PRINCIPLES AND POLICIES IN THE JUSTIFICATION OF LEGAL DECISIONS

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If my title were not already too long I would be tempted to add, as a subtitle, the question: Is the rule of law the rule of rules ? For though my concern here is with the justification of legal decisions, I share the conviction of Ronald Dworkin ([1]), Graham Hughes ([2]), and others that no satisfactory answer to the question of justification can be found within the framework of prevailing concepts of law. This is true whether the concept of law is the rule-centered model of the sort defended (in different ways) by Kelsen and H.L.A. Hart, or the sociological and instrumental models which have been espoused by legal realists. None of these influential concepts of law is fully able to accommodate what Hughes has called the "world of special expertise between a rule and a decision", within which have been developed whatever resources there may be for legal justification. Nor do they help us resolve the far-reaching practical issues raised by the question of justification. These issues have been well described by Dworkin:

> The question of justification has important ramifications, because it affects not only how far judicial authority extends, but the extent of an individual's political and moral obligation to obey judge-made law. It also affects the grounds on which a controversial opinion may be challenged. [3]

Dworkin rightly concludes that "though the question whether judges follow rules may sound linguistic, it reveals concerns that are in the last degree practical" ([4]).

It is these practical concerns which give the question of legal justification its special urgency, particularly in a world racked with doubt about actual and possible uses of state power. To most of us, it would appear that legal decisions should be paradigms of the rational and humane use of power in society.

With or without an adequate concept of law available to them, it remains for legal philosophers to show that this paradigmatic reputation of legal decisions is not undeserved; or where it is now undeserved, that it can be earned. In order to accomplish this important task, I believe it is necessary to explicate how principles and policies, as well as rules and facts, figure in the making and justifying of legal decisions. Some of the groundwork for this explication has already been laid by Dworkin and Hughes, and before them by Perelman and others. My purpose here will be to extend their efforts as far as a modest paper and my own limited understanding of law will permit.

In any explication of how legal decisions can be justified, it is well to forestall possible confusion by distinguishing, on the one hand, between decision-*guiding* and decision-*justifying* factors; and on the other hand, between *explanations* and *justifications* of legal decisions. The latter of these two distinctions deserves less comment than does the former. To anyone who has been exposed to recent philosophical analysis of this distinction, it should now be obvious that the motives or causes relevant to the explanation of a legal decision (by someone other than the decision-maker) are logically as well as practically distinct from the reasons relevant to the justification of that decision. Both explanations and justifications can be construed as answers to "why" questions, and this is one reason why (in both senses) they are sometimes confused. But in the case of explanation, the objective is to understand past decisions, and possibly to predict future ones, in light of *non-legal* causes, motivations, or influences. This objective, though well worth pursuing in its own right, is quite different from the objective of justification, which is to give the relevant *legal* grounds for understanding and accepting decisions as rational, authoritative, and binding on all parties. Failure to respect this distinction has tended to obscure the question of justification — and thus issues of authority, obligation, rights, and reasons — without which the normative rule of law would be unintelligible. Explanations of legal decisions may in some instances raise doubts about their justifiability (much

as explanations of criminal offenses may raise doubts about culpability and blameworthiness), but these doubts cannot be resolved without reference to authoritative legal norms (and not merely non-legal causes) of the decisions or actions in question.

The other distinction, between guiding and justifying factors in legal decisions, has attracted less critical attention, though it is no less important. What one finds in the literature are occasional acknowledgements that the factors relevant to the deliberative process of reaching a decision are not necessarily identical with the factors relevant to the justification of that decision ([5]). Further reflection will show, however, that these two sets of considerations can never be quite the same, because each new decision and its stated or implied justification will always alter somewhat the available legal guidelines for the making of such decisions. For example, established rules which serve to guide the reasoning by which a decision is reached may, in the justification of that decision, be reformulated as extended or otherwise altered rules for the guidance of similar decisions in the future. Sometimes this alteration is more dramatic, as occurs when a court overrules a precedent decision and offers or prescribes in its justificatory opinion quite different guidelines for making legal decisions of that sort. In general, one would say that the greater the alteration which a legal decision makes in the established guiding factors for that kind of decision, the more demanding are the criteria which the justification of that decision is expected to meet. This correlation, based upon considerations of rationality and consistency as well as authority and justice, would go largely unrecognized where a distinction is not first drawn between guiding and justifying factors in legal decisions.

This distinction has important relevance to the question of justification in yet another way. It serves to remind us that the public decision and its justifying argument — and not the private deliberative process by which the decision is reached — is what is legally authoritative, binding, and open to challenge or criticism. To emphasize this point is not to underestimate the value of studying and trying to improve the com-

plex deliberative process by which legal decisions are reached. It is rather to place the question of justification in its proper perspective, as a question which is of practical concern to everyone whom the law is intended to serve, and not merely to legal-makers and scholars. Armed with this distinction, we are more likely to avoid the sort of mistake which Gerald MacCallum has criticized, of presuming "that for a judge to apply rules is for him to use the rules in discovering the proper resolution of cases and controversies" ([6]). He went on to point out that "it is this presumption that has led to the arguing of the issues in terms of contentions about the psychology of judicial decision-making — i.e., about how judges make up their minds in cases". Whenever this happens, we are diverted away from the task of explicating how legal decisions can be justified, and into quite different though related endeavors.

This kind of mistake is made frequently enough, and is sufficiently serious in its consequences, to warrant quoting a key passage of MacCallum's article at some length:

> Since what counts in law is the *declaration* by a judge *in* court of the judgement *of* the court, and that is called *delivering* the judgement or decision of the court, *that,* while perhaps not the occasion on which the court makes up its mind on the case, is both the culmination and principal point of the judicial process. To make this plain, consider what would happen if the justices were to make up their minds on the case, and then wander off without delivering their decision. Given this circumstance, it may be of some interest to speak of the intentions of the justices when making up their minds on the case, but it is much more to the point to speak of their intentions when delivering the judgement. In considering the duty of justices, it is the *declaration* that counts.

From this perspective, MacCallum drew the conclusions that a legal decision-maker "has applied a rule if he invokes the authority of the rule in justification of the results he has reached", and "if he says or implies in his opinion that a rule has been applied, then it has been applied" ([8]). These conclusions are independent of any consideration of how, or even

whether, the rule entered into his deliberations in reaching the decision.

Of course these conclusions, and the distinction on which they depend, do not resolve the question of how legal decisions can be justified. They do suggest, however, that this is less a question of the *validity* of the rules or other legal grounds invoked in support of decisions, and more a question of their recognized *authority*. The difference here is between a technical and largely formal test (validity) and a non-technical and generally acknowledged substantive test (authority) of legal decisions. The significance of this difference for the explication of legal justification has been forcefully stated by Graham Hughes, in two separate passages:

> The upshot is that the whole distinction between which rules can be identified as "valid" and which cannot, to which the positivists attach so much importance, is of little help in an analysis of legal argument and decision-making. It is of little help because legal argument has to do with many concepts other than rules, and to say that a proposition cannot be formally identified as a valid rule of the system is therefore not to say anything about whether it is appropriate and usable in legal argument. [9]
>
> Decisions by a court are not characteristically based an *a* reason but rather on an edifice of reasoning; they are not supported by separating valid from invalid rules (wich would be so simple a task that disputes need never arise), but by arriving at an interpretation of materials generally acknowledged to be relevant in a fashion generally aknowledged to be acceptable. [10]

Dworkin has made a similar point in different terms by arguing that "when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, or other sorts of standards" ([11]). While these various arguments do not in themselves answer the question of justification, they at least set the stage by indicating the concepts and normative issues in terms of which

the question must be asked if it is to be answered satisfactorily.

Once we ask the question in these terms, the responsibility and discretionary authority of legal decision-makers become more challenging issues to try to resolve. For then we are not asking, What is the validity of the rules invoked to justify their decisions ? This narrow and formal line of questioning inevitably leads, as Dworkin has shown, to the awkward conclusions that (at least in hard cases if not others) judges exercise discretion in the strong sense of this term, and in so doing they are subject to no standards of responsible decision-making. Dworkin has distinguished weaker senses of discretion from this strong sense as follows: "We use 'discretion' sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question" ([12]). That judges must exercise strong discretion in some decisions follows from the premises (1) that the only way in which they can justify their decisions is by applying valid rules, and (2) that in at least some decisions their justification involves the alteration of established rules or the creation of new ones in order to resolve the issues in the case at hand. Dworkin's logic here seems unassailable, that "if a lawyer thinks of law as a system of rules, and yet recognizes, as he must, that judges change old rules and introduce new ones, he will come naturally to the theory of judicial discretion in the strong sense" ([13]).

However, when we seek to introduce principles and policies as authoritative legal standards of judicial responsibility and discretion, we run the risk of inviting serious misinterpretation of our intentions. This is likely to be viewed in some quarters as a covert attempt, either to compromise the autonomy and internal consistency of the law, or else to undermine the extra-legal (moral and social) foundations for criticizing legal institutions. Dworkin offered the following account of this characteristic misinterpretation, apparently in the hope that he might thereby dispel it in advance:

> When a positivist hears someone argue that legal principes are part of the law, he understands this to be an argument for what he calls the "higher law" theory, that these principles are the rules of law above the law. He refutes this theory by pointing out that these "rules" are sometimes followed and sometimes not, that for every "rule" like "no man shall profit from his own wrong" there is another competing "rule" like "the law favors security of title," and that these principles and policies are not valid rules of law above the law, which is true, because they are not rules at all. He also concludes that they are extra-legal standards which each judge selects according to his own lights in the exercise of his discretion, which is false. [14]

Unfortunately, this view has a tenacious hold on both the legal and popular mind, and it is not likely to be dispelled by the mere threat of a *reductio ad absurdum.* What is needed in addition is a constructive account of the role of principles and policies in legal justification which will be immune to the kinds of interpretations and objections we have just considered.

An important step in that direction is to specify the distinguishing features of principles and policies, especially in the context of their use in justifying the application of rules to the resolution of legal cases and issues. Dworkin has proposed, as a working definition of a principle in this context, that it is "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality" ([15]). A policy, on the other hand, is defined as "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)" ([16]). Familiar examples of principles that might be invoked in the justification of legal decisions are the right of all legal subjects to be protected from bodily harm, and the principle that no man shall profit by his own wrong. One can easily imagine generally accepted policies that are related to these principles, though

they constitute a different kind of legal justification. Consider, for example, a policy of reducing the incidence and severity of automobile accidents, or a policy of discouraging concentrations of economic power which would interfere with competition and public accountability.

These tentative definitions and familiar examples should be sufficient to indicate that principles and policies cannot be distinguished from rules on the basis of their verbal or logical form. The most obvious way in which they do differ is in their degree of concreteness. This difference helps explain the fact that principles and policies (unlike rules) admit of exceptions and call for judgements of weight or importance within an acknowledged scheme of priorities. These features make it possible for different principles or policies to compete and even conflict with one another and still be authoritative and binding. In contrast, as Hughes has remarked, "legal directives which are sufficiently concrete to be called rules cannot conflict and remain valid" ([17]). What this analysis suggests is that the justification of legal decisions can best be described as consisting of several levels of more or less distinct kinds of considerations and arguments. The most concrete level involves the application of a system of valid rules to the particular case — that is, to the concrete facts and issues which that case presents for authoritative decision. Within any such system, different rules will vary enormously in their degree of concreteness. To cite Hughes' examples, they may range from the rule that "A will must have two witnesses", at one extreme, to the rule that "Contributory negligence will defeat the claim of a plaintiff in a negligence suit" at the other. Thus the application of legal rules already involves several levels of argument. Beyond these levels, the choices and interpretations of the rules applied to the case depend for their justification upon less concrete (though perhaps no less tangible) considerations of principle and policy which bear on that decision. These additional levels of justification are required by the general and warranted expectation, as Dworkin has expressed it, that "every rule of law is supported, and presumably justified, by a set of policies it is supposed to advance and principles

it is supposed to respect" ([18]). The test of a justified legal decision, therefore, should be whether it meets and satisfies this basic expectation, and not merely whether it applies appropriate rules to the case which are either valid or accepted as rules of law.

The logical and practical connections between this general test of justification and the authority of legal decisions — and thus the obligation to obey them — should be obvious enough. At least it should be fairly obvious how to make out these connections in all the detail which would be necessary for a fully developed theory of justification. What is not so obvious is how to determine *which* principles and policies are to count as legally relevant and authoritative, both in general and in relation to particular cases and decisions. One of the issues posed by this question is whether there is any basis for general agreement on the principles and policies which should be considered as appropriate standards of legal argument. That such agreement is a necessary condition for the normative rule of law has been emphasized by Perelman:

> It is only when there is agreement on the values which a normative system develops that we can try to justify the rules and that it is possible to eliminate every factor tending arbitrarily to favor or disfavor the members of a certain essential category. Where agreement on values allows of the rational development of a normative system, the arbitrary will consist in the introduction of rules foreign to the system. It will be possible to attack these rules as unjust, because they are arbitrary and not soundly based. [19]

However, Perelman's statements appear to leave open the question whether this agreement can in fact be based on rational assent, or whether it is only the result (when it occurs) of fortuitous historical circumstances. If it is only the latter, then we cannot meet the positivists' charge that arguments from principles and policies in legal decisions would prevent the law from settling disputes rationally and authoritatively.

Can this charge be met ? And if so, how can the problem of finding a rational basis for agreement on principles and poli-

cies be solved ? Anyone who answers the first of these questions in the affirmative must also have a satisfactory answer to the second. In an effort to keep my discussion as brief as possible, I shall here only sketch the kind of answer which I think can and must be developed to the second question. The first items in this sketch might well be those principles which either formally or substantively prescribe the very conditions for rational and authoritative resolution of the kinds of issues which the law is called upon to address. These would surely include the principles which R.S. Peters, in another context, has cited as presuppositions of any reasoned justification or criticism of choices, decisions, and actions:

> There are a limited number of principles which are fundamental but nonarbitrary in the sense that they are presuppositions of the form of discourse in which the question "What are there reasons for doing ?" is asked seriously. The principles which have this sort of status are those of impartiality, the consideration of interests, freedom, respect for persons, and probably truth-telling. [20]

As Peters has shown, rational assent to these and other more concrete principles does not depend on being able to formulate and defend them. What this assent does depend on is a voluntarily acquired sensitivity to, and understanding of, the kinds of considerations which these principles make relevant to a particular situation. In other words, it would depend on acquiring a minimal degree of moral and social (though not necessarily formal) education of the sort we might call "liberal" in a fairly neutral sense of that term. There is no reason to think that this degree and kind of education cannot in fact be generally acquired by all citizens.

In this same connection, it would appear that Peters' description of a man of principle — as "one who is *consistent* in acting in the light of his sensitivity to aspects of a situation that are made morally relevant by a principle" ([21]) — has its counterpart in the expectations and standards by which we judge legal decisions and decision-makers. This may be a high standard to set for oneself or others as individuals. Yet, given the

power which a legal system either actually or potentially exerts over the lives of all its subjects, the standard that a legal system should be governed by principles, and that its decisions should be principled, does not seem too high. And as Peters has suggested, consistency is no less a factor when deciding in light of principles than it is when deciding under rules. It is only a more demanding kind of consistency.

The demand that decisions be principled, and palpably so, is likely to be greatest where hard cases are at issue. Here we encounter the maxim that "hard cases make bad law" which, like the maxim that "power corrupts", is a highly distilled half-truth. For hard cases may in fact make good law, or at least better law, if in deciding them the courts succeed in bringing established legal rules and practices more in harmony with authoritative principles. In addition to the highly abstract principles cited above, with which no one could argue, there are other more concrete principles which would always, or usually, be relevant to legal decisions. These include basic rights justified by considerations of justice about which there is growing and general agreement. Clearly we cannot depend on the legislative power alone to bring about the legal recognition and protection of these rights. Similarly, the achievement of a greater degree of rationality and authority in the whole criminal process will depend in part on the willingness of courts to submit their decisions to the tests of generally accepted principles of criminal responsibility and punishment. These are merely typical examples of the kinds of principles to which there can be rational assent, and whose relevance to the justification of many legal decisions is relatively uncontroversial — at least from the standpoint of the layman who is not committed to a particular legal theory.

Turning briefly to a consideration of policies, it was suggested earlier that their use as relevant standards of legal decisions depends on rational assent to the goals they are intended to promote. However, assent to goals, unlike assent to principles, is typically expressed through political decisions, and indirectly through legislative and administrative decisions which are (or should be) dependent in important ways on

collective political preferences. Thus, how general and how rational this assent actually is to any given policy will depend on how well the political process of collective decision-making is working with respect to that policy. A substantial factor in assent to policies, much as in assent to principles, is the extent to which those whose assent is in question have acquired a minimal degree of "liberal" education and political competence. Taken together, these are important considerations which must be taken into account when policies are invoked in the justification of legal decisions. Otherwise such arguments may serve to undermine, rather than enhance, the authority and rationality of the decisions they are intended to support. Moreover, policies are not pursued or invoked in a moral vacuum. Both the projected goals and the means adopted for their realization are always subject to the limitations set by considerations of principle. Hence considerations of policy, though always relevant, are never sufficient by themselves to justify a legal decision as authoritative, rational, and binding on all parties. Failure to appreciate this fundamental point is one source of the "balancing" approach to the justification of legal decisions, which in turn has given the courts and the system of law they represent a reputation for being unprincipled and thus unworthy of respect.

On this note, we return to the contemporary crisis of legal authority and obligation with which this discussion began. I can only hope that, having completed this small circle, we find this crisis slightly more within our power to resolve for the better.

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NOTES

(1) See "Is Law a System of Rules?" 35 *U. Chi. L. Rev.* 14 (1967). Reprinted in Robert S. Summers (ed.), *Essays in Legal Philosophy* (Oxford: Basil Blackwell, 1968), 25-60. References will be to the latter.

(2) See "Rules, Policy and Decision-Making", 77 *Yale L. J.* 411 (1968).

Reprinted in Graham HUGHES (ed.), *Law, Reason, and Justice* (New York: N.Y. Univ. Press, 1969), 101-135. References will be to the later.

(3) Ronald DWORKIN, "Morality and Law" (a review of H.L.A. HART's *Punishment and Responsibility*), 12 *N.Y. Rev. of Books* 30 (May 22, 1969).

(4) *Ibid.*, 30.

(5) A notable exception is Gidon GOTTLIEB, *The Logic of Choice* (London: George Allen and Unwin, 1968), who is primarily concerned with decision-guiding considerations, and who systematically recognizes the difference between these and justifying considerations.

(6) Gerald C. MACCALLUM, Jr., "On Applying Rules", 32 *Theoria* 197 (1966).

(7) *Ibid.*, 205 (his italics).

(8) *Ibid.*, 208.

(9) HUGHES, "Rules, Policy and Decision-Making", 124.

(10) *Ibid.*, 127.

(11) DWORKIN, "Is Law a System of Rules?" 34.

(12) *Ibid.*, 45-46.

(13) *Ibid.*, 53.

(14) *Ibid.*, 53-54.

(15) *Ibid.*, 35.

(16) *Ibid.*, 34-35.

(17) HUGHES, "Rules, Policy and Decision-Making", 116.

(18) Ronald DWORKIN, "On Not Prosecuting Civil Disobedience", 10 *N.Y. Rev. of Books* 19 (June 6, 1968).

(19) Ch. PERELMAN, *The Idea of Justice and the Problem of Argument* (London: Routledge and Kegan Paul, 1963), 54.

(20) R. S. PETERS, "Concrete Principles and the Rational Passions", in NANCY F. and Theodore R. SIZER (eds.), *Moral Education* (Cambridge: Harvard Univ. Press, 1970), 36.

(21) *Ibid.* (his italics).