

Three Key Arguments in “The Model of Rules I”

1. Section 3: The need to bring in an account of principles.
2. Sections 4 and 5: Judges do not have strong discretion.
3. Section 6: Hart is wrong about the Rule of Recognition

Sections 4 and 5: Judges do not have strong discretion

| Dworkin’s Approach | Hart’s Approach |
|---|---|
| <ul style="list-style-type: none">• Treat legal principles as legal rules• Some principles are binding as law• Principles must be taken into consideration by judges and lawyers• Principles are binding upon judges and judges are wrong not to apply principles when they are pertinent; accepting a principle as binding• The judge is enforcing pre-existing legal rights and obligations (31); there is an established obligation and there is no ex post facto law• The first weak sense of discretion | <ul style="list-style-type: none">• Principles are not binding the same way rules are• Principles exist beyond the law, they are extra-legal• Principles are summaries of what most judges make it a principle to do when forced to go beyond the rules that bind them• An act of judicial discretion applied ex post facto (31); there is no established obligation to justify this• Discretion in the strong sense): on some issue an official is simply not bound by standards set by the authority in question. |

Issue of discretion

Dworkin distinguishes three kinds of discretion:

- *Weak Discretion*¹: having the authority to judge in accordance with standards that cannot be applied mechanistically. The standards applied demand the use of judgment. An official must use judgment in applying the standard.
- *Weak Discretion*²: having the *final* authority to judge in accordance with standards that cannot be applied mechanistically. Some official has final authority and cannot be reviewed; no one will review that exercise of judgment.
- *Strong Discretion*: having authority to judge without being bound by any standards. On some issue, an official is simply not bound by standards.

Judicial Discretion: Dworkin’s Charge Against Hart

- Hart’s account of law allows more judicial “strong discretion” than actually exists.
- In fact, courts almost never have strong discretion according to Dworkin.
- Only in very rare situations will it be the case that there is “no (legally) right answer” in a case that confronts a court.

Legal Positivists: a judge has no discretion when a clear and established rule is available. BUT: when a judge runs out of rules, he has discretion, in the sense that he is not bound by any standard from the authority of law (the core versus the penumbra).

Dworkin: at least some principles must be acknowledged to be binding upon judges, requiring them as a set to reach particular decisions.