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LOOSE LAWS : THE ETHICS OF VAGUENESS VS. THE POLITICS OF PRECISION

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The shortfall between morality and the law has long been a cause of concern to social philosophers. The way the problem has traditionally been conceived is, in broad outline, this : law stands at the intersection of politics and morality; and each tugs in somewhat different directions. On this analysis, the crucial task in explaining and correcting the immorality of the law has been thought to be one of exploring the precise nature of the political contamination. Some, for example, lay blame on wicked politicians. Others more charitably suggest that, however noble any particular politician, he must dirty his hands by doing deals with scoundrels if he is to accomplish any good at all.[1]

A recent and rather radical challenge to this received wisdom points to structural sources of the shortfall. No one, individually or collectively, is responsible for the immorality of law. The problem is, rather, that the two systems (law and morality) have distinct and incompatible structures, so it is impossible for the one to capture the other fully. This argument makes great play of the difference between the *rules* characterising legal systems and the *principles* which have recently been discovered to characterise moral systems.

Morality, it is argued, simply cannot be a system of rules. 'Following a rule', one necessarily turns 'away from consideration of the particular merits of particular cases'.[2] This theme reverberates through several levels of modern moral discourse. Fletcher's pop plea for a *Situation Ethics* explicitly takes moral 'legalism' as its foil.[3] Richard Hare inveighs against simple rules of morality which, while perhaps adequate approximations where individual conduct is concerned, tend to lead public policy badly astray.[4] David Lyons repudiates rule-utilitarianism on the grounds that it either directs precisely the same behaviour as (i.e., is 'extensionally-equivalent' to)

act-utilitarianism, or else it must be inferior on clear moral (utilitarian) grounds.[5] Current fashion is to shun binding rules in favour of looser 'principles' or 'reasons for action'.[6] These are seen as the surest devices for achieving 'the best judgement on the full concrete merits of each individual case'.[7]

This new view of morality holds troubling implications for the possibility of making the law moral. If morality cannot be captured in rules, and if the law is necessarily a system of rules, then law necessarily departs from standards of morality to some greater or lesser extent.[8] Furthermore, no one is at fault, nor is politicking in any broader sense to blame.

In this essay, I shall argue that this claim is far too bold as it stands. In a weaker form, however, it is suggestive of other important political constraints on the morality of law. I shall show that the differences between rules (e.g., of law) and principles (e.g., of morality) are differences of degree rather than of kind. Principles are merely loose rules. After arguing that a system of loose legal principles is better adapted than rigid rules for capturing the wide range of ethically-significant considerations in any particular situation, I shall discuss what this would imply in practical terms for the legal system (vague concepts, unstructured procedures, shunning precedent, etc.). Few actual legal systems are organised in this way, of course. In the final sections I discuss a few attempts to move them in that direction and hypothesise political causes for their failure.

1. Collapsing the Rule-Principle Distinction

The fullest exposition of the distinction between rules and principles as generic forms comes in Ronald Dworkin's 1967 critique of 'The Model of Rules'. Although he focuses on the legal context, much the same distinction is suggested in passing comments by moral philosophers.

Dworkin's distinction is between rules and principles in their pure forms. Many so-called principles are stated in the form of rules and behave in much the same way. Using these as models will obviously only serve to conflate distinct categories. More significantly, many rules look much like principles because they are fragmentary, incomplete specifications of the rule. Usually this results from a failure to annex a complete list of exceptions to the rule statement. 'Of course a rule may have exceptions', Dworkin allows. 'However, an accurate statement of the rule would take this exception into account, and any that did not would be incomplete. If the list of exceptions is very long, it would be too clumsy to repeat them each

time the rule is cited, there is, however, no reason in theory why they could not all be added on, and the more that are, the more accurate the statement of the rule.'[9]

Rules, filled out in this way, are 'applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.'[10] A principle, in contrast, 'does not even purport to set out conditions that make its application necessary. Rather it states a reason that argues in one direction, but does not necessitate a particular decision. .... There may be other principles or policies arguing in the other direction. .... If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may bedecisive'.[11]

Much the same distinction is suggested by moral philosophers. Hare's rules 'cannot be overriden, but only altered or qualified to admit of some exceptions'.[12] This all-or-nothing feature is lacking from theories focusing on looser principles. Warnock, for example, finds it 'clear that moral principles *may* point in opposite directions'. He continues, 'I can discern no ground on which one could ever pronounce *in general* which, in such a case, is to predominate over another.'[13]

The second criterion for distinguishing rules from principles follows logically from the first. 'Principles have a dimension that rules do not — the dimension of weight or importance. When principles intersect ..., one who must resolve the conflict has to take into account the relative weight of each. ... Rules do not have this dimension. .... We cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of greater weight. If two rules conflict, one of them cannot be a valid rule.'[14] Those 'conflicts of law' that characterise so much actual litigation result, Dworkin holds, from incomplete specification of the rules. Had all the exceptions been specified in the original rule-statement, such conflicts could never occur in a proper system of rules. The reason they do occur is that the rules fail to qualify fully as rules.

Again, moral philosophers make substantially the same points with reference to moral principles. Warnock maintains that 'the exercise of moral judgment involves the taking notice, and due weighting, of all pertinent moral reasons.'[15] The clear implication is that several conflicting moral reasons (i.e., principles) might be simultaneously valid and operative.

The argument on both points turns very heavily upon the existence of the list of exceptions Dworkin asks us to append to all rule-statements. The strategy I shall pursue here in partially collapsing Dworkin's rule-principle distinction is to show that the list of exceptions to a rule is the *functional equivalent* of a principle's weight. In this way, I shall show that the two modes of regulating conduct are isomorphic rather than structurally distinct.

Consider first the 'weight' which principles are alleged to possess and rules to lack. In purely abstract terms, talk of a principle's weight must refer to its 'persuasive or convincing power' *(Oxford English Dictionary)*. This construction, however, entails a substantial element of private introspection. Since the purpose of moral or legal principles is the *social* prescription of individual behaviour, emphasis must fall on the weight of principles in an operational form. Operationally, the relative weight of two principles can be measured quite simply as the extent to which one has predominated over the other in our past deliberations. The more often one principle has overriden the other, the weightier it is. Weight thus surmised can than be used as a shorthand guide to future trade-off's between the principles.

In exactly like fashion one might produce a measure of the relative weight of rules. Having followed Dworkin's admonition to incorporate all exceptions and qualifications into the statement of the rule itself, the relative weight of a rule can simply be read off the list of exceptions. The less qualified the rule, the greater its weight.[16] The parallels do not end with the procedure for assessing the weight of rules and principles. They are as strong at the abstract level : a rule's weight (defined abstractly as its 'persuasiveness') is what formed the basis for adjudging competing claims of rules and thereby for devising the list of exceptions in the first place. Rules do have weight even in this abstract sense, and it is their weight which guides us in deciding which exceptions to allow and which to disallow.

Weights are, of course, crucial to principles in a way they are not to rules. That, however, is only because weights are used to decide between competing prescriptions; and with rules all possible conflicts have been decided in advance and the resolution recorded in the list of exceptions. Once the list of exceptions is at hand, we may dispense with the list of relative weights. So too the builder of a bridge may forget all he knows about civil engineering once he has a detailed blueprint. But to explain what he is doing now, or to try to do it again elsewhere, he must recall the principles of engineering that went into the design. The position of the social engineer is

perfectly parallel.

Much the same argument can be deployed against Dworkin's assertion that rules apply in an all-or-nothing fashion whereas principles have a mysterious 'on-again, off-again' property which makes them wonderous to behold. This phenomenon can be explained as the result of a relatively mechanical jurisprudence of really rather inflexible principles. Anyone applying abstract principles to particular cases must bear two considerations (at least) in mind : one is their weight, already discussed; the other is the centrality of the principles to the case at hand. Depending on the facts of the case, a principle *P* might be centrally implicated and another *P=* only marginally involved. Were the two principles of equal weight, then clearly the more central principle *P* should govern. Sometimes centrally might even counteract the effects of weight. A lightweight but centrally-implicated principle might overrule a weightier but more tangentially-involved principle. The joint effects of weight and centrality can, then, account for the peculiar pattern of choices of principles — *P* winning out over *P=* sometimes and sometimes losing out to it — of which Dworkin makes so much.

Identical considerations of centrality would naturally figure equally largely in resolving conflicts between rules and in generating lists of their exceptions. Indeed, many of the exceptions will be little more than descriptions of cases in which one rule must yield to another which is more centrally-implicated Again, considerations of centrality which characterise the application of principles also characterise the application of rules, only at one remove. They are used to construct a list of exceptions which, one constructed, obviates the need for further reference back.[17]

The implication of this analysis is that the rule-principle distinction can be partially (if not totally) collapsed. There are differences, but ones of degree rather than of kind. Principles are in many ways just inchoate rules.

This conclusion is borne out by analysis of ordinary language. The primary *Oxford English Dictionary* definition of a 'rule' is as 'a *principle*, regulation of maxim governing individual conduct' (empasis added). On the other side, lawers commonly characterise 'principles' as 'fundamental rules'.[18] Such distinctions as ordinary language does suggest is between relatively more precise 'rules' as relatively less precise 'principles'.[19] 'Principle' is to 'rule' as 'plan' is to 'blueprint', the latter being merely a more detailed form of the former in each case.

2. How Precise Ought a Good Law Be ?

The possibility of complete codification of rules — the exhaustive listing of their exceptions — is essentially what differentiates them from principles. The crux of the case against a rule-based model of morals is precisely the argument 'against the view that moral principles must be ... exhaustively codifiable'.[20] Thus, moral prescriptions must be very near the 'principle' end of the rule-principle continuum. Where to locate legal prescriptions is the problem now before us.

It is widely believed that this decision should be governed by two competing criteria. The need for certainty in the application of law argues in favour of a fully-specified system of rules. The need for flexibility argues in favour of the opposite, an absolutely open-ended set of principles. Conventional wisdom holds that here (as anywhere competing evaluative criteria pull in opposite directions) the choice should be a compromise, in this case a partially specified system of legal rules.[21]

Such a suggestion, however, flies in the face of 'the general theory of second best'.[20] Where there are multiple dimensions involved in the 'good behaviour' to be promoted, the rules must capture all the dimensions if they attempt to capture any in detail. Otherwise suboptimization is sure to occur as actors cut corners on those dimensions rule-makers have neglected to make mandatory. Consider in this connexion the arguments of Hamilton and Jackson against appending a Bill of Rights to the American Constitution : explicitly listing some rights of citizens tempts governments to infringe those rights they neglected to mention; so since framers cannot hope to list all rights, they ought not attempt to list any.[23]

In light of this, principle, lawmakers must not engage in the ordinary practice of compromising between competing criteria. They must make the hard choice between the two very different strategies available for promoting good behaviour. Either (1) they can issue very detailed directives capturing in full all desirable characteristics of behaviour; or else (2) they can outline in vague and general terms the types of behaviour they desire without going into particulars on any points. Failure to face up to the choice between rigid rules and ambiguous principles will, however, only frustrate the lawmaker's goals.

Special features of the moral principles laws hope to capture argue decisively against the rule-based legal strategy. It is a general feature of principles of practical reason that they cannot all be listed with any confidence of producing a complete list. Hare offers the example

of a 'person who is devoted to golf and has played it from his youth, and will go on until he can hardly shuffle round the course, getting all the time more and more canny; he, we might say, is learning all the time how to play better, and is in some sense acquiring ever more sophisticated principles No doubt, well before he reached middle age, his principles got sufficiently complex for it to be no longer possible for him to express them in words ....'[24] The same is true of moral principles. As Mew reflects, 'If someone were to ask me what were my moral principles, I should be unable to state them. I suspect that this would be true of many people who are nevertheless indisputably moral agents.'[25] This being the case, the strategy of enjoining good behaviour through specific rules runs intolerable risks of leaving out important provisions, thereby producing suboptimal results. The strategy of vagueness wins by default.[26]

Two standard objections to any proposal for very loose laws should be anticipated. The 'progressive introduction of vague formulas' is often held responsible for 'the increasing arbitrariness and uncertainty of law.[27] Hodgson bases his attack on act-utilitarianism on the propositon that good consequences often flow from being able to predict with confidence what others will do. Governing one's conduct by rules contributes much to the creation of these stable patterns of expectations. This precept is often thought particularly applicable to legal systems. Hart speaks of 'the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues ....' Warnock simplarly concedes a 'special need, in the case of public, legal or political institutions, for uniformity and predictability of operation'.[28] Very general laws obviously prevent the certain and predictable application of law which both Hart and Warnock suppose so important. Indeed, American courts consider excessively vague legislation an unconstitutional denial of due process.[29]

Beyond some point, however, the specificity strategy must backfire. The more detailed the prescriptions, the more confidently people can judge cases for themselves, to be sure. But detailed exceptions and qualifications can, in excess, be a source of confusion. Consider, for example, the Civil Procedure of the Punjab, which 'had originally been exceedingly simple'. Maine, in his 'Minute Recorded on October 1, 1868', observed that 'two years ago it had become so overlaid by explanations and modifications conveyed in Circular orders, that I do not hesitate to pronounce it as uncertain and difficult a body of rules as I ever attempted to study.'[30]

Furthermore, the more detailed a rule, the more difficult it is to communicate fully or to remember in detail.[31] In practical terms, then, specific rules are to be shunned for defeating their own purposes, confusing citizens rather than clarifying the law for them.

More important are the theoretical reasons for opposing certainty and predictability in the operation of law. Where reducing mutual interference is the goal, there are undeniable advantages to precise rules rendering behaviour predictable. This means that private arrangements — promises, contracts, etc. — should be governed by fairly full rules. But public regulation of anti-social behaviour hardly fits that model. The interference of a constable with the behaviour of criminals is to be maximised, not minimised. Were he to govern his conduct by precise and unchanging rules, always walking his beat in just the same path and at just the same pace, his behaviour would indeed be predictable. That would be an undeniable gain to the criminal but, on net, a loss to the community at large. More generally, rendering public regulatory practices predictable holds benefits mostly for those anxious to know how badly they may misbehave without penalty. Were the legal regulations vague and their application uncertain, innocent confusion will surely produce some accidental transgressions. This disadvantage, however, is easily overshadowed by the advantages of keeping scoundrels guessing. Not knowing how far they can safely go before incurring legal liability, and being somewhat averse to taking the risk, many prospective criminals would err on the side of caution and behave better than they would under a regime of precise and predictable rules.[32]

The second objection to vague laws protests the arbitrariness and injustice of their application. Warnock admits the need for detailed rules of law 'to lessen the chance of improper discrimination' and in order to introduce 'some measure of uniformity in the way they operate'.[33] If identical cases are decided differently, then clearly injustice has been done. But no two cases ever are identical in absolutely every respect; and the new model of morality suggests that most of those differences will be more or less ethically-significant. That being true, there will be few cases which are alike in all relevant respects and hence few opportunities for doing justice or injustice narrowly construed. The focus then is on equity, treating cases differently only in proportion to the ethically-sigificant difference between them. That cause, as Section IV shows, is better served by the application of flexible principles rather than rigid rules of law.

3. *The Practice of Principled Law*

The implications of this analysis for legal institutions are, roughly speaking, a return to the 'primitive'. The best examples of vague, principled law come from studies of relatively unstructured societies where law is still relatively unelaborated. Max Gluckman's discussion of *The Judicial Process Among the Bartose of Northern Rhodesia* is particularly instructive in the methods by which judges 'manipulate flexibility of concepts — what is often denigrated as their "ambiguity" — as they do the multiplicity of laws, to achieve justice.'[34]

Of primary importance are peculiar characteristics of the *concepts* of primitive law. They are *'flexible*, in that they are *elastic*, capable of being stretched to cover various circumstances, and/or in that they are *multiple.* in having several referents or definitions'; and they are *'absorbent* in that they can absorb the raw facts of evidence into their categories'. Judicial decision-making under these conditions becomes a process of 'fitting facts into absorbent legal concepts' in a way that 'gives flexibility and scope for development to the legal system' as a whole.[38] Llewellyn and Hoebel find similarly that it is *The Cheyenne Way* for judicial rationales 'to run in terms of semi-open points or areas ... so that however one detail might take shape, some other detail would provide much of whatever corrective might be needed. Throughout, all patterns retained around their normative or imperative cores a joyous range of flexible adaptivity, called on repeatedly'.[36]

The uncertain application of loose legal concepts is sustained largely through the absence of constraining *precedents.* Gluckman refers to the "'social amnesia" which operates in an unrecorded system of law so that unpaltable legal rules or edicts are forgotten'.[37] Where precedents are forgotten or ignored, the possibilities for deciding each case on its merits are obviously expanded.

A further feature contributing to the impressive power of the Lozi to reach just verdicts in particular cases is the relatively *unstructured* character of Lozi judicial *proceedings.* 'There are no restrictive "pleadings" in the form of the preparation and sifting of facts by professional lawyers to bring them within some form of action or some defined legal grounds. .... Each litigant and each witness tells his tale without restraint so that the court is given from the outset a view of all the circumstances of the dispute, and often of its past history'. Since hard cases in Lozi law typically involve litigants labouring under conflicting role demands, the open-ended nature of

judicial proceedings allows judges to 'achieve justice in one relationship by enforcing a sanction in another.'[38]

4. Abortive Attempts at Reintroducting Principled Law

Few legal systems of any complexity exhibit characteristics such as these. There have been several attempts at introducing such elements, however. Observing the fates of these abortive reform attempts suggests something of the political dynamic which prevents law from taking a moral shape.

The history of the English law of equity can, for example, be read as an effort to introduce elements of principled law into an overly-developed system. Within the English Constitution, the chancellor is 'he who cancels the evil laws of the realm, and makes equitable the commends of a pious prince'.[39]. From the 13th century and before, petitioners appealed to the chancellor for redress of wrongs admitting of no remedy within the increasingly rigid terms of the comon law. The law of equity gradually emerged out of this practice and, with the *Earl of Oxford's Case* of 1615, eventually won primary over the common law itself. Lord Ellesmere's decision in that case effectively captures the sentiment motivating the dramatic expansion of the law of equity : 'men's actions are so divers and infinite, that it is impossible to make any general law which may apply meet with every particular act, and not fail in some circumstances.'[40]

To achieve this goal of judging each case on its merits, early courts of Chancery used loose concepts, flexible rules and unstructured procedures characteristic of principled law. To some extent this might be explained by reference to the primitive state of the English law.[41] But, significantly, those practices were also warranted on theoretical grounds. The capacity of equity to remedy the injustices of the common law depended very heavily upon its unstructured character. No precise form can be prescribed for appeals to conscience, after all; and, in the early days of equity, none was. Similarly, no attempt was made to lay down rigid rules of equity. 'Equity depending ... upon the particular circumstances of each individual case,' Blackstone writes, 'there can be no established rules and fixed precepts of equity laid down, without destroying its very essence.'[42]

In due course, however, the procedures of courts of Chancery were regularised, their juridsiction carefully delimited and their substantive rules codified. The turning point, according to Holdsworth, was when the decisions of the court began being

recorded. Under those conditions, the court 'soon develops fixed rules of practice, which, in their turn, gradually create fixed substantive rules'. Having been recorded, past decisions were increasingly used as precedents for subsequent ones. And 'the growth of the practice of citing cases as precedents was an influence which was helping, not only to settle still more exactly the sphere of the court's jurisdiction, but also to make some fixed rules for the exercise of the chancellor's discretion.'[43]

The result of these developments was the increasing inability of courts of Chancery to come to grips with the peculiar circumstances of unusual cases. By the mid-19th century, these courts had become the mortibund institutions Dickens ridicules in *Bleak House* through the story of the 'perpetiually hopeless' case of Jarndyce and Jarndyce. Even more pointedly, a judge of the Chancery Division of the High Court, insisting on applying well-established maxims of equity rather than deciding a case on its peculiar merits, insisted that 'this court is not a court of conscience' — or at least not any longer.[44]

With growing respect for precedent and increasing rigidity of legal concepts, general *principles* often function as broad categories under which a multitude of detailed *rules* are subsumed. Indeed, the tendency is so common that many commentators are led to conclude that it is the nature of principles that they should serve this function.[45]

The practice of British imperial administrattors offers another example. When confronting a gap in indigenous legal systems, colonial officers were to decide disputes according to the very loose constraints of justice, equity and good conscience'. Originally this provision served to promote principled law, as was apparently its intention. But before long cases decided according to this principle served as precedents which were consolidated into quite specific and detailed rules of law.[46]

Similarly, American administrative law initially established loose 'standards' rather than rigid rules. But there is a pronounced tendency for administrators to 'crystallize particular applications to particular cases into rules and thus destroy the standard'.[47] Pound's scorn of this practice is, alas, not shared by many administrative theorists or administrators themselves. Among those groups, there is considerable enthusiasm for filling out the details of loose standards as soon as is possible.[48]

5. Political Pressures toward Precision

The reasons why attempts at principled law prove abortive are often obscure. Ignoble motives are typically cloaked in deceptively principled rhetoric. Sometimes, however, they are absolutely transparent, as in the case of the recent effort to return to 'traditional' law in India. The scheme obviously threatened the power base of lawyers and judges, who formed a frankly political (and enormously successful) coalition to foil the plan.[49]

The way in which principled law becomes increasingly precedentbound suggests similar political forces at work even when the rhetoric indicates otherwise. The essence of politics, it is often remarked, consists in the accumulation and exercise of social power; and an immensely important aspect of power is restricting the choices available to others.[50] A system of principles asks those in positions to make rules (legislators, administrators, judges) to pass up opportunities for binding their inferiors and successors to precise rules and precedents. In this, it really asks them to behave non-politically, to forgo opportunities for exercising power. The appeal rarely succeeds, as Section IV has demonstrated. The far more common tendency is for legislators, administrators and judges to produce increasingly rigid rules and precedents restricting the options available to their inferiors and successors in applying the law. In so doing, they not only exert but also increase their power.

Thus, a further political source of the shortfall between law and morality has been discovered. The quintessentially political 'will to power' forces legal prescriptions into the form of rules; and, as Section II has shown, no set of rigid rules can ever fully capture moral principles.

At best, a very large set of precise rules might aspire to approximating the loose principles of morality. Certain features of the procedures under which political rule-makers must operate, however, prevent their rules from constituting even close approximations. A good approximation would require a *large* set of rules, whereas political rule-makers can produce only a rather *small* set of rules in any one period. Judges and administrators can decide only those cases brought before them, and there are important limits (physical as well as political) on the number of bills legislators can enact in any session[51]. Political agendas must, then, be strictly limited and focus on only a subset of moral concerns as the scope for rule-making at any one time. Were the rules cumulative, these limitations might not matter much : the total set of rules might be large even if it were built up gradually. The political nature of the

rules, however, prevents them from being cumulative. As parties alternate in power, each strives to repeal many of the enactments by which its predecessor attempted to exercise power over it. There is little chance, then, that a set of politically-inspired rules will ever be large enough even to constitute a good approximation of moral principles.

Conclusion

A fully moral system of law is not a structural impossibility. On the contrary, the *principles* of morality and the *rules* of law are structurally isomorphic. The impossibility of enjoining all morally-desirable performances through precise rules, combined with the 'general theory of second best', suggests that a system of 'loose' laws is required to capture fully moral principles. Powerful political pressures arising from the 'will to power', however, force law to take the form of rigid rules. In that form, it *is* impossible for law to mirror moral principles. The law is, then, caught between ethical demands of vagueness and political pressures toward precision.

NOTES

[1] Michael Walzer, 'Political Action : The Problem of Dirty Hands', *Philosophy & Public Affairs*, 2 (1973), 160-80.

[2] G. J. Warnock, *The Object of Morality* (London : Methuen, 1971), 66. See similarly Marcus G. Singer, 'Moral Rules and Principles', *Essays in Moral Philosophy*, ed. A. I. Melden (Seattle : University of Washington Press, 1958), 160-97; and Peter Mew, 'Doubts about Moral Principles', *Inquiry*, 18 (1975), 289-308.

[3] Joseph Fletcher, *Situation Ethics* (Philadelphia : Westminster Press, 1966).

[4] R. M. Hare, 'Reasons of State', *Applications of Moral Philosophy* (Berkeley : University of California Press, 1972), 9-23. Hare, 'Rules of War and Moral Reasoning', *Philosophy & Public Affairs*, 1 (1972), 166-81.

[5] David Lyons, *Forms & Limits of Utilitarianism* (Oxford : Clarendon Press, 1965).

[6] Stephen Toulmin, *The Place of Reason in Ethics* (Cambridge : Cambridge University Press, 1950). David A. J. Richards, *A Theory of*

Reasons for Actions (Oxford : Clarendon Press, 1971).

[7] Warnock, *Object of Morality*, 67.

[8] Legal positivists, led by H. L. A. Hart, *The Concept of Law* (Oxford : Clarendon Press, 1961), have succeeded in showing law to be a system of rules. Dissenters can do little better than to urge that some extra-legal principles be grafted onto the system of rules. Most conspicuous among these critics is Ronald Dworkin : 'The Model of Rules', *University of Chicago Law Review*, 35 (1967), 14-46; 'Hard Cases', *Harvard Law Review*, 88 (1975), 1057-1109; and *Taking Rights Seriously* (London : Butterworths, 1976).

[9] Dworkin, 'The Model of Rules', 25. See similarly W. J. Rees, 'Moral Rules and the Analysis of "Ought"', *Philosophical Review*, 62 (1953), 23-40.

[10] *ibid.*, 25. See similarly G. H. von Wright, *Norm and Action* (London : Routledge & Kegan Paul, 1963), 135, 148-49, 205.

[11] *ibid.*, 26.

[12] R. M. Hare, *Freedom & Reason* (Oxford : Clarendon Press, 1963), 169. Notice that there is no consensus among moral philosophers on labels. Hare's statement refers to universalisable prescriptions he calls 'moral principles' but which Dworkin would call 'rules'.

[3] Warnock, *The Object of Morality*, 88-9.

[14] Dworkin, 'The Model of Rules', 27.

[15] Warnock, *The Object of Morality*, 93

[16] Some principle of individuation is required before we can begin counting up the exceptions to each rule. But it does not matter which we use, provided we apply the same one consistently in counting exceptions to all rules

[17] Examining the way in which judges apply legal rules to particular cases, we find that these rules are used in much the same way as Dworkin suggests principles would be. D. H. Hodgson, *Consequences of Utilitarianism* (Oxford : Clarendon Press, 1967), 133-141. Michael D. Bayles, 'Legal Principles, Rules and Standards', *Legal Reasoning*, ed. Hubert Hubien (Brussels : Emile Bruylant, 1971), 223-8. Notice especially George C. Christie, 'The Model of Principles', *Duke Law Journal*, 1968, 649-69, showing how the cases Dworkin uses to illustrate legal principles at work are really just applications of general rules.

[18] Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law', *Harvard Law Review*, 73 (1959), 26-35. Graham Hughes,

'Rules Policy and Decision-Making', *Yale Law Journal*, 77 (1968), 411-39.

[19] John Rawls, 'Two Concepts of Rules', *Philosophical Review*, 64 (1955), 3-32. Singer, 'Moral Rules & Principles', Richard S. Peters, 'Concrete Principles and Rational Passions', *Moral Education*, ed. N. F. & T. R. Sizer (Cambridge : Harvard University Press, 1970), 29-55. Max Black, 'The Analysis of Rules', *Theoria*, 24 (1958), 107-36. F. A. von Hayek, *Rules & Order* (London : Routledge & Kegan Paul, 1973).

[20] Mew, 'Doubts About Moral Principles', 304.

[21] Sir William Blackstone, *Commentaries on the Laws of England* (Oxford : Clarendon Press, 1785), Vol. I, 62. Hart, *Concept of Law*, 127. Lon L. Fuller, *The Morality of Law* (New Haven : Yale University Press, 1964), 212-4. Hodgson, *Consequences of Utilitarianism*, Ch. 2.

[22] R. K. Lancaster and R. G. Lipsey, 'The General Theory of Second Best', *Review of Economic Studies*, 24 (1956), 11-33.

[23] Alexander Hamilton, *The Federalist Papers*, 84, 11. James Jackson's speech in the House of Representatives is reprinted in part in *A Second Federalist*, ed. Charles S. Hyneman & George W. Carey (New York : Appleton-Century-Crofts, 1967), 262.

[24] R. M. Hare, 'Principles', *Proceedings of the Aristotelian Society*, 73 (1972—3), 1-18, 8-9.

[25] Mew, 'Doubts About Moral Principles', 290.

[26] Hayek, *Rules & Order*, argues similarly that abstract rules are required to capture fully-evolved social norms, which defy exhaustive codification.

[27] F. A. von Hayek, *The Road to Serfdom* (London : G. Routledge & Sons, 1944), 78.

[28] Hart, *Concept of Law*, 127. Warnock, *Object of Morality*, 67.

[29] Ralph W. Aigler, 'Legislation in Vague or General Terms', *Michigan Law Review*, 21 (1922), 831-51.

[30] Sir Henry Sumner Maine, *Village-Communities in the East and West* (London: John Murray, 1871), 213.

[31] Hare, 'Principles'. Joseph Raz, *The Concept of a Legal System* (Oxford : Clarendon Press, 1970), Chs. 5 & 6 bases his argument for 'principles of individuation' of laws upon similar communicative and pedagogical requirements. Raz shows, in 'Legal Principles and the

Limits of Law', *Yale Law Journal*, 81 (1972), 823-54, how these principles offer telling arguments against Dworkin's suggestions for a massive codification of all rules with all their exceptions.

[32] The advantages of uncertainty in securing moral behaviour are discussed more fully in Robert E. Goodin, *The Politics of Rational Man* (London : Wiley, 1976). This suggestion runs exactly counter to that of Ernst Freund, 'The Use of Indefinite Terms in Statutes', *Yale Law Journal*, 30 (1921), 437-55, who argues that restrictive legislation should be couched in fixed and definite language so as to minimise risks to citizens. The risks Freund would minimise are here shown to have considerable advantages.

[33] Warnock, *Object of Morality*, 66-7.

[34] Gluckman, *Judicial Process* ... (Manchester : Manchester University Press, 1955), 364. Richard L. Abel, 'A Comparative Theory of Dispute Institutions in Society', *Law & Society Review*, 8 (1973), 217-347 reports the tendency toward increasing legal specificity in increasingly differentiated society. This, I shall show in Section IV, is a result of political pressures rather than structural necessity.

[35] Gluckman, *Judicial Process* ..., 364, 293-4, 319, 305.

[36] K. M. Llewellyn and E. A. Hoebel, *The Cheyenne Way* (Norman : Oklahoma University Press, 1941), 323. Glanville L. Williams, 'Language & the Law', *Law Quarterly Review*, 61 (1945), 71-86, 179-95, 293-303, 384-406 and 62 (1946), 387-406 rightly supposes that concepts in any legal system have a 'penumbra of uncertainty'. But that is far more modest than the radical uncertainty of Lozi legal concepts.

[37] Gluckman, *Judicial Process* ..., 261

[38] *ibid.*, 233-4, 361. Similarly, in traditional Indian village tribunals judges knew the full background of a dispute and would often adjudicated the dispute behind the one they had originally met to settle. Lloyd L. and Suzanne H. Rudolph, 'Barristers and Brahmans in India : Legal Cultures & Social Change', *Comparative Studies in Society & History*, 8 (1965), 24-49, 27.

[39] John of Salibury, quoted in L. B. Cruzon, *Equity* (London : Macdonald & Evans, 1967), Ch. 1.

[40] *Earl of Oxford's Case* (1615) I Ch. Rep. 1-16. See further Sir William Holdsworth, *A History of English Law*, 7th ed. (London : Methuen, 1956), Vol. I, Ch. 5.

[41] Notice Blackstone's reply to those who made much of the

flexibility of the law of equity. 'This was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors, themselves, partly from their ignorance of law (being frequently bishops or statesmen) partly from ambition and lust of power ... but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as hath totally been disclaimed by their successors for now above a century past.' Blackstone, *Commentaries*, Vol. III, 433.

[42] *ibid.*, Vol. I, 62. There are interesting parallels in the history of canon law, which defied codification until the 13th century on the grounds that the 'right living' it enjoins is 'a relative concept depending on the kind of society to which it is applied'. Walter Ullman, *Law & Politics in the Middle Ages* (Ithaca : Cornell University Press, 1975), Ch. 4.

[43] Holdsworth, *History of English Law*, Vol. V, 275, 337.

[44] J. Buckley in the *Telescriptor Syndicate* (1903) 2 Ch. 195-6.

[45] Raz, 'Legal Principles & the Limits of Law', Rolf Sartorius, 'Social Policy & Judicial Legislation', *American Philosophical Quarterly*, 8 (1971), 151-60. Bernaro R. Carrio, *Legal Principles and Legal Positivism*, trans. M. I. O'Connell (Buenos Aires : Carrio, 1971).

[46] J. D. M. Derrett, 'Justice, Equity and Good Conscience', *Changing Law in Developing Countries*, ed. J. N. D. Anderson (London : Allen & Unwin, 1963), 114-53. Derrett, 'The Administration of Hindu Law by the British', *Comparative Studies in History & Society*, 4 (1961), 10-52. Marc Galanter, 'The Displacement of Traditional Law in Modern India', *Journal of Social Issues*, 24 (1968), 65-91. Zaki Mustafa, *The Common Law in the Sudan* (Oxford : Clarendon Press, 1971).

[47] Roscoe Pound, 'The Administrative Application of Legal Standards', *Report* of the 42nd Meeting of the American Bar Association, Boston, Mass., September 3-5, 1919.

[48] See, e.g., John Dickinson, *Administrative Justice & the Supremacy of Law in the United States* (Cambridge : Harvard University Press, 1927); and Henry J. Friendly, *The Federal Administrative Agencies* (Cambridge : Harvard University Press, 1962).

[49] Marc Galanter, 'Why the "Haves" Come Out Ahead : Speculations on the Limits of Legal Change', *Law & Society Review*, 9 (1974), 95-160. For background, see Randolph and Randolph, 'Barristers and Brahmans in India'.

[50] James G. March, 'Measurement Concepts in the Theory of

Influence', *Journal of Politics*, 19 (1957), 202-35. Steven Lukes, *Power: A Radical View* (London : Macmillan, 1974). S. G. Beackon and R. E. Goodin, 'The Powers that Be and the Powers that Do', *European Journal of Political Research*, 4 (1976), 175-93.

[51] Ivor Jennings, *Parliament*, 2nd ed. (Cambridge : Cambridge University Press, 1957), 203 writes, 'It is rarely possible to secure the passage of more than two long and controversial measures ... in any one Session'. See similarly Herbert Morrison, *Government & Parliament* (Oxford : Clarendon Press, 1954), 229 and, for evidence, Valentine Herman, 'What Goverments Say and What Governments Do : An Analysis of Post-War Queen's Speeches', *Parliamentary Affairs*, 28 (1974), 22-30.