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## Rules, Policy and Decision Making

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If one were to yield to what is perhaps dangerous temptation and try to identify the most potent influences in American legal philosophy in the twentieth century, three would stand out above the rest. One of these is almost aggressively indigenous while the other two are more or less exotic imports. The native element would be that steadily mounting sociological emphasis, stemming from Holmes, Pound and others, which was to express itself in a cluster of provocative and often brilliant writings in the twenties and thirties. If American realism, as it came to be called, sometimes overreached itself and if some of its philosophical positions have long since been abandoned or modified, its impact on American legal thought and education continues to be pervasive. In a quite different universe of juristic speculation has been the work of the legal philosopher Hans Kelsen. There has certainly been no school of American Kelsenians, and in consequence, by the side of the vast if not always very conscious adherence to realist modes of thinking, the influence of Kelsen seems superficially to have been small. But the eminence of Kelsen in European legal thought and the forceful amplitude of his writing have been such that every American writer of legal philosophy in the last two decades has felt obliged to take account of his general position. Of late a second, if somewhat less alien, intrusion must be acknowledged. This newer influence is exemplified in the work of Profes-

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sor H. L. A. Hart of Oxford and particularly in his celebrated book, *The Concept of Law*, published in 1961. Professor Hart is certainly not a lonely meteor, for his work in legal philosophy consists of the application to questions about law of a general technique of philosophical investigation, sometimes called linguistic analysis or ordinary-language philosophy, which has been dominant in England for some time and has many practitioners in the United States. But Professor Hart was one of the first to apply this technique to legal questions, and he has done it with such talent and elegance that his name is justly pre-eminent. His method has not proved congenial to the main body of opinion in the United States<sup>1</sup> but, as with Kelsen, those who disagree with his approach have uniformly felt him to be a writer whose work demands discussion, while a small number of American law professors and teachers of philosophy now write about juristic questions in a manner which owes a good deal to Professor Hart's example.<sup>2</sup>

With some rough propriety the realist movement may be regarded as one avenue of exploration into the nature of a legal system while the work of Hart and that of Kelsen may be bracketed as a quite different type of inquiry. The American realists perceived that the operation of a modern legal system is dependent on what Professor McDougal has aptly called a "flow of decisions"<sup>3</sup> and that it was therefore high time to take a hard look at the nature of decision-making under rules. At times this focus led some realist writers to the excesses of defining law exclusively in terms of decision-making or of denying the possibility that rules can play any meaningful part in decision-making but, purged of this exaggeration, the realist movement was and remains an invaluable invitation to an empirical investigation of the way in which officials adjudicate in the context of a legal system.

Both Kelsen and Hart, or so it seems to this writer, have been much more concerned with identifying aspects of a legal system which distinguish it both from human behavior which is not rule-governed and also from other kinds of human behavior in which rules play a part. In pursuing this aim they have concentrated their attention on the logical features of prescriptive language and on the structural aspects that give unity to the prescriptions contained in a legal system. This type of ap-

1. See, e.g., Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080 (1956); Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957).

2. See Summers, *The New Analytical Jurists*, 41 N.Y.U.L. REV. 861 (1966).

3. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DE COURS 137, 181 (1953).

proach has its illuminations and was no doubt necessary as an antibiotic for the behaviorist virus which American realism was threatening to unleash. But it has its own dangers, both in tending to an exotic preoccupation with the formal structure of legal propositions which are couched in authoritative generalizations and in obliquely dimming awareness of the need for a close examination of the business of practical reasoning within a legal system. Neither Kelsen nor Hart is in the least guilty of the old charge of believing that judicial decisions are reached by some kind of formal logic or even by some less formal process of deductive reasoning. Both are very willing to acknowledge the creative role of the judge. But Kelsen's interest in this area does not extend beyond the mere designation of the judge as the appropriate, authoritative agent for concretizing the superior norm, while Hart's comments about the nature of judicial decision-making seem peripheral to his central concern.<sup>4</sup>

Professor Hart's work seems to have aroused in a number of American writers a sense of its irrelevance or inappropriateness, as if, though clearly talented and impressive, it were somehow not directed to issues which they feel to be vital. Yet, as it seems to this writer, the critics of Professor Hart have failed to point clearly to what exactly is inadequate in his presentation. This article will argue that, in the first place, Professor Hart's elucidation of the concept of law is indeed inadequate in that it stops short of an examination of the nature of legal reasoning and decision-making and, secondly, that by analyzing why the failure to do this is critical we can learn something more about the nature of a legal system, something which was always implicit in the work of the American realists although never well articulated by them.

I.

The concept of a legal system has an intimate connection with the nature of the legal reasoning employed in legal argument and judicial decision-making. Admittedly, in an analysis of the business of organizing and regulating human behavior under rules, decision-making is not the only activity that deserves notice. The framing of new rules, the observation of rules, the giving of advice and the execution of sanctions are all eminently legal activities in this sense, though it may be observed that in a functioning legal system all of these activities are carried on with a careful eye to the prospect of adjudication and all are thus influenced and af-

4. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 134-35 (1945); H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961).

fects by the decision-making process. We could, of course, construct a model of a legal system which did not include judicial decision-making—where the rules were perfectly clear, providing unambiguous direction for all conceivable situations, and where compliance was perfect so that disputes never arose. But since no society that is at all complex is likely to be willing or able to operate under such a system, it does seem proper to characterize decision-making, whether adjudicatory or advisory, as a very important feature of the operation of a legal system. This is not to say that litigation is the whole of the law but only to insist that an elucidation of the concept of a legal system is dangerously neglectful if it fails to furnish a conceptual analysis that properly illuminates the business of decision-making.

This article will focus on the relation of rules to judicial decision-making. At the outset, some illumination may be gained by comparing, as is now often done, the workings of a legal system with playing a game. Professor Hart, in particular, has made much use of games as models for gaining insights into the nature of law and, since games are rule-systems, the analogy is clearly to some extent justified. It may, nevertheless, be helpful to point out that there are important respects in which the analogy between playing a game and participating in a legal system breaks down and these differences may themselves provide an insight to further the inquiry.

In many games the rules are comparatively simple and are sufficiently well understood by the players, so that disputes seldom arise and adjudicative decisions are seldom necessary. Thus we find that many games are commonly played without umpires or referees and that the absence of such arbiters does not occasion any great difficulty. In some games, such as tennis, even when umpires are used their task is usually only to make simple factual decisions such as which side of a line a ball fell on, and only rarely to interpret the rules. Even in a highly intellectual game such as chess, referees are rarely used and, when they are employed, they are seldom called upon to interpret rules. So where official decisions in games are criticized, as often happens in football or baseball, the criticism usually arises from what is felt to be the official's mistaken perception of fact and only rarely from a disputed interpretation of the rules.

Again, where game officials must settle disputes, their decisions must usually be instant. Argument by the parties to the contest is typically not permitted and indeed may be penalized. There is no appreciable period for deliberation and the decision is not supported by reasoned argument. Rarely is there any appellate procedure. One reason for this is that an appellate procedure is much more designed for disputed inter-

pretations of rules or questions about the severity of sanction than for decisions about disputed facts. Another reason is that the main thing in playing a game is usually to get on with it. If rules were so complicated or so obscure that a game had constantly to be held up while the players referred disputes to experts for deliberation, the primary purposes of diversion and entertainment would be frustrated. It is more important that the game should continue than that people should be allowed to argue, unless of course they are playing an argument-game. There are indeed argument and decision games, such as, perhaps, moot courts, but in them the arguments and decisions are not *about* rules of the game but are the game itself.

But a legal system is an ever present regulation of multitudinous aspects of life. Its impingement is continuous; it deals with issues vastly more important than diversion and entertainment. The rules through which it operates are so numerous and so wide-ranging that the players cannot know them all and their application must often be in doubt, perhaps because of ambiguity or vagueness in the rules themselves, perhaps because of unforeseen or unforeseeable circumstances, and often because of the contrary conclusions to which we seem to be impelled by the invocation of more than one rule. In a legal system, the clash of interests is so vital that we can seldom leave the parties to work things out for themselves. We must have the possibility of resolution by means of authoritative decision-making. In law we are always playing in a tournament and we need the officials all the time.

Another important difference between a game and a legal system is the obligatory character of the latter. It is true that once we have begun to play a game, there is a sense in which we may be said to have an obligation to comply with the rules. But the obligation exists only while we are playing the game, and by studied indifference to the rules we may simply cease to play the game. If while playing chess, I move the rook diagonally, I will be corrected and, if I persist, I will no doubt be told that I am simply not playing chess and my opponent will leave the board. Even if he should choose to indulge me and to continue to play with me in some fashion, we would no longer be playing chess, whatever we might call what we were playing. But nobody leaves the board in the law-game and breaking the rules does not bring the game to an end, at least not unless most people do so. We might compare working out a brand new game with promulgating a legal system for a society living at the moment in an anarchic state of nature. After inventing the game we could say, "If you do all these things and observe all these rules, you will be playing this game." After promulgating the legal system we would say,

"Some things that you have been doing up to now, you must no longer do; sometimes you may achieve a certain result only by doing things in a special way." The point is that while the rules of a game are, among other things, an invitation to play, a legal system is not an invitation to play but an obligatory impress on "natural" living. It is true that we can in some sense opt out of bits of the law-game, for I may say that, although rules have been provided which tell me how to make a valid will, I just do not care to make a will at all. But we can never opt out of those large sectors of the legal system which impose duties or expose us to the legal powers of others and, in practice, the social sacrifice that would be involved makes it prohibitive to opt out of those areas of the system which afford us privileges and powers to achieve certain social ends.

These differences between games and legal systems account for the different status of the process of adjudication in the two activities. Because of the vital importance of the interests which may be at stake in legal disputes and because too of the admitted likelihood that in a significant number of instances neither of the alternative determinations of a dispute could be demonstrated to be wrong, we have long insisted that the parties have an opportunity to argue their cases before a judge who must in most cases justify his judgment in a reasoned opinion which may be subjected to further argument in an appellate proceeding. And because of the obligatory character of law, claims to such full adjudicative procedures are recognized as claims of right. Decision-making about rule-governed behavior thus acquires a central role in a legal system, a role for which the game model contains no satisfactory analogue.

## II.

In recent discussion about the nature of judicial decision-making, at any rate in the context of statutory interpretation, two apparently rather dramatically opposed views have been articulated in the celebrated exchange between Professor Hart and Professor Fuller in the *Harvard Law Review* of 1958.<sup>5</sup> These two views will be briefly outlined as an introduction to what follows.

Professor Hart raises the simple example of a legal rule which forbids one to take a vehicle into a public park: "Plainly this forbids an automo-

5. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

bile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?"<sup>6</sup> He goes on to suggest that general words used in legal rules, like "vehicle" in the example, have a core of settled meaning, clearly encompassing an automobile, but that there is a surrounding penumbra of doubtful cases where linguistic usage dictates no answer, where opposite determinations might both be linguistically defensible, and where the judge must have recourse to considerations of policy, justice or morality. Since, in the penumbral area, decisions cannot be demonstrated to be "true" in the sense that a proposition can be true or false, it might seem that the only reason for preferring one to another would be its greater approximation to what the law ought to be. In this sense, Professor Hart suggests, there is a temptation to say that a clear separation between what the law is and what it ought to be cannot be made, since the best or most correct statement of a rule of law must be a statement of what the law on that point should be—a temptation to assert that "the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of 'law' which is held to be more illuminating than that used by the Utilitarians."<sup>7</sup>

This way of talking Professor Hart firmly rejects in a central passage which merits quoting at length:

If it is true that the intelligent decision of penumbral questions is one made not mechanically but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles, is it wise to express this important fact by saying that the firm utilitarian distinction between what the law is and what it ought to be should be dropped? Perhaps the claim that it is wise cannot be theoretically refuted for it is, in effect, an *invitation* to revise our conception of what a legal rule is. We are invited to include in the "rule" the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled. But though an invitation cannot be refuted, it may be refused and I would proffer two reasons for refusing this invitation. First, everything we have learned about the judicial process can be expressed in other less mysterious ways. We can say laws are incurably incomplete and we must decide the penumbral cases rationally by reference to social aims. I think Holmes, who had such a vivid apprecia-

6. Hart, *supra* note 5, at 607.

7. *Id.* at 612.

tion of the fact that "general propositions do not decide concrete cases," would have put it that way. Second, to insist on the utilitarian distinction is to emphasize that the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts' decisions would be senseless as some of the "Realists"—in their most extreme moods, and, I think, on bad grounds—claimed.

By contrast, to soften the distinction, to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy. Of course, it is good to be occupied with the penumbra. Its problems are rightly the daily diet of the law schools. But to be occupied with the penumbra is one thing, to be preoccupied with it another. And preoccupation with the penumbra is, if I may say so, as rich a source of confusion in the American legal tradition as formalism in the English.<sup>8</sup>

Professor Fuller, repudiating Hart's way of talking about statutory interpretation, begins by making the point that Hart misleadingly seems to imply that interpretation is commonly a matter of the vagueness or ambiguity of single words.<sup>9</sup> It is rather, Fuller suggests, more often a business of assigning meanings to sentences, paragraphs or even pages of text. But even if the question should present itself as turning on the interpretation of a single word, the certainty that we may feel about the propriety of a given interpretation is, in Fuller's view, derived not from linguistic usage but rather from the clearness of the purpose of the rule, or perhaps from the circumstance that the answer would be the same no matter which of several possible purposes underlies the rule. So, on the latter hypothesis, no matter whether the purpose of Hart's rule prohibiting vehicles is to suppress noise or to prevent air pollution, it would clearly apply to driving a Cadillac through the park. If a tank were driven into the park in order to be mounted on a pedestal as a war memorial, the decision might be in doubt, not because of any doubt concerning the usage of "vehicle," but rather because of our doubt whether any conceivable purpose for the rule would require or recommend its application to this case.

The principal task of statutory interpretation for Professor Fuller is

8. *Id.* at 614-15.

9. Fuller, *supra* note 5, at 662.



thus always a search for purpose. How the search is to be conducted and what relationship there is between the concepts of law and policy he does not discuss at any length, though he refers to a series of questions that should be asked, questions which are very reminiscent of the old common law principles of statutory interpretation as enunciated in Heydon's case:<sup>10</sup> "What can this rule be for? What evil does it seek to avert? What good is it intended to promote?"<sup>11</sup> He does not consider the possibility of detecting plausible but divergent purposes.

In this exchange, Hart and Fuller certainly create the impression that they have sketched two much-opposed general points of view, but there is a good deal of obscurity about the details of the disagreement. Much of this obscurity is generated by an excessive emphasis by both disputants on the concept of a rule in their analyses of judicial decision-making, by a failure to embark on a taxonomy of the very different types of legal rules and by a failure to explore the part that other legal materials play in statutory interpretation.

In the first place legal rules differ enormously in their concreteness and particularity. We may talk about a rule that "A will must have two witnesses" and again about a rule that "Contributory negligence will defeat the claim of a plaintiff in a negligence suit." But these rules clearly differ in their generality and in the amount of creative discretionary adjudication that must go into their application. And they may both be contrasted in these same respects with a principle like "A contract may be illegal if it offends against public policy" or a maxim that "He who comes to equity must come with clean hands." No precise distinctions can be made between rules, principles and maxims, but the terms serve to mark differences of degree in the precision of guides to decision-making. Rules are fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct. Principles are vaguer signals which alert us to general considerations that should be kept in mind in deciding disputes under rules. So we decide *under* rules but *in the light of* principles. A maxim is a principle that has been distilled in a traditional, aphoristic form. In marginal cases rules may be applied in the light of principles, but sometimes, when no concrete rule is present and relevant, a case must be decided by a direct application of principle or maxim to the facts without the interposition of a more concrete rule.

The first step in any discussion of how issues of policy enter into deci-

10. 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (1584).

11. Fuller, *supra* note 5, at 665.

sion-making should be an examination of how these issues are often very much embedded in these different layers of material used in legal reasoning. When is a recourse to considerations of policy in applying a rule a reference to extra-legal materials and when is it, at least in part, a reference to a more general legal notion in the form of another rule or principle or maxim? Is there some criterion by which we must say that rules are law and principles or maxims are not law, if this, indeed, is what Professor Hart might be taken to imply?

It will be best to illustrate this problem with an example. The English Wills Act requires that a will be signed "at the foot or end."<sup>12</sup> Let us suppose that a will has been written on the outer sides of a cardboard box and signed on the detachable lid. Here there is certainly no initial difficulty in perceiving what rule is immediately relevant. This is not a case of even an apparent lacuna in the law, for we are at once brought to consider whether the facts described can be taken to satisfy the rule that a will be signed at the foot or end. If we consider why a legislature should require that a will be signed at the foot or end thereof, a number of possible explanations come to mind. Some would be fanciful, such as an esthetic desire to achieve symmetry or elegance in the document. Another view might be that, although it does not much matter where a will is signed, it is desirable for the sake of uniformity and consistency to have *some* standard requirement, though it would do just as well to require that a will be signed at the beginning. Another and perhaps the most obvious view would be that a signature at the end of the document is the surest sign of authenticity and minimizes the possibility of fraudulent additions to the document. Requiring signature at the foot would not be the only way to further such a policy, for one might provide that the will could be signed at the beginning but that a double line in red ink must be drawn to signify the end of the testamentary provisions.

But in this case the task of interpretation need not begin with such a shuffling of possible explanations of the rule, for an amending statute elaborates the meaning of "foot or end thereof" by providing that the signature shall be sufficient if it is "so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will."<sup>13</sup> Whatever policy may have been inherent in the somewhat terse original rule is unques-

12. Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, § 9.

13. Wills Act Amendment Act, 1852, 15 & 16 Vict. c. 24, § 1.

tionably amplified by this provision of the amending statute. Moreover, a little research into the English case law reveals that the amending act was designed to nullify earlier strict interpretations of the original rule and, by including such words as “under, or beside, or opposite to the end of the will,” to introduce some relaxation in interpretation to accommodate the expressed overriding purpose that the signature clearly indicated the testator’s intent “to give effect by such his signature to the writing signed as his will.”

We thus begin with a simple rule which is reasonably concrete in its key terms “foot or end.” In the course of time this rule gives rise to difficulties and is filled out by a more elaborate, policy-charged explanation. It is very significant that the clause in the amending statute when read in full is rather like a discursive interpretative essay.<sup>14</sup> It does not seem easy to talk about it as a “rule.” It is more like a tactical manual for applying rules, in the sense that it contains a supervisory statement of the end or purpose to be aimed at and a series of illustrative sub-rules designed to indicate how the original rule should be interpreted to serve that purpose. This kind of very elementary situation immediately poses difficulties for any concept of a rule which does not take account of the diversity of policy intrusions. We are dealing here with a clearly binding and authoritative direction to judges, issuing immediately from the sovereign legislature, on how they are to work with and interpret another rule of the system. It would be artificial and unreal to say (and pre-

14. The full clause in the amending statute runs:

Where by the Wills Act, 1837, it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. *Id.*

sumably Professor Hart would not want to say) that only the original "foot or end" rule is law and that the amending clause must be thought of as "interpretative material." Such a description would encounter two important objections: first, the strangeness of refusing to call something law when it is a fairly typical statutory section, and, second, the almost impossible task of establishing a criterion for what is law in terms of the concreteness and simplicity of the directive. The point here is that sometimes more or less discursive policy directives are not in the least extra-legal, but are law in the most immediate sense of being embodied in statutory sections. An incidental point is that Professor Fuller is on solid ground when he suggests that Hart's thesis is mistaken insofar as it may be taken to imply that statutory interpretation is typically a matter of classifying border-line instances of "key words." As Professor Fuller suggests, as the Wills Act Amendment Act example reveals, and as any casual reading of a random volume of the law reports will confirm, it is much more often a matter of fixing the "drift" of a paragraph or distilling the conjunctive effect of many sections or clauses.

The illustration so far has revealed how, in looking for the policy in the light of which to interpret a statutory rule, a court need sometimes look no further than another section of the same statute or some other statutory enactment. But of course even our amending statute does not logically determine the solution of the problem where the will was signed on the lid of a cardboard box. Indeed, it may render the solution more difficult, for "at or after, or following, or under, or beside, or opposite to the end of the will" is more vague and complex than "foot or end," and the purposive direction that it should be apparent that the testator intended to give effect to the writing by his signature is not determinative of borderline cases such as our example might be thought to be. Here, then, if we use Professor Hart's terms, the judge is still outside the core and in the penumbra, and must look about him for what help he can find. How might he proceed? In upholding such a will a court might stress the underlying policy of probate law that wherever possible effect should be given to the wishes of the deceased, and that, therefore, where other arguments are nicely balanced, the benefit of doubts should be given to the document. Alternatively a judge might say that sloppiness in the drawing of such vital documents as testamentary provisions must be curbed and further that future litigation will be best discouraged by a comparatively strict policy of construction which will invalidate the present document. It is true that the Wills Act Amendment Act was passed because of what was felt to be an overly literal and rigid series of decisions under the "foot or end" provision, but

this legislative history, while effecting a reversal of certain decisions, does not necessarily preclude strict-leaning constructions under the new provisions. Courts may still simply take different views about whether the position of the signature does or does not make it apparent on the face of the will that the testator intended by his signature to give effect to the writing. Again, it may be that there are three decisions in a court of equivalent jurisdiction to the effect that wills made on cardboard boxes and signed on the lid cannot be admitted to probate. The judge is not technically bound by these decisions, but in order to further the goal of consistency in the law he may hold the document to be invalid.

In all these instances the court is resorting to what may be called policy notions. Are these notions extra-legal? They have all certainly been expressed frequently in court opinions, and the notion that, wherever possible, the wishes of the testator should be given effect is a recurring theme in probate judgments. The ideal of consistency in the law with its corollary prescription that precedents are not lightly to be disturbed is also a hallowed theme in judicial opinions. Even if we cannot appropriately refer to any of these ideas as legal "rules," they are most certainly a part of the stock of ideas which by observation we know influence judges in deciding cases. How do they differ from the directive expressed in the section of the Wills Act Amendment Act? Most obviously by not themselves being contained in a statute. But what, then, if they were contained in a statute? What if the Wills Act contained a general directive to judges that in interpreting the statute they should lean in favor of giving effect to the wishes of the testator? Or what if a general statute directed judges to give great weight in construing statutes to the authority of precedents and to disturb them only when there are very urgent reasons? General statutory policy directives of this kind are by no means unknown; indeed, they have become very common.<sup>15</sup> If we concede that general statements of interpretive policy

15. Among the very many instances the following are random examples. "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress . . . enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States." 64 Stat. 987, 50 U.S.C. § 781 (1964); "[I]t is the purpose of this Act (1) to discharge more effectively the obligations of the United States under the International Opium Convention of 1912, and the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 1931; (2) to promote the public health and the general welfare; (3) to regulate interstate and foreign commerce in opium poppies; and (4) to safeguard the revenue derived from taxation of opium and opium products." 56 Stat. 1045, 21 U.S.C. § 188 (1964).

are sometimes to be found in statutes and sometimes reiterated in judicial opinions, we have very little warrant in a common-law system for classifying the statutory expressions as law and denying this title to ones which, although not contained in a statute, are traditionally reiterated by judges.

Thus, if Professor Hart wants to say that policy directives contained in statutes are law because they are really very open-textured rules directing judges to decide cases in the light of the designated policy, he would also have to say that wherever judicial decisions have enunciated a policy to be considered in deciding a particular type of case, there is in fact a precedential rule to the effect that this policy must be taken into account by subsequent courts deciding cases of that type. Though it is conceptually possible to put the matter this way, to do so is to make nonsense of the sharp distinction between rules and policy to which Hart attaches so much importance. Hart's rule-centered model of law therefore does not seem to account for all the materials which we would want to call law; it certainly does not include all the materials actually employed in legal reasoning and judicial decision. And most important, it diverts attention from a study of the part played by principles and maxims of policy in the decision-making process which produces the final text of the law.

One interesting feature of these principles or maxims, as shown in the Wills Act example, is that they may appear to conflict with each other. It is inconceivable, except by a gross oversight which would have to be rectified, that a statute might say in one place that a will must be signed at the foot or end thereof and in another place that a will may be signed in the middle of the testamentary provisions. So legal directives which are sufficiently concrete to be called rules cannot conflict and remain valid. We might express this by saying that there is a superior rule that requires the resolution of conflicts between such concrete rules by a determination that only one of them is valid. But two principles may lead toward different outcomes in a dispute where the fact situation is not in doubt and yet both remain valid. In this respect legal principles are like proverbs. It is elementary to point out that "Many hands make light work" seems quite contrary to the admonition "Too many cooks spoil the broth," though, of course, both may be very sensible pieces of advice in different situations. When both are offered to a person in a dilemma, they may well leave him in a state of confusion, though even then they perform the valuable task of alerting him to different aspects of the situation that he should consider carefully. So it is with legal principles or maxims. In the example of the cardboard-box will, the notion that

wherever possible the wishes of the testator should be given effect may seem to conflict directly with the notion that uniformity should be required in solemn documents or with the principle that decisions should be consistent with precedent. In practice these principles serve to alert the judge to policy factors that he must weigh in coming to a decision. Though, since they conflict, they cannot solve the problem, they nevertheless all contribute to the process of rational decision-making by making manifest considerations which an opinion must discuss if it is to be convincing.

All the policy factors so far noticed as relevant to a decision in the will example were to a greater or lesser degree formally crystallized in legal doctrine, either by being expressly embodied in a statute or by being sufficiently reiterated by judges to achieve the status of legal maxims or principles. We are indeed familiar with the phrase "principles of statutory interpretation" and, as has been shown, it is often only accidental whether these principles themselves achieve statutory form or live more loosely as pervasive judicial ideas.

But suppose we add to the hypothetical the circumstance that to strike down the will would result in depriving a crippled eight-year-old child of all financial support. This seems at first to be an appeal to charity or compassion that cannot at all be thought of as a legal idea. But even here we can find in the storehouse of legal aphorisms something that has a bearing, even if a negative one. Judges have often said that hard cases make bad law. This aphorism expresses the idea that to depart from the principle of consistency solely out of compassion may carry great dangers for the future course of the law. "Hard cases make bad law" is certainly not a legal maxim in the clear sense of "He who comes to equity must come with clean hands," but neither can it clearly be dismissed as an extra-legal notion.

These examples reveal that in the edifice of argumentation in which a legal problem is debated and in the structure of reasoning by which a judicial opinion supports a judgment, there is constant movement between different layers of material. Some of this material is concrete and particular, though still perhaps vague or ambiguous at its edges, as with our rule about the signature at the foot or end of the will. Some is much more general, supervisory and policy-charged, as with the notion that wherever possible the wishes of the testator should be effected. Some is formally legal in the strongest sense as with the interpretive directions in the Wills Act Amendment Act. Some is less formally stamped with authority but yet remains in an important sense doctrinal, as with the principle that generally respect should be accorded to precedent. Some

has only faint marks of legal formality, as with the notion that hard cases make bad law. But we are dealing in every instance with the more or less concrete, the more or less formally legal. To attempt to draw sharp lines between law and policy or between legal and non-legal material in this context sadly oversimplifies a complicated problem.

But what if our experience with the particular judge in question affords us knowledge that he is in the habit of taking bribes? We have referred earlier to "the stock of ideas which by observation we know influence judges in deciding cases."<sup>16</sup> How then can we discriminate between the impact on a judge of the interpretive directions in the Wills Act Amendment Act and, on the other hand, the influence of a bribe? It is important to stress that the analysis offered here does insist on the need for drawing a distinction between these two phenomena. Otherwise statements about the nature of law and inquiries into legal reasoning would, indeed, become matters only of what judges do and we would be back with the excesses of early American realism. What we are concerned with in our analysis of the decision-making process is the structure of argumentation, which is intimately connected with what judges do but is certainly not the same as what they do. The philosophical inquiry about legal reasoning is markedly different from a psychological investigation into which influences in fact determine decisions or even into which arguments are in fact most likely to be acceptable or convincing. The most obvious point to make in this connection is that the judge's taking a bribe is not an argument at all. It is an explanation for his judgment in the sense that the bribe is a motivation, but it is not a *reason* in the sense of a justification that could be openly stated in his opinion. It is not therefore an instance of legal reasoning: it does not find any place among those arguments that, by consensus of the participants in the system, are regarded as legitimate materials for building a structure of persuasion.

From the point of view of the attorney who is conscientiously concerned only with advising a client about the probable outcome of litigation in which the client is or may become involved, it is certainly true that the personality of the judge, including his propensity to take bribes, is a consideration that cannot be ignored. But it would be strange to view the judge's tendency to behave criminally as a part of the law. To do this would be to accept some of the more extreme realist contentions that the concept of law has no meaning apart from a prediction of what judges will do. Even this extreme position provides some helpful insight

16. P. 423 *supra*.



into the workings of a legal system in the limited sense that, if all of the judges all of the time or most of the judges most of the time were known to take bribes, it would be increasingly difficult to maintain that a legal system existed. But where there is a generally accepted legal system it is centrally necessary to maintain a distinction between a structure of acceptable argumentation and the intrusion of corrupt motivation. That the bribing of the judge is totally extraneous to the law of the case can be demonstrated by pointing to the fact that a judgment procured by bribery can nevertheless be couched in the form of a scholarly and persuasive opinion which succeeds in enlisting the support or agreement of the profession. This is not of course a plea for ignoring the element of bribery when it can be shown to have occurred. The motivation of a venal judge is quite properly a ground for his dismissal and usually for the reopening of a proceeding. But to say that a judge has been bribed is quite different from saying that his arguments are defective, and the two statements should not be confused. There may be acceptable legal reasons for a judgment for which, in cold fact, the *explanation* is bribery. But philosophical study of legal reasoning is not concerned with motivation, which of course remains a perfectly proper and perhaps fruitful field of inquiry for sociologists and psychologists.

### III.

Motivation and reasoning, then, are two different concepts. We are concerned here with some of the ways in which policy can enter into legal reasoning. One unfortunate circumstance to be noticed here is the tendency to speak of "law and policy" as if these were two realms of discourse between which travel is possible but only with the usual formalities of passport and frontier. This artificial dichotomy has been perhaps the most barren legacy of Kelsen's "pure science of Law." The complex intertwining of prescription and policy in legal material and the infinite number of possible ways in which prescriptive utterances may be mingled with policy declarations have not so far received analysis.

A simple example may help. Parents may lay down a rule for a child that he shall not watch television more than one hour a day. A situation arises in which the child knows he will not be able to watch television at all on the next day and so requests permission to watch for two hours today in compensation. The proper parental decision is debatable. A literal interpretation of the original rule would seem to prescribe a refusal, though it would not do great violence to the terms employed to hold that "one hour a day" means "not more than an average of one

hour a day over a period of a week," or something of the sort. The correct decision would clearly depend on the policy behind the rule. It might be that viewing for more than one hour in any single day is thought to be damaging to the child's eyes. It might be that too much viewing is regarded as culturally demoralizing. It might be that watching for more than one hour a day is thought to leave the child insufficient time for other important activities. If the policy reflects concern about eyesight, the response should be negative; but if it is grounded in one of the other two concerns, the correct decision might well be affirmative, since the child will not be watching television at all on the next day. In this simple situation we seem to have a paradigm of Professor Hart's dichotomy between rule and policy, though even here it should be noted that decision-making hardly seems to be a matter of investigating the penumbra of meaning of a single word.

But suppose the rules were drafted or presented to the child rather differently and ran something like this. "You must spend two hours every evening doing your homework and one hour taking fresh air or exercise. Therefore it will be necessary to restrict you to one hour of television a day." The principal rule now appears to be one about homework and exercise and the rule about television is relegated to an ancillary status. And yet of course we might alternatively describe the prescription as a rule about television viewing which is explained by a statement of policy about doing homework and taking exercise. The reference to homework and exercise is in one light a purely prescriptive rule but in another light it is a policy statement that illuminates another rule. The example can be carried a step further. The rule that two hours each day must be spent at homework and one on fresh air and exercise is not a completely unambiguous declaration of a unique policy. It is most obviously seen as an attempt to concretize an ideal of *mens sana in corpore sano*, but this is so general a statement as to be almost vacuous until we inquire whether the rules entail any departure from the previous regimen. If we are told that under the earlier regulations only one hour was devoted to homework and two to fresh air and exercise, the new rules appear to reflect a policy of greater emphasis on academic study. If under the old regulations no specific time at all was prescribed for fresh air and exercise while three hours a day were allotted to homework, quite the contrary policy would seem to be indicated. Both these contrary policies could of course be subsumed under the general maxim, *mens sana in corpore sano*, for they both seek the same result by redressing excessive emphasis on one or the other aspects in the past.

Suppose now that the regulations do not offer any detailed directives

about how much time is to be spent at homework or taking fresh air or exercise or watching television but merely state that in the division of the child's time between these activities a judicious balance is to be maintained so as best to realize the ideal of *mens sana in corpore sano*. This now becomes the primary prescriptive rule, whereas in the earlier expression it was not a prescriptive rule at all but only a general policy notion, whether express or inarticulate. As these examples show, one rule's policy can be another policy's rule. There are many possible arrangements, many ways of achieving regulation in which prescriptive content and policy content can be more or less concrete and more or less vague and certainly more or less intertwined.

None of this complexity is in the least revealed by Professor Hart's simple dichotomy between "rule" and "policy." Hart gives us a view of statutory interpretation which apparently contemplates only two alternatives. In the first the case falls squarely within the "core" meaning of the words enshrining the rule, and no difficulty arises. We might observe that in such situations litigation is probably rare. In the second case the facts fall within an area where the words of the rule do not clearly govern, and here the judge must go outside the core of legal material and draw on notions of policy, morality and justice. The structure of legal reasoning is not so simple. The process of statutory interpretation or, indeed, any form of judicial decision-making is more typically a rummaging through layers of material in which prescription and policy are more or less express and more or less vague. The material used in this argumentation and decision-making will sometimes have a sharply legal character, as where it is a statutory clause; sometimes a more diffused legal character, as where it amounts to a general common-law doctrine, a principle or maxim; sometimes only a vaguely legal character, as where it is no more than a reiterated judicial idea.

The whole dichotomy between "law" and "policy" is centrally misconceived in its very implication that these are two disparate entities. It involves a quite artificial notion of "pure prescription" which is perhaps maintainable with respect to isolated orders but not with respect to the general rules of a legal system. The isolated command to a child "Go to bed by seven o'clock this evening" is very different from a general rule that the child shall go to bed by seven o'clock every night. The deliberate, planning aspects of laying down a general rule for a general course of conduct necessarily involve policy in the sense that the ephemeral wish behind an isolated command does not. For this reason it is in practice inevitable that collections of long-range general prescriptions, of which a legal system is the paradigm, should be themselves shot

through at different levels with expressions of policy, though it is of course not necessary that the statements or reflections of policy should be complete or consistent.

If Professor Hart's examination of the connection between rule and policy is defective, the analysis offered by Professor Fuller also has unacceptable aspects. It is certainly preferable to the Hart approach in perceiving that the purposive qualities of judicial decision-making cannot be properly elucidated in terms of occasional forays outside the realm of rules into the realm of policy. Professor Fuller recognizes that the notion of purposive interpretation cannot be so easily divorced from an elucidation of the rule itself. But, unfortunately, he has expressed this important perception in an overly narrow and overly mysterious manner by seeming to suggest that "purpose" is somehow immanent in a rule so that each rule has its own true purpose which has to be uncovered. One can agree with Professor Hart that it is less mysterious to speak of rules being interpreted in the light of purposes. But at this point it is necessary to insist that the purposes of which we speak are sometimes partly entwined in the rule itself, for policy notions may be more or less revealed and more or less embedded in prescriptive language, may be sometimes discoverable in other rules of the system and sometimes in principles, maxims and doctrines, so that purposes are often at least half manifest in legal material itself.

The process of legal reasoning is thus one of deploying a wide range of acceptable arguments the scope of which blurs any answer to the question of what is and what is not law. If courts are generally very willing to listen to (though not necessarily to be convinced by) the argument that a certain interpretation of a statute would lead to a grave injustice, why should we not regard the argument from injustice as a legal one? Certainly it has a different status from the argument that the court should decide against the plaintiff because he is ugly. Does it, on the other hand, stand on any different footing from the argument that a court should adopt a certain interpretation because there are earlier authoritative decisions which hold that way? It would not suffice to say that the latter is a legal argument because courts *must* be persuaded by it while the argument from injustice is only one that they *may* listen to, for courts have frequently brushed aside precedent and declared openly that for reasons of justice they will create a new rule. Nor can we say that one argument is to be classified as legal and the other not because observation leads us to believe that the one is as a matter of fact more likely to succeed than the other. This is often not a determination that can be made and, in any case, the discussion is not about what argu-

ments are in fact most likely to succeed but about which ones are acceptable in the sense that they will be listened to and that an obligation will usually be felt to rebut them if they are to be rejected. The idea of acceptable argument here is thus linked intimately with the ideas of audience and dialogue. In this way legal argument is very like moral argument and the everyday business of prudent decision-making in personal affairs. But in the legal context the audience is a specialized one with particular craft techniques and traditions which impose a more obvious hierarchy of cogency on arguments than is the case with everyday practical reasoning. Arguments about injustice, hardship and the like are quite acceptable in the legal sphere, but as legal arguments they may have to yield to the plain meaning of a statute or to the weight of a venerable precedent in cases where they would have carried the day in a moral argument. Where the meaning of a statute is not plain, or where precedent is not massed, such arguments are more likely to succeed. But the arguments used, listened to and sometimes accepted as persuasive in legal reasoning certainly embrace a wide field of arguments also employed in moral discussion and practical reasoning.

The upshot is that the whole distinction between which rules can be identified as "valid" and which cannot, to which the positivists attach so much importance, is of little help in an analysis of legal argument and decision-making. It is of little help because legal argument has to do with many concepts other than rules, and to say that a proposition cannot be formally identified as a valid rule of the system is therefore not to say anything about whether it is appropriate and usable in legal debate. Professor Hart's stigmatizing of views which confuse what the law is and what the law ought to be is not in point here, for what is being asserted is that the character of legal reasoning in the decision-making process is such that, though indeed there may be a difference between what the law is and what the law ought to be, the law itself is a collection of interwoven prescriptive and purposive statements which we marshal and deploy in the adjudication of disputes and also in the tendering of advice. Does this involve revising our concept of a rule in a "mysterious" fashion, which was the tendency that Professor Hart justifiably castigated in Professor Fuller's views? It certainly involves asserting that rules often combine with their prescriptive elements more or less incomplete purposive revelations which are used in conjunction with other material in the interpretation of the rule, but it is difficult to see what is mysterious about this or what generally accepted concept of a rule it is taken to be revising.

## IV.

Must the foregoing discussion lead us to revise any features of the modern analytical positivist position in jurisprudence? A comment on this question must open with some reflections on the difference between an investigation of the concept of law and an investigation of the nature of legal reasoning.

The now hallowed game analogy may be of use here. If we are interested in, say, cricket we are interested because it is a human activity. Nobody would care much about the rules of cricket unless people played the game. Of course, even if no one played, the rules would exist as a set of normative statements on paper or as the content of someone's mind. But rules of cricket are in fact of interest as a framework for understanding cricket activity or "cricketing." Now any full description of the cricket activity would have to include a reference to umpires and their decision-making role. We might want to add that cricket can be played without umpires, in which case the players have to make for themselves the kinds of decisions that umpires usually make as to whether a fielder caught the ball fairly, whether a batsman is out leg before wicket or run out, and so on. Thus, though the prescriptive rules of cricket may be stated without any express reference to an institutionalized decision-making process, cricket activity is impossible without such a process, whether conducted formally by umpires or informally by the players themselves. The necessity to refer to the process of decision-making in one's description and elucidation thus depends on whether the object of inquiry is the cricket activity or merely the existence of a set of normative prescriptions on paper.

In our investigation of the concept of law we are likewise interested in a rule system primarily because it has a significant effect on behavior and not merely because it is a collection of prescriptive sounding utterances. It is true that, as Professor Hart has pointed out, rule-governed or rule-oriented behavior has its own distinctive character in that it presupposes an ideology or attitude of acceptance, so that to understand it fully we must refer to phenomena more complex than statements of what people habitually do or predictions of what will probably be done. We must take account of attitudes and practices in referring to rules as standards for justification, for criticism and condemnation.<sup>17</sup> But it is precisely this social phenomenon of acceptance and application that lifts a system of rules out of the printed page and makes it a system of law.

17. H.L.A. HART, *THE CONCEPT OF LAW* 79-88 (1961).

Once this social operativeness is envisaged we are confronted with the business of decision-making and the whole task of reasoning about conduct in the light of rules. Moreover, as we have suggested earlier, decision-making plays a much more conspicuous and important part in the operation of a legal system than in the playing of a game. For the business of legal reasoning in the sense of making judgments about conduct in the light of rules is not confined to judicial decision-making. It is a vital task of counsel in arguing cases before a court and of the attorney in advising a client, and, indeed, must be an important concern of the legislature in framing a statute which it knows will then immediately become a part of the material to be used in the adjudicatory and advisory processes.

We must therefore distinguish between different inquiries. If the question to be asked is whether some explanation of the nature of legal reasoning and decision-making is important to describe how a legal system functions, the answer must be affirmative. If instead we are interested in laying down a set of necessary conditions for the existence of a legal system, then we must include a process of decision-making as the essential link between prescriptive rules and the determination of disputes, between rules on paper and rules in action. For the concept of a legal system is itself a concept of rules in action and not of rules on paper.

But if a different question is put and we ask not "What is a *legal system*?" but "What is a *valid law*?" some further comment is necessary. Professor Dworkin has written, "What, in general, is a good reason for decision by a court of law? This is *the* question of jurisprudence; it has been asked in an amazing number of forms of which the classic 'What is Law?' is only the briefest."<sup>18</sup> The implication seems to be that to elucidate the notion of what constitutes a good reason for decision by a court of law would be to proffer a good definition of a valid law. But the concept of a valid law does not appear to be at all the same as that of a good reason for a decision. Decisions by a court are not characteristically based on *a* reason but rather on an edifice of reasoning; they are not supported by separating valid from invalid rules (which would be so simple a task that disputes need never arise), but by arriving at an interpretation of materials generally acknowledged to be relevant in a fashion generally acknowledged to be acceptable. No judge was ever put in much of a quandary by the difficulty of deciding whether a statute emanates from his own jurisdiction or another. Certainly the identification of rules as belonging to the system is a subject worthy of philosophical analysis, but

18. Dworkin, *Wasserstrom: The Judicial Decision*, 75 *ETHICS* 47 (1964).

as a practical matter it occasions no difficulty whatever and is scarcely worth the attention that has been paid to it by the analytical jurists.

The analytical positivists, including pre-eminently Kelsen and Hart, have of course advanced an analysis of the validity of legal rules for purposes more ambitious than the mundane task of distinguishing between, say, English and French law. They have claimed that an explanation of the validity of the rules of a system in terms of their derivation from a *Grundnorm* (Kelsen)<sup>19</sup> or from a rule of recognition (Hart)<sup>20</sup> contains a valuable elucidation of the concept of a legal system. Such a construct is, indeed, a valuable analysis of the concept of obligation as it functions within a legal system and, as such, it is an important contribution to the general philosophy of law. But it is not a construct that is of much practical value for an understanding of the special ways in which a legal system implements its prescriptions, and it is thus somewhat remote from a jurisprudence that could be illuminating for the lawyer.

We might take the example of two very similar forms of the same game, such as, in England, Rugby Union football and Rugby League football. These are so recognizably similar that for many purposes we think and speak of them both as Rugby football. But there are many practical reasons why we often need to distinguish between them, such as the circumstance that Rugby Union is purely amateur while Rugby League is played professionally. In making such a distinction to an inquirer we would certainly refer to a difference in rules which could be identified by a designation of the different governing bodies of the two games. If we stopped with such an explanation we would leave the inquirer only half enlightened and we probably would wish to tell him more. We would want to tell him that Rugby League is an offshoot from an original uniform game of Rugby; that it was in some sense a revolutionary breakaway prompted by a desire to modify some of the substantive rules of the game and also to license professional playing; and that in practice it is played mostly in one area of the north of England. In this way our explanation of the differences between the two games would be rather like an explanation of the differences between the juridical orders of, say, Spain and Mexico.

When we are dealing, then, with two varieties of the same game and if we can assume that the inquirer has a general knowledge of the common nature of the two varieties, a reference to the existence of two different basic rules of recognition can certainly supply useful information, though, as we have seen from the Rugby example, a certain

19. H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 115-23 (1953).

20. H.L.A. Hart, *THE CONCEPT OF LAW*, 97-120 (1961).



amount of historical and sociological information is still necessary to enlarge the understanding. Now if we wanted to distinguish Rugby football (either variety) from chess we might also begin by pointing to different rules of recognition. To stop at this point would, however, convey very little information, for it would in itself say nothing about the important differences of substance, such as that Rugby is a game of physical movement and body contact while chess is a sedentary game of intellectual exercise. To know this the inquirer must be told about the content of the rules, to which he may indeed be led by an explanation of the different rules of recognition. But a statement couched only in terms of rules of recognition would be positively misleading in its implicit suggestion that Rugby and chess are the same kind of human activity. In the sense that they are both games this is true, but the inquirer may know this already and the type of elucidation that is practically important is left unprovided.

Similarly, the concept of a basic norm or fundamental rule of recognition is a useful designation of the unifying feature that enables us to regard one system of law as a single and unique set of obligations, but it tells us nothing about the special feature of law as an obligatory system that functions through a complex set of decision-making procedures. If one of the striking features of chess when contrasted with Rugby football is its sedentary and intellectual character, then one of the striking features of law when contrasted with any game is the centrality of its elaborate decision-making process. Structured presentations of the notion of validity are unassailable in their illumination of the concept of obligation, but a preoccupation with them results in a lack of sufficient emphasis on the decision-making aspects of a legal system. Just as many important special features of chess are not revealed by describing it as a rule system descended from a *Grundnorm*, in the same way important special features of a legal system remain hidden by such a presentation.

When we turn to the type of rule system that we call law a further point of importance must be made. The rule book of a game tells us how the game is to be played. But the rule book of a legal system tells us only something about how the game is played. The "valid rules," by which both Kelsen and Hart seem to mean chiefly the prescriptive and power-creating rules, sketch directive outlines for private and official behavior but tell us little or nothing of the vital process by which the rules are used and applied in decision-making. Now with respect to games this matters very little, for, as we have seen, adjudicative decision-making under rules is of minimal importance in game activity. The rules of a game are to be used in action by players seeking diversion or providing

a spectacle. Their primary thrust is not regulatory in the way that a legal system is, where a very important additional purpose of the rules is to guide adjudicative officials in making decisions. Any representation of the nature of a legal system as a rule edifice is thus much less illuminating than a similar description of a game, for it contains no hint at all of how rules are used in legal activity.

We might imagine a chess school, but we would contemplate its task as being to teach players how to play well and not how to make decisions about settling disputes under the rules of chess. The rules of chess may be learned perhaps in less than an hour, but one might still play very badly and the business of learning chess is that of learning how to operate *within* the rules in the best tactical and strategic manner. Playing chess badly is not usually a matter of being in breach of the rules and certainly not of acting in such a way that another person will make a disadvantageous judgment about one's behavior. But from the viewpoint of the citizen, playing the law-game badly means precisely acting in such a way that someone else will make a disadvantageous judgment with respect to one's behavior. Learning to be a lawyer is therefore a matter of learning how to advise people about what judgments are likely to be made on their behavior and learning how to influence those judgments by operating within an acceptable structure of argument.

The concept of a valid rule has some value in indicating a series of legitimate starting blocks for the adjudicatory performance. But the modern positivist elucidation of the nature of law has suffered from a refusal to go much beyond the question of how these starting blocks are to be found. Professor Hart is content to designate criteria for the identification of legal rules (which he proceeds to divide somewhat obscurely into "primary" and "secondary")<sup>21</sup> and then to suggest that penumbral cases are decided by excursions into the realms of justice and morality. Now it is true that the law can in some fashion be reduced to a body of rules, as indeed happens with collected editions of the statutes or with such works as the Restatement. But every law student quickly discovers (if he ever thought to the contrary) that he does not come to a law school to learn the content of these volumes, and it is a familiar cliché that no lawyer can know very much of the law. The tasks of law teaching are to impart sophistication in techniques of argument and reasoning. For this purpose, and for the elucidation of a legal system, we must add to the concepts of duty-imposing and power-conferring rules the notion of can-

21. A good discussion of the difficulties that surround this distinction made by Hart is to be found in Sartorius, *The Concept of Law*, 52 ARCHIVES FOR PHILOSOPHY OF L. & SOCIAL PHILOSOPHY 161, 164-68 (1966).

ons or standards of interpretation which serve more than one purpose. Sometimes, especially when contained in a statute, they function partly as a public justification of the enactment or as a declamatory statement of legislative policy. More often they are directives to officials, particularly judges, as to how they should work with the prescriptive rules of the system. When developed by the judges themselves in the form of principles, maxims and aphorisms they are a declaration of the shared understanding of craftsmen about how they should shape the materials on which they work. But, by their very nature, these interpretive directives are often capable of expression within the scope of a duty-imposing or power-creating rule, and for this reason it is not profitable to attempt to split them off and reserve the title "law" for statements of pure prescription. Such an attempt would serve no useful purpose for, both by the criteria of formal validity and functional importance, such judgment standards meet the same tests as purely prescriptive statements.

The concept of a rule is thus too narrow to explain the variety of material contained within a legal system. It may usefully identify the "law points" around which legal argument swirls. In this way the concept of a rule is certainly a *necessary* part of the elucidation of the nature of a legal system. But it is inadequate as a vehicle for an explanation of the nature of legal reasoning which, as we have seen, is necessary for an elucidation of the central operation of decision-making.

### V.

For these reasons the American realist movement is in some ways a more fruitful and hopeful jurisprudential school than that of the modern analytical positivists. One careful reservation must be made on this comment. It is not meant as a denigration of the technique of sophisticated linguistic analysis, which is an invaluable weapon for attacking all problems of law and all questions of legal philosophy. The criticism is not directed at that technique but rather at the emphasis in such writers as Kelsen and Professor Hart on the centrality of the concepts of norm or rule. Such a monocular concentration has inevitably led to a lack of focus on the decision-making process. The American realists, although guilty of some crude analytical blunders, did perceive that the importance of the process of decision-making and also that the concept of a rule was of little help in its elucidation. The realist fallacy lay in the preoccupation with explaining the causes of decisions in a sociological or psychological context and in the inability to distinguish between motivation and argument. The need now is to return to a concentration on decision-making with an awareness of this distinction.

Such an endeavor might have as a highly desirable by-product the clarification of the uses of legal philosophy in a law school curriculum. Jurisprudence, as the subject tends unhappily to be styled in the United States, occupies an exotic and barely tolerated role in the great majority of American law schools, and it is not hard to understand why this should be so. The general exercises in analysis of the concept of law by the more celebrated of the modern positivist jurists, such as Kelsen and Hart, are rightly seen to be of little or no help in increasing our understanding of the workings of a legal system. The realists have produced no general sociology of law that deserves to be ranked as an academic discipline, and it is probably still correct to say that the sociological background and implications of legal subject matter are best displayed interstitially in the presentation of particular legal subjects. As long as jurisprudence is thought of as a separate body of knowledge, as a subject in the same sense that corporation law and criminal law are subjects, its low estate is inevitable. But its proper place and its value should be apparent once its role is restated as a technique for studying concepts, as a technique for studying a special kind of reasoning and decision-making, as a technique for studying techniques. Doing law is always to be arguing and deciding. All law teaching, in any field, is a business of arguing and studying argument and decisions. If the major contribution of legal philosophy to law is a concentrated study of argument, reasoning and decision-making, then of course it must be acknowledged that no lawyer or law teacher could ever avoid doing legal philosophy at some time or other in his professional activity. For if working with law is a kind of practical reasoning, then all who do it are likely to reflect from time to time on the nature of what they are doing. In that sense we have been doing legal philosophy all the time without knowing it.

But there is room, indeed an important need, for a more systematic and detached examination of the special characteristics of that type of practical reasoning that is found in law. Legal argument has a great deal in common with general moral and ethical argument, but it has too its very special features which stem from the more or less authoritative quality of the materials deployed and its professional and technical traditions. There is not enough time to study and expound such features in the traditional, technical areas of a law school curriculum, but if they are not studied, legal education is at best haphazard and at worst a failure. In this way, radical as the suggestion may be to American ears, legal philosophy has a stronger claim than any other area to a compulsory place in the law school curriculum.

Such a view is perhaps particularly appropriate at present, when the

American public scene is troubled by sharply conflicting views not only about the wisdom of certain judicial decisions but also indeed about the very propriety of the techniques used in reaching them. The relationship between the concepts of law and policy is not an arid or *recherché* concern of the legal philosopher, but a matter of vigorous public debate and unease. No pretension can be made that anything said in this article provides a resolution of that debate, but perhaps a signpost to the solution has been raised. The indispensable prerequisite is a realization that "law" and "policy" are not contiguous territories suitable for border raids and frontier violations. Policy is almost always to some extent articulated in law. Sometimes it speaks with a very clear voice in the most formal of legal materials; sometimes it is muted or muffled and has to be amplified and clarified through a process of pursuit that leads us out through layers of less formal legal material into a realm of discourse where authoritative prescriptions have receded into the background. Choices will have to be made at many points along the path to clarification, and they are choices which deserve to be examined by criteria which are a blend of the standards used in everyday, non-legal decision-making and the special, technical and intellectual traditions of the legal profession.

All this could perhaps be summarized by saying that Professor Hart's picture of a legal system is curiously unprofessional. There is a world of special expertise between a rule and a decision, and the most practical and fruitful task of legal philosophy is its study. There are rules in the law and there is law in rules, but one needs special tools to dig it out, and these tools are as centrally important and as worthy of examination as the rules themselves.<sup>22</sup>

22. It is remarkable how very little useful work has been done in legal philosophy on the nature of legal reasoning and decision-making. Some very penetrating observations were made by the unjustly neglected American legal scholar, John Dickinson, particularly in two of his articles, Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931); Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052 (1931). A great deal of illuminating material is to be found in K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960), though, in the realist tradition, Llewellyn always seems more interested in providing a scheme for predicting decisions than in analyzing a structure of argument. Of late there has been an awakening of interest in this subject in continental Europe under the stimulation of the important work done by Professor Perelman of the University of Brussels. See C. PERELMAN & L. OLBRECHTS-TYTECA, *TRAITÉ DE L'ARGUMENTATION: LA NOUVELLE RHÉTORIQUE* (1958) and the collection of essays *LA THÉORIE DE L'ARGUMENTATION* (1963). There are signs now in the American literature of an awareness that the concept of a rule is inadequate for an analysis of legal reasoning. See Singer, *Hart's Concept of Law*, 60 J. PHILOSOPHY 197, 210 (1963). A very valuable contribution is Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963), though Professor Dworkin's approach perhaps overemphasizes the similarities between legal and moral argument and does not take sufficient account of the special technical and professional characteristics of legal reasoning.