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COMMENTARY: THE RULES OF LAW AND THE POINT OF LAW

THOMAS MORAWETZ†

H.L.A. Hart's book, *The Concept of Law*,¹ is a description of the kinds of rules which are characteristic of a legal system and which give it its structure. Ronald Dworkin has argued that such an account of the concept of law is, in important ways, mistaken because law encompasses "standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards."²

I shall attempt to evaluate Dworkin's criticism, but I shall not do so directly. I shall first ask what would count in a very general way as a satisfactory analysis of a rule-structured activity like law—what kinds of questions such an analysis must answer. Such an investigation, if carried forward with moderate success, would allow us to ask whether Hart's analysis satisfactorily answers these questions. If it is not satisfactory, we can ask how it can be made satisfactory and whether these changes are of the sort that Dworkin recommends.

I. THE NATURE OF OPEN AND CLOSED PRACTICES

According to John Rawls, a practice is any "form of activity specified by a system of rules . . . which gives the activity its structure."³ To say this is to distinguish between activity which merely occurs regularly or *as a rule*, and activity which is governed by rules. Hart's example is that if most members of a community go to the movies on Friday night, it is proper to say that they go to the movies on Friday as a rule, or that they are in the habit of going to the movies. But it is not the case that they are following a rule in going to the movies, nor is it the case that their activity constitutes a practice. Stopping cars at red lights, on the other hand, may be something individuals do as a rule, or are in the habit of doing, but to say this is ordinarily inadequate or, worse, misleading. It is misleading because they are also *following* a rule and thereby are involved in a practice.⁴

This distinction can be clarified as follows. An external observer

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¹ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

² Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25, 34 (R. Summers ed. 1968).

³ Rawls, *Two Concepts of Rules*, 64 *PHILOSOPHICAL REV.* 3 n.1 (1955).

⁴ See H.L.A. HART, *supra* note 1, at 9-13.

may record the frequency of movie-attending behavior and the frequency of stopping-at-red-light behavior. He may, moreover, record the kinds of reactions which follow deviations from set patterns, and he may be able to anticipate sequences of behavior and response with a fair degree of accuracy. What he cannot do from an external standpoint is to invoke a conceptual distinction between mere irregularities in behavior and violations of rules. This distinction *may* be reflected only in the attitudes participants take (internally) to deviations. Participants within a practice invoke the rules as standards to describe behavior which conforms to the rules and to criticize deviation. Failure to go to the movies on Friday night is an irregularity which is not usually described or criticized as a violation of a rule; failure to stop at a red light will be seen not as a mere irregularity but as a violation of a rule.⁵ *One* kind of rule violation is a mistake; mistakes are attributable only in a context in which behavior is seen as rule-governed. For example, one can be said to move the bishop wrongly (rather than unusually) and thereby make a mistake in chess only when the behavior of playing is seen as governed by the rules of chess.⁶

Thus, the idea of a practice cannot be understood without the idea of a rule. The idea of a rule introduces a distinction between mere irregularities of behavior and violation of rules, and it allows us to refer to rules as standards which participants themselves employ.

I would like to distinguish between two kinds of practices, open and closed practices. Chess and baseball are closed practices. Roughly, a closed practice is one in which each instantiation (each *game*, for example) has an explicit beginning and end. Participants qualify as participants when they are familiar with all the rules of the practice which define moves, positions, goals, etc., rules which can be given more or less exhaustively and are *constitutive* of the practice. During a game, these rules are fixed. Without having violated rules, the participants are ordinarily in an adversary situation, and the constitutive rules specify, among other things, the goal or goals of the participants. I do not want to say, however, that all games are closed practices or that all closed practices are games.

An open practice, and I shall argue that law is an open practice, has none of these features. Participation is ordinarily open-ended, and the rules of the practice are standing rules which govern on-going activity. Participants are not required to know the particular rules which

⁵ *Id.*

⁶ This distinction parallels Rawls' distinction between the summary conception of rules and the practice conception of rules. A rule exists in the example of movie-going only as a description of regular behavior. Rawls, *supra* note 3, at 19-30.

define permissible moves and positions in order for them to qualify as participants, and in fact they may not do so. Moreover, it may be impossible in principle to give an exhaustive and complete account of the rules of the practice, either because they are unlimited in number or, more importantly, because the set of rules is constantly evolving. The practice may provide institutional ways in which rules can be changed. Ordinarily in an open practice participants are not adversaries, although an adversary situation may be created when a rule is violated.

Examples of open practices are particular legal systems and particular languages. Traffic rules and rules of grammar and usage are standing rules. Stopping at a red light or using "table" in successful communication are not moves within a game which has a formal beginning and end. Further, no citizen and no user of English is expected to know all the particular rules which govern behavior within the practice in order to be regarded as a participant. No exhaustive account of the first-order rules of a legal system or of English can be given. Even if such a listing could be given, the rules in their application would be unlike those of chess or baseball because they have, as Hart has argued, *open texture*. Rules of law have open texture if no statement of them can anticipate every possible problematic application.⁷ Similarly, no statement of the rules of English can be anything but an approximation of usage. Laws change, and there are even *rules within the practice* which instruct officers of the practice how to make such changes. Furthermore, law and language are both cooperative enterprises, at least as long as the rules are followed.

Using the rough distinction between closed and open practices, I shall argue that certain features of closed practices are not present in all practices, as Rawls seems to suggest. Rawls says that "the rules of practices are logically prior to particular cases."⁸ By this, he means that the intelligibility of the very terms with which we describe an activity presupposes the rules. "[G]iven any rule which specifies a form of action (a move), a particular action which would be taken as falling under this rule given that there is the practice would not be *described as* that sort of action unless there was the practice."⁹

⁷ See H.L.A. HART, *supra* note 1, at 123:

Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.

⁸ Rawls, *supra* note 3, at 25.

⁹ *Id.*

Rawls draws examples from baseball; among them are "striking out," "stealing a base," "balking."

Rawls concludes that a player within a practice, *qua* player, can have no authority to question

the propriety of following a rule in particular cases. To engage in a practice, to perform those actions specified by a practice, *means* to follow the appropriate rules. If one wants to do an action which a certain practice specifies then there is no way to do it except to follow the rules which define it. Therefore, it doesn't *make sense* for a person to raise the question whether or not a rule of a practice correctly applies to *his* case where the action he contemplates is a form of action defined by a practice. If someone were to raise such a question, he would simply show that he didn't understand the situation in which he was acting.¹⁰

Rawls' example is again drawn from baseball. During a game a player cannot ask to be permitted four strikes. Being at bat is a situation defined by the practice, and it does not make sense for the player to question whether the rules governing batting correctly apply to his case. He can question the rule only when he is *not* a participant by suggesting that the rules in general be *changed* to allow batters four strikes.

In a closed practice the constitutive rules anticipate all situations. No situation can arise in which it is unclear whether a player ought to be permitted four strikes. In other words, the rules of a closed practice do not have open texture.¹¹ Moreover, the constitutive rules of a closed practice make no provision for change, or, a fortiori, for criticism, of the rules themselves within the practice. Thus, the suggestion that a player be permitted four strikes cannot be made by a player within the context of the practice and is meaningful only as a recommendation for new constitutive rules.

In open practices none of this is true as a matter of course. Any question whether a move is permitted in chess has an easy answer, presupposes the rules, and is obviated by a knowledge of the rules. On the other hand, a question whether a move is permitted in law (for example, whether an ordinance forbidding mechanized transportation in a park forbids pogo sticks) may have no easy answer. What is called for is an interpretation of the rules, and whatever guidelines

¹⁰ *Id.* 26 (emphasis added).

¹¹ See note 7 *supra*. Throughout the discussion of closed and open practices, note the distinction between *a* game of baseball and *the* game of baseball. A game of baseball is an activity which is an instance of a closed practice. The game of baseball can be regarded as an evolving institution over time in which the rules change, in which a commissioner makes quasi-judicial decisions, etc. In this sense, it is like an open practice. In referring to baseball as an example of a closed practice, I have in mind the former sense. It is clear that only the former sense is at issue in Rawls' article.

are relevant to interpretation are also relevant to criticism and change. To say that a participant may appeal, in questioning the traffic ordinance, to guidelines other than the rules themselves, is to say that rules are not constitutive of moves within law as they are of moves within closed practices.

Rawls recognizes that a practice may provide for the change of rules, but his analysis seems incomplete. He first says that "if one holds an office defined by a practice then questions regarding one's actions in this office are settled by reference to the rules which define the practice."¹² Here, "officer" apparently designates anyone whose behavior is governed by the rules; questions regarding pitchers, batters, and chess players *are* settled by reference to the rules. Rawls continues, "If one seeks to question these rules, then one's office undergoes a fundamental change: one then assumes the office of one empowered to change and criticize the rules, or the office of a reformer, and so on."¹³ Here, Rawls acknowledges that there may be practices more complex than chess, practices within which some rules confer a special kind of authority on certain players—the authority to change and to criticize the rules.¹⁴

But who are these officers and what is the nature of their authority? They are not like umpires since umpires administer the rules but do not change or criticize them. Are they like judges? A judge's role seems to be both to administer and to interpret rules. Legislators too are empowered to change and to create laws. But the substantive exercise of such authority cannot consist of moves defined by existing rules. In this sense, the reformer works *in vacuo*. At most, the rules which empower him and define his role set limitations and guidelines for his conduct, such as acting in the public interest. But they do not inform his behavior, as do the rules of a game; they do not determine what counts as implementation of the public interest.

To summarize, I have tried to identify the nature of a practice and to distinguish closed and open practices. A closed practice, like chess or baseball, is adequately explicated in a full statement of its constitutive rules. The rules do not change within the game and are definitive for the evaluation of moves within a game. To criticize the rules is to stand outside the practice and to recommend a new practice.

By contrast, within an open practice rules may be evaluated and changed, and the considerations relevant to evaluation and change do

¹² Rawls, *supra* note 3, at 28.

¹³ *Id.*

¹⁴ Rawls is clearly not referring to such decisionmaking officers of baseball as umpires. Umpires are empowered only to apply rules, not to criticize or question them.

not emanate from other rules. I shall next argue that these considerations can be understood only as grounded in what I shall call the "point" of the practice.

If we ask a chess player what the point of the game is, he *may* say that the point is to checkmate the other player's king. Similarly, the point of baseball is to score more runs than the other team. In each case a rule of the game instructs the players how one wins. If we ask a player to *justify* a move he has made, he may do one of two things. If he thinks we are unfamiliar with the rules, he may cite the rule which allows him to make his move. If he thinks we are familiar with the rules, he may explain his strategy; he may explain the move in relation to the rule which specifies the point of the game for players in their roles as adversaries. The specification of the rules of chess or baseball is at the same time the specification of the point of the game *in this sense*.

On the other hand, the point of chess or baseball may be said to be the exercise of skill, the enjoyment of playing, etc. This point is nowhere specified in the rules. Described in this way, the point of the game is a justification for playing. It is not a constitutive feature of the game since a game of chess or baseball can be carried forward even if the players do not enjoy it and even if they exercise little or no particular skill.

What I wish to suggest about law as a practice, and about open practices generally, is that the point (or goal) of the practice is, on the one hand, not given in a specification of the rules, and yet must be taken into account before the application of rules to moves can be explained. The point of an open practice is *like* checkmating in chess in that it determines the strategy with which particular moves are made; it gives them their *raison d'être*. In what follows I shall use the example of law to illustrate that an account of an open practice is not complete once the rules are given; the point of the practice must be given as well.¹⁵

II. THE POINT OF LAW

I suggested initially that an account of what is required for the satisfactory analysis of a practice would help us evaluate Hart's analysis of law. I shall try to show that law, as an open practice, can be understood—and specifically that the features which Dworkin identi-

¹⁵ The following section is an attempt to qualify and restrict the very general notion of the point of law. It is irrelevant whether one holds that there is one point of law or several complementary ones.

fies can be understood—only if both the rules of law and the point of law are taken into account. But what is the point of law? I shall not defend a particular formulation of it, but I shall suggest how it might be understood.

There is general agreement among legal philosophers that law is (at least) a system of rules for ordering behavior and that *some* legal rules are coercive and backed by sanctions.¹⁶ Behavior which would go unpunished in the absence of a legal order is punishable within the legal order. Obvious examples are the taking of life and driving beyond a certain speed. Of course, not all legal rules are of this sort.¹⁷ Insofar as it is coercive, law is different from such other practices as the English language, chess and baseball. In all of these practices the existence of the practice increases behavioral options; certain forms of behavior—verbal communicating, playing baseball—become possible *ipso facto* by virtue of the existence of the practice.

To say that the very existence of a practice creates new behavioral options is to give a very rough justification of the practice, which is not immediately available for coercive rules. It is available only if one can say that by limiting a certain range of behavioral options, a greater general good, otherwise unattainable, is made available to those whose behavior is limited. Only the minimal limitation needed to secure the greater good can be justified in this way.

The notion of justification in terms of the greater good encompasses not only material benefit but such values as justice and fairness. The suggestion here, which I shall discuss more fully below, is that any justification of a legal decision is *formally* justification in terms of the general good. The enhancement of a special interest is justified only insofar as it redounds to the general good.

It is now possible to formulate tentatively the point of law. The point is to limit permissible human activity in a general way so as to attain a greater general good that would otherwise be unattainable. Law can be justified only if it is admitted that this kind of justification can arise and that individuals *can* be benefited by limiting their options—when such a limitation is general.¹⁸

Even if a justification of law will be of this sort, why *must* a characterization of law include *any* justification at all? Why not say

¹⁶ See H.L.A. HART, *supra* note 1, chs. II-V.

¹⁷ Rules which empower individuals to make contracts or wills are not properly regarded as coercive rules. See *id.* 27-41.

¹⁸ One who holds that there can be no justification for any infringement on human freedom would hold that all legal systems are unjustified. See Rawls, *Justice as Fairness*, 67 *PHILOSOPHICAL REV.* 164 (1958). Rawls argues that rational, self-interested individuals will recognize that a general limitation of the sort contemplated by law will be in their best interest.

that law is simply a system of rules, some of them coercive? The reason is that this leaves unexplained the strategy of the players, the reasons and justifications that they themselves give for moving as they do. It is important to recall the difference between closed and open practices. In closed practices, the strategies of the players, their reasons and justifications for moving, can be understood in terms of the rule which specifies the point; for example, checkmating. In open practices there is no such rule.

The point of law is reflected in the strategies of players, in the reasons and justifications which are given. This may be seen by looking briefly at the actual practice of citizens, legislatures and courts. Consider the citizen obeying a traffic light. Under ordinary circumstances, he might explain his act by saying, "That's the law." If asked to *justify* his act, he might say that without such a rule, highway safety (an ingredient of social order) could not be realized. By the restriction of a personal option, the general benefit of safe driving is made possible. This justification is a justification *both* of the general rule *and* of each particular act which falls under it.¹⁹ Thus it is possible for someone who is seeking urgent medical aid to argue that the traffic law ought not to apply in his case because its point is not served. This argument *makes sense* and it is very different from the suggestion of a baseball player that he be permitted four strikes. (To say that the argument makes sense is not to say that the law does not apply or ought not to apply. It is to say that *whether* the law applies is for those empowered to administer the law to decide, taking the point of law as relevant to their decision.)

Secondly, consider a legislature passing on a statute which regulates the sale of firearms. A basic justification of the law is that by limiting the option of individuals to own firearms without regulation, a greater good is secured for the whole community. A showing that the community is in some way better off without such regulation, or a showing that such a limitation goes beyond the minimal restriction needed to secure the good, is tantamount to a showing that the law is unjustified.

Finally, if we consider the arguments which lawyers and courts use to support, challenge and defend decisions, we will find them invoking what Dworkin calls "principles, policies and other sorts of standards." In one of Dworkin's examples, a decision limiting the ability of automobile manufacturers to limit their own liability by warranty

¹⁹ This is not to say that every feature of the law will stand in need of justification. Some features may be arbitrary, as is the color at which one stops or the date on which tax returns are due.

in case of defect is justified by the argument that, on the whole, consumers and public interests must be fairly treated.²⁰ An option created within law itself, the freedom of manufacturers to contract, is limited because such a limitation is necessary for the general good.

My argument should be qualified in five ways.

(1) The suggestion that the point of law is to limit permissible human activity in a general way so as to bring about greater general good than would otherwise be attainable should be tested as an attempt to represent the general character of the reasons which are given—by citizens, legislatures, lawyers, courts—to justify and criticize laws and their applications. Regardless of whether my particular formulation requires qualification, I am suggesting both that some characterization *can* be given, *i.e.* that there is a point of law, and that the role of principles as reasons can be understood only if there is a point of law which they instantiate.

(2) I am not suggesting that every citizen would be able or likely to justify law-obeying behavior in terms of the general good. But to give no justification at all (“that’s the law”) is to open oneself to the criticism that one has failed to consider for what justifiable reason one is acting. Further, I am not suggesting anything about the relation between the relevant justifications participants might give and their *motivation* for acting as they do. A fortiori, I am not saying anything about motivation or individual purposes at all. The point of the law and one’s own point (or purpose) in following the law (helping one’s family or keeping out of trouble) may be different matters entirely.

(3) The general principle which I have called the point of law is compatible with the existence of conflicting views about the general good. Most disagreements about what ought to be law and about how a particular law ought to be interpreted are *framed* as arguments about what kinds of acts would secure the general good. Even laws which seem hostile to the general principle (for example, Nazi expropriation laws, laws of apartheid) are defended or justified in terms of some such principle. Thus, the principle is an attempt to account for what counts as justification or criticism of *any* law in any system; in that sense what I have called “the point of law” belongs to the concept of law.

(4) Can there be a legal system in which laws are not justified in this way, in which, for example, they are simply oracular pronounce-

²⁰ See Dworkin, *supra* note 2, *passim*. For purposes of argument, I take for granted that Dworkin is correct on these points. The case in question is *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 387, 161 A.2d 69, 85 (1960).

ments? If so, the so-called point of law is not really a necessary feature of the concept of law.

This criticism mistakes the nature of the present discussion, which is not to give necessary features in the absence of which a practice *cannot* be called "law." There may be practices with coercive rules about which there is no satisfactory answer to "Is it law?" The suggested hypothesis is one example. Another would be a system having coercive rules but no rules specifying how to recognize valid law or how to administer it.²¹ In this sense the concept of law is itself a concept with open texture. There are no hard and fast rules for its application to penumbral cases.

(5) It is important that the same kind of considerations are usually relevant in determining the application and interpretation of particular rules and in determining what rules the practice ought to include. Law in its character as an open practice is different from a game, in which moves are justified by appeal to rules, and the set of rules (the game itself) is justified, if at all, by appeal to such different considerations as display of skill, entertainment, etc., all of which are general utilitarian considerations.

III. HART'S ANALYSIS OF LAW

Hart's analysis of law is an analysis in terms of rules. As we have already seen, and as Hart argues, any analysis of a practice must begin with the notion of rule-governed behavior, which is to be distinguished from merely regular behavior.²² Moreover, Hart notes that law is a practice in which at least some of the rules are coercive; they are rules whereby "human beings are required to do or abstain from certain actions, whether they wish to or not."²³ Hart calls these rules "primary rules of obligation."

Hart recognizes that law includes more than coercive rules, in part because legal coercion requires machinery for administration and enforcement, and he discusses the importance of "secondary" rules which empower some participants to administer the law. "[T]hey provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations."²⁴ Rules about making contracts, the formation of legislatures, and the

²¹ See H.L.A. HART, *supra* note 1, at 114-20. In Hart's terminology this is the question whether a legal system may have primary rules of obligation and no secondary rules. Primitive systems of coercive social organization may be of this form. See also *id.* ch. I.

²² Text accompanying notes 3-6 *supra*.

²³ H.L.A. HART, *supra* note 1, at 78-79.

²⁴ *Id.* 79.

conduct of courts are all of this sort. Since the set of primary rules changes over time, there must be a criterion for the primary rules of the practice. The special secondary rule which gives this criterion is "the rule of recognition." A primary rule is *valid* if it meets the criterion of the rule of recognition. The rule of recognition is what Dworkin calls a "master rule" which distinguishes laws from other social standards.

Finally, Hart notes that the application of primary rules to situations is sometimes uncertain because laws have open texture. Those empowered to interpret rules in these cases cannot merely have recourse to the rules themselves in making their interpretation; they must also make determinations with recourse to other (extralegal) considerations.²⁵ To say that judges have this power is simply to say that they have discretion.

In general, Hart seems to analyze law as if it were a closed practice, since closed practices are adequately analyzed when their constitutive rules are exhaustively given. Hart gives what he regards as an adequate account of the *kinds* of rules that are distinctive of law. Yet this is an incomplete portrait of law, while an account of chess in terms of its rules would not be incomplete, because it fails to answer why the players make the moves they make, what goals guide them, what reasons and justifications they might give for their moves, and in what way these reasons and justifications make sense. In chess an account of the rules includes an account of the point of the activity so that these questions are answered. In law, by Hart's own admission, these questions involve considerations not specified in the rules.

To analyze law as a closed practice is to analyze it as an oddly defective closed practice—defective because its rules generate hard cases. The wheels of the machine get stuck as they cannot get stuck in baseball. Therefore, special technicians must be called in; their expertise cannot be specified within the practice of law and consists in something extralegal. They have discretion to exercise their delegated powers. In regarding law as an open rather than a closed practice, we consider the possibility that it is not defective at all. The possibility is that at all levels of the on-going practice participants have recourse not only to rules but to relevant purposes and goals of the practice.

This is not to say that Hart's analysis is incorrect as an analysis of the kinds of rules that comprise law. But an adequate account of legal rules is not necessarily an adequate account of the concept of law. In particular, I am not suggesting that a rule which is valid by the rule

²⁵ For Dworkin's discussion of this point, see Dworkin, *supra* note 2, at 44-54.

of recognition must meet some further test, specified by the point of the practice. Valid laws may be said to violate the point of the practice, and this gives the impetus for reform. The vulnerability of existing law to criticism and modification inherently prevents law from becoming the fixed system that is a closed practice.

IV. DWORKIN'S RESPONSE TO HART

Dworkin's objections to Hart's theory are framed as objections to *positivism*. I shall discuss Dworkin's objections before considering briefly whether they are also objections to positivism.

The first of three challenged tenets of positivism is "that the law of a community is distinguished from other social standards by some test in the form of a master rule."²⁶ Dworkin notes that policies and principles belong to law and that they have no place in Hart's system of primary and secondary rules. This challenges the theory that the rule of recognition is a criterion for all standards properly called "law."

I shall assume with Dworkin that principles cannot be brought under the rule of recognition,²⁷ and that principles play a role at all levels of legal reasoning.²⁸ But nothing in Hart's analysis precludes supplementation by the notion of the point of law and the principles that flow from it. The rule of recognition is the criterion for legal rules rather than for law. This recommendation does not greatly alter Hart's program, a large part of which is to show that analyses of law as a *homogeneous* set of primary rules are inadequate. In this he succeeds.²⁹

Dworkin suggests that principles—unlike legal rules—"are controversial . . . [and] numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle."³⁰ This leaves their origin and character unintelligible and leaves mysterious just why they count as justification. The mystery evaporates if principles are seen as instantiations of the point of the practice, relevant in legal decisions as vectors pointing to the common purpose for which law exists.

Dworkin's second objection is derived from the first. He challenges the theory of judicial discretion as a theory that once a judge has exhausted all relevant legal rules, there are no further considerations

²⁶ *Id.* 59.

²⁷ It seems clear that Hart would agree that principles cannot be brought under the rule of recognition.

²⁸ See text accompanying note 20 *supra*.

²⁹ For Hart's critique of John Austin's theory of jurisprudence, see H.L.A. HART, *supra* note 1, at 1-76. Austin suggests that legal rules are homogeneous and may all be seen as coercive rules; Hart's account of secondary rules corrects this defect in Austin's theory.

³⁰ Dworkin, *supra* note 2, at 58.

binding upon his decisionmaking. If what I have argued is correct, principles which represent the point of law are binding in the sense Dworkin requires. He makes two points in support of this argument:

[N]ot any principle will do to justify a change, or no rule would ever be safe. There must be some principles that count and others that do not, and there must be some principles that count for more than others. It could not depend on the judge's own preferences amongst a sea of respectable extra-legal standards, any one in principle eligible, because if that were the case we could not say that any rules were binding. We could always imagine a judge whose preferences amongst extra-legal standards were such as would justify a shift or radical re-interpretation of even the most entrenched rule.

Second, any judge who proposes to change existing doctrine must take account of some important standards that argue against departures from established doctrine, and these standards are also for the most part principles. They include the doctrine of 'legislative supremacy,' a set of principles and policies that require the courts to pay a qualified deference to the acts of the legislature. They also include the doctrine of precedent³¹

We have already seen that the relevance and importance of a principle—the extent to which it is binding—cannot depend on the judge's preferences. They depend on the relation of the principle to the point of the practice, minimal coercion for the greater general good. Such doctrines as *stare decisis* have general relevance because it can always be argued that reliance on established practice is in the general interest.³²

The third untenable tenet of positivism, according to Dworkin, is the theory of legal obligation whereby "a legal obligation exists when (and only when) an established rule of law imposes such an obligation. . . . [I]n a hard case—when no such established rule can be found—there is no legal obligation until the judge creates a new rule for the future."³³ This tenet follows from the identification of law with a system of rules and from the identification of obligation with the existence of particular primary (coercive) rules of obligation.

Again it is difficult to evaluate Dworkin's argument as a criticism of Hart, even if the argument itself is granted. It is possible to agree

³¹ *Id.* 51-52.

³² The point of the practice can be seen as a criterion of relevance for suggested principles just as the rule of recognition is a criterion of validity for suggested primary rules. To show that a principle is relevant is to show that it refers to a social order in which coercive (and other) rules exist only for the sake of the greater general good. It seems that the point of the practice is a substantive limit on possible reasons and justification, while the rule of recognition is a formal criterion.

³³ Dworkin, *supra* note 2, at 59.

with Hart that existing legal rules do impose obligations and still to hold that law is not simply a matter of rules. Valid rules may be criticized as bad law, as misrepresenting the point of law. To argue this may be to suggest that the obligatory nature of an unjustified rule is eroded, and that only justifiable rules impose obligations. If this is true, the obligatory nature of rules does not follow simply from their validity, as Hart suggests, but from their justifiability. On the other hand, if Hart is saying merely that *prima facie* obligation and justifiability attach to valid rules, this more cautious and tentative position is not vulnerable to criticism in the same way.

To decide whether Dworkin's argument is a refutation of Hart, one must decide how strong a position Hart takes. Let us call "strong" the position that the rule of recognition is a master rule for all law, that judges in hard cases cannot resolve cases by rule and are left to their own preferences, and that any valid legal rule determines obligation. Dworkin refutes this position. But if Hart holds that the rule of recognition is the criterion for legal rules (rather than for all of law), that judges in hard cases must appeal to principles (not to their own preferences) rather than to legal rules which are themselves ambiguous, and that legal rules are *prima facie* rules of obligation (but not necessarily obligatory if they are bad law), then none of Dworkin's three criticisms seems relevant to his position.

V. POSITIVISM

Dworkin identifies the stronger position with positivism. If we assume *arguendo* that Hart holds the weaker position, and argue that this analysis of legal rules must be supplemented by an account of the point of the practice to compose an adequate account of the practice, is this composite account still a kind of positivism?

In an explanatory note in *The Concept of Law*, Hart lists five views, all of which appear in contemporary Anglo-American jurisprudence, as "positivism."³⁴ With regard to each, I shall ask whether either Hart's view or the composite view is positivism.

(1) "Laws are commands of human beings." This view, according to Hart, presupposes that rules are homogeneous and fails to give an adequate account of the role of secondary rules.³⁵ Hart's view and the composite view are not positivism in this sense.

(2) "There is no necessary connexion between law and morals, or law as it is and law as it ought to be." A law may be valid law

³⁴ H.L.A. HART, *supra* note 1, at 253.

³⁵ See *id.* 1-76.

even if criticized as bad law, as betraying or undercutting the point of the practice. In this sense, both Hart's view and the composite view are positivistic.

(3) "The analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, &c." In this fairly trivial sense, Hart's view and the composite view are both positivistic, insofar as they are attempts to provide a study of meanings.

(4) "A legal system is a 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone." Neither view is positivistic in this sense. Hart recognizes open texture, and the composite view explains open texture by the fact that law is an open and not a closed practice.

(5) "Moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof." Neither theory takes a stand on this question.

It follows that the composite or amended theory is neither more nor less positivistic than Hart's theory. The composite theory, moreover, explains those features of law which Hart's analysis, taken only as an analysis of legal rules, leaves inchoate. Dworkin correctly objects that these features require explanation.