

California Law Review

VOL. 62

JANUARY 1974

No. 1

On Treating Like Cases Alike* †

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In 1958, H.L.A. Hart published an article in the *Harvard Law Review* in which he distinguished several theses traditionally advocated by or associated with legal positivists.¹ Though Hart rejects the bulk of these theses, he devotes the greater part of his article to a defense of one of them, regarding the intersection of law and morality. This thesis—which both Bentham and Austin propounded—is that, in the absence of an express constitutional or legal provision, it does not follow from the fact that a rule violates a standard of morality that it is not a rule of law; conversely, it does not follow from the fact that a rule is morally defensible that it is a rule of law. The particular wording of this thesis indicates that it is directed primarily against traditional natural law theorists, such as Sir William Blackstone² and Gustav Radbruch,³ who have said that human or positive laws are invalid if contrary to some “higher” law.

In accord with this defense, Hart presents as the central positivist claim “the contention that there is no necessary connection between law and morals or law as it is and law as it ought to be.”⁴ And

* A fellowship from the American Council of Learned Societies provided release from teaching obligations for the academic year 1972-73, during which this paper was put into its present form. I am very grateful to Martin P. Golding, whose guidance during the initial versions of this paper was extremely valuable, and to Stanley L. Paulson, Richard B. Parker, and George Rutherglen, who offered helpful comments on the final draft.

† Certain variances in form from that normally followed by the *Review* have been made at the request of the author. Eds.

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1. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1958).

2. *Id.* at 598, citing 1 W. BLACKSTONE, COMMENTARIES *41.

3. Hart, *supra* note 1, at 595 n.5, 617-21.

4. *Id.* at 594, 601 n.25.

in his principal work, *The Concept of Law*, he says: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."⁵ These assertions must be compared, however, with other statements regarding the intersection of law and morality for which Hart is willing to use the term "necessary," at least in some sense. For example, Hart takes pains to defend what he calls "the minimum content of natural law."⁶ Given certain features of the human condition—such as the vulnerability of human beings to bodily attack, the approximate equality of men (at least with regard to powers of domination), and the scarcity of natural resources and human altruism—there are grounds for denying the corollary of the positivists' tenet: namely, that law may have any content whatever. For in the absence of rules forbidding murder, violence, and theft, "there would be no point in having any other rules at all."⁷ Hart acknowledges the inescapability of these rules by saying that they represent a "natural necessity."⁸

To provide a framework for the discussion of this issue, Hart distinguishes six versions of the claim that there is a necessary connection between law and morality.⁹ His purpose is to separate out five "acceptable" claims from the natural law thesis that morally iniquitous laws are not valid. Few positivists, Hart says, would be concerned to deny these five claims. As I understand them, *four* of these five claims are not especially problematic. They may be summarized, in their acceptable form, as follows: (1) that a legal system is most stable when it rests on a general conviction of the moral value of the system; (2) that moral notions determine the content of much law; (3) that moral judgments are decisive in certain areas of judicial discretion; and (4) that a good legal system must conform (in a non-tautological sense) to the requirements of justice and morality. Of these four claims, the classical legal positivists explicitly acknowledged (2) and (3), and it is unlikely they would have disagreed with (1) and (4).

I want to argue, however, that the fifth claim *is* problematic. Stated briefly, the claim is that a minimum of justice is necessarily realized whenever human conduct is governed by general rules pub-

5. H.L.A. HART, *THE CONCEPT OF LAW* 181-82 (1961) [hereinafter *THE CONCEPT OF LAW*]; *see id.* at 253.

6. *Id.* at 188-89.

7. Hart, *supra* note 1, at 623; *accord*, *THE CONCEPT OF LAW*, *supra* note 5, at 189-195.

8. It is interesting to note that A.P. d'Entrève has endorsed Hart's argument as "completely plausible" for a natural law theorist. *See* d'Entrève, *A Core of Good Sense: Reflections on Hart's Theory of Natural Law*, 9 *PHILOSOPHY TODAY* 120, 132 (1965).

9. *THE CONCEPT OF LAW*, *supra* note 5, at 198-207.

licly announced and judicially applied. Hart's argument for this claim runs as follows:

If we attach to a legal system the minimum meaning that it must consist of general rules—general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals—this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. It is, however, true that *one* essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of law, not justice of the law. So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles. Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law and which are designed to ensure that rules are applied only to what are genuinely cases of the rule or at least to minimize the risks of inequalities in this sense.¹⁰

An analysis of the critical steps in this argument must await the body of this essay, but its significance for the separation of law and morality should be evident. Hart's argument yields the following rather curious result: If it is part of the meaning of a legal system that it consists of general rules, and if the notion of law consisting of general rules embodies a certain moral principle (a principle of justice), then any system of governance that does not embody this moral principle is not a legal system. Again: If the use of legal rules necessarily satisfies a certain moral principle, then any standard whose use does not satisfy this moral principle is not a legal rule. These simple conclusions bear a striking resemblance to the natural law thesis. Of course, one could object that Hart's argument says nothing about the *content* of legal rules and the potential conflict *in content* between legal rules and moral principles—the traditional focus of the natural law thesis. The results I have sketched are concerned only with the *form* of rules. Yet with Hart's admission that a moral principle is at stake in the form of rules, it is not clear what importance the form/content distinction has. It is apparent that Hart believes that the form of rules is logically related to values to be realized in legal practices.

Thus, in drawing out the implications of Hart's argument, I appear to have confirmed a suspicion that legal positivists neglect the consequences of their occasional avowals that legal and moral standards intersect. There is a strain in Hart's argument, it seems, pulling him toward a form of natural law theory, or at least pulling him away from legal positivism, and it is precisely such strains that demand

10. Hart, *supra* note 1, at 623-24.

clinical examination. Are they pathological growths that need to be extirpated or do they anticipate new and more durable forms of life?

I shall contend that Hart's thesis regarding a necessary connection between general rules and a minimum of justice is mistaken, principally as a consequence of his misunderstanding the function of the principle of treating like cases alike. To demonstrate my contention, I will begin with a brief review of the proximate origin of Hart's analysis of justice, an essay by the Belgian philosopher, Chaim Perelman. This review will lead to an extended consideration of two interpretations of the principle of treating like cases alike. The first views it as a moral principle, derived from the notion of what it means to have a morality, and the second views it as a principle of reason, entailed by the intelligible use of language. I shall argue that both of these interpretations are inadequate either to providing a special status (moral or logical) for the principle of treating like cases alike or to demonstrating a special connection between the principle and the use of general rules. In the final section of this Article, I will sketch a more acceptable understanding of the principle, indicating what pragmatic justification its use is entitled to receive.

I

THE ANALYSIS OF JUSTICE

As the ensuing discussion is devoted to an examination of the critical steps in Hart's argument, it would be appropriate to set them out briefly here.¹¹

Principles of justice are standards of evaluation representing a distinct, and usually rather specific, segment of moral criticism. Their characteristic features and their special connection with law emerge in noting the typical interchangeability of the terms "just" and "unjust" and the terms "fair" and "unfair." Questions of fairness arise primarily in two types of situations: in the distribution of benefits and burdens to classes of persons, and in claims of compensation or redress for injuries done. Other uses of the terms are derivative from these.¹² Now the general principle that pervades the diverse applications of the concept of justice is that persons are entitled in respect of each other to a relative position of equality or inequality. This principle

11. Hart's fullest discussion of the concept of justice appears in *THE CONCEPT OF LAW*, *supra* note 5, at 153-63. The following paragraph in the text is a summary of that discussion.

12. I will not pursue Hart's discussion of compensation and its connections with principles of justice. His analysis at that point, *id.* at 160-161, rests on several equivocations. It is safely neglected since it does not bear on his contention regarding the special status of the principle that like cases should be treated alike.

is expressed in the following precept: treat like cases alike and different cases differently. But this precept, while central to the concept of justice, is by itself incomplete. Until supplemented by criteria of likeness and difference, it remains empty and cannot serve as a determinate guide to conduct. The concept of justice therefore has two parts: a uniform or constant feature, and shifting or varying criteria of likeness and difference. Furthermore, in dealing with the application of laws to particular cases, the criteria of likeness and difference are provided by the laws themselves; whether one "case" is like another "case" is determined by the categories contained in the laws. A "case" is an instance of a legal category, and "like cases" are instances of an identical legal category. Thus, a law is justly applied when applied to all those and only those who are alike in satisfying the criteria specified in the law. To apply a law justly is simply to proceed by rule; it is a matter of taking the same general rule and applying it to all the cases it covers—without prejudice, interest, or caprice. (Hence, it is the generality of legal rules, not the impartiality of application, that "connotes" the principle of like treatment.¹³) Laws themselves may be criticized in the name of justice—that is, in terms of alternative criteria of likeness and difference—but the principle of like treatment entails and is entailed by conformity to law.

While the logical relationships among the parts of this argument are not always clear, one can say minimally that the claim of a necessary connection between acting justly and proceeding by rule rests on a special analysis of the concept of justice. Consequently, I shall begin by taking a close look at that analysis.

The idea of treating like cases alike has received particular prominence in contemporary discussions as a principle of formal, as opposed to substantive, justice. One of the decisive influences in this regard is Chaim Perelman's "Concerning Justice,"¹⁴ an essay whose central distinction has enjoyed both widespread acceptance and an absence of sustained critical evaluation.¹⁵ In this essay, Perelman sets himself

13. See THE CONCEPT OF LAW, *supra* note 5, at 156-57.

14. C. PERELMAN, *Concerning Justice*, in THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 1 (J. Petrie transl. 1963). This essay was first published in 1945. Perelman has further elaborated his analysis in two other essays contained in the cited collection—*The Three Aspects of Justice* and *The Rule of Justice*—as well as in a series of lectures published as C. PERELMAN, JUSTICE (1967). The French version of the collected essays may be found in C. PERELMAN, JUSTICE ET RAISON (1963).

15. To comprehend the extent of Perelman's influence, one should note the discussions of justice in M. GINSBERG, ON JUSTICE IN SOCIETY ch. 2 (1965); THE CONCEPT OF LAW, *supra* note 6, at 155-59, 251; P. FITZGERALD, SALMOND ON JURISPRUDENCE § 9 (12th ed. 1966) (following Hart); D. LLOYD, THE IDEA OF LAW ch. 6 (1962); A. ROSS, ON LAW AND JUSTICE ch. 12 (1959); Frankena, *The Concept of Social Justice*, in SOCIAL JUSTICE 1, 8 (R. Brandt ed. 1962).

the task of uncovering a common and neutral principle in the many formulae currently proffered as true principles of justice. His attempt is to locate the sources of disagreement among contemporary political doctrines and to indicate an area of agreement. Six formulae in particular are singled out for discussion, each apparently an alternative guide for distributing benefits and burdens to individuals according to specific criteria.¹⁶ Perelman finds that, in each of the six formulae, justice consists in a certain application of the idea of equality. Each formula isolates a category in terms of which individuals are to be treated. To act justly is to provide the same treatment to those individuals who come under the same category, or in other words to those who are equal from that point of view.¹⁷ Perelman compares the principle of equal treatment to a mathematical proposition with a variable. It has an indeterminate element the specification of which will yield the various formulae of justice. Thus, an act or decision of individual *A* (a distributor of goods) providing a certain treatment for individual *B* (a recipient of goods) may be considered by *B* as unjust either because of an infringement by *A* of the principle of equal treatment or because of a disagreement between *A* and *B* as to the proper formula (or the correct interpretation of a particular formula) to be applied in a given set of circumstances.¹⁸

Perelman recognizes the centrality to the six formulae of the principle of equal treatment by referring to it as the principle of *formal* justice, in contrast to the various *substantive* formulae. In order to appreciate the significance of this distinction, it is important to recognize that Perelman is working with a theory of emotive meaning for value terms. The details of this theory need not detain us, apart from the claim that disagreements about the meaning of justice, as with all "prestige-laden" terms, are rooted in differences in the "affective content" that is associated with the concept.¹⁹ Emotive disagreement hinders conceptual agreement and prevents the general acceptance of

16. The six formulae are: "to each the same thing," "to each according to his merits," "to each according to his works," "to each according to his needs," "to each according to his rank," and "to each according to his legal entitlement." C. PERELMAN, *Concerning Justice*, *supra* note 14, at 7-10, 17-26. It is to be noted that Perelman admits that this list is incomplete, yet fails to specify a general criterion for determining which formulae may or may not be included in the list.

17. Strictly speaking, these categories, except for the first, become divided into sub-categories, such as degrees of merit and hierarchies of rank, each with an attached treatment. *Id.* at 17-26.

18. An act or decision may also be unjust, according to Perelman, when it doesn't take adequate account of the facts. These considerations are to be distinguished from those relevant in situations in which a plurality of contradictory categories are applicable simultaneously; such situations require principles of equity. *See id.* at 29-36.

19. *Id.* at 2-3.

a single definition or elucidation. Conversely, the resolution of conceptual disagreement can legitimately be expected only to the extent that emotive meaning is altogether dissociated from the term in question.²⁰ Thus, Perelman's effort to uncover a common and neutral principle among the formulae of justice is an attempt to demonstrate that treating like cases alike is not the expression of a typical "prestige-laden" value term but is a principle of an altogether different sort, requiring a different type of analysis and a different form of justification from the substantive formulae. The principle of formal justice, once it is separated from the substantive formulae, loses its affective content; it does not prejudice our judgments of value.²¹

But what alternative forms of explication and justification are available for the formal principle? The main clue to Perelman's response to this question appears in the contrast with his treatment of the substantive formulae. It is characteristic of these formulae, as one would expect from the emotive analysis, that they are not open to any conclusive justification. To speak of substantive injustice amounts to a comparison of opposing or contrasting categories of classification. Now it may be possible to show that a given category is a sub-class of a wider category, or that a rule containing a particular category is deducible from a more general rule and thus constitutes a special case. But however far one may be able to proceed with more general considerations, there will be a point at which reasoning comes to a halt. The most general normative principles establish what has value, but "this value has no basis either in logic or in reality. . . . [I]ts affirmation results neither from a logical necessity nor from an experiential universality It is, logically and experientially, arbitrary."²² Fundamentally, then, the substantive formulae of justice are founded on expressions of subjective preference or sentiment and are not subject to rational argument. They reflect, as Perelman sometimes says, a world conception, for or against which reasons cannot be produced.²³

20. *Id.* at 4.

21. *Id.* at 28. In an interesting reversal of the logical positivists' disdain for "meaningless" propositions, Perelman uses the problems of emotive meaning to define philosophical studies: "[T]he proper object of philosophy is the study of those value-laden ideas which are so strongly coloured from the emotive point of view that agreement on their conceptual meaning is almost unattainable." *Id.* at 4.

22. *Id.* at 52.

23. In subsequent accounts, Perelman modifies this view to allow for various forms of moral argumentation. He believes that, while there is no single logic of value statements, they are open to such disputation as is employed generally in the criticism and justification of opinions, decisions, and claims, wherever logically conclusive demonstrations are inappropriate. Nonetheless, he continues to maintain that values, and thus the substantive formulae, neither are derivable from experience nor are the logical consequence of incontestable principles. See C. PERELMAN, *JUSTICE* 56 (1967);

The importance of these remarks on the character of the substantive formulae lies in the contrast with Perelman's treatment of the formal principle. By a curious conflation of logical and psychological analysis, Perelman argues that the formal principle is both experientially universal and logically necessary.²⁴ This conflation presents unique problems which have been ignored by those who have accepted Perelman's distinction and which require a thorough examination of the natural psycho-social foundations of principles of justice—a subject, fortunately, which lies beyond the confines of this essay. More decisive for our purposes are the two principal interpretations that have been placed on Perelman's remarks in the attempt to secure a unique status for the formal principle that cannot be attacked as arbitrary.

The first interpretation regards the formal principle as a distinctively moral principle that rests on a certain notion of equality. As Perelman himself says, "we all agree on the fact that to be just is to treat in equal fashion."²⁵ And this is quite compatible with the fact that fashions change. What this observation comes to mean, in Hart's words, is that "individuals are entitled in respect of each other to a certain relative position of equality or inequality"²⁶—a position relative, that is, to the categories of which they are members. Perhaps a more revealing formulation of this position is the claim that, even if the categories being applied in a particular situation are morally reprehensible, it would be a *further wrong* to treat similar cases differently.²⁷ The special burden of this position, of course, is to demonstrate that the principle of like treatment is indeed common to and neutral between the various substantive formulae. The only point I wish to make here is that, even if the commonality of the formal principle is established, it remains unclear exactly what sort of equality is at stake.

The second interpretation of Perelman's remarks dispenses with the notion of equality and regards treating like cases alike as a strictly logical principle. This interpretation appears to be closer to Perelman's own view, since he states: "Our analysis shows that, contrary to current opinion, it is not the idea of equality that constitutes the basis of justice, even of formal justice, but the fact of applying one

C. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (J. Wilkinson & P. Weaver transl. 1969).

24. C. PERELMAN, *Concerning Justice*, *supra* note 14, at 40-42.

25. *Id.* at 15.

26. THE CONCEPT OF LAW, *supra* note 5, at 155. For this construction, note particularly Frankena, *supra* note 15, at 8.

27. Compare H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 24-25 (1968) with THE CONCEPT OF LAW, *supra* note 5, at 161-62.

rule to all the members of an essential category."²⁸ That is, equality of treatment among individuals is merely a logical consequence of the process of abiding by rules. For Perelman, the consistent application of rules to human conduct appears, in turn, to be a product of a certain rational necessity, which is accounted for by reference to a psychic need for coherence and regularity.²⁹ However that may be, the formal principle has lost its peculiarly moral importance and has become some sort of principle of reason.

It should be noted that these two interpretations, while analytically distinct, are sometimes combined into a single explication of the formal principle. Thus, when Hart says, "there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles," he is retaining *both* the logical connection between proceeding by rule and treating like cases alike *and* the moral connection between treating like cases alike and achieving a certain kind of equality to which individuals are entitled. I do not wish to dispute, in principle, such a merger of the two interpretations, but for the purposes of analysis it is best to consider them independently of one another.

In the pages that follow, I propose to examine both these interpretations of the formal principle. Since the principle of treating like cases alike is so much taken for granted, these interpretations are rarely spelled out in any detail. (Indeed this point applies above all to Hart, who makes no attempt himself to provide a general justification of the principle. Hence the need to rely on other sources.) So my initial task in each case is to construct the arguments that would demonstrate that the formal principle is a distinctively moral or a strictly logical principle. However, these attempts at demonstration show that neither argument does, or could, succeed, and thus that both constructions fail to secure the desired status for the formal principle.

II

A MORAL PRINCIPLE

Establishing a moral construction for the principle of formal justice is more difficult than one may at first suppose. Two obstacles in particular present themselves: the first having to do with the nature of the grounds offered in defense of the construction; the second having to do with the relation between the construction and the special interpretation which Hart gives the formal principle in his argument for

28. C. PERELMAN, *Concerning Justice*, *supra* note 14, at 38.

29. *See* note 61 *infra* and accompanying text.

its necessary connection with a system of general laws. I shall focus primarily on the second obstacle, but I need to sketch briefly the first.

It is a commonplace of contemporary moral philosophy that standards of human conduct, to be considered moral, must be universal. This requirement is regarded, alternatively, as (1) a defining characteristic (or identifying criterion) of moral conduct, or (2) a necessary condition of the moral correctness of an action, or (3) both of the above. A typical statement of this requirement takes the form of what Marcus Singer has called "the generalization principle":³⁰

- (G) An act is morally correct (or incorrect) for a particular agent in a particular situation, only if it would be correct (or incorrect) for any similar agent in a similar situation.

Now it is easy enough to construe the principle of formal justice as simply a variation or special application of the generalization principle.³¹ Thus, the demarcation of agent and situation as separate elements—which may be difficult enough to keep distinct in practice—may be collapsed into "act" as a single inclusive expression which serves as the basic unit of comparison. The principle may then be formulated as follows:

- (G') An act is morally correct (or incorrect) in one instance, only if it is correct (or incorrect) in every instance.

Provided with a suitable interpretation of likeness (in terms of identity of relevant description), the principle of treating like cases alike is simply an alternative statement of (G'). This formulation preserves the indeterminateness of the formal principle and the consequent need to be supplemented by substantive criteria of likeness and difference. Thus, whatever argument can be made for (G) or (G'), as a defining characteristic of moral conduct or as a necessary condition of the moral correctness of an action, can be made for the formal principle as well.

This point will be seen even more clearly in an alternative (and indeed more common) way of formulating the requirement of universality, which shifts the focus from the characteristics of moral action to the characteristics of moral judgments. A typical formulation along these lines runs as follows:

- (M) It is part of the meanings of moral words that we are logically prohibited from making different moral judgments about two

30. M. SINGER, *GENERALIZATION IN ETHICS* 5 (1961).

31. There may be some question as to which principle has logical priority. David Lyons suggests, for example, that the generalization principle "may perhaps best be viewed as a consequence of the maxim, 'Treat like cases alike.'" D. LYONS, *THE FORMS AND LIMITS OF UTILITARIANISM* 203 (1965). He says that it "may be regarded as a particular instance or implication or codification of one aspect of the maxim." *Id.* But I don't see any obvious way to determine these relationships.

cases, when we cannot adduce any difference between the cases which is the ground for the difference in moral judgments.³²

Aside from the use of the language of cases, which makes the principle of formal justice evident, the advantage of this formulation is that it reveals the grounds that are typically appealed to in defense of the requirement of universality, which are semantic. In other words, the thesis that universality is characteristic of moral judgments is a "logical" thesis, in the sense in which that term is currently used, *i.e.*, a thesis about the meaning of words. Thus, for R.M. Hare, universality is a feature of the use of *descriptive* terms, and moral terms share in that characteristic insofar as and because of the fact that they have descriptive meaning.³³

The difficulty with this defense of the requirement of universality is that if (G) and (M) are regarded simply as linguistic facts, then they need not have any status as moral principles. Consequently, to show that the formal principle is a variation of either one does not establish a moral construction for it, merely a linguistic construction. Hare is quite clear on this point. He says that a person who uses moral words thereby commits himself to a universal rule, but he does not thereby commit himself to any moral principles, not even to the principle that one ought always to adhere to universal rules. The logical thesis is no more than a logical thesis, "for otherwise the objection will be made that a moral principle has been smuggled in disguised as a logical doctrine"³⁴ As it happens, however, Hare fudges this issue when, in another context, he discusses the "utilitarian" principle, "Everyone to count for one, nobody for more than one." Hare claims that this principle is a corollary of the requirement of universality, following simply from the logical character of moral words. By way of explanation he says that this "utilitarian" principle means "that everyone is *entitled* to equal consideration."³⁵ Certainly this is a moral claim and not simply a point of logic. Hare wants to assert that the requirement of universality does not commit one to any particular moral opinion. But the idea that each is entitled to equal consideration is nothing else if not a moral opinion. One might try to defend Hare by saying that he is distinguishing (implicitly) a formal moral principle from what he elsewhere calls substantial moral principles. But to give credence to that distinction begs the very question at issue.

Singer is more troubled by this problem and adopts a different tack. While agreeing that the requirement of universality is "part of

32. R. HARE, *FREEDOM AND REASON* 216 (1963).

33. *Id.* at 10-14, 30.

34. *Id.* at 31.

35. *Id.* at 118 (emphasis added).

the meaning" of moral terms in their distinctively moral senses, he nonetheless does not agree that it is merely a fact of language or morally neutral. Thus, he regards it not only as a defining characteristic of moral conduct but also as a necessary condition of the moral correctness of an action. In short, he provides for the requirement of universality the status of a moral principle and refers to it frequently as a principle of justice or fairness. Yet Singer is not open to offering anything other than a linguistic ground for (G), for to attempt to demonstrate that one ought to follow (G) is to attempt to demonstrate that one ought to be moral—which is, in his view, nonsensical.³⁶ At the same time Singer admits that the mere fact that (G) is a feature of moral language does not by itself prove anything; in fact, he goes so far as to suggest that the reason (G) is such a "pervasive feature of moral language" is precisely that it is "so fundamental" a moral principle.³⁷ It seems, then, as if we are left having to treat (G) simply as primitive—which means we cannot give any account of it at all.

Quite aside from the difficulty of establishing appropriate grounds to support a moral construction for the formal principle, a second and more important obstacle arises because of the special interpretation that Hart provides for the principle in his attempt to demonstrate its necessary connection with a system of general laws. This interpretation, as I will argue, appears to compromise the fairness (or "relative equality")³⁸ that is supposedly achieved through like treatment. However, since Hart provides few clues in his discussion of the concept of justice as to his reason for regarding like treatment as fair, it is helpful to look elsewhere in his writings to spell out his position.

In his essay "Are There Any Natural Rights?," Hart is concerned to discover "those principles . . . which alone make it morally legitimate for one human being to determine by his choice how another should act"³⁹ This question is raised not to determine the propriety of one particular obligation or other, but of any obligation at all, of the whole system of rights and obligations, powers and liabilities, that are operative within an institutional structure. It is at this level that fairness is invoked, for it serves to define the scope of justified limitations on a person's activity. The obligations incumbent on any particular person do not arise out of the character of the acts that become obligatory in the course of the activity; they arise out of the

36. *Id.* at 46-49.

37. *Id.* at 49.

38. See text accompanying notes 12-13, 26 *supra*.

39. Hart, *Are There Any Natural Rights?*, 64 *PHILOSOPHICAL REV.* 175, 178 (1955).

relationships of persons. And the obligations are owed specifically to, and only to, those persons who are also engaged in the activity. In Hart's words:

[W]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. . . . [T]he moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience.⁴⁰

The significance of Hart's reference to "those who have benefited" is not entirely clear. He does not appear to mean that the obligations of a particular person are a consequence of any benefit actually derived from the common activity being engaged in; otherwise it would be legitimate for a participant who suffered substantial losses (*e.g.*, of property) to consider himself relieved of all obligations. Rather, the moral weight of the obligations incumbent on a person rests on the mere fact of participation—or, more properly, on the conditions consequent upon participation: namely, the mutuality of restrictions. Where mutual restrictions exist, the claim to interfere with a person's conduct when it oversteps those restrictions is justified because it is fair.

Hart's phrase, "those who have benefited," could of course be interpreted differently. It is rather common, in fact, to argue that it is unfair for an individual to derive some benefit by breaking a rule, where the benefit can be obtained only so long as other individuals engaged in the activity keep to the rule. By way of example, Isaiah Berlin describes a situation in which he boards a train without paying for a ticket and instead offers the money to a pauper. By circumscribing the effects of this act in a suitable way, Berlin is able to argue that the act increases utility overall and so, from that point of view, is morally right. Nonetheless, the advantage is gained only if the other passengers pay for their tickets. The act, then, is unfair.⁴¹ Yet, curiously enough, in general remarks leading into a discussion of this situation, Berlin also suggests that the reference to a benefit gained is misleading. Arguing similarly to Hart, he says that the demand for fairness is an expression of "the belief in general rules of conduct" and is "a form of desire for equality for its own sake."⁴² Thus a breach of rules is unfair because it represents the violation of an ideal of equality that is realized in mutual regulation.

40. *Id.* at 185.

41. Berlin, *Equality as an Ideal*, in *JUSTICE AND SOCIAL POLICY*, 144-45 (F. Olafson ed. 1961).

42. *Id.* at 144.

However that may be, Hart's connection of fairness with mutual regulation is explicit. Interference with another's activity by the imposition of rules is justified because it is fair. But "it is fair because only so will there be an equal distribution of restrictions and so of freedom among this group of men."⁴³ Recognition of the validity of mutual restrictions entails recognition of the equal right of all persons to be free, which is, according to Hart, a right that is presupposed by all other claims regarding rights and obligations.

It is not my concern here to assess this broader contention, but two observations are in order. First, Hart's claim that it is the right to be free, and not some other right, that is at stake seems to reflect the importance he places on the voluntary submission or consent of each participant in a rule-governed activity to the conditions of the activity. Each person chooses to create claims upon himself and, hence, approaches the question of participation from a position of freedom. Hart says elsewhere that voluntary cooperation is a necessary condition of the creation of authority and, thus, of the coercive enforcement of law which that authority justifies.⁴⁴ Whether or not this is the principal, or the only, reason underlying Hart's position, it is vulnerable to standard objections against the use of consent as a foundation for obligations—whether understood historically, in which case one finds that the notion of voluntary membership has very limited application, or understood analytically, in which case the notion of consent yields to a statement of rational conditions that make consent itself obligatory.⁴⁵

Second, and more importantly, Hart has selected, so it happens, the only definition of freedom which permits the deduction, "an equal distribution of restrictions and so of freedom." Freedom is understood in terms of the presence or absence of external constraints, and a state of equal freedom is maintained if each person is subjected to identical constraints. The difficulty with this notion of freedom is that there is a significant sense in which mutual restrictions are not necessarily mutually coercive, not necessarily mutually onerous. As a result, the meaning of "freedom" that is indispensable to the deduction does not appear to be the meaning upon which the thrust of the argument depends.

A simple example of a restriction that imposes unequal burdens is a rule against spitting in subway stations. Some people find the rule quite frustrating, some are only mildly annoyed, some are indiffer-

43. Hart, *supra* note 39, at 191.

44. THE CONCEPT OF LAW, *supra* note 5, at 196.

45. For some of the relevant arguments on this point, see Pitkin, *Obligation and Consent-I*, 59 AM. POL. SCI. REV. 990 (1965).

ent, and some are positively delighted. To argue here that the rule is fair *because* it yields an equal distribution of freedom must seem sophistical. However, the principal difficulty lies not with the notion of freedom, but with the alleged connection between fairness and mutual regulation. Games are usually regarded as paradigmatic instances in which it is "only fair" that the same rules apply to everyone. But it is rather easy to produce examples of game rules that systematically advantage some players over others. Thus in tennis, the rule that permits two serves gives an advantage to height and strength, which would diminish if the number were reduced to one. Again, one of the crucial differences between auction and contract bridge is the decrease in the latter of the element of chance, which makes bidding more crucial, thereby favoring those with special talents. In general, then, fairness in game situations is a function of the capacities of the players as well as the mutuality of regulation. Indeed, when these capacities are sufficiently disproportionate, it is considered "only fair" that the rules *not* be applied equally to all players.

What is true of the paradigm of mutual regulation, however, is true of mutual regulation generally. In proceeding by rule, attention is paid only to the features of persons and their circumstances that are singled out by the rule in question. Consequently, the fairness of applying the same rule to different persons (that is, of treating like cases alike) presupposes that the persons affected are characterized by at least a rough equality with regard to all other features; or, more accurately, it must be presupposed that all other personal and circumstantial features are irrelevant to the fairness of applying the rule. Suppose it could be shown, however, that in principle it is impossible to guarantee, for any specified rule, that all other features are indifferent. It would then follow, I think, that the fairness of mutual regulation is always debatable, until it is specifically demonstrated in a particular case.

To realize that this mootness is a consequence of Hart's analysis, one need only examine Hart's explication of the epistemic issue that lies at the core of treating like cases alike: namely, the identification of "like cases."⁴⁶

Typically in legal discussions a "case" is a set of circumstances or an incident under observation, or simply a dispute between two parties, as in the expression "the case before the court." In this use, the term is not bound up with a particular description of the state of affairs; a case of this sort, indeed, is subject to innumerable descrip-

46. The following paragraph in the text alters the form but not the substance of my argument as presented in *Justice and Rules: A Criticism*, PROCEEDINGS OF THE WORLD CONGRESS FOR LEGAL AND SOCIAL PHILOSOPHY 177 (1971).

tions, no two of which are exactly similar. "Like cases," then, might refer to either (a) cases that are partially identical in the sense that they share a certain description, though differing with regard to another, more extensive description, or (b) cases that bear to one another a certain resemblance or analogy not completely reducible to an identity of descriptions. If we focus on (a), we may say that each description has a class of cases as its extension. That is, the extension of the description is the class of all cases of which the description is true. Since cases are subject to innumerable descriptions, any one case is a member of innumerable classes which constitute the extensions of the different descriptions that case satisfies. This means that any particular description of a case is necessarily incomplete, so that the identification of an incident as "a case of . . .," where the blank is filled in by some description, does not preclude its simultaneous identification as a case of another sort as well. For legal purposes, however, this profusion of possible descriptions is controlled by confining the relevant descriptions for identifying cases to those embodied in existing laws. Thus "like cases" are cases subsumable under the same rule of law, *i.e.*, cases satisfying an identical legal description.

No doubt other interpretations of the phrase "like cases" are possible, but it is the interpretation sketched here that is central to Hart's analysis. For Hart, treating like cases alike means that any difference in treatment of persons in the distribution of legal benefits and burdens is justified by reference to the different legal categories of which they are members; for any justified difference of treatment, a reason can be produced in the form of a description embodied in law which makes the distinguishability of cases, and thus of treatment, legitimate. Injustice occurs when a difference of treatment has no such reason as its basis. Similarly, likeness of treatment is justified, and otherwise arbitrary, only if the descriptions of those cases given similar treatment are identical.⁴⁷ This makes it possible to offer a more precise statement of the principle of formal justice, as it is understood by Hart: treat like cases, as defined by the rules, alike.⁴⁸

47. Thus, whether it is a similarity or a difference of treatment that is in question, the justification of any particular treatment accorded to a person is always relative to the legal description of his act.

48. This formulation makes it clear why Hart insists that the rules of a legal system must be general, that is, must allow for a multiplicity of instances. As I have observed previously, in *Justice and Rules: A Criticism*, *supra* note 46, at 178, it is a matter of historical fact that not all laws have been of that character. Furthermore, Hart does not explain his insistence on generality with regard to both persons and actions. Richard Wollheim remarks that generality has often been taken as a defining property of law "although there has been sometimes uncertainty whether the required generality is of actions involved (Austin) or of persons affected (Blackstone) or of both (Rousseau)." Wollheim, *The Nature of Law*, 2 *POL. STUDIES* 128, 131 (1954).

It is important to observe that, in adopting this understanding of the formal principle, Hart clearly (though perhaps inadvertently) diverges from Perelman's analysis. In Perelman's terms, what Hart has done is to conflate the formal principle with one of its substantive interpretations: namely, to each according to his legal entitlement. Perelman understood that legal rules provided only *one* among several ways of supplying criteria for the identification of cases. Thus, he says that the substantive principle, "to each according to his legal entitlement," is a specifically juridical interpretation of the formula "to each his due," which "enables us to say that a judge is just, that is impartial and uncorrupt, when he applies the same laws to the same situations (*in paribus causis paria jura*)."⁴⁹ Sometimes, to be sure, Perelman goes further and suggests that the formal principle cannot be understood apart from its connection with legal categories. Thus, he says: "[P]ositive law can never enter into conflict with formal justice, seeing that all it does is to establish the categories of which formal justice speaks, and without whose establishment the administration of justice is quite impossible."⁵⁰ Nonetheless, Perelman's analysis provides for a clear separation of the formal principle from its juridical interpretation and thus reveals Hart's conflation of the two. In Hart's view, the principle of formal justice refers to justice in the administration of law, and he adds that "the relevant resemblances and differences between individuals, to which the person who administers the law must attend, are determined by the law itself."⁵¹ By way of illustration: "To say that the law against murder is justly applied is to say that it is impartially applied to *all those and only those* who are alike in having done what the law forbids"⁵² It is because of this interpretation that Hart can say that to apply a law justly to numerically different cases is simply to apply to different cases the same legal rule.

But now the difficulty with Hart's analysis becomes evident. If the descriptions of cases embodied in rules of law are necessarily incomplete, then there is no guarantee that the application of a particular rule to a case will take account of all the features of the case relevant to determining the fairness of the application. In different words, the description in the rule is sufficient for determining the *applicability*, but not the *warranted application*, of the rule to the case. Cases always overflow the boundaries within which rules attempt to confine them. As a consequence, the identification of a case as a member of a class (*i.e.*, as subsumable under a rule) does not commit one,

49. C. PERELMAN, *Concerning Justice*, *supra* note 14, at 10.

50. *Id.* at 26. In a similar vein, Perelman declares that justice "is inconceivable without rules. Justice is fidelity to rule, obedience to system." *Id.* at 41.

51. THE CONCEPT OF LAW, *supra* note 5, at 156.

52. *Id.* (emphasis added).

on moral grounds, to the same identification for any other case satisfying an identical description. Since the case satisfies alternative descriptions, fairness could require that it be placed in an alternative class. Thus, adjudicators frequently, and quite rightly, refrain from applying a law to a case that it clearly covers, for example, on the ground that there are features attached to the case that were not anticipated, or at least not provided for, by the law.

Now one might object to this argument in two ways. First, one might say that the situation with unanticipated contingencies is, for that very reason, a novel case—not a like case—and so to be distinguished from other cases correctly subsumed under the law in question. But this would be a mistake. For by hypothesis the criteria of likeness and difference are supplied by the law itself.⁵³ Any case is a member of the class specified by the law as long as the description embodied in the law, however minimal, is true of it. Hence the cases are alike but nonetheless should be treated differently.

If this conclusion is somewhat startling, it is only because the usual invocations of this principle (which tend to resemble ritualistic chanting) unwittingly shift back and forth between alternative criteria of likeness and difference. Hart himself engages in this ploy, in another context, when he suggests that the formal principle may not be “felt to be infringed” when the ground for differential treatment of those guilty of “the same crime” is “some personal characteristic of the offender connected with the commission of the crime” or “the effect of punishment on him.”⁵⁴ But how is it possible for the formal principle not to be infringed when like cases—those guilty of the same crime—are accorded differential treatment? If any restraint in the application of rules to cases is imposed by the formal principle, it would seem to be that the type or quantity of punishment is to be determined by the legal description of the offender’s act. Instead, in Hart’s example, one set of criteria—the legal description of the offense committed—is used to identify similar crimes and thereby the persons for whom punishment must be provided, while an alternative set of criteria—having to do with the personal characteristics of offenders or the likely effects of treatment on them—is used to determine what the punishment will be. To claim, in the face of this shift in criteria, that because of (say) differences in the likely effects of treatment the cases are “not really” alike is to engage in a ruse. In the attempt perhaps to pay retroactive homage to the formal principle, one conceals its conscientious violation. The fact that there is no “feeling of infringement”

53. See text accompanying notes 11-13 *supra*.

54. H.L.A. HART, *supra* note 27, at 24.

may be an indication that the violation does not represent the sacrifice of a moral principle.

One might reply, I suppose, that in Hart's example the expectation remains that like cases will be treated alike. Thus, once a certain punishment is handed down on the basis of (say) the personal characteristics of the offender, then it is to be expected that other offenders with identical characteristics will be accorded the same punishment. However, there is no more (and no less) reason to adhere to this new way of determining which cases are to be considered alike than to the old way. Implicit in the first shift of criteria is the recognition that any initial specification of categories (*i.e.*, of like cases) may give way—either in general or in any particular case—to alternative grounds for deciding upon appropriate treatment. For example, a system of categories that classifies offenders by personal characteristics connected with the commission of crimes may give way (in general or in particular cases) to considerations of the effects of punishment on the offenders. A system of categories that classifies offenders in accordance with the effects of punishment (on them) may give way to considerations of the deterrent effect of such punishment (on others). And so on indefinitely. I should make it clear that I am not arguing that *any* set of alternative criteria may be introduced without producing a feeling of infringement of the formal principle. Hart points out that, if the differential treatment of persons guilty of the same crime is based on the special prevalence of the crime at a given time (so the judge imposes a heavier sentence "as a warning"), then the infringement of the formal principle—even if it is thought to be justified—is felt.⁵⁵ Thus the fact of special prevalence is somehow ruled out as an alternative criterion. I do not disagree with Hart's feeling here. I want to argue only that there is no way of specifying ahead of time—at least on grounds of fairness—all the criteria that might or might not be ruled out. And so there is no reason of fairness for thinking that, as a matter of general principle, cases that are identified as alike should be treated alike.

A second way of objecting to my argument is to claim that, in the application of rules to cases, taking account of unanticipated contingencies is simply tempering justice with mercy, or, in different words, providing for exceptions to the rule. Such temperance, it will be said, does not contravene the formal principle, since the question remains whether any similar unanticipated case will be treated with equal mercy.

Now I would reply to this form of the objection in two ways. To begin with, this objection tacitly supposes that the use of the for-

55. *Id.* at 24-25.

mal principle introduces a presumption in favor of existing legal categories. No special reason is required for applying existing categories, only for overriding them. Hence the burden of argument lies in one direction. In this view, the formal principle should be understood as prescribing the like treatment of like cases, as defined by the rules, unless there is a good (*i.e.*, a substantively just) reason against it.⁵⁶ An adjudicator is permitted then to make use of substantive categories other than those embodied in existing laws, as long as existing categories are given priority. However, there is nothing about the formal principle, or the substantive formulae for that matter, that provides a foundation for this priority. Thus the presumption, if it is defensible, must be supported by other sorts of considerations. In section IV of this Article, I will in fact indicate alternative considerations which argue for the presumption in some contexts, but they are not considerations of either formal or substantive justice.⁵⁷

Furthermore, it needs to be observed that, when an exception is made to a rule, it is still correct to say that like cases are being treated differently. At least it is a consequence of Hart's analysis that these alternative descriptions of what is occurring are not necessarily exclusive of one another but may be extensionally equivalent.⁵⁸

Of course, one might indulge in a wholesale rejection of Hart's explication of "like cases." However, I am not persuaded that there is a coherent alternative explication that preserves a significant use for the formal principle, other than the retrospective homage which I mentioned previously. Vilhelm Aubert, for example, suggests that to invoke the formal principle is to contend (paradoxically, he says) that each case shall be treated according to its peculiarities, "if we interpret 'likeness' to mean something more than that two cases shall be judged exactly alike if they fulfill exactly the same clear and simple conditions which are to be read from the law."⁵⁹ Certainly Hart would respond to this suggestion by pointing out that judging cases in accordance with their peculiarities is exactly what proceeding by rule precludes.

56. Perelman himself appears sometimes to adopt this interpretation of the formal principle, when he states that "[c]hange, and change alone, needs to be justified." C. PERELMAN, *The Three Aspects of Justice*, *supra* note 14, at 63. However, the admission that change is possible, *i.e.*, that an adjudicator may have good reasons for not applying categories embodied in existing laws, must be compared with his remark, quoted in text accompanying note 50 *supra*, that it is positive law that establishes the categories of which formal justice speaks.

57. See text accompanying notes 103-12 *infra*.

58. This may not be the usual account of the relation between rules and their exceptions, but I defend this position in the next section. See especially text accompanying notes 66-70, 89-100 *infra*.

59. V. Aubert, *Sociology of Law* 74 (1964) (unpublished manuscript available at the Center for the Study of Law and Society in Berkeley, California).

III

A PRINCIPLE OF REASON

On the alternative interpretation of the formal principle, equality of treatment for instances of the same legal category is treated as a logical consequence of keeping to a rule. The formal principle becomes, as Perelman would have it, a manifestation of reason in action or a regulative principle of rationality that the human mind imposes on phenomena.⁶⁰

Insofar as Perelman provides any explication of the rational necessity of the formal principle, it is grounded in an allegedly universal characteristic of human thought: namely, mental inertia. The human mind, according to Perelman, finds regularity to be a peculiar source of satisfaction and so finds it "normal and rational" that a decision in accordance with a rule in one case should likewise be taken in similar cases. Conduct in conformity with established rules, whether it be a matter of law or custom, requires no supplementary justification. "In any social order, then, everything that is traditional will appear to be a matter of course."⁶¹

Such is Perelman's claim for the "experiential universality" of the formal principle. Unfortunately, Perelman neither elaborates this thesis nor explains how one might work out the logical connection between a genetic account of the emergence of the formal principle and the justification for its use. Although attempts have been made to give a meaning to epistemic necessity independent of logical or linguistic necessity,⁶² contemporary philosophers have great difficulty making sense of such a distinction. In this respect Hart is no exception, as evidenced by his uncertainty as to the logical status of his argument regarding "natural necessities."⁶³ Perhaps I may be excused then for side-stepping, in this paper at least, the challenge posed by naturalistic arguments. Whatever the status of the formal principle as a psychic phenomenon, there is an argument to be made for its rational necessity based on logical (or conceptual) considerations: specifically, from the necessity of consistency of usage for intelligibility. This argument may be taken, without too much strain, as a gloss on Perelman's remark

60. C. PERELMAN, *Concerning Justice*, *supra* note 14, at 40-41; C. PERELMAN, *The Rule of Justice*, *supra* note 14, at 80, 83.

61. C. PERELMAN, *The Rule of Justice*, *supra* note 14, at 86; *accord*, C. PERELMAN, *The Three Aspects of Justice*, *supra* note 14, at 63. This view is re-affirmed by Perelman in *THE NEW RHETORIC* 105-107, 218-219 (1969).

62. *E.g.*, J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (M. Gabain transl. 1965). The problems posed by Perelman's thesis are also present in G. DEL VECCHIO, *JUSTICE: AN HISTORICAL AND PHILSOPHICAL ESSAY* ch. 9 (1952).

63. *See* text accompanying notes 5-8 *supra*; *THE CONCEPT OF LAW*, *supra* note 5, at 195.

that the value that justice possesses in itself results from the fact that its application satisfies a rational need for coherence.

The argument runs as follows:⁶⁴ In the use of the various substantive formulae of justice, one employs the concept of a case by saying, "The present situation is an instance (or case) of *x* and so deserving of treatment *t*." Now in doing this one does not merely identify the situation at hand as a member of a class; one commits oneself to making the same identification for any situation satisfying the same description, and so subjecting it to the same treatment. That is, the situation at hand is brought under a rule which relates it to other situations already encountered or possibly to be encountered. If the rule is not adhered to, then one has either applied the concept of a case wrongly or erred in introducing it at all. The use of the concept of a case would not be intelligible if it did not involve this commitment. Thus, it is merely a consequence of the application of the various formulae of justice, which set out the descriptions used in the classification of cases, that members of the same category are given the same treatment.⁶⁵

The difficulty with this argument lies in the conditions under which rules are applicable to cases. As indicated in the previous section,⁶⁶ it is clear, first, that a case is a member of innumerable classes which constitute the extensions of the different descriptions that case satisfies, and second, that Hart considers a case to be an instance of a legal category only insofar as the description embodied in a legal rule is applicable to it. It follows that the identification of a case as a member of a legal category does not commit one to making the same identification for all cases satisfying an identical description. Employing a distinction offered previously,⁶⁷ we may say that the assessment of the *applicability* of a rule to a case—judged by the fitness of the description in the rule—is not sufficient to determine the *warranted application* of the rule to that case. For a case that satisfies one description also satisfies alternative descriptions, and so might with

64. I am following the construction of a similar argument concerning the concept of an object in J. BENNETT, *KANT'S ANALYTIC* 126 (1966). Cf. P. WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* 50 (2d ed. 1958).

65. This argument, it should be noted, does not eliminate the normative character of the formal principle. It is still to be understood that like cases *should* be treated alike. But the force of invoking the principle is for the sake of intelligibility, or conceptual clarity, not for the sake of some moral principle. Indeed, it is only in this way, I think, that one can make sense of the frequent claim that it is implied in "the very idea" of a rule that like cases should be treated alike. See MacAdam, *The Precepts of Justice*, 77 *MIND* 307, 369 (1968); Rawls, *Justice as Fairness*, in *JUSTICE AND SOCIAL POLICY* 82 (F. Olafson ed. 1961). Otherwise, it is simply one further instance of a moral claim founded on purely linguistic considerations.

66. See text accompanying notes 46-48 *supra*.

67. See text accompanying notes 42-53 *supra*.

equal justification be placed in an alternative legal category. This point can be clarified as follows: Suppose that the description of a case has elements x , y , and z and has attached to it treatment t . Now act a is accurately (though, of course, not completely) described in terms of x , y , and z , and so the person who commits that act would be subject to t . According to the argument constructed, any act like a in the relevant respects should also be subject to t . But let us suppose that act b is accurately (though incompletely) described in terms of x , y , z , and w . Now b is like a in the respects relevant to invoking t , but it could as well be that the appropriate treatment, judging by a rule that takes account of w , is t' .

One might respond that, because of the addition of w , b is not like a in the relevant respects. The claim would be that one is committed to treating alike any act similar to a in the relevant respects, only if the act is not *unlike* in any relevant respects. But this would be a mistake, for a reason alluded to earlier:⁶⁸ by hypothesis, the criteria of relevance are contained in the (incomplete) descriptions embodied in the existing rules. Since the absence of properties may be as critical as their presence for the warranted application of a rule to a case, the only way to avoid the above result is to make the implausible assumption that a legal description of an act implicitly contains the negative of every property not expressly included. Otherwise, the description embodied in a rule always fails to provide a certain answer to the question whether a particular case properly falls under it.

It should be noted, furthermore, that the argument criticized here, while developed in terms of the concept of a case, does not rest on peculiarities of that concept. Any similar argument regarding the grammar or logical use of terms will yield an identical result, for the logical hiatus between a case and the incomplete description that subsumes it is simply one instance of a general hiatus between words and objects. This hiatus is bridged only in contexts where the description in question is rendered complete, for example, by stipulating that certain conditions are necessary and sufficient for the application of a term. Short of that, the commitment to be consistent or intelligible in the use of terms does not entail that a judgment about a particular object is inescapably about objects like it.

Perhaps I might best illustrate this point by reference to a different version of the above argument, which runs as follows:

If I say that x is red, I do so in virtue of certain properties of x .
When I do so, I commit myself to saying that any other object that

68. See text accompanying note 53 *supra*.

has the same properties is red. If *y* has all the properties that led me to say that *x* is red, I must say that *y* is red as well, or retract my statement concerning *x*.⁶⁹

The plausibility of this argument rests, I think, on its example. For there is only one quality of an object that properly leads one to say it is red, namely its being red, and so any other object that has the same quality will also be red. But one has only to shift to an example of an object with a plurality of identifying qualities to realize the faultiness of the argument. It may be that *y* has all the properties that led one to say that *x* is *Q*, and yet has an additional property that would make it inappropriate to call it *Q*. Nor would one need then to retract the statement concerning *x*. For example, I might properly refer to a certain object as a chair because it is a single seat on legs with a back. But in another case, if the legs are sufficiently long and the back is largely perfunctory, I am likely to think that the object more appropriately would be called a stool (*e.g.*, a bar stool). Nor could one claim here that I simply was not explicit enough in specifying the kind of legs and back characteristic of chairs, for the fact of the matter is that many objects that are chairs have no legs or back at all. In general, then, the description of an *n* that is similar to an *m* may be incomplete, such that in the light of further elaboration one would alter one's judgment regarding *n*, without retracting what one said of *m*.⁷⁰

But now it may be argued, for example by Hart, that the peculiar connection between rules and cases upon which the previous analysis has rested is unwarranted because the relation between rules and the cases they (are made to) subsume is logically tighter than has been presumed. The line of argument I have in mind rests on an analogy drawn between games and legal practices, to the effect that the rules of both share a certain logical structure.⁷¹ Whether the claims made

69. Flathman, *Equality and Generalization: A Formal Analysis*, in *EQUALITY* 54-55 (J. Pennock & J. Chapman eds. 1967); *accord*, R. HARE, *supra* note 32, at 13.

70. Thus, I do not disagree with Kovesi's statement that "unless we can point to relevant differences between two objects, if one of them is to be called a kettle, so is the other." J. KOVESI, *MORAL NOTIONS* 62 (1967). Rather I am arguing, contrary to Kovesi, that this statement is not equivalent to the further statement that after having pointed to the features of an object that are reasons for calling it a kettle, one cannot point to another object and say that it has the same features but is not a kettle. I am arguing that one *can* properly do that. *See id.* at 61-62.

71. In an early essay, Hart makes the claim that "the rules of a game . . . at many vital points have the same puzzling logical structure as rules of law." Hart, *Definition and Theory in Jurisprudence*, 70 *L.Q. REV.* 37, 42 (1954). However, his claim of logical congruency in that essay is quite unrelated to the contention in question here. More to the point are his references to games in elaborating the distinction between restraining rules and enabling rules, *see* text accompanying notes 78-87 *infra*, and his claim that, without enabling rules, "we should lack some of the most familiar concepts

on behalf of the rules of games are accurate is actually not important for our purposes. Rather, the crucial questions are, first, what the character of game rules is presumed to be, and second, whether legal rules fit that characterization.

As a first approximation to understanding the character of game rules, we may note Alf Ross' remark that "the game of chess can be taken as a simple model of that which we call a social phenomenon."⁷² For Ross, the most striking fact about chess is that the actions of the players "are relevant and have significance" only in relation to a set of shared rules.⁷³ A purely bio-physical description of the movement of the pieces would give no indication that a game is being played. The relations of the moves to one another are not causal but constitute a succession of ploys, of attacks and defenses, each of which must come within the possibilities specified by the rules. Certain legal activities can be understood in an analogous manner. Purchasing a house, bringing an action against the seller for fraudulent misrepresentation, obtaining a judgment against him, and levying on his property to satisfy the judgment—all of these moves "are relevant and have significance" in terms of the legal rules that define the activities of purchasing property, bringing suit, and so on. "The whole proceeding," says Ross, "has the character of a 'game,' only according to norms which are far more complicated than the norms of the game of chess."⁷⁴

While this analogy may seem intuitively clear, the contention that an act has significance only in relation to a rule is ambiguous. There are two quite distinct theses that Ross could be urging, and it is essential to keep them separate. He could be saying that legal rules *name* and *describe* particular kinds of acts (*e.g.*, double parking) which are identifiable by that name and description independently of the existence of that (or any other) legal rule. Such acts, then, have significance only in relation to a rule in the sense that the existence of a legal rule specifies that certain legal consequences may follow on the occasion that such acts occur. If the rule does not exist, no consequences attach to the performance of the act, and so the act has, in that sense, no significance. Alternatively, Ross could be claiming that legal rules not only name and describe, but also *create* the possibility of particular kinds of acts (*e.g.*, making a valid will), which simply would not exist were it not for their definition in legal rules. The important feature

of social life, since these logically presuppose the existence of such rules," *THE CONCEPT OF LAW*, *supra* note 5, at 32; *see id.* at 9, 238-39. However, Hart does not clarify the notion of "logical presupposition," so it is necessary to turn to other sources to elaborate what Hart's argument might be.

72. A. Ross, *supra* note 15, at 13; *see id.* at 11-18.

73. *Id.* at 12.

74. *Id.* at 17.

of such rules, in other words, is that they *enable* certain kinds of acts to occur. Not abiding by them (*e.g.*, not obtaining the signatures of two witnesses) simply means the act (making a valid will) is not performed. Thus, such acts have significance only in relation to a rule, in the sense that failure to follow the rule results in a nullity.

Ross' use of the game analogy indicates that he is defending the second thesis. Stealing a base, drawing a walk, and striking out are acts (or moves) that do not occur as such, except metaphorically, outside the game of baseball; such acts exist only if the rules exist. Because the rules specify (create the possibility of) such acts, they could not be described as the sorts of acts they are absent the relevant rules. Only by reference to the rules can one say what the acts are.⁷⁵ It follows from this feature of game rules that an exception to a game rule is simply a further specification of the rule. That is, game rules do not permit exceptions. Since game rules create the possibility of the acts they subsume, it is logically impossible to make an exception to such a rule and still be performing the act specified by the rule.⁷⁶ As a consequence, the hiatus between rules and cases disappears. Because acts specified by game rules are not identifiable as such independently of those rules, they are not open to alternative descriptions. Hence, no act could count as an instance of a description (a case) and yet be classified differently from other acts satisfying the same description. The description embodied in the rule is as complete a description as is necessary to judge the applicability *and* the warranted application of the rule to the act.

Such then is the analysis of a certain kind of rule which is said to be characteristic of both games and legal practices and which yields a logical connection between proceeding by rule and treating like cases alike.⁷⁷ While I have assumed that the above analysis is an accurate representation of the constitutive rules of games, I do not consider this question to be at issue. The important question is whether the analysis applies to legal rules, for the use of the game analogy hinges on that point.

75. The features of game rules are most fully detailed in Rawls, *Two Concepts of Rules*, 64 *PHILOSOPHICAL REV.* 3, 25-27 (1955). Rawls' discussion is noteworthy for the fact that all of the detailed examples are drawn from the game of baseball. No similar analysis is offered for the moral and legal activities that are supposedly of primary concern. Compare *id.* at 25-26 with *id.* at 30-31.

76. In games it is assumed that each player aims to abide by the rules, so exceptions are considered to be mistakes or accidents—to which penalties are attached if they lead to the premature disclosure of information or some other disruption of the normal distribution of advantages.

77. Strictly speaking, the argument is restricted to the constitutive rules of games. In other words, it is admitted that not every move or relevant action in a game is created in this sense, but only those actions defining or constituting the game. There is no need here to pursue the problems raised by this qualification.

For present purposes, in fact, it will be most helpful to begin with a distinction which lies at the core of Hart's analysis of legal systems, according to which legal rules are divided into two broad categories: (primary) restraining rules and (secondary) enabling rules.⁷⁸ As observed earlier, the use of the game analogy turns on the presumed congruence of the constitutive rules of games with legal rules, the rules in each case being termed enabling rules. Hart's distinction then would seem to have certain immediate consequences for the use of the analogy. If "enabling" has the same sense in referring both to game rules and a certain kind of legal rule, a principal section of the law, restraining rules, must be omitted from comparison with game rules. Alternatively, if "enabling" has different senses, then either the game analogy is useful for both types of legal rules or it is altogether misleading. It is the questions raised by these possibilities that must now be considered.

Restraining rules, according to Hart's characterization, make certain forms of behavior non-optional. Both in requiring abstinence (for example, from certain forms of violence) and performance (such as payment of taxes), they are designed, usually with the aid of attached sanctions, to channel decisions how to act in various circumstances. Restraining rules regulate conduct by delineating the limits of its permitted forms. For the purpose of distinguishing them from secondary rules, then, the crucial question is whether the forms of activity regulated by restraining rules exist independently of the operation of the rules. Now there is a sense, as Hart recognizes, in which acts regulated by restraining rules logically presuppose the existence of the rules. It may be said, for example, that there are no "crimes" without rules that specify the sort of behavior that falls under that rubric—*i.e.*, no crimes without criminal laws. Thus one speaks of a legislature making an act a crime or as having the power to create new crimes. The rules, in other words, create the possibility of committing a crime, or of performing an act that would not be regarded as a crime but for the rules. For this reason, Hart's restraining rules may appear to possess the characteristics of game rules. This example, however, indicates that *any* general description covering an assortment of acts can form the principal component of an enabling rule. For example, the various acts prohibited by traffic regulations—*e.g.*, double parking, driving on the left side of the road, driving at night without the automobile's lights on—can be subsumed under the general rubric "scoring a violation." It is then possible to say that the rules regulating traffic create the possibility of scoring a violation, that the rule specifying what it means to score a violation is logically prior to any instance of it, and so on.

78. THE CONCEPT OF LAW, *supra* note 5, chs. I, III, V.

In other words, it is possible to transform any set of activities governed by regulative rules into a coherent activity constituted by an enabling rule, merely by establishing a description that subsumes the activities.⁷⁹

However, the possibility of this transformation does not mean that legal rules are structurally congruent with game rules. A crucial difference remains. In the case of traffic regulations, even after the introduction of "scoring a violation," it is still true that the specific acts subsumed by this category do not require any legal rules for their description. Double parking, for example, can be described quite independently of any traffic regulations.⁸⁰ Similarly, the manifold acts that are instances of homicide can be described independently of the rules of criminal law. The *actus* (or event) subsumed under the criminal law is identical in each of the several categories of homicide: justifiable homicide, excusable homicide, murder, manslaughter, etc. The *actus* is the physical death of a human being as the result of human conduct. When the *actus* is *reus* (forbidden), the homicide is punishable. But since the *actus* is the same in all such cases, the different kinds of punishable homicide are distinguished by the variations in *mens rea*. When the *actus* is not *reus* (e.g., justifiable homicide), the distinction among kinds of homicide is made with reference to the circumstances surrounding the *actus* (e.g., whether the responsible party was acting in self-defense). Thus the descriptive elements essential to the application of the laws of homicide are identifiable as such independently of their embodiment in particular rules.⁸¹

These examples indicate that the supposed congruence between restraining rules and game rules does not hold, at least generally. At best, the game analogy might be useful for understanding Hart's other type of legal rule, secondary rules, but here again I think the analogy breaks down. A discussion of secondary rules is complicated by the fact that Hart alters his characterization of them as he shifts his focus of interest from *facilitative* rules by which private parties realize their wishes in the form of marriages, wills, and contracts (with the effect of creating new structures of rights and duties) to *procedural* rules by which public bodies introduce, apply, modify, and eliminate other

79. This is a variation of a point made in M. BLACK, *The Analysis of Rules*, in *MODELS AND METAPHORS* 95, 123-24 (1962).

80. Black bids us think "of the absurdity of somebody arriving in a remote village where there are no parking regulations at all and saying 'Too bad—it's logically impossible for me to park here.'" *Id.* at 124.

81. See C. KENNY, *OUTLINES OF CRIMINAL LAW* 102, 109 (J. Turner ed. 1952); G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 11 (2d ed. 1961). For further examples of the logical independence of the descriptions of criminal acts, consider that the laws of the Massachusetts Bay Colony prohibited idleness, failure to attend church, and cursing a swine. J. HALL, *Crime as Social Reality*, in *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 209 (1958).

rules of the legal system, which now include the rules governing marriages, wills, and contracts.⁸² It is this latter group of rules that are of principal concern to Hart, but the former group is used more commonly to illustrate the logical priority of rules to cases. While the two classes of rules are probably no different with respect to the question of logical priority, I shall confine my attention to facilitative rules.

The question to be faced, as it may now be phrased, is whether secondary rules of law are enabling rules in the same sense in which game rules are. I have not settled in my own mind what the proper answer is to this question, but at least I may say that I am not persuaded by Hart's analysis. According to Hart, a statement by an ordinary citizen that his father has made a will "may give rise to curious difficulties if it is later found that the reputed or intended legal conclusion has not been established".⁸³

What should we say of the sentence written in my diary that "My father made his will yesterday" if it turns out that, since it was not witnessed and he was not domiciled in Scotland, the courts refuse to recognize it as a will. Is the sentence in my diary false? We should, I think, hesitate to say that it is; on the other hand, we would not repeat the sentence after the court's decision is made.⁸⁴

This account is, I think, misleading. For it could be said that what the courts refused to recognize is not that the document is a will but that the will that was made is valid. Thus consider the following diary entry: "Yesterday the court refused to give legal effect to the will that my father made last month. Hence, his estate must be divided in accordance with established law for such cases, as though, contrary to fact, his wishes were not known." I see no linguistic impropriety or oddity in talking about "my father's will" in this way.

It is true, of course, that courts typically do not employ the distinction between a will and a valid will, or a contract and a valid contract, but rather "find" or "hold" that a will or contract does or does not exist. At the same time, however, it is fairly obvious that judicial resolution of disputed issues—*e.g.*, Was there an offer by the defendant? Was there detrimental reliance by the plaintiff?—is guided by the purpose of ordering forms of activity that exist independently of legislative and judicial regulation.⁸⁵ Hart fails to recognize the auton-

82. Compare THE CONCEPT OF LAW, *supra* note 5, at 9, 27-29 with *id.* at 79, 92-95.

83. Hart, *The Ascription of Responsibility and Rights*, in LOGIC AND LANGUAGE 164 (1st series, A. Flew ed. 1965).

84. *Id.*

85. An interesting illustration of this point is the series of cases concerning the question whether the acceptance of an offer becomes effective on dispatch by the offeree or on receipt by the offeror. *E.g.*, Rhode Island Tool Co. v. United States, 128 F.

omy of these forms of activity, but instead claims that the acts of buying, selling, giving gifts, making wills, and so on, logically presuppose legal power-conferring rules that render these activities possible.⁸⁶ But the re-description of the "father's will" situation suggests that, as in the case of restraining rules, it is legitimate to distinguish the acts that could be performed regardless of the existence of the rules, acts whose description is logically independent of the rules, and the supervenient acts whose description and performance are parasitic on the description and performance of acts of the first type. Thus the act of making a valid will might be said to stand in the same logical relation to the act of making a will as committing a crime stands to homicide, or as scoring a violation stands to double parking.⁸⁷ With regard to both primary and secondary rules, there is a foundation of systematic activity that is intelligible independently of its regulation by a body of legal rules. Indeed, I would stress the point that Hart's analysis of rules governing buying and selling misses the significance of even these laws as a form of social ordering, designed not to create but to regularize and make predictable pre-existing activities. That these activities should be pursued in accordance with certain formalities, such as the signature of witnesses, is a way of making them manageable, of settling disputes before they arise, or of providing accessible criteria for their settlement when they do arise.

The thesis I have been defending, then, is that the descriptions of acts contained in legal rules are (at least to a great extent) eliminable. That is to say, the descriptions are logically independent of the rules; their use to characterize conduct is not contingent on any reference to the rule in which they might be embodied. Of course, I have not attempted to defend this thesis for all legal rules whatever; certain areas of the law could possibly resist such an analysis. But I have at least provided important counterexamples to the opposite thesis, sufficient to demonstrate that the supposed congruence with game rules does not hold. It also should be clear that I recognize the possibility that certain descriptions of acts are not logically independent of the rules in which they are contained: for example, "committing a crime," "scoring a violation," and "making a valid will." I am uncertain about the ultimate status of these descriptions, but I would insist minimally that these terms characterize supervenient acts whose performance is logically parasitic on the performance of acts whose de-

Supp. 417, 419 (Ct. Cl. 1955); *Dick v. United States*, 82 F. Supp. 326, 329-30 (Ct. Cl. 1949).

86. THE CONCEPT OF LAW, *supra* note 5, at 32; see Hart, *supra* note 1, at 604-05.

87. Or to put the point another way, the fact that signatures of witnesses are required by law, and a certain number of signatures at that, is not part of the definition or description of a will.

scriptions are eliminable.⁸⁸

Important consequences follow from this rejection of the thesis that legal rules are logically prior to cases. It is Rawls' contention that "[i]t doesn't make sense for a person to raise the question whether or not a rule or a practice correctly applies to *his* case where the action he contemplated is a form of action defined by a practice."⁸⁹ The reason it doesn't make sense is that cases are identifiable only by means of the logically prior rules that specify them. The rejection of the thesis of logical priority therefore entails that, in the application of rules to cases, an adjudicator is not committed on logical grounds to the enumeration of relevant features embodied in any given rule. It is not even true, as a matter of logic, that rules must be applied to cases they logically subsume. Hence, contrary to Rawls, it is *always* intelligible for a person to question whether the application of a rule

88. Given this conclusion, one may wonder why the thesis of non-eliminability has been so well received. One prominent reason is the desire to rescue utilitarianism from longstanding objections to its analyses of punishment and promising. This is not an appropriate place to pursue these arguments, but I may mention that the crucial step in the rescue operation is the distinction between justifying the rules of a practice, where utilitarian considerations are relevant, and justifying an act falling under a rule of the practice, where such considerations are excluded on logical grounds. See Rawls, *supra* note 75, at 4-18. (The same distinction is often made on other than logical grounds. E.g., Mabbott, *Moral Rules*, 39 PROCEEDINGS OF THE BRITISH ACADEMY 97, 115 (1953).) Several criticisms that have been offered of this distinction fail to appreciate its dependence on an analysis of the rules involved that precludes the evaluation of acts except as instances of descriptions contained in actual or possible rules. E.g., D. LYONS, *supra* note 31, at 185; R. WASSERSTROM, THE JUDICIAL DECISION 134-35 (1961). *Contra*, Melden, *Utility and Moral Reasoning*, in ETHICS AND SOCIETY 173, 185-92 (R. DeGeorge ed. 1966). Nonetheless, the desire to rescue utilitarianism is extrinsic to the character of legal practices; if a closer examination of legal rules fails to support the proffered analysis, so much the worse for utilitarianism.

More importantly, it seems to me that philosophers who adopt the position that rules are logically prior to cases are misled by the fact that legal rules frequently use words in special senses. One often finds in the introductory sections of a legislative enactment, for example, definitions of crucial terms which will be narrower or broader than, or simply different from, ordinary usage. The same specialization of terminology results from judicial decisions that are made to hinge, at least in part, on a peculiar definition of an otherwise common term. Thus, legal practices generate linguistic as well as juridical conventions and expectations. But one shouldn't be misled by this phenomenon. The fact that a word contained in a legal rule is used in an uncommon way does not mean that an explication of the significance of the word logically depends on some reference to the rule. Suppose it is decided, for example, that for the purposes of the traffic regulation, "No vehicles are permitted in the park," the term "vehicle" is applicable not only to automobiles, buses, etc., but also to roller skates. While this would be an odd use of the term, judged by ordinary meanings, it would in no way alter its character as a descriptive term and hence its eliminability from a rule in which it is contained. Or to put the point differently, it is equally possible to roller skate in the public park before as well as after the promulgation of the judicial interpretation of the regulation. But after the promulgation, the act will have legal consequences it didn't have previously.

89. Rawls, *supra* note 75, at 26.

to his case is correct. Even if the description embodied in the rule fits his activity, he may have grounds for claiming that his case is an exception to the rule.

This conclusion is sufficiently at variance with some contemporary explications of the notion of a rule that it is worth elaborating further. Philosophers who are not committed to Rawls' thesis of logical priority may still claim that rules do not permit exceptions. This claim is proffered by Isaiah Berlin, for example, in his discussion of the notion of equality. For Berlin, equality requires that each member of a class specified by a rule has an equal right to whatever is granted to the class as a whole. Berlin says:

This type of equality derives simply from the conception of rules as such—namely, that they allow of no exceptions. Indeed what is meant by saying that a given rule exists is that it should be fully, i.e., equally fully, obeyed by those who fall under it, and that any inequality in obedience would constitute an exception, i.e., an offence against the rules.⁹⁰

Berlin's grammatical construction is striking. He says that "they," i.e., the rules, allow of no exceptions, as though they operated independently of the persons who do or do not put them to use. In fact, we may, either as agents or adjudicators, think it correct to observe a rule in most cases to which it is applicable but also think it correct to "make an exception" in the remaining cases. However that may be, there is some uncertainty in Berlin's argument as to the precise ground for his claim. That rules must apply to all of their instances seems to rest on "the conception of rules as such," which suggests that there is a conceptual absurdity lurking in the notion of an exception. At the same time it is said that rules "should" be fully obeyed but that failures in obedience are possible; these failures are exceptions, offenses against the rules. What is not clear is whether these offenses are moral or conceptual—or both.

A more elaborate version of Berlin's claim is defended by Ronald Dworkin in the course of his attack on "the model of rules," which is favored by legal positivists, such as Hart, as the key to understanding the nature of legal systems. Dworkin argues that the model of rules neglects the fact that lawyers and judges make use of standards that do not function as rules and whose authority (or validity) is established in ways quite different from that of rules.⁹¹ Dworkin refers to these other standards as "legal principles," and the core of his argument consists in spelling out a "logical" distinction between legal principles and legal rules. The principal feature of legal rules that Dwor-

90. Berlin, *supra* note 41, at 132.

91. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

kin stresses is that they set out, or purport to set out, the conditions that make their application necessary. Consequently: "If the facts a rule stipulates are given, then either the rule is valid [meaning, presumably, "is applicable"], in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."⁹² Legal principles, by contrast, do not stipulate the legal consequences that "follow automatically"⁹³ when the conditions provided are met, but simply establish directions of argument that carry more or less weight from one case to the next.

For present purposes, it is important to observe that the principal claim—that if a rule is applicable the "answer" it gives must be accepted—rests on a conception of rules that renders the claim tautological. According to that conception, a statement of a rule contains all its exceptions; it contains an enumeration of all the cases in which it is or is not to be accepted. Any statement of a rule that does not contain this enumeration is simply an inaccurate or incomplete statement of the rule. Thus, in situations where two rules are thought to conflict (where it is thought, in other words, that a rule applies but must yield to the "answer" provided by another rule), it can only be because one of the rules has been stated inaccurately. Rules then have no exceptions, since anything that appears to be an exception is actually a further elaboration of the rule. Legal principles, by contrast, do not possess the same all-or-nothing quality in application, and so a complete and accurate statement of them does not allow, let alone require, an enumeration of the cases where they yield to the "answer" provided by other principles.⁹⁴

To illustrate this "logical" distinction between legal rules and legal principles, Dworkin refers to the two longstanding interpretations of the freedom of speech clause in the first amendment. Those who adhere to the "absolutist" interpretation, he says, are claiming that this clause must be taken as a rule, "so that if a particular law does abridge freedom of speech, it follows ["automatically," I suppose] that it is unconstitutional."⁹⁵ Conversely, those who adhere to the "balancing" interpretation are claiming that abridgments of speech are unconstitutional only if no other policy or principle is sufficiently weighty to justify the abridgment.⁹⁶ However, as neat as this account is, it is not persuasive. For in Dworkin's own terms, the difference between

92. *Id.* at 25.

93. *Id.*

94. For an extended criticism of Dworkin that assimilates legal principles to his analysis of legal rules, without bringing the latter into question, see Coval & Smith, *Some Structural Properties of Legal Decisions*, 32 CAMBRIDGE L.J. 81 (1973).

95. Dworkin, *supra* note 91, at 28.

96. *Id.*

the two interpretations could be understood as a dispute over the correct statement of the rule, where the "absolutists" are claiming that there are no (or few) exceptions and the "balancers" are claiming that there are many.

But Dworkin's use of this illustration is striking for other reasons. Dworkin admits that one cannot tell from the "form" of a standard whether it is a rule or a principle; even generality is not an adequate test.⁹⁷ But the illustration shows further that "content" will not do either, since the freedom of speech clause can be interpreted either way. What then marks the difference? Dworkin purports to be offering a "logical" distinction between legal standards, but his analysis raises the epistemological problem of recognizing whether a standard is of one logical type or the other. Neither the form nor the content of the standard is sufficient or necessary for such recognition. In fact, I submit, it is not standards that are being distinguished by Dworkin at all, but accounts by judges of the reasoning process that yields one decision or another. One judge may speak of making exceptions to a rule, while another may speak of balancing one principle against another. To be sure, important consequences may follow from a judge's characterization of what he is doing. For example, "balancers" as a group may tend to be less careful about protecting individual rights against societal encroachment. But this is a matter of empirical fact, not the consequence of a logical distinction.

I should make it clear that I have no quarrel with Dworkin's general thesis, namely, that there are standards with obvious legal status which serve to guide judicial decision-making and yet whose authoritativeness cannot be accounted for by positivist criteria of validity. But this thesis does not presuppose a "logical" distinction between rules and principles. If Dworkin insists on this distinction, he seems to do so in order to make a point about the exercise of judicial discretion. His distinction is between certain legal standards—rules—that place limits on the range of discretion because they must be accepted or rejected in toto, and other legal standards—principles—that serve to widen the range of discretion because they may be given more or less weight from case to case. But this makes the first amendment example all the more curious, for it is apparently open to judges to decide whether to regard the freedom of speech clause as a rule or a principle; that is, it is open to them to decide the range of their discretion.

Again, I think Dworkin is attempting to treat as a logical distinction a matter that can only be understood empirically. This point is more evident in another of Dworkin's illustrations, namely, the provi-

97. *Id.*

sion of the Sherman Act that every contract in restraint of trade shall be void.⁹⁸ As Dworkin points out, the Supreme Court has interpolated the term "unreasonable" in this provision, with the consequence (according to Dworkin) that the provision functions *logically* as a rule but *substantively* as a principle.⁹⁹ Whatever else this may mean, Dworkin at least takes it to mean that whenever a court finds that a restraint of trade is "unreasonable" it is bound to hold the contract invalid.¹⁰⁰ But in what sense is the court "bound" to do this? There is surely no point of logic, nor for that matter any feature of its powers as a decision-making body, that prevents it from finding that a certain restraint of trade is unreasonable but nonetheless warranted on other grounds. This possibility is precluded only if the court construes the term "unreasonable" to exclude *as a matter of definition* all possible warranting grounds. But then "unreasonableness" would not itself be a *justifying ground* for not condoning a certain restraint of trade; it would be only a verbal formula for characterizing a decision arrived at on *other* grounds. In other words, it's not that a court is bound to hold a contract invalid whenever it finds it to be an unreasonable restraint; rather, whenever it finds a contract invalid, it is bound *to say* that the restraint is unreasonable.

Thus, instead of addressing himself to a "logical" distinction between rules and principles, Dworkin should have been elaborating the "substantive functioning" of different legal standards—a task that can be carried out only by eliciting the institutional context of decision-making that the verbal formulae reflect. If I have dwelt at such length on Dworkin's argument, it is because it provides the clue to understanding the ultimate failure of Hart's analysis of formal justice. For Hart too, I want to argue, attempts to provide neat logical answers to questions that are essentially questions of institutional policy.¹⁰¹

IV

CONTEXTUAL REASONS FOR TREATING LIKE CASES ALIKE

The point I want to make can be brought out by noting a certain equivocation in Hart's statement of the claim with which this Article is concerned. Usually Hart asserts that it is "the meaning" of a legal system consisting of general rules that "connotes" the principle of treating like cases alike. Sometimes, however, he ties the principle not to the notion of a legal system but to the notion of proceeding by

98. 15 U.S.C. § 1 (1970).

99. Dworkin, *supra* note 91, at 28.

100. *Id.*

101. See L. FULLER, *THE MORALITY OF LAW* 141 (1969).

rule.¹⁰² The suggestion in these passages is that treating like cases alike is an integral feature of a certain kind of activity—an activity that, in the legal context, might be described as the enterprise of governance in accordance with rules. What the argument in the preceding section has shown, however, is that treating like cases alike is not logically entailed by the use of rules. So the question arises: In the enterprise of governance by rules, when is the principle of like treatment invoked and for what reasons? Since insistence on the principle of like treatment restricts relevant considerations in decision-making to the descriptions contained in existing rules, and since the strength of this insistence varies from one institutional context to the next, the question comes to this: In what contexts is special stress placed on strict adherence to existing rules, and why?

I shall not attempt an exhaustive list of such contexts, if indeed such a list could be made, but I shall describe a few contexts of greater or less specificity in order to explicate my argument. One context consists of situations of distribution in which it is exceedingly difficult to determine what is just.¹⁰³ The reasons for the difficulty may be various: for example, the complexity of relevant factors, the absence of clear priorities among those factors, the difficulty of taking detailed notice of fact situations, and so on. But whatever the reason such situations provide grounds for a shift of focus from the relation of distributor and recipient to comparisons among recipients. Descriptions will be forthcoming of “similarly situated” recipients that represent abstractions from the fuller descriptions of persons which, on grounds of justice, would be warranted. Likeness of treatment is enforced in full recognition that it is a *faute de mieux* procedure for arriving at decisions. If the resulting distributions are regarded as fair, they are so only in a residual sense.

In this context, then, the principle of like treatment is invoked as a safeguard against *apparent* or *potential* arbitrariness. And it is interesting to note that it may be invoked both by the recipients and by the distributor. For instance, the principle may provide recipients with a sense of security or status, as seems to be true for seniority rules in industrial employment when they are adhered to regardless of the qualifications or performance of the beneficiaries of the rules. Distributors, on the other hand, may insist on strict adherence to rules as a protection against criticism, which may be valued more highly than the attempt to give each recipient his due. Of course, this insistence has its dangers. Like other sorts of formalism, it is, in C.H.

102. E.g., THE CONCEPT OF LAW, *supra* note 5, at 156-57.

103. I am drawing here on an excellent discussion in Aubert, *Justice as a Problem of Social Psychology*, 56 ARCHIV FÜR RECHTS - UND SOZIALPHILOSOPHIE 465 (1970).

Cooley's words, "psychically cheap" because it eliminates the necessity of thinking through each case.¹⁰⁴ Its benefits may also be short-lived; while it facilitates a *prima facie* impartiality, at least where it appears to eliminate discretion and favoritism, it may foster a systematic partiality insofar as the failure to permit alternative descriptions of some cases perpetrates injustices in those cases. What needs to be emphasized, of course, is that the decision to adhere strictly to a rule and not to recognize exceptions is itself an exercise of discretion, for which the "logic" of proceeding by rule provides no guidance.

Another context in which there is great concern about strict adherence to rules is the substantive criminal law. Here uniformity of decision is desirable because it provides for foreseeability; it allows people to know ahead of time which acts are prohibited and so to plan their lives as to avoid interference from official intermeddlers.¹⁰⁵ It is important to note that there is nothing inherent in the nature of "crimes" or the criminal law that requires either that offenses be described with sufficient specificity so that the ordinary citizen will readily know what is required of him, or that the descriptions embodied in the laws, even if specific, be strictly adhered to. Both of these requirements rest instead on considerations of privacy, security, and personal liberty which are given priority in our complex and impersonal system of criminal law. But these considerations are not always so highly valued, and there have existed systems of criminal justice in which existing rules were both less specific in their content and less strictly adhered to in their application, for instance, systems which were more concerned to sustain quasi-familial relationships among the members of the community than to protect privacy.¹⁰⁶

The concern with foreseeability (or the values that underlie it) has led some social theorists to insist that terms which lack specificity be eliminated altogether from the law. Paul Diesing, for example, asserts that rules of law should be so constructed that the categorical schemes which they embody are rendered unambiguous and complete. If the rules are not free from ambiguity, "the formal requirement that all cases of the same class should be treated the same would be defeated."¹⁰⁷ To prevent such an occurrence, it is necessary not only

104. C. COOLEY, *SOCIAL ORGANIZATION* 349 (1919), as quoted in A. GOULDNER, *PATTERNS OF INDUSTRIAL BUREAUCRACY* 175 (1954).

105. *E.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); see H.L.A. HART, *Legal Responsibility and Excuses*, in *PUNISHMENT AND RESPONSIBILITY* 28, 44-47 (2d ed. 1969).

106. The Puritan law of the early Massachusetts Bay Colony provides an excellent example of this type of system. For illustrations, see K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (1966).

107. P. DIESING, *REASON IN SOCIETY* 147 (1962). Note the similar warnings in F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960), particularly ch. 15.

that the laws be "complex, detailed, and precise,"¹⁰⁸ and that the hierarchical relations between laws be "clear and unmistakable,"¹⁰⁹ but also that they be complete enough to apply straightforwardly to all possible cases. No doubt the construction of such a set of laws would be demanding, but Diesing is quite right to suggest that the principle of like treatment is a demanding principle. Its use is intelligible only with rules of sufficient definiteness to permit the meaningful comparison of cases. (Thus, although proceeding by rules does not entail treating like cases alike, it is still true that treating like cases alike presupposes the existence of rules—and definite rules at that.) Where Diesing is wrong, however, is in thinking that foreseeability is possible or even desirable in all areas of the law.

Thus in tort law a combination of factors supports a form of decision-making that gives only meager weight to treating like cases alike. Typically, the rules that are generated judicially do not establish what must or must not be done but only articulate requirements regarding the *manner* of doing it (with reasonable care, in conformity with the requirements of a profession, and so on). Such rules permit decisions to be made on the basis of detailed knowledge of fact situations. Yet the complexity that is thereby introduced into the decision-making process increases the difficulty of interpreting and applying those rules—it is much easier for reasonable men to disagree. For this reason (among others), the decision how to apply the rules is usually left to juries, which may well arrive at contrary judgments in identical fact situations. Thus, although the descriptive materials necessary for the comparison of cases are readily available (in the testimony of witnesses, in the judge's instructions to the jury, and so on), these materials are slighted in favor of the decentralized, and to a large extent uncontrolled, decision-making of the jury.

Such uncertainty is permissible in tort law partly because it presents no *special* need to know ahead of time exactly what the law requires. The decentralized administrative structure of tort law does not pose the same threat of official intervention in the private lives of citizens that is posed by the criminal law. Also, the penalties to which defendants are potentially liable are not as severe as those in the criminal law; in fact, most tort cases in the United States seem to amount to simple reallocations of resources to take account of the occurrence of accidents.¹¹⁰ The ease with which utilitarian arguments

108. P. DIESING, *supra* note 107, at 151.

109. *Id.* at 147.

110. It is this context of decision-making, I believe, that accounts for judicial concern about flexibility in the application of tort law. For a classic statement of this view, see *Pokora v. Wabash Ry.*, 292 U.S. 98, 105-06 (1934) (Cardozo, J.). For the view that exceptions to rules are specifically warranted when obedience to the

are entertained in this area of the law¹¹¹ reflects the fact that the moral quality of a tortious offense is frequently ambiguous. Recklessness, as in automobile driving, is clearly anti-social conduct, although not directed against any specific individual, but negligence is rarely described as a corrigible vice. Nonetheless, it is interesting to note that the judiciary on occasion expresses some concern about the uniformity of outcomes from one case to the next.¹¹² When this concern becomes sufficiently pressing, judges will shift more of the responsibility for the decision into their own hands, for example, by instructing the jury more specifically about what features of the case it may and may not consider in the course of its deliberations. But it would be incorrect to say that the jury thereby comes to apply a rule to the case where otherwise it would not have done so. Rather, the rule has become more specific, and the judge admonishes the jury to adhere to it strictly. At the same time, no attempt is made to ensure that the jury confines itself to the limits posed by the judge. Its task is to arrive at a decision, and the process by which that task is accomplished is not a matter of public record. Consequently, it is an integral feature of the decision-making structure of tort law that it permits dissimilar treatment of like cases. To be sure, if there were more stress on uniformity of outcomes in tort law, it would encourage private settlement between parties and reduce the volume of litigation. But these factors are not given great weight in the present system.

These examples, although only briefly elucidated, should be sufficient to demonstrate that treating like cases alike is not a pervasive feature of law, or of a legal system consisting of general rules, but is rather a special feature appropriate to certain contexts in which definite values are to be realized. The empirical examination of such contexts reveals how one might respond to Hart's claim that there is a necessary connection between law and morality. One can admit that generality is not a morally neutral characteristic of law, not because it "connotes" the principle of treating like cases alike, but because strict adherence to rules (with appropriate contextual variations) is an instrument of the values it promotes. To understand the role of treating like cases alike in any particular context, one must look to the values at stake, which means one must look to the relationships between the parties involved and the purposes they intend in subjecting themselves to special forms of ordering.

rule would defeat the purpose for which the rule was enacted, see *Tedla v. Ellman*, 280 N.Y. 124, 131-33, 19 N.E.2d 987, 991 (1939) (Lehman, J.).

111. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 555-63 (1972).

112. *E.g.*, *Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927) (Holmes, J.).