

# “Hard Cases and Legal Validity”

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**Date Feb 5, 2009 , 4:55p.m.-6:30p.m., Room 2326**

<http://www.law.ucla.edu/home/index.asp?page=817>

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# HARD CASES AND LEGAL VALIDITY

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## 0. Introduction

Ronald Dworkin, legal positivism's harshest critic, challenges the legal positivist thought that legal validity can be explained by reference to social facts alone.<sup>1</sup> Legal validity consists in the binding force of legal rules. Legal positivists hold that social sources are necessary and sufficient for legal validity. This position rests on the basic intuition that the existence or non-existence of a legal system is a matter of social fact. Social sources are necessary for legal validity, since, on this view, a given consideration must be posited by a legally recognized source in order to be a valid rule of the system. Legal positivists thus endorse the sources thesis, or the thesis that all laws must come from a source. On the other hand, social sources are sufficient for legal validity for legal positivists, since nothing more than being posited by a recognized source is needed for legal validity. In particular, we need appeal to no further moral considerations in order to explain the binding force of law. They thus also adopt the separation thesis, which claims that there is no necessary connection between law and morality.

Ronald Dworkin attacks both positivist tenets by examining judges' reasoning in hard cases. Hard cases are cases where the posited law points to a clear answer, but the question of what the law requires remains open. Consider *Riggs v. Palmer*, the case at the centre of this debate.<sup>2</sup> *Riggs* is a case in which a grandson, Elmer Palmer, murdered his

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<sup>1</sup> This theme runs throughout Dworkin's work on legal positivism. See especially *Taking Rights Seriously*, (Harvard University Press: Cambridge, MA, 1977), 16. [Hereinafter, *Taking Rights Seriously*], and *Law's Empire*, (Harvard University Press: Cambridge, MA, 1986.) [Hereinafter *Law's Empire*.]

<sup>2</sup> 115 N.Y. 506, 22 N.E. 188 (1889) [Hereinafter *Riggs*.]

grandfather in order to expedite his inheritance. Elmer was clearly named as a beneficiary in the will, the will was validly enacted, and there was no posited law overriding the Statute of Wills, or prohibiting murderers from inheriting. Nonetheless, the majority held it is the “universal law administered in all civilized countries”<sup>3</sup> that no one should profit from his own wrong, and for this reason denied Elmer the inheritance.

Here the Court relied on a rule that had no posited source in order to render its decision. Even so, the judges argued that they were deciding what the law *is*, rather than what it ought to be. This calls the sources thesis, or the view that all law must come from a source, into question. This also challenges the separation thesis, since the mere fact that the posited law pointed to a given outcome did not settle the question of what the law required; the judges still had to look to morality in order to decide the issue. The intuitive plausibility of *Riggs* suggests that a complete theory of law must be capable of explaining the validity of these further considerations as well.

The parties to this debate take *Riggs* to illustrate the possibility of legally binding moral considerations that are not anticipated by posited ones. They thus take the challenge posed by *Riggs* to lie in the possibility of explaining the legal force of these considerations, given that the existence of a legal system is a matter of social fact. However, none succeed in meeting this challenge. Existing positivist responses fail because they take the challenge of hard cases to lie in the problem of explaining how morality can sometimes be imported into the law.<sup>4</sup> On the other hand, Dworkin’s solution fails because he takes hard cases to indicate that all of morality is always in law.<sup>5</sup>

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<sup>3</sup> *id.* at 511f; 190.

<sup>4</sup> I examine positivist responses to Dworkin’s challenge and argue that they fail to meet it in chapters three and four of my dissertation.

<sup>5</sup> I argue against Dworkin’s conception of law in chapter two of my dissertation.

Their mistake is to take the problem to be one of explaining how morality gets into law in the first instance. I will argue that despite surface appearances, *Riggs* is not an example of law being decided on unposited moral grounds at all. Instead, it is an example of the law preventing a unilateral attempt to seek legally prohibited advantage through the application of its rules. The law can prevent such attempts because of the distinctive way in which it governs people's behaviour, as compared to all other social rules and institutions. It is true, I will argue, that the distinctive structure of law renders it specially vulnerable to hard cases like *Riggs*. Dworkin is thus right to suggest that the problem of hard cases is inescapable for law. But, I will argue the very features of law that explain its vulnerability to these cases also explain its ability to resolve them. This is because, as I will argue, it is one of the distinctive features of law that law maintains ultimate authority over its rules, and denies unilateral attempts to subvert them, and that the problem posed by *Riggs* consists in nothing more than such an attempt.

I will begin by briefly outlining the distinctive features of law that distinguish it from all other social rules and institutions, and show that they follow from H. L. A. Hart's widely accepted view of law as the union of primary and secondary rules.<sup>6</sup> I then turn to the advantage of such a system of rules, and explain why law is needed to accrue this advantage, even if people are perfectly good. Finally, I show how this understanding of law explains why law is inescapably vulnerable to hard cases like *Riggs*, as Dworkin suggests, but it also shows why law has the resources to resolve such cases. Let us begin with an account of the distinctive nature of law.

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<sup>6</sup> See Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1994). [Hereinafter, *The Concept of Law*.] I provide a defense of this view of law in chapter one of my dissertation, and an explanation of why the argument I provide here is continuous with this defense of law in chapter five of my dissertation.

### *I. The Distinctive Features of Law*

The idea that law helps people to plan and coordinate their actions with one another is a familiar one. Law consists in a fixed and public set of rules for governing people's actions and structuring their relations with one another, and these rules apply to all the members of a given community. Of course, the existence of such rules does not guarantee that people will comply with them. But, it makes people's actions more predictable, and therefore helps each person to plan her affairs and coordinate with others' attempts to do the same.

This cannot be all that law does, however. This is because this leaves the distinctive features of law that distinguish it from all other social rules and institutions unexplained. Coordination requires that people have *some* common and public set of rules or considerations, of which they are all aware, and to which they can all appeal when planning their affairs requires them to take into consideration the activities of others. This is not all that law provides, however. Law not only gives people some indication of how those around them will behave; it gives people a legal *right* to have others behave this way, and imposes a legal *obligation* on others to so behave. Second, in order to confer these rights and obligations on people, law must also be issued from an *authorized source*; otherwise, it consists in the arbitrary exercise of power. Finally, not all harms count as legal sanctions. Instead, law backs these rights and obligations with a *public sword*; it entitles each person to call upon the power of the state in order to protect her rights against others and to enforce people's obligations against one another. These features constitute the distinctive marks of law, as compared to all other social standards

and rules.<sup>7</sup> An explanation of what law provides that leaves these features out fails to explain the advantage of establishing a system of *legal* rules, as opposed to instituting just any set of standards for coordinating people's behaviour with one another. In order to understand how law governs people's behaviour then, we must explain the point of these key features that make a system of social rules a legal system. My claim is that these features are necessary for explaining how law governs people's interactions as actors who are capable of setting and pursuing ends for themselves, independently of the ends and pursuits of those around them. Law's attempt to structure the relations between independent actors renders it vulnerable to the possibility of hard cases because, as I will argue, independent actors are capable of acting so as to subvert law's structure. But, I will argue, law can also prevent people from succeeding in their efforts precisely because it consists in a system that renders the activities of independent actors consistent with one another. As such a system, it must also be capable of preventing its rules as being used as means for furthering prohibited ends. Let us begin by considering the distinctive way in which law purports to govern people's actions, and those features of law that make such governance possible.

## *II. Law as the Union of Primary and Secondary Rules*

When people are governed a legal system, they are subject to a set of rules conferring a coordinated set of rights and duties on them. That is, when people are governed a legal system, they are subject to a set of rules securing for each person a range of action over

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<sup>7</sup> Indeed, it is precisely because John Austin could not account for these key features of law that Hart rejected his theory. I discuss Hart's objections to Austin in chapter two of my dissertation.

which she is entitled to be free from interference by those around her, but limiting this range of action to that which is consistent with others' entitlement to the same; people thus also incur a set of obligations to respect the rights of all other subjects of the system.

The law secures these rights and obligations with the threat of force. When someone has a right at law, she is entitled to call upon the power of the state to protect it from encroachment by others, and when she is under an obligation, she is subject to the threat of state coercion for its violation.

This is of course not to say that the state will protect people's interests from all sources of interference, nor is it a promise to provide people with the conditions for achieving their aims, come what may. It is, of course, always possible that, say, despite their best efforts, people fail to achieve the ends they set for themselves: I might do all that I can do but my efforts might be thwarted by natural forces, or, say, someone else gets there first, and so on. These are all unhappy results, but they are not violations of my legal rights. The entitlement to be free from interference is also not a promise that people will in fact refrain from interfering with one another's rights. Rights and duties are rational constraints; it is up to the actor to decide whether or not to comply. By backing legal rights and obligations with the power of the state, however, law gives public warning that violations of these rights and duties are taken at the risk of state coercion, and that the state might force the wrongdoer to redress her wrong.

At the same time, the state is limited to protecting *just* those interests secured by legal rights and duties; people can engage in all other activities free from the threat of state coercion. This is not to say that people are under no further obligations to one another; there are indefinitely many obligations that people incur towards each other. Nor

is it to say that only legal obligations are backed by the threat of harm. People can impose many different kinds of sanctions on one another for the violation of their obligations. But, the law limits the exercise of *state* coercion to upholding just those that are prescribed by law; there are no further types of behaviour that the state is justified in coercing.

Law has these features because of basic facts about its structure. In particular, law can provide the security it does because, as Hart illustrates, law fundamentally consists in the union of primary duty-imposing rules and secondary power-conferring rules, and it is founded in an ultimate rule of recognition.<sup>8</sup> Primary rules are action-guiding rules. They tell people what, according to the law, they must and must not do. Power-conferring rules are rules setting out the conditions under which people can create, amend, or extinguish primary rules. Intuitively speaking, power-conferring rules are rules establishing legal institutions, like legislatures, courts, judges, police, etc. Legal systems must include such rules in order to render intelligible the idea that, under some circumstances, members of a community act and speak in an official law-creating, applying, and enforcing capacity, separate from acting on their personal desires and judgments.

Power-conferring rules also include rules setting out the conditions for making a valid will or contract, and other ways that private parties can alter their legal status with respect to each other. These rules are a kind of power-conferring rules because people are acting like private legislators when they change their legal status in accordance with these rules. But, there remains a significant difference between the actions that private parties

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<sup>8</sup> Hart, *The Concept of Law*.

take pursuant to these rules and the actions of officials; private parties do not act in an official capacity when they, say, make a will, get married, incorporate, and so on.

Moreover, the powers they have to change their legal status consist in just those that the law confers on them; the law prevents people from unilaterally changing their legal status with respect to each other. Indeed, as we shall see, this is the central idea that the notion of a secondary rules explains.

Finally, law is founded in an ultimate rule of recognition setting out the authoritative criteria for validity for all the subordinate rules of the system. This rule imposes a hierarchical order on all the subordinate rules of the system, thereby establishing a means of resolving conflicts between them, should they arise. The rule of recognition thus unites all the various rules of the system into a systemic and coherent whole, and the various judgments and actions the officers of the system into that of a single public authority capable of speaking in a unified voice.

Such a system of rules enables law to issue rules conferring a set of legal rights and duties on the people living under it. This set of rules is fixed, public and coordinated. Consider each feature in turn.

First, to say that these rules are fixed is not to say that these rules are unchanging or unchangeable. On the contrary, as Hart points out in his criticism of John Austin, one of the distinctive features of a legal system is that it provides the procedures for creating, amending, and extinguishing its own rules.<sup>9</sup> The rules conferring rights and duties are fixed, then, in the sense that they are determined by facts that are independent of the whims and activities of private actors. This is because these rules are just those that are

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<sup>9</sup> *The Concept of Law*, ch. III.

enacted pursuant to the recognized procedures of the system, and it is just to the extent that a rule is enacted in accordance with these procedures that it confers a legal right or duty; no other rights or duties, no matter how weighty, morally good, or widely practiced, are enforced by law. To say that law provides people with a fixed set of rules then is to say that it provides them with a set of rules that are fixed at any given time by facts that are independent of people's private behaviour and attitudes in this respect.

Secondly, by making legal validity depend on conformity with specified procedures, the existence of power-conferring rules makes people's legal rights and duties public. This is because on this conception of law, whether or not a given rule is a rule of the system depends the actions and judgments of public officials. In this respect, people's legal rights and duties depend on facts that are available to all subjects of the system, and the continued existence of these rights and duties, or their extinction, remains a matter of public fact; there is no risk that they might change or be extinguished in secret. This is not to say that they are easily discernable, or to say that there is a clear answer to what the law requires in any given case. As we well know, legal systems can be arbitrarily complex and people often need significant expertise in order to determine what the law requires in a given case. But, legal rights and duties are public in that the facts that make it true that a given person is under a legal right or duty are available to the public at large, and, that these are the relevant facts for determining people's rights and duties under the system is also a publicly available fact.

Finally, power-conferring rules also make it possible for law to issue a coordinated set of rules conferring a coherent set of rights and duties. Law confers a coordinated set of rules insofar as its rules work together to promote, rather than impede

action. So, for example, where the law grants a right, it also imposes corresponding obligations to respect it; the law does not permit and prohibit the same action; it does not require people to engage in conflicting actions, or do and refrain from engaging in the same action, or otherwise require practical impossibilities. This does not mean that conflicts are impossible, or that they do not arise between the various rights and duties conferred by the system. In a system that is sufficiently complex, and that is created and maintained by many individuals, conflicts between rules are not unlikely. But, power-conferring rules allow law to resolve conflicts when they do arise by including rules for ordering the rules of the system and deciding conflicts. Where there is no such explicit rule for settling a conflict, the law will direct people to an authoritative official whose judgment on the matter settles the question. The important point here is that where conflicts between rules do arise, their resolution is also a question for the legal system; the system does not leave conflicts to be resolved by the subjects themselves. This is so just by virtue of the fact that the power-conferring rules return questions arising from the issuing, application and enforcement of its rules to the system.

### *III. Independence*

These distinctive features of law make possible the complex kinds of interactions between people that we typically associate with life under a legal system, and that we think are absent in pre-legal societies.

Where there is no law, whether or not people's interactions go well or badly for them depends on the particular characteristics of those around them. It is true that people might be kind and generous towards one another, and they might respect the interests of

those around them, but they might not, and whether or not they do depends on their particular whims and inclinations on the matter. This is not to say that people are subject to the *mere* whims and inclinations of those around them where they have no law. Absent a system of fixed legal rules, people may well develop practices of, say, respecting one another's holdings and engage in trades or exchanges of them; they might refrain from injuring one another, and inflict harm on those who do injure people, and so on. These practices can help to force some people to treat those around them well, even when they are not so inclined. But, whether or not such practices are in place, and which practices people adopt remains a function of the particular characteristics of the members of the community, as does their continued existence. It is thus just to the extent that the members of a community are inclined to adopt and enforce such practices that they are in place. As a result, where there is no fixed set of rules for settling such conflicts, there is *nothing further* than people's whims and choices to which people can appeal. That is, there is no further standard to which they can hold one another, other than that which is set by the particular choices of particular people in order to settle such conflicts and redress wrongs when they occur.

This makes people's relations with one another doubly insecure. On the one hand, people are independent actors, capable of choosing their ends and pursuits for themselves, independently of ends and pursuits of others. Although they might take their ends and pursuits of those around them into consideration when deciding what to do, they need not. As a result, when people interact with one another, they are vulnerable to the risk that others might act against their interests and injure them. On the other hand, where there is no fixed, public, and coordinated set of rules for governing people's activities

with respect to one another, people are vulnerable to the possibility of suffering *any* injury at the hands of another; there is no limit to the ways in which people might harm one another. As a result, people are wholly vulnerable to the whims and inclinations of those around them.

One way of mitigating against these risks is to physically insulate oneself from the activities of others, making the risk of harm by one's neighbours physically impossible, or unlikely. People might thus, e.g., build fortresses around their homes, or impose other physical barriers between themselves and those around them. This is a useful strategy, and it is especially important for protecting things that are not fungible, like one's person. So, for example, people, have reason to drive defensively even when they have the right of way because the available remedies for accidents are poor compensation for the potential injuries that one might suffer.

Another way to mitigate against the risk of injury at the hands of another is to provide people with an avenue of recovery should an injury occur. The availability of recourse for recovery does not necessarily make the possibility of injury less likely (though it may help, since it increases the cost of engaging in risky activities). But it can reduce the harm that people suffer when an injury does occur by displacing some of the resulting costs of the injury. The availability of recourse can thus relieve people of the responsibility for bearing the full burden of the loss. It is thus another way of making people's interactions with one another more secure, even though it does not (necessarily) reduce the risk of injury directly.

Where there is no law, people are vulnerable to both kinds of risk. They are vulnerable to the possibility people take no heed of the needs and interests of those around them into account, and they are vulnerable to the risk that any of their aims or pursuits might be thwarted by the activities of another. To be sure, people might adopt alternative means for relieving each other of these risks and making their interactions with each other more secure. As we saw above, people might, say, physically insulate themselves from the activities of others, or institute practices of, say, respecting one another's interests, and, say, forcing people to compensate one another for what is owed. As we have seen, however, whether or not they do engage in such practices depends on the whims and inclinations of the members of a given community, making people once again vulnerable to the particular characteristics of those around them.

Law, of course, does not relieve people from the physical risk of suffering a harm at the hands of another. Law does not consist in a set of physical constraints, that physically prevent people from harming one another, and this is what would be needed in order to protect people from the possibility of harm in this way. Instead, it consists in a system of rules prescribing the legal rights and duties that its subjects can invoke the power of the state to claim against one another, coupled with the assurance that these are the only claims that the state will enforce against its subjects; there are no further complaints that subjects can call upon the state to enforce against one another beyond those prescribed by law. It thus remains possible for people to harm one another in violations of the rights and obligations that the law imposes on them, even when they are subject to a legal system. But the distinctive features of law described above – namely, that it is fixed by facts that are independent of any person or group's personal

characteristics, that these facts are publicly available to all the subjects of the system, and that they form a unified system, directing questions of conflict or indeterminacy back to the system to be resolved – relieve people of the twin risks of the possibility that people refuse or fail to take the needs and interests of those around them into account, and that there is no limit to harms to which they are vulnerable. It does so by providing people with a further set of standards that, first, do not depend on the whims and inclinations of any particular person or group, and whose continued existence is independent of what anyone thinks of these rules, or whether or not people comply with them. Second, people can determine according to these standards, for any given action, whether or not it is subject to the threat of state coercion, and they can take those around them to know this as well. And, thirdly, these standards set out the conditions of state coercion conclusively, so that where questions as to the rules' requirements do arise, as in cases of conflict or indeterminacy, they are not left to be settled by the subjects themselves. Although, as mentioned above, the existence of such a set of rules does not make violation impossible, it assures people that they can seek recourse when they do occur, and that these are the only claims that people can call upon the power of the state to enforce against one another, thereby relieving people of the risks they face when interacting with other actors.

The availability of such a set of rules makes it possible for people to interact with strangers, or with one another as strangers, without facing the insecurity described above. It does so because it guarantees all subject to a legal system that they can seek recovery if they are injured by another party to an interaction, but that they are responsible for no more than the cost of the harm in the case of an injury. So, for example, it is of course

possible that, even without a legal system in place, people can designate routes for travel, that they develop conventions coordinating their travel, and that these conventions are steady and well-established, so that people can safely get from one place to another. But, it is the existence of a fixed system of rules securing, e.g., people's right of way on the green light but not the red; at the crosswalk but not in the middle of the road; designating the roads for drivers but not, say, lawns or sidewalks, and so on, and rules preventing people from unilaterally changing all these rules, that makes possible the complex systems of traffic that we currently have. Similarly, even without a legal system, people may, say, trade goods with one another, develop reliable practices for determining the relative value of different objects, institute mechanisms for holding one another to the bargains they strike, and so on. But, it is only once people establish a legal system that also exhaustively sets out a set of public, fixed, and coordinated conditions under which its rules can be changed that people can, e.g., book a flight on the internet, or make a trade on the stock market. These are all risky activities, in the sense that they involve high, or non-trivial, stakes, and people stand to lose a lot in the case of injury. They are also risky in that they require the coordination of many people who often know nothing about one another, and who likely bear no other relation to one another beyond their mutual involvement in these interactions. The existence of a legal system renders people's activities in these cases more secure by simultaneously relieving them of the risk of bearing the full burden of these losses, and by guaranteeing that they can be held responsible by the state for no more than the cost of these losses.

More generally, the existence of a legal system allows people interact with one another merely on the supposition that those around them are also independent actors,

entitled to set and pursue their ends for themselves, so long as they can be reconciled with the ends and pursuits of those around them. They need not assume anything further about people's particular ends or pursuits, or other personal characteristics in order to render their interactions with one another more secure. In particular, they need not assume anything about the intentions or motivations of those around them, including the assumption that people are self-interested, or morally good (or wicked), in order to render their interactions with one another more secure. They need only act under the assumption that they are each subject to a set of public, coercively enforced rules securing their choices over a range of actions, subject to the constraint that these rules secure a corresponding range of choices for all other subjects to the system as well.

The difficulties with interacting with other persons capable of independent action is not merely a product of people's bad nature, though it is certainly made worse by people's wickedness or selfishness in their pursuits. People's choices can conflict even if they are morally good. This is because it is perfectly permissible for people to act on ends they set for themselves, independently of the ends and pursuits of those around them, and to respect the ability of others to do the same. Even so, however, people remain vulnerable to the risk of conflict. This is because there are multiple morally permissible ends that people might choose, and when they choose independently of one another, their ends and pursuits might come into conflict. Even if people are perfectly good, then, they still require a fixed and public set of rules for rendering their independent activities consistent with one another.

One might think that morality consists in just such a set of rules. Morality consists in a unified set of rules governing people's actions to which everyone has access, and that binds people regardless of what their whims and desires happen to be. It is thus coordinated, fixed and public in the relevant respects. Morality also provides people with some guidance for avoiding conflict and resolving them when they do arise. But, it cannot provide a determinate standard for rendering people's independent activities consistent with one another because it cannot set fixed boundaries for distinguishing one person's rights from another, and such a determinate standard is needed for rendering people's independent activities consistent with one another. Let us consider an example.

Morality can, for example, tell people that it is wrong to help themselves to the belongings of others, that they ought to return objects lent to them, that they ought to compensate people when they destroy their belongings, and so on. But, it cannot provide a determinate answer to the question of what counts as the thing in question. It cannot tell people that, say, when a person writes on a paper, it is the paper that persists, even when the text is a beautiful poem, and even when it is written in gold, but when a person paints on a canvas, the canvas is destroyed and a new object – the painting – is created.<sup>10</sup> So far as morality is concerned, either option is permissible, and the choice between them is arbitrary. As a result, when one person mistakenly writes on another's paper, or paints on another's canvas, morality can indeed tell her that the mistaken party must either return the original object or compensate the owner for its destruction. But it cannot direct the parties in these cases to, say, return the paper with the text on it to its owner, but to compensate the owner of the canvas for the destruction of her property, and this is what is

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<sup>10</sup> See Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 134 for a discussion of these cases.

needed in order for people to satisfy the requirements of their moral obligations, and to render their activities consistent with one another.

This problem is a general one. It is true that morality can provide people with principles governing the acquisition and transfer of rights. But these principles are indifferent as to the object of the right. People's obligation, say, to return objects lent is independent of how they determine what counts as the object; if it is on loan, they are under an obligation to return it, whatever it is. As we have seen, however, there are multiple morally permissible candidates for what can count as the object. Satisfaction of this moral obligation requires returning the *actual* object lent, however, even when this is something different from what one might intuitively expect, and morality cannot deliver this. People thus need a further fixed and public set of rules specifying the conditions under which a given object can be said to belong to someone if they are to render their independent activities consistent with one another, regardless of how careful or well-intentioned they are in their attempts to respect the belongings of others.

So too for the other rules that law provides for reconciling people's independent activities. In order for people to, e.g., drive safely in the presence of other drivers trying to do the same, they need rules specifying what counts as a road and who has right of way, no matter how careful or considerate they are; in order for people to limit their liability in their dealings with others, they need rules specifying the conditions under which they can incorporate, no matter how scrupulous they are, and so on. This is so even when people are perfectly good and in perfect agreement on morality's dictates. Satisfaction of moral obligations when engaged in these practices likewise requires the existence of a fixed and public answer to these questions.

This problem is also much deeper than it first appears. Rendering people's disparate aims and the actions they take in their pursuit consistent with one another does not require reconciling every action that a person can take with the pursuits of every other actor in the world. So holding would make action virtually impossible. This is because virtually every time someone acts, she limits the range of action of all other actors. If people had to take every action that every person might choose into account every time she acted, they could almost never act. Law releases people from this general obligation, on the condition that they respect others' power to act as well. But, it provides people with only a limited range of actions over which their choices are sovereign, and puts them under a corresponding obligation towards only a limited range of people, and morality cannot supply the boundaries for fixing this range of actions, or of persons towards whom people are under reciprocal obligations. That is, morality cannot specify the determinate particulars that fix the boundaries for deciding who counts as a party to an interaction and which actions are to be reconciled for the purposes of rendering people's independent activities consistent with each other. As a result, although interacting on terms of independence is morally permissible, and although morality can provide people with general guidelines for governing such interactions, it cannot specify the boundaries in which they can occur, and, as a result, cannot supply people with determinate rules for rendering their independent actions consistent with one another.

When a legal system is a just one, the law gives effect to an important aspect of morality, namely, people's ability to set and pursue their ends for themselves, and to respect the ability of others to do so as well. This is because, as we have seen, the existence of such a

set of rules provides people with the relevant specifications for fulfilling their moral obligations towards one another. This is not to say that this is the purpose of legal rules to give effect to morality in this way, though it is certainly true that legal rules *ought* to be just. It is just to notice that when they are good, this is something that people can gain from law.

Legal rules can render the actions of independent actors consistent with one another even when these rules are wicked or unjust. This is because it is the mere fact that legal rules are fixed, public, and coordinated in the ways described above that makes it possible for them to reconcile people's independent activities with one another. Recall the initial difficulty: law makes it possible for people to interact with one another even though they are vulnerable to one another's power of choice by establishing rules governing the circumstances in which the state can interfere with its subjects' affairs, and by establishing fixed procedures for determining the creation, amendment and extinction of these rules. This makes it impossible for any particular person or group to unilaterally change these rules governing the state's use of its power on a private desire or whim. Instead, it is only under certain circumstances – namely, when officials, acting in their official capacity, change these rules in accordance with set procedures – that one can effect a change in these rules. This makes the kind of complex interactions that we typically associate with life under law possible because it allows people to interact with one another – e.g., to drive on a highway, to make a trade on the stock market, etc. – without knowing anything about the particular characters of the parties to the interactions. That is, the existence of such a fixed and public set of rules exhaustively setting the terms governing the state's use of force makes it possible for people to interact

with one another on terms of independence, or without any concern for the particular ends and pursuits of those around them. This is so even if the rules themselves are bad or unjust ones because it is the mere fact that they are fixed, public, and coordinated that makes such interactions possible; all that is needed for securing people's interactions with one another is a fixed, public warning about the state's use of force, and the assurance that these conditions will persist until further public notice. Of course, where the rules of the system are not good ones – where, say, they do not accord their subjects equal status, where they deny people rights that are morally valuable, etc. – subjects will likewise be incapable of engaging in free or just interactions with one another, or, at least, their ability to do so will be significantly curtailed. But, their mere ability to interact with one another as independent actors – i.e., their mere ability to set and pursue their ends for themselves and to refrain from interfering with the attempts of others – will remain intact, even where the system fails to set out moral or good conditions for interaction. My claim, then, is, that the fact that law renders the actions of free actors consistent with one another makes law vulnerable to hard cases like *Riggs*. However, law's ability to so render people's actions consistent with one another also explains how it can decide such cases. Let us therefore consider again the difficulty posed by *Riggs*.

#### *IV. Riggs Revisited*

The Court in *Riggs* held that even though Elmer was clearly set to inherit under the will, and even though there was no countervailing posited law prohibiting murderers from inheriting, it is fundamental principle of law that no one should profit from his own

wrong. For this reason, it denied Elmer the inheritance. Moreover, the Court held that this principle governed the case even though it had no posited source.

*Riggs* is not a hard case in the sense that it requires judges to apply a wicked or unsavoury law, nor is it hard in the sense that it arises from defects, moral or otherwise, in the formulation or application of legal rules; the Court in *Riggs* was not charged with applying unjust or wicked laws. Nor further is it hard in the sense that the relevant rules are hard to apply, or that it is unclear whether it falls under the rules in question. In all these respects, *Riggs* is an easy or clear case: the rules governing the disposition of property are just ones; the will clearly named Elmer as a beneficiary; it was clearly valid; it clearly fell under the Statute of Wills; and there was no posited law prohibiting murderers from inheriting, or otherwise vitiating the Statute. The difficulty that *Riggs* raises, then, does not lie in the application of the particular rules themselves.

Dworkin suggests that the difficulty with *Riggs* arises from the immorality of permitting Elmer to benefit from his wicked act, and the possibility that the law is implicated in such a wrong. Further commentators have adopted this analysis as well. All have supposed that the law's appeal to the principle that no man should profit from his own wrong constitutes an appeal to a moral principle in an attempt to prevent the law from furthering Elmer's immoral ends. The law on the matter is not so straightforward, however.

First, the principle upon which the Court in *Riggs* relied – that no man should profit from his own wrong – is too broad as stated. The law certainly sometimes permits people to profit from the fact that they have committed a wrong, even if they are not profiting from the wrong directly. So, for example, although many states have laws

prohibiting criminals from profiting from the publication of the details of their crimes (so-called “Son of Sam” laws), not all states do, and whether or not so profiting is legally prohibited depends upon whether such a law has been enacted, rather than on a conceptual feature of law. Adverse possession and breach of contract are two other obvious examples of instances in which the law permits people to profit from their wrongs. The law thus does not prohibit all attempts to profit from one’s wrong.

More importantly, however, modern legal systems typically prohibit the imposition of a penalty beyond that provided by the criminal law for the commission of a crime.<sup>11</sup> In general, the law cannot divest a person of her civil rights or her property because of a lack of desert, or dirty hands. This is so even when allowing a person the benefit of her property or civil rights is morally repugnant. So, for example, the administrators of a retirement fund cannot deny a retired police officer his pension on the grounds that he has been convicted of drug trafficking.<sup>12</sup> The mere fact that the officer is morally undeserving of this benefit cannot serve as the reason for denying it to him. More generally, considerations of moral desert, or lack of desert, cannot form the basis of a

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<sup>11</sup> Article III of the U.S. Constitution states that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted,” U.S. Const. art. III, § 3, cl. 2. This clause has been liberally construed and has been read to prevent all official attempts to impose further punishment for crimes committed. See *United States v. Brown*, 381 U.S. 437 (1965), 442. See also *Cummings v. Missouri*, 71 U.S. 4 Wall. 277 277 (1867), holding that the deprivation of any right can count as a punishment if it is imposed as such. Similarly, article I of the U.S. Constitution prohibits federal and state Congresses from passing *ex post facto* laws and bills of attainder. Art. I, §§ 4, 9 and 10, respectively.

<sup>12</sup> *Board of Trustees of Police Pension and Retirement System of Oklahoma Board of Trustees of Police Pension and Retirement System of Oklahoma City v. Weed* 719 P.2d 1276, holding that the Police Pension and Retirement Board’s attempt to divest an otherwise meritorious officer of his earned pension on the grounds of his criminal conviction violates the prohibition on corruption of blood and forfeitures of estates.

decision about who benefits at law. The Court's denial of Elmer's claim thus cannot be explained by mere appeal to his lack of *moral* entitlement to the inheritance.

Instead, the problem in *Riggs* is that the defendant committed a legal wrong *so as to gain from someone else's legal power*. Elmer's act did not just consist in the prohibited act of murder, though it was also murder. Instead, he killed his grandfather *in order to* prevent him from changing his will and disinheriting him. In other words, Elmer sought to benefit from a power that the law confers on his grandfather, namely, his power to dispose of his property as he sees fit, and he did so through legally prohibited means.

By so doing, Elmer tried to usurp his grandfather's legal right for his own gain. That is, he tried to help himself to his grandfather's right to name the beneficiaries of his estate in order to secure his claim on the estate. But, when the law confers a power on people to dispose of their property as they see fit upon their death, it confers this power *just* on the testator. No one else has the legal power to decide how the testator will divest his property. Of course, the testator might ask for advice from his family or, say, his lawyers on how to best dispose of his estate. But, the ultimate decision, at law, remains his; no one else's decision can have the legal effect of naming a beneficiary under his will. By murdering his grandfather so as to benefit under the will, Elmer attempted to subvert this power.

It is thus true that the will named Elmer as the beneficiary, that it was validly enacted, and that there was no countervailing posited law preventing murderers from inheriting in New York State at that time. But, the Court asked, "what law, human or divine, will allow him [Elmer] to take the estate and enjoy the fruits of his crime?" It continued,

If he had met the testator and taken his property by force, he would have no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of the state, and an offense against public policy.<sup>13</sup>

In other words, by murdering his grandfather in order to prevent him from changing his will, Elmer negated his claim to inherit under it just as he would have lost his claim to title had he taken the property by force, or had he fraudulently induced his grandfather to will it to him.

The law's vulnerability to the possibility that its subjects unilaterally act so as to subvert the power it confers is an unavoidable feature of its structure. By issuing a set of rules that render people's actions consistent with one another, law takes its subjects to be rational actors, capable of setting and pursuing ends independently of those around them, whose actions can come into conflict with one another. Law aims to render people's actions consistent with one another by subjecting them to a coordinated scheme of rights and duties, and by backing these rules with the threat of state coercion. These rules *legally* prohibit acting so as to subvert this scheme. However, as rational actors, it is always open to legal subjects to attempt to subvert the law; there is no conceptual impossibility in their doing so. It is thus always possible for actors under this scheme to help themselves to its guarantees in order to seek a legally prohibited advantage; i.e., it is always open to the subjects of this scheme, as free actors, to seek to benefit from the law's protection of, for example, someone else's right to dispose of his property as he chooses.

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<sup>13</sup> As per Earl, J., writing for the majority in *Riggs*, 512f, 190.

No combination of rules can prevent actors from choosing to act in this way, no matter how complete or carefully crafted. This is because the law cannot make it impossible for subjects to abuse or subvert its guarantees. In addition to the possibility that they violate of its rules, people can also abuse the law's guarantees by attempting to usurp its authority and attempting to claim for themselves powers that it reserves for other subjects, or for its officials.

The law remains vulnerable to the possibility that its subjects act this way regardless of who it designates as a subject, and which actions it permits or prohibits. This is because it is the mere fact that the law seeks to govern the actions of free actors through the imposition of a fixed set of permissions and prohibitions that it leaves open the possibility that a legal actor, whoever it is, will commit a prohibited act, whatever it is, so as to gain from a legal permission. This is so even if the law denies status to, say, women or African-Americans, or, say, confers it to households or ships,<sup>14</sup> and even when it prohibits good acts and permits wicked ones. The law's appeal to the prohibition against profiting from one's own wrong only appears to be an appeal to a moral principle in *Riggs* because the law in this case was just.

The law's inherent structure renders it vulnerable to cases like *Riggs*, but its inherent structure also provides it with the resources to resolve such cases. The law secures for the testator the exclusive right to name the beneficiaries of his estate by reserving to itself the power to determine its rules. As we know, legal rules can only be

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<sup>14</sup> The household is taken to be the primary legal actor under Roman law, and under U.S. Admiralty law, ships can be taken to be legal actors for the sake of proceedings *in rem*. See, Barry Nichols, *An Introduction to Roman Law*, cited in fn. 11, above, for a discussion of the Roman law of persons, and e.g., *The Ville de St. Nazaire*, 124 F. 1008 (D. Or. 1903), for the a discussion of the U.S. doctrine of proceedings *in rem*.

changed in accordance with fixed legal procedures. It is never open to a private party to unilaterally change the rules of the system. This includes the rules conferring the power on a testator to decide who is to inherit his property when he dies. Elmer's actions constitute such a unilateral attempt. Recall the facts of *Riggs*. In this case, Elmer had warning that his grandfather might attempt to change his will and disinherit him. Elmer murdered his grandfather in order to pre-empt this possibility and guarantee his inheritance. Elmer's murder of his grandfather thus constitutes an attempt to usurp the power that the law reserves to itself to set the rules for deciding who gets to dispose of someone's property when he dies. The law can prevent such attempts just by virtue of the fact that, in setting out the conditions under which its rules are created, amended or extinguished, it makes these conditions exhaustive, rendering all other attempts to change the rules of the system void. It is for this reason that it must hold Elmer's attempts to be void as well, and deny his claim to the estate.

Cases like *Riggs* are easily multiplied. Consider another example. The law also prohibits keeping the profits from the sale of timber that was wrongfully taken from another's land and then improved.<sup>15</sup> This is so even if the defendants have a greater *moral* claim to the timber than do its owners. In *Wooden-Ware*, timber was taken by Aborigines off land owned by the federal government, but reserved for them. Arguably, the defendants in this case are morally entitled to the benefits of the land, even if they do not have title at law. The law, however, upheld the rights of the lawful owner as against the defendants. It did so because it prohibits such unilateral attempts to subvert its rules, even if they are morally justified.

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<sup>15</sup> *Wooden-Ware Co. v. U.S.* 106 U.S. 432, 1 S. Ct. 398 (1882).

Similarly, the law also prohibits keeping the profits from the sale of a book in which the author intentionally commits libel for the sake of selling more books;<sup>16</sup> or from improvements made on coal that is taken from another's mine,<sup>17</sup> and so on. As above, in such cases the law is preventing itself from being used as an instrument to subvert its own aims. It is true that, in general, the benefits sought by the defendants in these cases are ones that the law protects: in general, the law protects the profits gained from otherwise lawful sales, and those accrued through improvements one makes to one's property. But, in these cases, the defendants committed a legal wrong *so as to* benefit from these protections: Cassell & Co. helped themselves to Captain Broome's reputation *in order to sell more books*; the defendants in the coal cases helped themselves to others' coal *in order to gain from its resale*, and so on. As in *Riggs*, their acts constitute unilateral attempts to usurp powers that the law confers on others, namely, the power to control one's reputation and to seek profit from the sale of one's property. And, as above, the defendants in these cases committed these wrongs so as to benefit from the law's protections. The denial of their claims, however, is not an *ad hoc* attempt to ignore the posited law when it points to an outcome too unsavoury to uphold, or to insert morality to curtail unwanted consequences of the posited law. Nor are these cases examples of the seamless connection between law and morality. They are not an open door for the inclusion of all moral considerations in legal reasoning, as Dworkin suggests. Instead, they are instances of the law's attempt to reassert itself as an institution that delimits the range within which people are authorized to act in the face of the legally authorized

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<sup>16</sup> *Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027; [1972] 1 All E.R. 801.

<sup>17</sup> *Martin v. Porter*, 5 Mee. & W. 351; *Morgan v. Powell*, 3 Ad. & E.N.S. 278; *Wood v. Morewood*, 3 id. 440; *Hilton v. Woods*, Law Rep. 4 Eq. 432; *Jegon v. Vivian*, Law Rep. 6 Ch. App. 742, all cited in *Wooden-Ware*.

powers of other agents to act. These limitations on the exercise of legal rights do not need to be posited in order to be law. Instead, they follow just from the fact that the law precludes the unilateral attempt to change its rules.

Indeed, we can even generate another principle like the one applied in *Riggs* using this same line reasoning. In addition to preventing people from committing a prohibited act so as to benefit from another's exercise of his right, the law must also prevent people from exercising their legal rights so as to benefit from another's commission of a legal wrong.<sup>18</sup> So, for example, I cannot refuse to contract with one person unless he breaks his contract with another.<sup>19</sup> This is so even though the law gives me the freedom to contract, including the freedom to refuse to contract, and even though, in general, the law relieves people of responsibility for the wrongs of others. These prohibitions do not require explicit enactment in order to be legally binding. Nor do they indicate the existence of unposited moral considerations in law. Instead, they follow just from the fact that the law aims to systematically coordinate the rights of each with the rights of others, but that it protects nothing more than people's entitlement to one another's rightful actions.

My suggestion, then, is that the unposited moral considerations that Dworkin thinks are missing from the positivist account but that remain legally binding are just those that arise from the fact that law consists in a system of rules that confers a coordinated scheme of rights and duties on free actors. Doing so requires that it deny legal effect to unilateral attempts to change its rules. Hard cases arise under such a system because law governs free actors, who are capable of attempting to subvert law's structure,

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<sup>18</sup> See O. W. Holmes, "Privilege, Malice, and Intent," 8 *Harvard Law Review* 1, 1-14, (1894) for raising this point in this connection.

<sup>19</sup> Holmes, "Privilege, Malice and Intent," 12, fn. 1. Holmes cites *Temperton v. Russell* (1893) 1 Q.B.D. 715 in support of this point.

whatever it is. The law has the resources to resolve them because it maintains ultimate authority to determine its rules: unilateral action only has legal effect when the law confers a power. No further appeal to morality is necessary.

Dworkin is thus correct to suggest that the law is inescapably vulnerable to the possibility of hard cases, and that, when confronted with them, the law has the resources to resolve them even when their solution cannot be traced to a posited source. A complete theory of legal validity must therefore explain law's ability to handle these cases. But, Dworkin is wrong to think that this poses a threat to positivism. Explaining law's ability to issue such a set of rules is precisely what Hart sets out to do in conceiving of law as the union of primary and secondary rules, and, I suggest, we need appeal to nothing further in order to explain law's ability to resolve hard cases. In particular, no further explanation of the legal validity of moral considerations is needed.