommodating principles:

- (1) Treat principles in the same way we treat rules of law: as elements of the law that judges are legally bound to take into account.
- (2) Treat principles as external to law, and appeals to principle as extra-legal: as judges reaching beyond the law to make decisions the law itself does not obligate them to make. In such a case, Hart might say, a judge *exercises discretion*.

### *Three Kinds of Discretion*

There are three different things we might mean, according to Dworkin, when we claim that judges must exercise discretion in deciding hard cases:

- (1) Discretion as the use of *judgment*: judges must exercise discretion in the sense that determining how they legally ought to rule cannot be done mechanically but requires them to use judgment. (Weak)
  - Other examples: a referee deciding which boxer has won a fight; a sergeant, ordered to form a team of his most experienced soldiers, deciding who is most experienced.
- (2) Discretion as *finality*: judges may have discretion in how they rule if their ruling is the final arbiter of the case – it can't be overturned. (Weak)
  - Other examples: a second-base umpire's ruling that a runner reached the base before the ball did.
- (3) Discretion as *freedom from standards* set by the authority granting discretion: judges may have discretion if the standards of law governing how they may decide cases have nothing to say about the case. (Strong)
  - Other examples: sergeant ordered to pick five men for his team, with no further instructions, may exercise his discretion in choosing them.
  - Dworkin notes that even discretion in this *strong* sense does not exclude criticism – there may be other standards by which the judge's or the sergeant's decisions may be criticized, but those standards won't be those established by the authority granting him discretion: they're external standards.

Dworkin argues that a judge's having discretion in the first or second sense in no way entails his have discretion in the third sense: indeed, the first sense of discretion *precludes* the third, because it makes explicit reference to the internal-to-law standards governing the judge's decision.

*Legal Realists*, according to Dworkin, conflate the second and third sense of discretion: they confuse *finality* with *infallibility relative to internal standards*.

*Model-of-Rules theorists like Hart* conflate the first and third sense of discretion: judges must often exercise judgment in deciding hard cases; we shouldn't be misled by this into concluding that in deciding such cases, judges reach beyond the laws they are bound to apply. Hart's claim that judges who appeal to principles to decide hard cases are exercising (strong) discretion misdescribes, according to Dworkin, what judges do in such cases.

- *What's preferable about taking principles to be internal to law, as Dworkin claims? And why is the dispute not merely verbal?*

Hart: while all rules have a core of settled meaning, there's a "penumbra" of cases where the meaning of the rule is indeterminate (e.g. "No vehicles in the park). In such cases, the law does not contain anything that compels the judge to settle a case one way rather than another, and the judge must appeal to extra-legal considerations to make his decision. In such cases judges *make*, rather than *apply*, the law. Hart sees his account as occupying a reasonable middle ground between the extreme rule-skepticism of the Legal Realists (according to whom judges always have the discretion to rule as they like) and Dworkin's view that the law is almost maximally determinate.

Dworkin: legal principles are *internal* to law. Judges deciding hard cases have a *legal obligation* to take principles into consideration (though probably not to give them a particular weight, so long as they proceed conscientiously). A judge's job is to use principles to interpret the law and respond to previous rulings in such a way as to make the best sense out of the legal system he has inherited: judicial decision-making compared to writing a chain novel

"According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." (*Law's Empire*, p. 225)

*Dworkin's criticism of Hart:*

- (1) It's a social fact, which the positivist must acknowledge, that judges very frequently reject established rules (even in cases, like *Riggs*, where the meaning of the established rule is straight-forward).
- (2) Since general acceptance is a precondition of the existence of a secondary rule, it cannot be that the rule of law forbids such overturning of previous decision. Instead, it allows judges to overturn such rules on occasion. (Otherwise, we'd have to conclude that there is no rule of law in the US and UK, e.g.)
- (3) But then there must be *some* standards that are internal to law – standards that specify *when* a judge may reverse a previous decision. Otherwise, the judge could reverse *any* decision, and then we would not, according to positivism, have rule of law at all (because judges would not see themselves as bound by the rules). The standards judges appeal to in such cases look like *principles*, not rules... (e.g. *Riggs*).
- (4) These "standards" are themselves to be weighed against the standards that argue against departure from precedent: legislative supremacy, the unfairness of *ex post facto* legislation...

- (5) But these standards are themselves *principles*: taking them all into account is a matter of *weighing* the pros and cons.
- (6) So at least some principles are internal to law.

In short: there is no “middle ground” to be occupied between the Legal Realists and Dworkin’s view. When judges overturn previous decisions or introduce new rules by appeal to principle, they must be exercising discretion at most in the first, *judgment-based* sense. Otherwise we can’t explain *when* judges have discretion (in the strong sense) without concluding that the *always* have it.

*Where does this leave Hart’s positivism?*

- Dworkin has been arguing against the *second tenet* of legal positivism: the claim that legal rules are exhaustive of law, and that judges must exercise strong discretion in deciding cases not explicitly determined by the rules. Dworkin says the law contains *principles*, not just rules, and that these guide judicial decisions in hard cases.
- What about the third tenet: the claim that judges deciding hard cases that force them to go beyond the rules are not enforcing legal rights or obligations? If judges in such cases are constraint by standards *internal to law*, a door is opened to the possibility that constellations of principles themselves establish legal obligations.
- Finally, the first tenet: that identifying valid rules of law relies on a test for *pedigree*, not *content*. Can we appeal to a test for pedigree to determine which principles are internal to law?
  - The standard tests for the validity of rules don’t easily apply to principles: the principles appealed to in *Riggs* and *Henningsen* weren’t enacted by legislature or court; rather, their origin lies in “a sense of appropriateness developed in the profession and the public over time. Their continued power depends on this sense of appropriateness being sustained.”
  - Moreover, the clean distinction Hart appeals to between the *acceptance* of a secondary rule and the *validity* of a primary rule does not apply to principles: some arguments we make to support appeal to principle by pointing to precedent, but we might then support appeal to precedent by pointing to principle – arguments of validity mix together with arguments of social fact.

*Is the dispute “merely verbal”?*

Dworkin says no: it’s essential to our understanding of judicial obligation.

*Question:* Are our all-things-considered judgments about how a judge should rule about a particular case affected by whether we think a certain ruling would require her to “legislate from the bench”?

What worries does the model raise about undemocratic, or *ex post facto*, decision-making? (Consider Dworkin’s distinction between *policy-based* and *principle-based* decisions. He argues the latter are less problematic than the former. Why?)

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