

# Principles, Policies and Persuasion

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In Jane Austen's so-called autumnal novel, *Persuasion*, we read of the complex deliberations of Anne Elliot about her family's future and her own relationship with her former suitor, Captain Wentworth. Anne's bluff and vain father, Sir Walter Elliot, who eight years before had talked Anne out of marrying Wentworth, has his own views on how best to make decisions for the family. They reflect an exquisite concern for satisfying social conventions, for observing the status and duties borne by individuals in a class-conscious society, and for calculating the consequences of the family's declining social and financial fortunes. In Austen's portrait of a nineteenth-century family in crisis, the admirable women tend to be more judicious than the men. By contrast with her father's fear of the effects of straitened circumstances, and what Anne calls her father's "partialities and injustices," Anne ultimately seeks solutions based on a "higher tone of indifference for every thing but justice and equity."<sup>1</sup> Anne Elliot's method for dealing with relationships and conflicts is through what she understands to be the best kind of persuasion, that is, an appeal to principles, rather than to her father's short-sighted policies. The tension between principles and policies, between Anne's approach and that of her father, forms a major motif of the novel. The book vividly illustrates a "war of ideas."<sup>2</sup> Can Anne Elliot act according to principle and still be persuaded to marry Captain Wentworth? The answer will be revealed at the end of this paper, after a review of what several philosophers have said about what standards should guide decision-making.

One of the most robust cases in favour of principles and against the use of policies to justify legal decision-making has been offered by a contemporary theorist who (paradoxically, one might think) favours the possibility of an "activist" judiciary. Should judges decide a difficult case on the basis of what is socially more desirable, somehow evaluating arguments of welfare and morality and operating as a legislature would have, if it had dealt with the problem? To answer such a question one must first examine relevant distinctions between rules, principles, and policies. This takes us into an exceedingly abstract area of law — requiring one to probe the sometimes obscure conceptual underpinnings of legal practices and institutions — but a knowledge of jurisprudence arguably makes for better lawyers, judges, legislators, and academics.<sup>3</sup> I say "arguably" because, as maintained by Stanley Fish for instance, not only is asking judges to articulate the theory behind their decisions fruitless (like asking a baseball pitcher to frame a theory behind throwing the curve ball), but indeed posing such a question to them

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1. Jane Austen, *Persuasion*, 3rd ed., ed. R. W. Chapman (Oxford : Oxford University Press, 1933, reissued 1988) at 12.
  2. See Marilyn Butler, *Jane Austen and the War of Ideas* (Oxford : Clarendon Press, 1975, reissued 1987).
  3. See K. Llewellyn, "A Required Course in Jurisprudence" in W. Twining (ed.), *Legal Theory and Common Law* (Oxford : Basil Blackwell, 1986) 255; N. MacCormick, "The Democratic Intellect and the Law" (1985) 5 *Legal Stud.* 172; and R. E. Barnett, "Foreword : Why We Need Legal Philosophy" (1985) 8 *Harv. J. L. & Pub. Policy* 1; and M. Salter, "Common Sense and the Resistance to Legal Theory" (1992) 5 *Ratio Juris* 212.

might, as with a pitcher, preoccupy and paralyze them for the moment, interfering with their performance.<sup>4</sup>

The object of this paper is to elucidate how two leading theorists have attempted to distinguish those tasks judges are supposed to perform from the jobs for legislators. Thus, we should be able say that each type of law-maker has its own area of competence, not only because of the kind of knowledge and authority it has, but also because of a background political theory that legitimates their respective institutional role. This separation involves more than a respect for boundaries in the sense of negotiated trade union guidelines about division of labour and who is permitted to undertake which kinds of work. The difference is supposed to reflect the unique intellectual and ratiocinative qualities of judges and lawyers.

Among modern legal philosophers, the pre-eminent figures in the attempt to clarify and justify an original approach to the distinctive role of judges have been the late H.L.A. Hart and his successor at Oxford, Ronald Dworkin. It is through a brief exposition of some of their work that I will be offering a view on how principles differ from rules, on the one hand, and how principles are distinguishable from policies, on the other. Dworkin's work, in particular, has heightened our sensitivity to "principle" as a key judicial construct. His analysis of why judges must be conversant in the language of principle, while legislators operate in the forum of policy, makes sense only after considering, as background, Hart's description of a legal system as a matter of rules, where judges occasionally have to make utilitarian calculations about how to apply a rule in a novel situation.

Dworkin's rejection of many basic elements used by Hart to theorize about legal reasoning and legal practices has in turn been attacked, often without quarter, by lawyers and philosophers who doubt whether law can be founded on the principled basis that Dworkin claims. Indeed, for many contemporary theorists, law is kneaded out of policy arguments alone, without any yeast in the form of principle to leaven the result. As one writer has described it, law is "incompletely theorized," implying that judges do not have to resort to principles.<sup>5</sup> Dworkin has invested much of his career in distinguishing between courts, as the forum of principle, and the legislature or legislative committee, the cabinet, or the municipal council chambers, as forums of policy. For some of Dworkin's detractors, such as Richard Posner and Cass Sunstein, the distinction is overstretched and inaccurate.<sup>6</sup> For others, such as contemporary theorists who emphasize the ideological content of law, Dworkin's distinction damages the cause of democracy because it (wrongly) assumes that there is a shared vision of the judicial role; that developed law is so coherent that moral principles are discoverable in its foundations; that judges have privileged insights no mere

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4. See S. Fish, "Dennis Martinez and the Uses of Theory" (1987) 96 Yale L. J. 1773, reprinted in S. Fish, *Doing What Comes Naturally : Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C. : Duke University Press, 1989) at 372.

5. See C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York : Oxford University Press, 1996) 38-41.

6. See *ibid.*; R.A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass. : Harvard University Press, 1990) at 21-27; and R.A. Posner, "Conceptions of Legal 'Theory' : A Response to Ronald Dworkin." (1997) 29 Ariz. St. L. J. 377.

citizen could attain; and that judges approach the law as if it were merely a story to be continued.<sup>7</sup>

Before proceeding to the substance of this paper, I should make it clear that several topics are not broached here. For instance, there are undoubtedly other senses of "policy" besides those discussed by Hart and Dworkin. When Dworkin speaks of policies, he proceeds largely by way of stipulative definitions. There are other senses or uses of "public policy" invoked by lawyers or judges, for example in deciding whether certain private transactions should be enforced, that might form the topic of another jurisprudential analysis.<sup>8</sup> Similarly, constitutional theorists in particular have debated the assumptions and deployment of a judicial philosophy founded on "deference," *à la* Learned Hand, but that also falls outside the rather narrower focus I have chosen.<sup>9</sup>

The first part of my discussion describes a traditional point of view on the issue of when judges might resort to policy considerations to settle a legal dispute. The English legal philosopher, H.L.A. Hart, provided an elegantly suggestive account of how the lessons of legal theorizing give practising lawyers and judges some additional information about what they do in performing their roles. Hart's influence on subsequent legal and political philosophy can hardly be overestimated. We encounter, among the responses to his work, versions of legal theory that themselves would place great store in legal theorizing, both as a vocation itself and as necessary for competent lawyering and judging. From the point of view of such notable modern theorists as Ronald Dworkin and Neil MacCormick, the working skills of lawyers and judges must include certain capacities for reflection, for abstraction, and for reasoning from broad concepts. This conception of the role of theoretical learning has become an influential stream in contemporary legal theory, if not the mainstream.

## I. A POSITIVIST PORTRAIT

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7. The first three points are among those argued by M. Tushnet in his "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 Harv. L. Rev. 781; "An Essay on Rights" (1984) 62 Tex. L. Rev. 1363; and *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1988) at 108ff. The critique of Dworkin for excessive abstraction in his interpretive thesis is found in C.A. MacKinnon, "Freedom from Unreal Loyalties': On Fidelity in Constitutional Interpretation" (1997) 65 Fordham L. Rev. 1773.
  8. See J. Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983) at 156-158 for a discussion of agreements that offend public policy because they are in restraint of trade.
  9. For Hand's articulation of the case for judicial restraint, see his Holmes Lectures, published as Learned Hand, *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958). See also G. Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994) at 662-672.

I shall begin with what remains perhaps an unfashionable starting-place : the so-called positivist theory of H.L.A. Hart.<sup>10</sup> For the purposes of this discussion, Hart's precisely constructed text, *The Concept of Law*,<sup>11</sup> offers a framework for understanding what lawyers and judges must know in order properly to fulfil their functions in a legal system. For Hart, judges must be able to identify the authoritative sources of law; they must be able to interpret statutes, common law precedents, or legal conventions according to accepted canons of legal interpretation; and they must resist the temptation to shape their presentation of the law by reference to moral or political values. Insofar as law is an argumentative process, with lawyers vying to have their positions adopted by a court, Hart in effect lays down strictures on which kinds of legal arguments are acceptable. While there is some scope for judges and lawyers to refer to the purposes underlying a law, this scope is severely limited. In the "hard" case — an intellectually challenging dispute where there appears to be no applicable rule, that is, no relevant statute and no binding precedent to cover the particular case — Hart describes the judge as enjoying a certain discretion. This is not a license, however, to create the law according to a judge's own convictions about what the law ought to be. This is a crude summary of Hart's interpretation of the concept of law, which relies heavily on meticulous definitions, an acute awareness of how legal terms are actually used, and the interrelations between legal and political theory.

To give a better picture of how the role of policy (definable in this context as normative considerations from outside the law) plays only a limited part in Hart's system, some elaboration is required. Lawyers or judges who wish to separate law from other concepts, such as moral versions of justice or political theories of equality, and who embrace the "autonomy" of law will find sustenance in Hart's theory. In particular, they will gain a rich understanding of why we say that law imposes obligations on its subjects. Laws are not merely a matter of coercion achieved through force or the threat of force. Instead, Hart elucidates a sophisticated conception of legal obligation that better captures the way that individual citizens understand what a legal system achieves and why a law is "binding." This is not to say that Hart's account leaves no room for civil disobedience. But, in order to understand what might be the grounds for such disobedience, we must see first why citizens customarily obey laws and how their activities and aspirations are advanced by the presence of a legal system.

For Hart, legal obligation is not explicable by means of some phenomenological description about the "regular convergence" of behaviour or the externally observable habits of a population. This is too crude an account of social rules and habits. In its place, Hart offers an explanation that focusses on what he calls the "internal aspect" of rules. That is, a theoretical account of why citizens generally feel a legal obligation to perform an act or refrain from certain conduct must attend also to the attitude of those citizens. In a legal system, the citizens accept a rule in the sense that it becomes a standard against which every citizen's behaviour can be evaluated. Hart elaborates this notion in several respects, but it is vital to recall what he means by this "reflective critical attitude." This

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10. For one explanation why positivism's popularity has waned since the 1960's, see F. Schauer, "Positivism as Pariah" in R.P. George (ed.), *The Autonomy of Law : Essays on Legal Positivism* (Oxford : Clarendon Press, 1996) 31.

11. H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford : Clarendon Press, 1994). The first edition was published in 1961.

notion provides much of the normative content and terminology of Hart's system. The continuity and relatively settled character of most legal systems depends on that social practice called by Hart "the acceptance of a rule." Normative criticism within the legal system thus takes place in a certain context. The characteristic form of criticism is where one citizen censures another for deviating from the standard which the group generally has already accepted.

Thus a lawyer or judge who accepts Hart's analysis will be less liable to confuse the notion of legal obligation with moral obligation. Legal rights and duties are different from moral rights and duties, notwithstanding some linguistic coincidences. It is crucially important in Hart's scheme that an official, such as a lawyer or a judge, is viewed generally as capable of ascertaining what the law is without having to inquire, as part of this process, what the law ought to be. This is not to imply that those of us who have been trained in the law have thereby dampened or cast off our consciences. Rather, Hart argues that in our professional capacity our moral judgment is not engaged in the process of consulting the sources of law within our system in order to learn what legal rights or duties are present in a particular situation. The practice of moral inquiry is reserved for those moments when, in some other civilian or "non-official" role, we evaluate a legal result or ponder its merits or wisdom.

Moreover, Hart's theory is taken to have delivered the *coup de grâce* to the idea that a legal system is essentially composed of imperative, determinative rules that can be used through legal reasoning to achieve certainty. This view is especially associated with the kind of unreflective attitude adopted by persons who have failed to practise analytical jurisprudence.<sup>12</sup> According to Hart, it is wrong to think of law as primarily a matter of rules that set relatively definite boundaries for the behaviour of each citizen. Not just legal standards framed in terms of what is "reasonable," "fair," "reckless," or "fraudulent," but arguably all rules have a "penumbra of uncertainty" about them, and this peripheral aspect requires lawyers to advocate, and a judge to choose between, alternative meanings. Legal reasoning can only be reduced to a formalistic procedure at the cost of distortion.<sup>13</sup> A legislature enacting a statute or a judge reasoning in a previous case cannot know all the possible circumstances that the future might bring, so later judges must choose whether to bring a hard or doubtful case within a rule or to exclude it, thus gradually amplifying or narrowing the scope of a rule.<sup>14</sup> Many areas of human action and language remain too "open-textured" to be controlled by an invariable rule.<sup>15</sup> Hart refuses to concede, however, that the "life of the law" is indeterminacy: rather, he claims as against the strong skepticism of the legal realists that most legal practice, by lawyers and by judges, consists in areas governed by determinate rules. Indeterminacy remains pathological. It is not a normal condition of the legal system. As Hart describes the rule-skeptic, he is welcome

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12. A sample of the variety of methods associated with analytical jurisprudence is contained in A. D'Amato (ed.), *Analytic Jurisprudence Anthology* (Cincinnati: Anderson Pub. Co., 1996).

13. Hart, *supra* note 11 at 126.

14. *Ibid.* at 128.

15. *Ibid.* at 131.

at the margins of legal theory, "as long as he does not forget that it is at the fringe that he is welcome."<sup>16</sup>

These small zones of indeterminacy call for interstitial law-making or the exercise of judicial discretion. To the extent that judges, especially those who are members of a supreme tribunal, must be "creative," owing to a gap in the settled law, Hart analogizes their situation to that of a humbler official, namely a "scorer" in a game who is empowered to make decisions which are final, though not infallible.<sup>17</sup> The constraints operating on a scorer consist in the fact that the game has rules, that the scorer knows how to determine the rules' existence and validity, and that the scorer has jurisdiction to apply those rules. All this does not prevent a scorer from getting it wrong, from making "honest mistakes" about borderline calls, or even from abusing the scorer's authority. As long as the scorer is not so wayward that the game simply degenerates into one of "scorer's discretion," the game will continue despite the scorer's errors. One of the great causes for lament about Hart's elucidation of a legal system is that he fails to clarify directly (rather than by analogy) exactly what standards or limiting conditions control a judge's discretion in hard cases.<sup>18</sup> All he appears to have argued is that a judge cannot turn all of adjudication into a matter of judicial discretion. As we shall see, Hart's tantalizing omission in this context has allowed subsequent theorists to interpret Hart's theory as exclusively dependent on legal rules and incapable of accommodating legal principles.

Hart's theory of legal obligation, legal criticism, and the restricted zone of judicial discretion combine to provide much of the foundation for Hart's analysis in *The Concept of Law*. They import a vision of how legal decision-making ought to be conducted. It remains a matter for controversy among Hart's later interpreters whether Hart actually presented a descriptive or normative theory of adjudication.<sup>19</sup> Nevertheless, numerous subsequent writers have purported to extract or extrapolate such a theory from Hart's positivism. Hart repeatedly distinguishes between two classes of "citizen": the official citizen and the ordinary citizen. Included in the first category are judges, lawyers, legislators, police officers, and government bureaucrats, who are expected, by the very concept of a legal system, to "acknowledge explicitly" the laws that create their functions and enable them to perform those functions. By contrast, ordinary citizens in Hart's scheme cannot be expected to have such knowledge. Their acceptance of the governing rules takes the form of "acquiescence in the results of these official operations."<sup>20</sup> The "active" roles of making laws, applying and identifying what laws there are, and giving legal advice are all reserved to the "officials or experts of the system." In summary, legal reasoning consists in applying legal rules developed in a political community for that

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16. *Ibid.* at 150.

17. *Ibid.* at 142.

18. The most rigorous attempt to vindicate the positivist case for judicial discretion is J. Raz, *The Autonomy of Law* (Oxford: Clarendon Press, 1979) at 53-77.

19. See, for example, Steven Walt, "Hart and the Claims of Analytic Jurisprudence" (1996) 15 L. & Phil. 387 and Hart's own admission in the postscript to the *Concept of Law*, *supra* note 11 at 259 that he said too little in his book about legal reasoning and adjudication.

20. Hart, *supra* note 11 at 60.



purpose, so that general theoretical considerations, unless they are explicitly incorporated in the legal rules, are irrelevant to identifying what the law is.

At this stage in the discussion of Hart's analytical system, one may justifiably wonder how it is that judges ever are given any opportunity, within their institutional role or their legal education, of achieving a "critical point of view," in which the notion of critique is at all vigorous. That is, by what means are they encouraged or trained or subjected to examples of a critical attitude that might test the primary or secondary rules of a particular legal system against the criteria of justice or fairness or equality? The answer seems to be that this task can never be achieved within the context of a strictly judicial practice.<sup>21</sup> Hart characterizes the search for justice or the "criticism of legal arrangements" as a "distinct segment of morality."<sup>22</sup> He does not treat this type of inquiry as unimportant or irrelevant. Indeed, he devotes two entire chapters of *The Concept of Law* to an astute discussion of how laws can be measured against standards of justice or fairness or other moral criteria. For our purposes, the significant aspect of his discussion is that criticism of this sort is not part of the province of a lawyer or a judge. Each individual citizen *qua* citizen can of course, in light of her specific moral and political outlook, formulate and try to persuade other citizens to accept certain conditions of justice or equality. As Hart repeatedly emphasizes, the essential features of the moral point of view differ fundamentally from the legal point of view.<sup>23</sup> Although the legal regime adopted by a particular group will invariably be affected by the type of moral ideals and moral criticism that members of that group have expressed, nevertheless there is no necessary connection between a group's system of morality and the secondary rules that partially make up that group's legal system.<sup>24</sup> This is one of the core premises of Hart's version of legal positivism.

Flowing from Hart's attempt to explain the nature of law, then, is the following lesson for judges and lawyers. Only by an accidental conjunction or intersection are certain values shared by a society's moral and legal systems. Such an overlap is by no means necessary in order for a legal regime to be constituted. Nor is the judgment that a particular law is morally bad or at least in conflict with a widely-held moral belief any justification for suggesting that the law should not be accepted, i.e., for denying that it is valid. The special knowledge of the legally-trained official, endowed with the power to identify and apply a group's laws, lies in a strictly legal sphere. A lawyer or a judge may profess a moral outlook that conflicts with the "voluntary" acceptance by that official of a primary legal rule.<sup>25</sup> Nevertheless, that official's "acceptance" of the rules constituting the system of law is not a moral choice and the performance of the duties of office is best achieved where there is no confusion between the content and demands of the "public"

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21. This is not to say that legal education itself is entirely impossible on Hart's account, though such an argument has been made by M.J. Detmold, *The Unity of Law and Morality* (London : Routledge & Kegan Paul, 1984) at 89-90.

22. *Supra* note 11 at 153.

23. See *ibid.* at 168-176.

24. *Ibid.* at 181.

25. On the voluntariness of this acceptance, see *ibid.* at 197.

laws and the directives of a "private" morality. Hart does not deny that laws themselves may reflect moral values, but it is not part of the official's job to criticize the constituent rules of a legal system on moral or political grounds. As a law teacher, I should make sure that law school learning is concerned with the study of what makes certain rules legally valid. The broader question of whether such rules reflect our dominant system of morality or one or another moralities is not, on Hart's theory, a topic that falls within the ambit of legal education. Judges, lawyers, and law teachers may subject particular legal arrangements or doctrines to moral scrutiny, but this is a "private" concern, not necessarily related to the "public" duties of their office.

Does Hart's theoretical account imply that lawyers or law teachers are disabled from taking moral attitudes toward the content of a legal system? The answer is that they are in fact disabled insofar as they are performing their role as officials within that system. That does not, however, mean that they become morally callous or vacuous. Instead, Hart claims that he has provided a justification for understanding the true extent of our moral freedom. Once we understand how the issue of a law's invalidity is a different issue altogether from a law's immorality, we better grasp the limits of legal discourse and a training in law. An academic lawyer's criticism of the settled law is properly within the bounds of normative discussion appropriate to that teacher's office when the criticism is directed to legal validity. By contrast, discussion of the moral or political quality of a legal doctrine is not within the lawyer's or judge's purview in their professional capacities. That is a concern they ought to treat in their "private" lives. The result is that legal theory, on Hart's account, largely justifies the exclusion of moral and political controversy from judicial reasoning. Judges make "policy" under the guise of legal reasoning at the risk of overstepping their proper institutional role.

## II. THE LEGAL AND POLITICAL EDUCATION OF DWORKIN'S JUDGE

Dworkin disagrees with Hart on a vast range of philosophical issues, but nevertheless shares with him the view that judges ought generally to eschew policy-making. The two philosophers have different reasons for reaching this conclusion. According to Dworkin, Hart's description of judicial discretion is misconceived: it neither reflects what judges do in modern legal systems; nor does it make sense; nor, finally, is that theory desirable. In Dworkin's technical terminology, Hart's positivism fails to fit the data provided by a knowledge of Anglo-American legal reasoning, and it also fails to put legal practices in their best light. Thus, Hart's system is morally and politically indefensible. Instead, Dworkin has proposed a legal theory that would appear to make theoretical disagreement about the law not merely a tangential, but rather the focal issue in the work of lawyers and judges. More than any other contemporary work in this field, Dworkin's published books and articles in jurisprudence demonstrate his view that the law is "drenched" in theory.<sup>26</sup> At least on the surface, Dworkin's theory makes heavy demands on our ability, as part of the very vocation of the law, to engage in moral and political analysis. In other words, for a lawyer, judge, law student, or law teacher to be able to state what the law is will require both a taste and some skills for entering into normative debate and deliberation. Simply being in command of "the facts" (whether historical or

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26. See Ronald Dworkin, "In Praise of Theory" (1997) 29 *Ariz. St. L. J.* 353 at 360.

institutional) is not enough. Dworkin has characterized positivism (or at least Hart's version of it) as dependent on a "plain fact" view of law. Dworkin doubts that "thoughtful working lawyers and judges" would adhere to the plain fact theory.<sup>27</sup> Moreover, unlike Hart, Dworkin ambitiously hopes through his account to provide an instrument for "intelligent and constructive criticism of what our judges do."<sup>28</sup> This is a promising departure from the essentially quiescent role that Hart's theory prescribes for legal experts.

Much of Dworkin's critique of Hart pivots on the distinction between rules, principles, and policies. Dworkin dismisses the positivist portrait of law as predominantly based on standards in the form of rules. Rules do not make up all of law, and describing them as having fuzzy edges hardly captures the difficulty of deciding hard cases—where no settled rule dictates a decision either way. So Dworkin sets up a system employing two key categories : policies and principles. By a "policy" Dworkin means a standard that sets out a community goal "to be reached, generally an improvement in some economic, political, or social feature." For example, the goal of decreasing automobile accidents is a policy. By a "principle," Dworkin means a standard that does not operate as a rule and is to be observed "because it is a requirement of justice or fairness or some other dimension of morality."<sup>29</sup> One of Dworkin's best-known examples of a principle is the standard that persons should not be permitted to profit from their own wrong. Arguments of principle advance rights, while policy arguments are intended to establish a collective goal. Rights are "individuated," in the sense that individuals or groups within a community may have some opportunity, resource, or liberty.<sup>30</sup> By contrast, the goals associated with policies are collective : so a community might pursue economic efficiency or a certain patterned distribution of wealth, but it makes no sense to speak of a society itself having rights.<sup>31</sup>

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27. R. Dworkin, *Law's Empire* (Cambridge, Mass. : Harvard University Press, 1986) at 10.

28. *Ibid.* at 11.

29. R. Dworkin, *Taking Rights Seriously*, rev. ed. (Cambridge, Mass. : Harvard University Press, 1978) 22.

30. *Ibid.* at 91.

31. Though this leaves open the question whether certain social interests, such as the integrity of the environment, should not be accorded protection through rights : see Jeremy Waldron, "Can Communal Goods be Human Rights?" in *Liberal Rights : Collected Papers, 1981–1991* (Cambridge : Cambridge University Press, 1993) 339.

32. Ronald Dworkin, *Taking Rights Seriously*, rev. ed. (Cambridge, Mass. : Harvard University Press, 1978) 22.

Thus, unlike Hart, Dworkin seeks to incorporate moral and political values within his conception of law, rather than to treat these values as external to the law. From speaking of law's "background political morality," Dworkin makes a short leap to speaking of principles and thence to an analysis framed in terms of rights. This does not mean that judges are supposed to give direct effect to moral rights. Rather, courts are suited to the task of developing the moral concepts already found in the law.<sup>33</sup> A modern legal system is so rich in its coverage that a judge ideally can consult all relevant materials, weigh competing principles, and arrive at a right answer to (or, at least, the best interpretation of) virtually every difficult legal question. The distinction between principles and policies thus helps Dworkin define the setting within which rival forms of legal and political justification can be argued. When a hard case calls for a judge to determine what the law is, Dworkin's well-known dictum requires that rights "trump" utilitarian goals. That is, the task of a judge is to identify what principle might arguably govern a particular case and then to give it the best interpretation in light of the judge's overall sense of what justice requires. Legislators, not judges, should make policies.<sup>34</sup> In Dworkin's scheme, rights can be interpreted as virtually absolute — as has been argued by some U.S. commentators on freedom of speech — but they may also be recognized within a legal system as less than absolute. One principle might have to yield to another, or a legislature might determine that a right should be subject to a collective goal in the form of a particular policy. So, for example, certain rights to political assembly and to engage in public speech might for a time be suspended in circumstances where law-makers fear widespread insurgency. Especially in such an extraordinary situations should judges be zealous guardians of principle.

In Dworkin's view, judges who rely on arguments of policy to resolve novel cases commit errors because they fail to understand their own role. Consider the judgment in *Spartan Steel & Alloys Ltd. v. Martin & Co.*<sup>35</sup> In that case involving whether the plaintiff should be allowed to recover its economic loss suffered following negligent damage to a third party's property, Lord Denning justified his decision apparently by reference to policy grounds. That is, in his words, "the question of recovering economic loss is one of policy," based on whether it would be economically wise to distribute liability for accidents in the way advocated by the plaintiff.<sup>36</sup> A principled approach to the issue of liability would aim at determining whether the party in the plaintiff's position would have a right to recovery.<sup>37</sup> In a situation such as *Spartan Steel*, policy justification typically takes the form of assessing what is the best balance or compromise between individual preferences and purposes that would serve the welfare of the community as a whole. The policy discussion might look at incentives or disincentives to investment, the

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33. See the opening lines of the brief of the *amici curiae* filed by Dworkin and five fellow philosophers in the argument before the U.S. Supreme Court in the recent case of *State of Washington v. Glucksberg*: R. Dworkin, T. Nagel, R. Nozick, J. Rawls, T. Scanlon, and J.J. Thompson, "Assisted Suicide: The Philosophers' Brief" (March 27, 1997) 44(5) *New York Review* 41 at 43.

34. Though, of course, legislators can choose to base their choices on principles as well.

35. *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1973] 1 Q.B. 27 (C.A.).

36. *Ibid.* at 36.

37. See Dworkin, *supra* note 29 at 83.

possibility of negative externalities (harmful consequences for innocent parties), and the kind of industry within which these particular parties operate. It may be necessary in the end to find that the defendant should be liable in the circumstances of *Spartan Steel*, even though the defendant could not have known in advance of the policy decision that it owed a duty to such third parties as the plaintiff. If the wisest economic policy favours such a transfer of wealth to improve overall efficiency, then the defendant's rights might have to be sacrificed. To reach this policy assessment, says Dworkin, a political system of representative democracy works better than a system of unelected judges.<sup>38</sup> Legislators can listen to the views of their constituents, or industry lobbyists, or pressure groups and arrive at the best collective arrangement. In *Spartan Steel*, if a judge based a decision exclusively on the consequences of allowing such claims as the plaintiff's to succeed against such firms as the defendant, emphasizing the economic havoc that might occur, this would be relatively naked policy-based adjudication.<sup>39</sup>

On what grounds does Dworkin think that judges should confine themselves to principles rather than policies? Several rationales appear in his work. The first weaves together his theory of political democracy, responsible government, and institutional competence. Policy judgments should be made by law-makers who are able to judge the nature and intensity of competing demands and interests present throughout the political community. Judgments of principle do not depend on such arguments. Rather, an argument of principle focusses on a particular interest raised by the claimant of a right, who alleges that the interest is of such a character that it overrides any consideration based on policies that might oppose it. The virtue of the system of unelected judges is that they are insulated from the pressures of satisfying a political majority and therefore they are in a better position to evaluate the argument of principle.

The second ground for viewing courts as forums of principle reflects Dworkin's generally anti-utilitarian moral views.<sup>40</sup> Popularized versions of utilitarianism would permit wrongs to individuals so long as the general welfare were even marginally improved. For example, one might contend that a state-endorsed practice of permitting human slavery is justified on the basis that this ensures the most productive use of labour and frees up leisure time for some members of the society to engage in philosophical speculation. As do other critics of utilitarianism, Dworkin detects in such a policy a grave

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38. *Ibid.* at 85.

39. In fact, in his judgment in *Spartan Steel*, Lord Denning did look at more factors than just the general impact of assessing liability for economic loss : see *supra* note 35 at 37-38.

40. See J.L. Coleman, "Book Review of *Taking Rights Seriously*" (1978) 66 Calif. L. Rev. 885 at 886 : "Dworkin identifies positivism with utilitarian moral theory." The qualification "generally" is used here because Dworkin's political theory of equality would seem to countenance some utilitarian assumptions : see Dworkin's two earliest instalments of a series of articles on equality, "What is Equality? Part 1 : Equality of Welfare" (1981) 10 Phil. & Pub. Aff. 185 and "What is Equality? Part 2 : Equality of Resources" (1981) 10 Phil. & Pub. Aff. 283, in addition to S. Guest, *Ronald Dworkin* (Stanford : Stanford University Press, 1991) at 65.

violation of human dignity.<sup>41</sup> A principled approach to adjudication would not allow claims of rights to be defeated by a simple appeal to marginal increases in a community's overall welfare or efficiency. In his published work over the last three decades, Dworkin has addressed a wide range of controversial legal issues that he argues are best resolved by reminding judges of the moral and political principles to which their community is committed and adjuring those judges not to bend to arguments of policy or expediency. These include, for example, a right to fair or due process (in the face of claims that it would be in the "public interest" to deny the name of an informant to a falsely accused person);<sup>42</sup> a right to practise civil disobedience (which is not justified when the protestors are motivated by the policy of increasing the cost to the majority of continuing to favour a particular program);<sup>43</sup> a right to be protected against suffering because one is a member of a disadvantaged group (hence affirmative action programs in certain instances are justified on Dworkin's broad egalitarian principle that each person is entitled to equal concern and respect);<sup>44</sup> a right to moral independence (which, in a practical context, limits the ability of a government to enact laws restricting the availability of pornography);<sup>45</sup> a principle of the sanctity of life (which Dworkin views as a better basis for dealing with the issue of abortion than, for example, trying to determine whether a fetus has rights);<sup>46</sup> and a right to refuse to be kept alive (that would override government prohibitions on physician-assisted suicide).<sup>47</sup> In each instance, Dworkin argues that judges should give little weight to goal-based arguments that emphasize the benefits to society, and instead frame their reasoning according to the relevant principle, which captures the fundamental moral values of liberty and decency that a community's laws incorporate.<sup>48</sup> It is for judges to determine what these abstract, comprehensive standards mean in concrete cases.

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41. See, for example, B. Williams, "A Critique of Utilitarianism" in J.J.C. Smart and B. Williams, *Utilitarianism; For and Against* (Cambridge : Cambridge University Press, 1973) 77.

42. See R. Dworkin, *A Matter of Principle* (Cambridge, Mass. : Harvard University Press, 1985) at 72-103.

43. *Ibid.* at 104-116.

44. *Ibid.* at 293-303 and R. Dworkin, *Freedom's Law : The Moral Reading of the American Constitution* (Cambridge, Mass. : Harvard University Press, 1996) at 147-162.

45. Dworkin, *supra* note 40 at 335-372 and Dworkin, *Freedom's Law, supra* note 44 at 214-243.

46. R. Dworkin, *Life's Dominion : An Argument about Abortion, Euthanasia, and Individual Freedom* (New York : Alfred A. Knopf, 1993) and Dworkin, *Freedom's Law, supra* note 44 at 44-59 and 117-129.

47. See *supra* note 44 at 130-146 and Dworkin *et al.*, *supra* note 33.

48. Dworkin has joined issue with, for example, Justice Scalia over the extent to which these fundamental principles, in a constitutional context, are a matter of "intent" on the part of the framers. See A. Scalia, *A Matter of Interpretation : Federal Courts and the Law—An Essay with commentary by A. Gutmann (ed.), G.S. Wood, L.H. Tribe, M.A. Glendon, and R. Dworkin* (Princeton : Princeton University Press, 1997).

Thirdly, in Dworkin's scheme, judges are expected to make decisions on grounds that they would follow in other similar cases. That is, judges are supposed to decide with "articulate consistency."<sup>49</sup> Dworkin argues that decisions based on policy do not necessarily require consistency : a government that acts to further a collective goal in a certain way on one occasion does not thereby commit itself to serving the same goal in the same way indefinitely into the future.<sup>50</sup> A principled approach is different. According to Dworkin, judges must be both backward-looking and forward-looking. They have to understand those principles that underpin existing rights and be prepared to maintain them consistently in novel cases.<sup>51</sup>

A fourth reason for depicting judges as oracles of principle is that is what they (or the best of them) have always done so in the Anglo-American common law tradition when deciding hard cases. Although a great proportion of Dworkin's writing about adjudication has involved Hercules, an ideal judge with perfect command of the common law and infallible reasoning skills, Dworkin has also identified certain cases where actual working judges reached the right answer on the basis of principle. For example, he has praised Judge Cardozo's landmark decision regarding the right to damages for bodily injury caused by dangerous instruments in *MacPherson v. Buick Motor Co.*<sup>52</sup> According to Dworkin, Cardozo's handling of precedent, principle, and policy was masterfully Herculean.<sup>53</sup>

Where do judges acquire the familiarity with, and the facility to manipulate and assess, moral and political principles? It should be made clear that Dworkin's theory does not imply that judges first have to earn a degree in philosophy or political theory. He has welcomed the addition to the law school curricula of courses designed to promote interdisciplinary studies, though he has lamented that such "vigorous attempts have on the whole failed."<sup>54</sup> For the most part, Dworkin relies on the professionalism of judges. His theoretical account primarily represents an "internal point of view." That is, it presents the perspective of those participants in the legal process who make argumentative claims in

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49. *Supra* note 29 at 113-115. In later versions of his theory Dworkin has re-cast this demand for consistency in terms of "law as integrity" : see *Law's Empire*, *supra* note 27 at 227-258.

50. This original position of Dworkin has undergone some modification. He has more latterly been arguing that ideally legislators, too, should act on a consistent set of principles : see *Law's Empire*, *supra* note 27 at 176-186.

51. In this context Dworkin has tended to speak of the "gravitational force" of existing precedents, the process of "justificatory ascent," and a criterion of choice based on the "local priority" of certain principles.

52. *MacPherson v. Buick Motor Co.* 217 N.Y. 382 (1916). See Dworkin, *supra* note 29 at 111-119.

53. Though Dworkin is not similarly enthusiastic about Cardozo's own extra-curial theorizing that characterizes judging as a form of "craft" : see *supra* note 27 at 10.

54. See R. Dworkin, "Legal Theory and Political Education" in Melvin Richter (ed.), *Political Theory and Political Education* (Princeton : Princeton University Press, 1980) 177.

the course of the workings of the legal system.<sup>55</sup> Dworkin frequently describes his method as theorizing from the "inside out."<sup>56</sup> He argues that Hart, who also claimed to be presenting an internal point of view, went wrong in conceiving hard cases as representing penumbral or marginal situations difficult to resolve because of linguistic imprecision. By contrast, Dworkin views such cases as central or pivotal instances of legal disagreement that force participants in the legal process to articulate and deal with the consequences of fundamental principles.<sup>57</sup> In a (Hartian) world where law is supposed to be made up largely of rules, with a rare case of policy (to be applied where the rule is either unclear or non-existent), judges are left to their own devices. They are no better at making moral or economic calculations than any other citizen. No peculiar judicial expertise will help them in this part of their job. For Dworkin, however, judicial practice is more complex, more interesting, and potentially more transformative than Hart's theory would allow. Judges are simply urged to continue the practice they have joined.<sup>58</sup> It is to be expected that judges and lawyers will disagree strenuously over theoretical legal issues. Overall, judges are to seek the soundest interpretation of the legal materials they have before them. The exercise is not solely analytical, but normative as well. Dworkin's account is stirringly idealistic. He describes an ongoing project where judges are dedicated to making the legal system, in his words, the best that it can be.

### III. SOME PROBLEMS WITH PRINCIPLES

Dworkin's critics are legion. Among their objections to a theory of law based on the distinction between principles and policies, and what this implies about the respective roles of courts and legislatures, are the following.<sup>59</sup>

It is not universally conceded that legislatures are better equipped to decide questions of policy better than judges. Granted, a representative law-making body might have greater ability to fashion policies that accommodate conflicting interests. Nevertheless, judges who hear individual disputes can better appreciate the immediate consequences of a policy-based decision. Moreover, it might be worthwhile to have policy formed on the

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55. *Ibid.* at 13-14.

56. *Supra* note 46 at 28-29. It has been commented that legal philosophers too readily and wrongly assume that there is a point of view "internal" to the legal system that represents a single standpoint or perspective : see W. Twining, "Some Jobs for Jurisprudence" (1974) 1 *Brit. J. L. & Soc'y* 149. Also, Dworkin has been somewhat equivocal about whether an interpretation is best because it is internal to the system, or internal because it is best : see Ernest Weinrib, "Legal Formalism : On the Immanent Rationality of Law" (1988) 97 *Yale L. J.* 949 at 1014 note 132.

57. *Supra* note 27 at 43.

58. *Ibid.* at 87.

59. Dworkin himself has responded to each of the following criticisms. See the postscript, "A Reply to Critics," in the revised edition of *Taking Rights Seriously*, *supra* note 29 at 291-368 and "A Reply by Ronald Dworkin" in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London : Duckworth, 1983) at 247-300.



basis of reasoned, judicial deliberation rather than out of the rough-and-tumble processes of legislative deal-making.<sup>60</sup>

Another criticism of Dworkin's theory that would have judges abstain from making policies is that the line between policies and principles, or between principles and rules, even as each of these are exemplified in actual legal doctrine, is so blurred that the distinctions ultimately break down.<sup>61</sup> Dworkin himself has shown how what initially might appear to be a clear case of policy-making really turns out to be, once it is fully understood in light of his theory, a concrete application of a principle. Take the famous Hand formula for the determining whether a defendant failed to take reasonable precautions and therefore should be liable for negligence.<sup>62</sup> Hand frames an algebraic test that compares the cost of what the defendant would have had to pay to avoid the accident with the loss suffered by the plaintiff, discounted by the improbability of the accident.<sup>63</sup> This would appear to provide an argument of policy, rather than principle, especially because the test relies so clearly on economic factors. Dworkin, however, argues that Hand's formula is best characterized as a method for choosing between competing rights—the abstract principle involved in this instance is that each person has a "right to be treated by every other member of the community with the minimal respect due a fellow human being."<sup>64</sup> Thus, even though a judge in the case of alleged negligence has to compare the welfare of those whose rights are immediately at stake, the decision does not involve subordinating an individual's right to the welfare of the community at large. Dworkin's tack in this regard has been criticized because it potentially undermines the argument from democracy that favours principled adjudication. If, as Dworkin says, judges must sum up and weigh different interests, this means they are engaged in the kind of reckoning that legislators do better.<sup>65</sup> Moreover, according to Kent Greenawalt, this example of Dworkin converting arguments of policy into arguments of principle can be generalized.<sup>66</sup> It not only occurs in Dworkin's version of common law adjudication, but

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60. See K. Greenawalt, "Policy, Rights, and Judicial Decision" (1977) 11 Ga. L. Rev. 991 at 1004.

61. For example, a positivist might argue that Hart's conception of a rule is not so narrow as Dworkin characterizes it, for some principles might be included in Hart's rules of recognition: see Coleman, *supra* note 40 at 892; E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" in Cohen, *supra* note 59 at 3; S.W. Ball, "Dworkin and His Critics: The Relevance of Ethical Theory in Philosophy of Law" (1990) 3 Ratio Juris 340; and W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

62. *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947) at 173.

63. Dworkin, *supra* note 29 at 98.

64. *Ibid.*

65. K. Kress and S.W. Anderson, "Dworkin in Transition" (1989) 37 Am. J. Comp. L. 337 at 342-343.

66. Other theorists have levelled a different criticism at Dworkin over his interpretation of this negligence standard as a matter of principle, claiming that not all litigation is about trump-rights: see, for instance, D.H. Regan, "Glosses on Dworkin: Rights, Principles, and Policies" (1978) 76 Mich. L. Rev. 1213 at 1222-1228.

in statutory interpretation and constitutional construction as well.<sup>67</sup> Greenawalt contends that by this subtle move Dworkin simply minimizes the extent to which policy considerations do play a vital role in adjudication. In other words, common law decisions about standards of negligence and nuisance frequently do require judges to consider the social needs and community welfare; in interpreting a statute or instrument, judges have resorted to criteria of what is in the general interest of promoting convenience and efficiency; and, with respect to a country's constitution, courts do ask whether a guarantee should be enforced despite the harmful consequences that might ensue.<sup>68</sup>

Thirdly, Dworkin has been taken to task for presupposing that conflicting principles found in the law can be easily reconciled.<sup>69</sup> In Roberto Unger's words :

*[...] it would strange if the results of a coherent, richly developed normative theory were to cohere with a major portion of any extended branch of law.*<sup>70</sup>

The search for such a synthesis would be "daring and implausible."<sup>71</sup> On this view, the bodies of tort law or contract law historically contain rules and doctrines which make the fields relatively disordered. Not only do judges lack the time, patience, or perhaps skill necessary to make every one of their decisions consistent with all the settled law, they certainly do not satisfy Dworkin's vision of global coherence with abstract political theory. Even if Dworkin is correct that a judge does not have to resort to extra-legal materials (for Hercules, the law never runs out), a judge's decision as to what the law is still involves substituting some element of personal political convictions, even if these are smuggled in under this exercise of principled analysis.

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67. Greenawalt, *supra* note 60 at 1013, 1026, and 1033. See also Bell, *supra* note 8 at 215-225, where Dworkin's model does not seem to match up well against instances where judges appear to be engaged in making assessments of a policy type.

68. It should be noted that Dworkin expressly notes that whether a standard is a principle or policy can depend on the particular political theory embraced by a judge : there is no "natural" distinction between them. Also, a right that is powerful or weighty in one theory might be relatively weak within another : see Dworkin, *supra* note 27 at 92.

69. See J.M. Balkin, "Taking Ideology Seriously : Ronald Dworkin and the CLS Critique" (1987) 55 U.M.K.C. L. Rev. 392 at 415-431.

70. R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass. : Harvard University Press, 1986) at 9.

71. *Ibid.*

## CONCLUSION

Where does all this crossfire leave us? Many of Dworkin's critics are willing to grant he has a point, that at least some of his insights are useful as rough descriptions of how courts function.<sup>72</sup> The typical way arguments are presented to judges and generally the either/or character of judicial outcomes differ from the arguments or results associated with a legislative setting. Obviously, too, a provision in a statute or in its preamble might legitimately direct the court to consider standards of morality or collective welfare, thus conferring directly on a court the duty to decide matters of policy. The provision might very well be silent about what is the best source for determining community values. Dworkin's scheme impresses some of his critics as a potent defence of the idea that judges should not tailor their understanding of community values by tracking changes in public mood.<sup>73</sup> Sometimes courts in assessing the constitutional validity of a legislative measure will appear to engage in weighing the moral or political merits of the statute under review. In fact, judges will tend to deny they are doing just that, preferring instead to describe their review as based on evaluating the rationality or proportionality of the law in question.

Dworkin's theory is particularly useful as an ideal standard against which to test in at least two ways whether courts have taken rights "seriously." The first way is to look at a court's interpretation of the interests protected by a right and see if the principles this identified are drawn from the vast body of legal materials a court could consider. If the court reckons that at this stage the right in question is subject to some qualification or needs to be balanced against a community value or collective goal, then on Dworkin's terms the court has failed to take the right seriously. Secondly, in weighing whether the circumstances are such that a case of necessity can be made out and thus that the protection of a right is outweighed by extraordinary social needs, a court would be advised by Dworkin to find that the principle should yield to policy concerns in only the rarest of cases. If a court uses a laxer standard in reviewing the application of utilitarian criteria, then rights again have not been taken seriously.

Both Hart and Dworkin caution judges to be wary of arguments of policy when deciding difficult cases. For Hart's concept of law, importing moral and political values into adjudication is to lose faith with the legal system. Such reasoning is not governed by legal criteria, but rather by a strong sense of "discretion." In Dworkin's jurisprudence, judges ought, like Jane Austen's Anne Elliot, to keep to the high ground of principle. This is what judges are supposed to be good at and, furthermore, that is what is so exciting about the practice of adjudication. Judges engaged in resolving novel cases must rise to arduous challenges, requiring them to exercise logical, historical, and philosophical skills of the highest order. Some judges might find instruction in works of the literary imagination. As Martha Nussbaum has pointed out, *"novel-reading will not give us the whole story about social justice, but it can be a bridge to a vision of justice and to the*

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72. Not all critics are this generous : see L. Alexander, "Striking Back at the Empire : A Brief Survey of Problems in Dworkin's Theory of Law" (1987) 6 L. & Phil. 419 at 419 where he says, "Dworkin's theory was and remains quite bizarre."

73. Greenawalt, *supra* note 60 at 1046.

*social enactment of that vision.*"<sup>74</sup> At the conclusion of *Persuasion*—after experiencing some errors and doubts about the actions and attitudes of those in her family and social circle — Anne Elliot finally grasps the true character of Captain Wentworth and agrees to marry him. In the narrator's words, a "persuadable temper" and a willingness to yield to the authority of principle, rather than give in to social demands, is just as important as resoluteness.<sup>75</sup> Anne stands out in *Persuasion* for her rich inner life, her capacity for reflection, and her struggles against the constraints of class and convention. Taught through a Cinderella marriage plot, one lesson of the tale is that certain things (especially the goal of keeping up appearances that worries her father so) "should not matter too much."<sup>76</sup> A capacity for discerning and applying principles, on the other hand, is not only a domestic virtue, but can be a judicial one as well.

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74. M.C. Nussbaum, *Poetic Justice : The Literary Imagination and Public Life* (Boston : Beacon Press, 1995) at 12.

75. *Persuasion*, *supra* note 1 at 116.

76. Juliet McMaster, "Class" in Edward Copeland and Juliet McMaster (eds.), *The Cambridge Companion to Jane Austen* (Cambridge : Harvard University Press, 1997) 115 at 130.