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Recommended Citation
Gary S. Lawson, *A Farewell to Principles* , *in* Iowa Law Review 893 (1997).
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A Farewell To Principles

*Gary Lawson**

Larry Alexander and Ken Kress have written one of the most interesting and engaging articles on jurisprudence in recent times.[1] That is not surprising, as they are two of the most consistently interesting and engaging figures on the contemporary legal scene. Their case against the use of Dworkinian legal principles in adjudication is simply devastating. In particular, their argument that Dworkinian legal principles must be identical to correct moral principles in all future cases—their so-called "Argument from Fit"[2]—seems to me unanswerable.

Although I fully agree with the main thrust of Alexander and Kress's article, I have two related concerns about their argument. First, by focusing on Dworkin's account of legal principles, Alexander and Kress may have selected the most rather than the least vulnerable target for their attack on legal principles. Advocates of other accounts of legal principles, most notably many conventionalists, will not feel threatened by Alexander and Kress's most telling criticisms of Dworkin. Second, by not probing more deeply into the reasons why many modern theorists seem so fascinated by legal principles, Alexander and Kress fail to address what I suspect will be the most common criticism of their efforts: that they have overlooked what many theorists will regard as the critical role of legal principles as a response to legal (and, secondarily, moral) indeterminacy. Alexander and Kress can make perfectly good responses to this criticism, but they do not make them in their article.

In Part I of this Comment, I briefly explain why concentrating so heavily on Dworkin is a mistake. In Part II, I offer the outline of an argument against the use of any kind of principles, whether legal or moral, as a response to legal indeterminacy.

I

Alexander and Kress focus their efforts on Dworkin's theory of legal principles because they (rightly) regard it as "the most careful account in the literature."[3] But "most careful" does not necessarily mean "best," and it

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1. *See* Larry A. Alexander & Ken Kress, *Against Legal Principles*, *in* Law and Interpretation 279 (Andrei Marmor ed., 1995), *reprinted in* 82 Iowa. L. Rev. 739 (1997).

2. *Id.* at 304-06, *reprinted in* 82 Iowa L. Rev. 739, 764-65 (1997).

3. *Id.* at 292-93, *reprinted in* 82 Iowa L. Rev. 739, 752 (1997). To be sure, Dworkin's account of legal principles is the "most careful" in the same sense in which democracy, by Churchill's reckoning, is the best political system. Dworkin is notoriously hard to pin down

certainly does not mean "representative." Indeed, Dworkin's account of legal principles is decidedly unrepresentative of modern understandings of legal principles in one crucial respect: Dworkin makes some very strong assumptions about the power of moral reasoning that many other legal actors do not share.[4] For Dworkin, legal principles are the morally best principles that meet a certain minimum threshold of "fit" with authoritative legal materials.[5] But because there are innumerable sets of legal principles that will satisfy any given threshold of fit in any given context, a theory that requires identification of the morally "best" set of principles from among the available candidates requires moral reasoning that is capable of making very fine distinctions.[6] Even if one is able to reduce the field of principles significantly—by, for example, invoking some notion of parsimony to rule out sets of principles that are especially difficult to apply—one still is asking a great deal of moral theory to require it to identify one set of principles as uniquely "best." And if our moral reasoning is that finely tuned, then Alexander and Kress are surely right that it is hard to explain why we should not make direct use of it instead of channeling—and therefore diluting—our moral knowledge through legal principles.

But one need not be a moral skeptic to doubt whether moral reasoning is capable of doing the work that Dworkin's theory demands. One plausible view of moral reasoning holds that moral theorizing can produce very general principles that set outer limits for conduct, but that it is not always capable of making fine distinctions among actions or theories that are all within the outer limits. On this view, the most that moral reasoning can do for a theory of adjudication is to keep it from straying outside certain broad moral boundaries. Accordingly, legal principles under such a model constitute the set of principles that best fit the available legal materials while satisfying a minimum threshold of moral attractiveness, rather than the morally best principles that meet a minimum threshold of fit. I strongly suspect that this conception of principles rather than Dworkin's better conforms to the intuitions of ordinary practitioners and scholars. Disputes about legal principles in our culture seem to be

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even when he is being clear. It is especially hard to determine how much of his account of legal principles is positive, how much is normative, and how much (in question-begging fashion) is an attempt to provide the morally best theory of adjudication that explains a substantial threshold portion of our legal practice.

4. I do not mean to suggest that Dworkin's assumptions are wrong. Indeed, I suspect that I am even more optimistic about the possibility of a rational moral theory than is Dworkin. The point is only that many (and perhaps most) advocates of legal principles probably do not share this optimistic view of the power of moral reasoning.

5. I accept the elegant Alexander-Kress proof that Dworkinian legal principles must always be at the minimum threshold of fit. *See* Alexander & Kress, *supra* note 1, at 287-92, *reprinted in* 82 Iowa L. Rev. 739, 747-52 (1997) (discussing Dworkin's account of the fit between legal principles and legal rules).

6. Consider, for example, how one would distinguish two sets of principles that differ only in the prescribed outcome of one hypothetical case.

disputes about the criteria of "fit" more than they are disputes about morality.[7]

An account of legal principles that stresses "fit" rather than normative attractiveness is not vulnerable to some of Alexander and Kress's strongest arguments against Dworkin. Legal principles do not, on this view, reduce to correct moral principles in all future cases, because correct moral principles have exhausted their possible effect by setting outer boundaries. Any other arguments against legal principles that rely on a claimed inconsistency between legal and moral principles are similarly defused by the denial (which Dworkin is estopped from making) that moral reasoning can do much more than exclude a range of outcomes.

For example, one popular conception of legal principles relies on convention: legal principles are those principles that meet a minimum threshold of moral attractiveness[8] while best describing the actual practices that constitute the practice of law in a given legal community.[9] Such a theory is normative in the weak sense that any theory that uses comparative terms is normative, but it differs significantly from the Dworkinian approach because there is no claim that the conventional criteria of "fit" are necessarily derived from or conform to correct moral understandings.

Alexander and Kress offer two brief criticisms of this conventionalist account of legal principles.[10] First, they have serious doubts that any such conventionalist account can be formulated that does not rely on some kind of agreement among practitioners,[11] and they find a number of theoretical problems with grounding principles in agreement.[12] Second, they "urge the normative superiority of following correct moral principles rather than conventional legal principles."[13] The second criticism has no force unless Alexander and Kress can demonstrate that correct moral principles are sufficiently robust to provide guidance in all situations in which legal principles are invoked. If one believes that conventional legal principles step in precisely where correct moral principles fail to provide useful

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7. The "best" fitting set of principles, for example, cannot be the set that accounts for the highest percentage of the available legal materials, because even with a moral side constraint, innumerable sets of principles will account for all of the relevant materials. There is, of course, no single, received conception of fit in our legal culture—which is why there is no single, received conception of law.

8. This means that the applicable set of principles resolves a sufficient number of sufficiently important cases in a fashion that is consistent with moral understandings.

9. For a refreshingly clear exposition of one such theory, see Steven J. Burton, Judging in Good Faith (1992).

10. Of course, it would take a book—and a very long one at that—for Alexander and Kress to address in detail all of the jurisprudential theories that in some form make use of legal principles. Accordingly, it is totally unfair to fault Alexander and Kress for failing to address conventionalism at more length. But I am going to do it anyway.

11. Alexander & Kress, *supra* note 1, at 307 n.106, *reprinted in* 82 Iowa L. Rev. 739, 767 n.106 (1997).

12. *See id.* at 307-08, *reprinted in* 82 Iowa L. Rev. 739, 767-68 (1997) (questioning the explanatory power of agreement-based theories).

13. *Id.* at 307 n.106, *reprinted in* 82 Iowa L. Rev. 739, 766 n.106 (1997).

guidance, then one simply will not regard "following correct moral principles" as a serious alternative to the use of legal principles in all situations.

Alexander and Kress's first argument—that conventionalism must rely on agreement and that legal principles cannot be established by agreement—is also unsuccessful. As they observe, some forms of conventionalism do not treat legal principles as express objects of agreement among practitioners, but instead derive these principles from a reconstruction of legal practice.[14] Of course, in order for there to be an identifiable "legal practice," there must be some measure of agreement among practitioners about outcomes, dispositions, or both. At one level, therefore, Alexander and Kress are right that conventionalism—and indeed any legal theory that attaches any normative weight to existing practices—cannot do away entirely with agreement. But Alexander and Kress have very little to say against a theory that does not treat legal principles as objects of agreement. Their only real argument is that agreement about case outcomes (and possibly about legal rules) can be explained equally well either by legal principles or by higher-order rules that govern cases (perhaps in accordance with moral principles) when the acknowledged rules run out.[15] In other words, they claim, a reconstructive methodology can never provide grounds for identifying legal principles rather than rules grounded in moral principles as the best explanation for the implicit structure of legal practice. But that is just false. Especially if one doubts that moral principles can have much to do with the resolution of most cases, it seems fairly easy to tell whether a legal principles-based or a rule-based explanation better describes what practitioners really do—just as it is generally easy to tell whether, when adding 68 and 57 to reach 125, mathematicians are performing addition rather than some similar but slightly different operation that we might call "quaddition."[16] Unless Alexander and Kress can show how the identification of rule-following in a legal system is different from the identification of any other form of rule-following, their argument here comes perilously close to endorsing a full-blown argument against the very possibility of identifying instances of rule-following.[17] And the claim that one can never distinguish the use of legal

14. *Id.*

15. *Id.* at 308, *reprinted in* 82 Iowa L. Rev. 739, 767-68 (1997).

16. For a brilliant (if ultimately unsuccessful) argument that we cannot in any given case distinguish addition from different mathematical operations, see Saul A. Kripke, Wittgenstein on Rules and Private Language 8-22(1982) (presenting an interpretation of Wittgenstein that suggests that there is no way to distinguish addition ("add 68 and 57 to get 125") from quaddition ("add 68 and 57 to get 125, except that on the *n*th operation, add 68 and 57 to get 5")).

17. This, in turn, quickly leads to an argument against the possibility of rule-following, as we cannot follow rules in any meaningful sense if we cannot tell in any given case whether or not we are following rules. Other legal scholars have tottered even closer to the brink of peril with respect to this "Kripkensteinian" argument. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. Rev. 781, 797-801 (1989) (using doubts about rule following to challenge

principles from the use of legal rules (or addition from quaddition) entails a radical skepticism that neither Alexander nor Kress embraces. That is wise, because like all radical skeptical positions, an argument against the possibility (or knowability) of rule-following immediately self-destructs. We must be able, on at least some occasions, to know whether we are following rules in order to use concepts coherently, because employing a concept is one form of rule-following.[18] A blanket denial, expressed using concepts, that we can ever know whether we are following rules thus presupposes the very thing that is denied.[19] Our ability to engage recognizably in rule-following is axiomatic in the strongest sense of the term,[20] and there is no apparent reason why an ability to recognize when legal principles rather than legal rules are at work should be especially problematic.

The only kind of "agreement" that conventionalism really requires is agreement among practitioners that they are in fact using legal principles rather than moral principles. Then the search for the appropriate legal principles—for the explanatory structure that is implicit in legal practice—can take place without further reference to professional agreement.

Thus, although Alexander and Kress have neatly dispatched Dworkin, they still have some work to do if they want to put away conventionalist accounts of legal principles as well.

II

Alexander and Kress are right that legal principles are strange phenomena: legal principles "offer neither the guidance virtues of rules nor the virtue of moral correctness."[21] So why are legal principles such a popular item among both sophisticated jurisprudes and ordinary practitioners? Why do legal actors use principles (or, at the very least, claim to use principles)?

Alexander and Kress do not really explore this question, but I think it has a straightforward answer. A defender of principles would likely argue as follows:[22] rules are fine as far as they go, but they can never go as far as

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traditional understandings of the role of law); *see also* Charles M. Yablon, *Law and Metaphysics*, 96 Yale L.J. 613, 624-36 (1987) (reviewing Kripke, *supra* note 16).

18. *See infra* notes 25-27 and accompanying text.

19. Kripke recognizes that a strong form of an argument against the possibility of rule-following extends to all concepts, Kripke, *supra* note 15, at 19-20, but does not acknowledge that this necessarily defeats any strong form of an argument against the possibility of rule-following.

20. There is still, of course, the problem of knowing whether others who report that they are performing addition rather than quaddition are deluded or lying, but that is just a manifestation of the general problem of other minds. That problem is solved, as are all other epistemological problems, by evaluating the evidence at hand, which overwhelmingly argues in favor of the existence of other minds that are structured similarly to our own and are therefore capable of reliably reporting on their contents.

21. Alexander & Kress, *supra* note 1, at 327, *reprinted in* 82 Iowa L. Rev. 739, 786 (1997).

22. For one such argument, see Burton, *supra* note 9, at 1-68.

we need. Rules will never give us complete determinacy in adjudication, either because the rules' proper application will sometimes be unclear or because there will sometimes be gaps in their coverage. But adjudicators must be able to decide cases even when the rules give out, so we have to supplement the rules with something. That "something" might be moral principles if they are capable of doing the job, or it might be legal principles if moral principles are insufficiently robust, but it will and must be principles of some kind. If not principles, then what?

The answer to this challenge is more rules. A legal system can achieve complete adjudicative determinacy using nothing but rules, and a legal system ought to go to very great lengths to try to find suitable rules before it falls back on principles.

Assume a set of primary rules of conduct and a set of rules for interpreting the primary rules.[23] Those primary and interpretive rules will unproblematically resolve a number of cases, but will surely leave others—and perhaps many others—unresolved. In those unresolved cases, adjudicators must nonetheless decide for one party or the other. Even a decision not to decide is, in effect, a decision to let matters stand as they are, and therefore a decision against the party seeking the aid of the legal system.

There are a number of ways to resolve disputes when the primary rules break down. One way is to invoke principles: reasons that push nondeterminatively in one or another direction. Another way, however, is to invoke a secondary rule that determinatively specifies how to resolve disputes that cannot be conclusively settled in terms of the primary rules. Of course, if the secondary rule is unclear or incomplete, one will need a third rule that specifies how to decide when the secondary rule is inconclusive, and so on. The regress will halt when one reaches a rule that, for purposes of the case at hand, is clear and complete.[24]

A full defense of rule-based decision-making would require a book,[25] but some preliminary observations are enough to get the argument going. Rules are primarily devices for economizing on information.[26] By reducing the number of considerations that we must take into account,

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23. *See* Brian Leiter, *Legal Indeterminacy*, 1 Legal Theory 481, 481 (1995) (defining "the class of legal reasons" to include both sources of law and legitimate interpretive operations). The choice of a set of primary rules is obviously normative and must be justified in terms of sound moral arguments. Such arguments might, of course, indicate that primary rules should be identified by reference to some rule of recognition rather than by direct, case-by-case moral examination. There can be very good natural law justifications for operational legal positivism, but that is a story for another time.

24. How quickly that happens in any given case depends, of course, on the content of the applicable rules. The system of rules sketched out in this Comment, *see infra* notes 36-37 and accompanying text, will generally resolve cases with a relatively small number of rules.

25. Fortunately, a very good one already exists. *See generally* Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991) (comprehensively analyzing rule-based decision-making).

26. *Id.* at 229-31.

they greatly expand the range of problems with which we can deal. Indeed, conceptual thinking itself is a form of rule-based decision-making. Concepts are categorizations of entities on the basis of perceived similarities and differences. Any particular entity either is or is not a referent of any particular concept in any given cognitive context; the use of concepts is therefore rule-based rather than principle-based. And the ability to deal with classes of entities, even at the expense of a loss of focus on some of the particularities of members of the class, is so invaluable to our ability to function in a complex world that the epistemological (and evolutionary) justification for conceptual thinking is simply overwhelming.

In law, rule-based decision-making is equally important. Decision-makers cannot possibly take account of every particularity of every situation. Rules have the potential to "simplify our thought processes"[27] and thereby make complex human existence possible. Just as a thought process that relies on rules (concepts) is superior by any rational standard to a thought process that relies on particularity (perceptions), because it enormously expands the potential scope of our knowledge, a legal system that relies on rules is superior by any rational standard to a system that relies on less general forms of decision-making, because it allows us to do more with fewer cognitive demands.

Rules also have the potential to economize on virtue. To the extent that rules give decision-makers less to do, they give decision-makers less to do wrong. One need not believe that everyone is a Holmesian bad man in order to be concerned about the motives of decisionmakers in a legal system. One need only believe that the assumption that decisionmakers will faithfully carry out whatever charges the legal system gives them, with no thought of personal gain, will generate poorer predictions than alternative assumptions. And that is not a difficult belief to hold or defend. If rules require less virtue to apply than do principles, that is a reason for preferring rules.

There is also a subtler, but even more important, virtue to rules as the basis for a legal system. Rules are potentially over- or under-inclusive from the standpoint of all-things-considered reasoning.[28] Accordingly, if one looks closely at any specific application of a rule, one is likely to be able to find reasons why application of the rule in that particular case is unwarranted. The more closely one scrutinizes rule-based decision-making, the less appealing it becomes in any given instance. The virtues of rule-based decision-making tend to be abstract and future-oriented and, therefore, less visible than the benefits of departing from a rule in a specific case and reaching the "right" result on the basis of more particularized considerations. If, however, those abstract virtues are sufficiently powerful, there can accordingly be good reason to tie oneself to the masthead and not look too closely at specific applications of rules. In

27. *Id.* at 231.
28. *Id.* at 31-34.

other words, there can be good reasons—morally good reasons—to make a meta-decision to engage in rule-based decision-making and then not to re-examine that meta-decision in subsequent instances of rule-based decision-making. Following rules can be a valuable habit of mind that ought to be cultivated in order to avoid the inevitable temptations to depart from rules in specific cases.

Such a meta-rule to follow rules is vitally important in the law. One of the central concepts in Anglo-American law is the rule of law. There is widespread agreement among serious thinkers that the rule of law is a good thing, but no one can say precisely what this rule of law is or what it does.[29] That is not surprising, as the rule of law is a spontaneous order that is too complex to be fully described in a verbal formula. As Steven Calabresi and I have elsewhere noted:

> "The rule of law" has proved to be one of the most elusive concepts in the lexicon of jurisprudence. Attempts at concise definition seem invariably to fail, resulting instead in lists of attributes supposedly characteristic of the rule of law (such as generality and prospectivity), typically accompanied by a warning that not all of these attributes must always be present for the rule of law to be achieved.
>
> We suspect that the absence of a clear definition of "the rule of law" is an inevitable result of the fact that "the rule of law" is not an identifiable set of precepts or a decisionmaking algorithm, but is instead a *habit of mind*—a way of dealing with problems that has more or less characterized the Western legal traditions for the past millennium. Instances of the application of the rule of law can be recognized, but the concept itself cannot be reduced to a verbal description, because it embodies centuries of accumulated knowledge, practices, wisdom, and error, which no single mind can comprehend or process. The rule of law, in other words, is what F.A. Hayek has termed a *spontaneous order*: it is a complex, abstract institution that has emerged as an unplanned consequence of the actions of countless people aiming at ends other than the establishment of the rule of law.[30]

If this account of the traditional rule of law is correct, then the concept describes an historically contingent practice that is justified by the incredible results with which it is associated: societies that operate more or less in accordance with the rule of law seem to do better, by almost any rational definition of welfare, than do societies that operate in accordance with different legal norms.[31] Whatever the traditional rule of law may be,

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29. *See* Radin, *supra* note 17, at 781 ("Among those who affirm the traditional ideal [of the rule of law] there is no canonical formulation of its meaning . . . .").

30. Steven G. Calabresi & Gary Lawson, *Introduction: Prospects for the Rule of Law*, 21 Cumb. L. Rev. 427, 428-29 (1991) (footnotes omitted).

31. One coherent way of giving meaning to the concept of "welfare" in this context is to ask whether a person would like to be placed at random in society *X* or society *Y*. If an overwhelming majority of people would choose society *X*, one can meaningfully say that society *X* is better, from a welfare standpoint, than society *Y*. Any other notion of social

it seems to be of great value to human advancement. One can play chicken-and-egg games about whether the rule of law is the cause or the effect of some other institutions with which human advancement is correlated, such as capitalism and republicanism, but whatever the logical hierarchy of these institutions may be, the rule of law seems to be linked to prosperity in a manner close enough to warrant positing a causal relationship.

If the rule of law is really a way of thinking or a habit of mind, then the only way to preserve it is to practice it. More importantly, if the rule of law is truly a spontaneous order, then its emergence (or re-emergence) cannot be planned or ordered.[32] If the rule of law is lost, there may literally be no way to get it back.

Although there is much about the rule of law that we do not, and cannot, know, one thing seems evident: rule-following is an essential component of the rule of law.[33] Professor Schauer has correctly pointed out that there is nothing inherent in the linguistic concept of the rule of law that requires rule-following.[34] But my point here is empirical rather than conceptual: the contingent set of practices that constitutes the traditional Anglo-American rule of law, and which seems to generate enormous benefits for enormous numbers of people, includes rule-following as an important element. Accordingly, promoting rule-following is a way (and perhaps, in the end, the only way) of fostering the spontaneous order that generates and sustains the rule of law.

Of course, principles also are a part of the Anglo-American legal tradition. Might they also be important to maintaining the rule of law? The answer is maybe, but probably not. First, because rules can economize on information and virtue better than do principles, there is every reason to think that the rule element rather than the principles element in the traditional rule of law has been primarily responsible for the human prosperity that has accompanied the rule of law. Second, principles will have their due. Moral principles will find their way into the mix somehow—even if only as part of the justification for the primary rules—and some form of non-Dworkinian legal principles will no doubt endure, perhaps as part of the interpretative regime, inasmuch as no one has yet successfully reduced legal interpretation to fixed rules.

In the end, we do not and cannot know the optimal mix of rules and

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welfare encounters serious, and probably insuperable, methodological and conceptual problems. *See* Gary Lawson, *Efficiency and Individualism*, 42 Duke L.J. 53, 78-97 (1992) (criticizing different conceptions of social welfare).

32. *See* Calabresi & Lawson, *supra* note 30, at 429 (identifying the rule of law as a "complex, abstract institution that has emerged as an unplanned consequence of the actions of countless people aiming at ends other than the establishment of the rule of law").

33. *See* Radin, *supra* note 17, at 782 ("[T]he main formulations of the Rule of Law do agree upon an assumption that law consists of rules . . . .").

34. *See* Schauer, *supra* note 25, at 167-68 ("'the rule of law' is at least linguistically compatible with law not being an affair of rules").

principles for maintaining the rule of law. We can only guess, with very large consequences for human welfare hanging on our skill and luck. But it is a good guess that reliance on rules will, in general, better maintain the rule of law than will reliance on principles.

Accordingly, a legal system should have, at a minimum, a very strong presumption in favor of governance by rule. And as a prima facie matter, the same considerations that lead actors in a rational legal system to prefer primary rules of conduct to case-by-case, all-things-considered decision-making should lead them to think long and hard before choosing principles rather than rules as the secondary device for addressing primary adjudicative indeterminacy.

Of course, not all rules are desirable simply because they are rules. Indeed, the all-or-nothing character of rules can be an affirmative vice if the content of the rules is substantively evil. Even the rule of law is valuable only when the system of rules that it embodies is morally acceptable. For example, a primary rule that says "Kill all Jews" is an unmitigated human evil and should not be followed, regardless of the consequences for the rule of law. Similarly, a secondary rule stating that when primary rules fail to resolve the dispute, the adjudicator should decide in favor of whichever party has religious beliefs that the adjudicator most prefers would be hard to defend. The case for rules, and for the rule of law, is presumptive. But the presumption is an exceedingly strong one. Even a merely plausible secondary rule for resolving adjudicative indeterminacy starts out with a very strong lead over even the most attractive competing set of principles, and there are plenty of plausible secondary rules that neatly handle the adjudicative indeterminacy problem.

Here is one: when primary rules are indeterminate with respect to an issue, the party seeking to invoke the machinery of the legal system with respect to that issue loses. In other words, legal indeterminacy can be handled by a simple, straightforward allocation of the burden of proof. He who legally asserts loses if the truth value of the legal assertion is indeterminate.

To avoid any confusion, let me make clear that I am not taking any position on the amount of indeterminacy that nay particular set of primary rules will generate or on the standard of proof that a legal system should impose on its primary rules.[35] As I have elsewhere argued at length,[36] indeterminacy is a function of two contingent variables: uncertainty and the standard of proof. The amount of uncertainty in a set of primary rules depends on the depth and clarity of the rules, and the standard of

35. I have elsewhere suggested that the legal system ought generally to require legal propositions to be proved beyond a reasonable doubt. *See generally* Gary Lawson, *Proving the Law*, 86 Nw. U. L. Rev. 859 (1992). Larry Alexander has criticized this suggestion. *See generally* Larry Alexander, *Proving the Law: Not Proven*, 86 Nw. U. L. Rev. 905 (1992). My present argument is agnostic on the proper standard of proof for legal propositions.

36. *See generally* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J.L. & Pub. Pol'y 411 (1996).

proof—the degree of confidence that one must have in a legal proposition before accepting it—is something that every legal system must determine as a normative matter in each context.[37] Accordingly, the amount of indeterminacy in any given legal system is wholly contingent on these variables. My argument here assumes that there is some measure of indeterminacy (we need not say how much) in the application of the primary rules and prescribes a method for resolving disputes in the face of such primary indeterminacy.

A burden of proof rule for resolving issues when the primary rules are indeterminate yields complete adjudicative determinacy. When the law—the set of primary rules—is indeterminate, the party that is relying on a legal proposition whose truth depends on those rules loses. The only possible complication is that it may not always be easy to determine who is "relying" on a legal proposition. For example, in a quiet title action, there may be many possible claimants who are all claiming title to the property based on different theories of ownership. Who bears the burden of proof in this circumstance? Any possible indeterminacy in the application of the secondary burden of proof rule, however, can be handled by one further rule that is wholly opaque: when in doubt, don't. In other words, the legal system should have a presumption of inaction, and when neither the primary rules nor the secondary burden of proof rules give an answer, the legal system should simply refuse to act on behalf of any party.

Such a set of rules achieves complete adjudicative determinacy without resort to principles. It does so with all of the virtues of rule-based decisionmaking, and it is morally attractive, as it embodies a basic libertarian presumption against coercion and in favor of human liberty. At a minimum, it is not so morally outrageous that one should instead prefer principles. In any event, my point here is not to argue for a burden of proof rule as the best rule for resolving primary adjudicative indeterminacy, but only to argue that there is at least one such rule that is superior to reliance on principles, and that reliance on principles to solve adjudicative indeterminacy is therefore unnecessary and undesirable.

Whenever we use principles, we are not using rules. Whenever we are not using rules, there is a very good chance that we are subtly but systematically—and perhaps irretrievably—undermining the rule of law. Accordingly, one needs to have a very compelling reason for using principles rather than rules. Adjudicative indeterminacy is not such a reason. For handling adjudicative indeterminacy, all you need is rules; rules is all you need.

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37. All else being equal, the higher the standard of proof to which a legal system holds legal claims, the greater the amount of indeterminacy. For example, if the standard of proof is beyond a reasonable doubt, there will surely be many claims in any legal system which fail to satisfy that standard of proof. On the other hand, if the standard of proof is simply that a claim must be better than the available alternatives, there will be indeterminacy only in the very rare cases when one can honestly say that no answer is better than others.