

DWORKIN AND HART ON “THE LAW”: A POLANYIAN RECONSIDERATION

Ira H. Peak, Jr.

INTRODUCTION

It is the purpose of this paper to propose and defend a potential resolution of a long-standing conundrum in the philosophy of law. The conundrum is posed by the conceptual impasse emerging from the debate between H.L.A. Hart and Ronald Dworkin over the nature of “the law.” The paper is developed in three sections. The first contextualizes the debate between these giants in the field of jurisprudence. The second section develops in some detail the positions of each thinker on this central issue in legal philosophy ? the “rules” approach of Hart and the “principles” approach of Dworkin. This section also sharpens these differences in terms of the broader issues which their debate poses for the larger field of philosophy of law. A third section proposes a Polanyian model for reconsidering this apparent impasse. The model develops an approach to decision-making in terms of “universal intent.” The paper’s conclusion seeks to establish that this model can be applied to the philosophy of law and effectively forge a compromise between the competing views of Hart and Dworkin.

I.

Perhaps the simplest way to contextualize the Hart-Dworkin debate is to sketch (all too) briefly the poles between which each sought to position himself, i.e. natural law theory (exemplified preeminently by St. Thomas) and “legal positivism” (articulated classically by the 19th century British jurist John Austin).

In *Summa Theologica*, St. Thomas organizes his discussions of “the nature of law” around his notion of “natural law.” Law, in this view, is universal because it springs from reason possessed by all people. It is this natural law that shapes the positive law of which we ordinarily speak in referring to “the law.” Positive law stands in contrast both to natural law and to divine law, and the relations among the three in the ordering of human life are explained by St. Thomas. In this connection the question of special importance is whether (and in what way) human law is derived from natural law.

Positive law, for St. Thomas, is determined by the natural law for the common good. It is binding upon the conscience, because it is just. The “angelic doctor’s” concept of law, then, is of an ideal to be found in laws. It is absent when unjust exercise of power produces laws in name only. For the most part these need not be obeyed. St. Thomas’s views on law and morality actually anticipate more modern views regarding conscientious objection to unjust laws. For, on his understanding, only moral wrongs that are socially significant, such as harm to others, properly concern the law.

John Austin's work in jurisprudence has long been regarded in the Anglo-American tradition as the leading work in opposition to natural law theory. Austin seeks to define positive law, and this he does by distinguishing "laws properly so called" from other law-like utterances and other things called laws.

Laws properly so called turn out to be "commands" requiring conduct; and some, called positive laws, issue from a sovereign to members of an independent political society over which sovereignty is exercised. Commands entail a purpose and a power to impose sanctions on those who disobey; a sovereign is a determinate human superior (that is, one who can successfully compel others to obey) who is not in a habit of obedience to such a superior and who also receives habitual obedience. An independent political society, then, is one in which the bulk of society habitually obeys a sovereign.

Accordingly, Austin's "legal positivism" sees the issue of "the law" reducing to the issue of who sets the rule (i.e. "command") and how the command is enforced (i.e. by force or threat of force). Oversimplified, and crudely so, Austin sees the operative principle in determination of "the law" as something like, (successfully and effectively exercised) "might makes (properly "legal") right."

Hence, whereas for St. Thomas positive law could be said to be grounded, in some sense, axiologically, for Austin law's only "grounding" is the effective exercise of power to enforce commands. Stated alternatively, while St. Thomas defines the law in terms *de jure*, Austin does so in terms *de facto*.

II.

As one might suppose, much of the literature in this domain of the philosophy of law has been given over to attempts to define mediating positions between these "extremes." Two such mediating views are articulated by Hart and Dworkin.

The work now generally regarded as the most important twentieth century statement of the positivist position in the Anglo-American tradition is H.L.A. Hart's book, *The Concept of Law* (Hart, 1961). In it, Hart does not seek to defend a narrow, partisan tradition, but rather departs from Austin's version of positivism by undertaking a broad reexamination of the fundamental questions of jurisprudence, clarifying them and securing their importance.

Hart's analysis of the concept of law is based on several interrelated ideas (See especially Hart, 1961, "Law As the Union of Primary and Secondary Rules," pp. 77ff). He maintains that a legal system—in contrast to a set of unrelated laws—consists of a union of primary rules of obligation and secondary rules. The most important secondary rule, which Hart calls "the rule of recognition," specifies the criteria for identifying a law within the system (e.g. the United States Constitution). Other secondary rules specify how primary rules are changed or modified and when primary rules have been violated.

Furthermore, in distinguishing primary rules of obligation from secondary rules, Hart takes the position that there is at least one type of law that imposes an obligation (Hart, 1961, p. 80ff). This type tells citizens that they must not do this or must do that. Raising the crucial question of what an obligation with respect to legal rules means, Hart rejects the idea that to say that law imposes an obligation is merely to assert a prediction (about likely behavior of

citizens). Nor does he accept the view that laws imposing an obligation are simply coercive orders.

Hart (1961, p. 84ff) attempts to provide a general analysis of obligation in terms of social pressure. He sees this analysis as clearly distinguishing his view from those of Austin and other positivists.

Finally, in order to understand secondary and primary rules and the obligation the law imposes, Hart (1961, pp. 86-87) insists that the point of view of people who follow and apply the law must be considered. In particular, he emphasizes the importance of an internal point of view of the law – that is, the point of view of those who operate within the law rather than of external observers of the law. So, according to Hart (1961, p. 88ff), a legal theorist who wishes to understand a legal system must view the legal system from the point of view of an actor *in* the system. In Wittgenstein’s categories, perhaps, we might say that Hart views the legal system as a “form of life,” rather than merely as a formal system.

How then, one might inquire, do Hart’s notions of “law” and “legal system” impact the crucial issue of judicial interpretation? Clearly, he has moved away from a strict legal formalism, the view that legal interpretation is always simply the straightforward application of a legal rule to a case. Hart does believe that there are instances where this formalist approach is appropriate, but he denies that it always is. Sometimes the judge must exercise discretion, and a mechanical application of rule to case is impossible.

Note the difficulty which this issue poses for a legal positivist who is equally displeased with a natural law form of “legal foundations” and the extreme position of rule skepticism (the notion that judges always have wide discretion and that the application of rules to cases plays no significant role in judicial decision). I will return to this issue a bit later. For the present, I will merely note that across the years Hart’s position on this issue has undergone change. To be fair, therefore, I will attempt to characterize his position on judicial interpretation in terms of his mature thought on this problem, some of which has evolved in his ongoing debate with Ronald M. Dworkin.

Dworkin, the most famous critic of Hart’s theory of judicial interpretation, was Hart’s successor to the Chair of Jurisprudence at Oxford University. Against Hart, Dworkin maintains that even in unclear cases there is always one correct decision, although what this decision might be is unknown. In addition, Dworkin argues that a judge’s decision in unclear cases is characteristically determined, and should be, entirely by principles specifying rights and entitlements. But I am here getting ahead of myself. I must first summarize in more specific terms exactly how Dworkin’s position differs from Hart’s.

Professor Ronald Dworkin has presented a fascinating critical tool in philosophy of law for critiquing legal positivism, i.e., his notion of “legal principles” (Dworkin, 1986 a, p. 153ff). He describes principles as “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality” (153). He argues that the difference between “principles” and “rules” is (1) “logical” (154); (2) related to the fact that principles (not rules) differ in their “weightiness” (156); but (3) not always recognizable from their form (156).

Although “principles” are sometimes well-established (for example, by judicial precedent), at times they do not become established until there is adjudication of “hard cases” (157). Yet these *principles* become (indeed are used for) the justification of decisions in cases, which (in turn) become *rules* of law (157).

Although Dworkin defends his concept of “legal principles” with explicit intent and systematic vigor in “The Model of Rules,” the nature and subtlety of his position emerges more clearly from his more popular article “On Not Prosecuting Civil Disobedience” (Dworkin, 1968). For our purposes here, however, the foregoing summary of Dworkin’s position will suffice.

It would appear that the net effect of Dworkin’s firm opposition to legal positivism is a kind of conundrum for philosophy of law. On the one hand, Dworkin is able to demonstrate that the “rules” (or “pedigree”) approach of H.L.A. Hart to “certifying” valid positive law does not account for the presence of (and appeal to) “principles” (not reducible to “rules”) within jurisprudence. Indeed, it does appear that “principles” in fact play a role in some judges’ arriving at decisions, interpreting their reasoning, and justifying their claims.

On the other hand, Dworkin is unable to identify all such principles (since some remain unnoticed/undiscovered until a judge is forced to rule on a “hard case”). Moreover, he cannot specify their status, although he believes quite clearly that they are “legally binding” upon judges in making rulings or handing down decisions.

Hence, the conundrum. It would appear that there is a functioning critical apparatus at work within our legal system (and, perhaps, beyond), the legal status of which cannot be established.

In “On Not Prosecuting Civil Disobedience,” Dworkin does at least begin to lay bare why this anomaly exists. He argues that there is what he calls “doubtful law” (Dworkin, 1968, p. 15ff), law the validity of which is in dispute (or is otherwise suspect). “In the U.S., at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful? if not clearly invalid? on constitutional grounds as well. The constitution makes our conventional political morality relevant to the question of validity: any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also” (1968, p. 16). Moreover, Dworkin believes that in draft resistance cases of the late 1960’s, the connection between moral and legal issues were made especially (even starkly) clear.

Draft dissenters, in Dworkin’s view, were not asserting a privilege to disobey valid laws. They believed firmly that the laws being broken were unconstitutional. Under these conditions, it is not always clear how such dissenters in a complex society are to “play the game” (1968, p. 17). This metaphor is ironic. It is the legal positivists who have relied heavily on images and metaphors like “playing a game” to emphasize the law’s rule-like character and process. Yet, Dworkin has presented a challenge, asking now what (or whose?) move is next. (For a detailed examination of these issues in a format comparing Hart and Dworkin, see Soper, 1984.)

How then does Hart’s position respond to Dworkin’s challenge? We must recall that Hart sees law as an institution within a larger social system. It is a form of rule-making, rule-applying, and rule-enforcing behavior. These rules do indeed have connection to morality, both in origin (on occasion) and in interpretation, as well as in application and enforcement. This overlapping of differing kinds of rules? in this case moral ones and legal ones? does not imply the dependence of one upon the other in any “ultimate” sense, any more than other social rules (e.g. “rules of etiquette”) might be (Hart, 1986, p. 82). What alternative, then, does Hart offer for explaining the “foundations” of law? Hart introduced the notion of “rules of recognition” (Hart, 1961, p. 94).

The “rule of recognition” is a secondary rule used to identify primary rules of obligation (1961, p. 94ff). This rule of recognition is more complex in modern legal systems where there are a variety of “sources” of law (1961, p. 97ff). The relationship of one set of rules to the other is one of “relative subordination,” not derivation.

In his more mature thought, Hart has broadened his concept of “rules” applied by judges in their decisions to embrace “legal standards” (Soper, 1984, pp. 7-9). Although Hart now believes that these legal standards constrain a judge’s decision in unclear cases, he maintains that there may be alternative decisions in such cases that are equally justified in terms of these standards. In Dworkin’s view, Hart’s position remains truncated and unsatisfying.

Hence, the conundrum cited above remains. It can be summarized as follows. If Hart’s positivist account of the nature of “the law” ? a system of primary and secondary rules, validated by a (secondary) “rule of recognition” and supplemented by emerging “legal standards” in the process of judicial interpretation ? is accepted, his approach seems unable to account for the role played by principles in many judicial decisions, especially “hard cases.” If, by contrast, Dworkin’s claims ? that some principles appealed to in judicial decisions and opinions are in fact “legal principles” and “obligatory” for judges to follow ? are accepted, then it would seem that he should be able to identify these principles or to state how they are themselves justified or validated. But, alas, he cannot. How then is “the law” to be related to “principles”?

It would appear that the impasse reached by Hart and Dworkin remains. Yet, there may be another alternative. The key to identifying that alternative may be lurking in Dworkin’s characterization of judicial decisions in “hard cases.” Dworkin admits that judges sometimes face cases where the “right” principle of law (to which appeal should be made in determining the case) is not known. Not only is it not known by the particular judge presiding; but it is not known by anyone else as well! In fact, says Dworkin, it is only when such hard cases are adjudicated that a judge’s attention can be directed to that principle (which is the right principle). In other words, it is only in the judicial process itself that some such principles emerge. They are actual, but previously unrecognized, principles of law. The principle for deciding the case rightly, it would seem ? given this characterization, is present only *tacitly*, not *explicitly*.

Yet, this hypothesizing takes us outside the parameters of either Hart’s position or Dworkin’s. To develop a model, then, for moving beyond their conundrum, I propose that we consider a model for decision-making developed from the thought of Michael Polanyi.

III.

The model to be developed here out of Polanyi’s thought was anticipated in, and suggested to me by, a paragraph from Richard Gelwick (Gelwick, 1977, pp. 127-128). Following Carl Friedrich’s analysis (Langford and Poteat, 1968, pp. 91-110), Gelwick suggests a new possibility for discussing natural law. “Even though Polanyi does not discuss natural law, his grounding of cultural values in a society of universal intent suggests a `natural law theory in human nature’” (Gelwick, 1977, p. 127). “His (Polanyi’s) thought, therefore, bears *a fortiori* upon the enterprise and its interpretation of attempting to embody justice in law . . .” (Friedrich, from Langford and Poteat, 1968, p. 92).

In the analysis which follows, I will develop a model of decision-making which parallels, in some respects the position articulated by Friedrich; but it is not dependent upon his notion of “natural law.” Hence, while being appreciative of Friedrich’s illuminating insights, I have developed a model which is independent of his and more closely tied to the phenomenology of moral experience than to the venerable history of natural law theory. (I have developed the connections between a Polanyian model for decision making and the phenomenological analysis of moral experience more explicitly in an unpublished paper, “Can a Moral Judgment be Both Contextual and Objective?”)

Taking the conundrum bequeathed to the philosophy of law by Hart and Dworkin as our point of departure, I ask that you recall the plight of the judge hypothesized above, who must decide a “hard case” in which the strict application of rules will not suffice. Moreover, he or she may not have access even to a specific principle of law, because the “right” principle has not yet been articulated (or otherwise discovered) in the history of judicial interpretation. Yet, in order to become the basis for the adjudication of the case at hand, the judge must appeal to a *legal* principle, one derived from, and inherent in, the body of existing law (both legislated and interpreted).

Since what is called for, then is a kind of “discovery,” on the part of our hypothetical judge, I would direct your attention back to Polanyi’s discussion of that issue in *Science, Faith and Society*. You will recall that “discovery” is described by Polanyi there as a process ? which he summarizes in the four words “Preparation, Incubation, Illumination, and Verification” ? a process not unlike consistent efforts at “guessing and experimenting,” in creating a work of art, . . . solving riddles, inventing practical devices, . . . diagnosing of an illness,” and perhaps, prayerfully “searching for God” (Polanyi, 1964 b, p. 34). Rather than attempting merely to “achieve results,” the scientist is attempting to make contact with reality. Therefore, the guiding and constraining force by which he/she seeks and sorts evidence must be his/her own conscience-- since there are not set rules for procedure to which he/she can appeal for validation of his/her choices and conclusions.

Polanyi devotes the balance of this work (*SFS*) to showing how the community of scientific discovery and inquiry protects its tradition against mere subjectivism and blatant error and to describing the necessary freedom under which science must operate to prohibit the encroachment of either skepticism or totalitarianism. He is concerned to show that the loyalty of scientists to the discovery of truth for its own sake must not be abdicated to the transient interests of any lesser authority.

Polanyi notes that the seemingly subjective judgements of scientists are guided by the premises of science which are twofold. These are (1) “naturalistic assumptions concerning the nature of every day life;” and (2) “more particular assumptions underlying the process of scientific discovery and verification” (Polanyi, 1964 b, p. 42). These premises are learned and passed on to succeeding generations of scientists in the manner of artistic tradition and practice. Hence, there is not a set of cold facts which can be captured in language and memorized by the novice in science. He or she must be guided beyond techniques and principles to a grasping of reality, whereby his/her own judgement can become operative in both assessment of data and recognition of problems.

In a similar vein, Polanyi demonstrates the way in which mutual discipline in the scientific community protects against the admission of error into premises and tradition. He does so by indicating the kind of self-government in science which exercises the authority of scientific opinion. He summarizes thus, “It is clear enough then that the self-governing institutions of science are effective in safe-guarding the organized practice of science which embodies and transmits its premises” (1964b, p. 50). He argues that the functions of these institutions are mainly protective and regulative and based themselves on a “general harmony of views among scientists.” This general harmony is seen as growing out of a common tradition in science, as being maintained by the acceptance of mutual bonds of loyalty to scientific ideals, and as depending ultimately on the common exercise of scientific conscience. There can be no appeal for validity in scientific inquiry, other than to scientific opinion itself, without jeopardizing the entire scientific enterprise. The kind of authority operative in the scientific community demands not obedience ? but freedom.

The exercise of decision by which new theories are to be screened and competing theories evaluated must not be usurped.

There are divisions among scientists, sometimes sharp and passionate, but both contestants remain agreed that scientific opinion will ultimately decide right; and they are satisfied to appeal to it as their ultimate arbiter . . . A common belief in the reality of scientific ideals and a sufficient confidence in their fellow scientists' sincerity resolves among scientists the apparent internal contradiction in the conception of freedom. It establishes government by scientific opinion, as a General Authority, inherently restricted to the guardianship of the premises of freedom (1964 b, p. 63).

Hence, Polanyi can affirm that the goal of scientific inquiry must never be exclusively utilitarian. Rather, its goal must be the discovery of the truth to which it is committed. This can be done only within the context of a society which guarantees the freedom and encourages the dedication of its members to the pursuit of transcendent obligations, "particularly to truth, justice and charity" (1964 b, p. 85).

Nevertheless, Polanyi's belief that knowledge is grounded in personal and tacit commitments does not mean that he thinks that "knowledge" is simply subjective. It is true that there is no such thing as perfect objectivity in knowledge. No perfect detachment, nothing perfectly explicit is possible ? even in the ideal case of knowledge.

The knower, however, is not thereby condemned to whimsical subjectivity, by the fact that his/her *intent* in knowledge is universal (Polanyi, 1967, pp. 77-78). The intent is inescapably universal, Polanyi thinks, because the quest for knowledge is a quest for an impersonal reality (Polanyi, 1964 a, p. 300ff) to suppose that one has found it is to suppose that others "similarly equipped," would also be able to find it (1964 a, p. 324). The knower, therefore, does make use of the rules and standards that he/she supposes to be universal, in the sense of being the "proper" ones for anyone to use (1964 a, p. 343). On Polanyi's view the scientific community functions as a kind of moral association of persons by exercising mutual authority. It welds tradition and freedom together in a pursuit of the truth. It upholds the personal, tacit component but also the universal intent of knowing. This touches the central nerve of Polanyi's epistemology. He is purposing nothing less than the attempt to overcome the split between the subjective and the objective, an attempt which is based on the distinction between

... the personal in us, which actively enters into our commitments, and our subjective states, in which we merely endure our feelings. This distinction establishes the conception of the *personal*, which is neither subjective nor objective. In so far as the personal submits to requirements acknowledged by itself as independent of itself, it is not subjective; but insofar as it is an action guided by individual passions it is not objective either. It transcends the disjunction between subjective and objective (1964 a, p. 300).

The mutual correlation between the personal and the universal within the framework of commitment, then, is the "solution" to the paradox of standards which are determined by personal commitment and belief. The answer to the objection to Polanyi's view that it implies that "you can believe whatever you like" is, quite simply, that you cannot, if you wish to be responsible within a community of universal intent.

While compulsion by force or by neurotic obsession excludes responsibility, compulsion by universal intent establishes responsibility . . . While the choices in question are open to egocentric decisions, a craving for the universal sustains a constructive effort and narrows down this discretion to the point where the agent making the decision finds that he cannot do otherwise. *The freedom of the subjective person to do as he pleases is overruled by the freedom of the responsible person to act as he must* (1964 a, p. 309).

It is in this limited sense, then, of what Polanyi has called “personal knowledge” that any scientific judgement can lay claim to being “objective.”

How, then, does this account of “discovery” and exercise of judgement underwrite a model of decision-making which could be employed by a judge deciding a “hard case”?

Both Polanyi’s scientist and the judge presuppose that the respective principles with which each is concerned are ultimately rooted in beliefs and commitments (ones foundational to scientific inquiry and the practice of jurisprudence, respectively). Yet, in the nature of the case (for each enterprise) these beliefs and commitments are nondemonstrable.

Moreover, each of these projects, in its own way, asserts that its judgements represent attempts to make contact with reality, based on informed perceptions of patterns or “shapes” in the real which manifest themselves to inquiry— whether the inquiry be into the observable behavior of phenomena or into “the facts of the case.” Each kind of judgement is informed by norms or principles embraced by a community of people who share mutual commitments (to the premises of science/to the rule of law) and universal intent (in the pursuit of truth/in the pursuit of justice). Each one’s judgements claim to be public and authoritative, even if they are original or novel; because they are made with universal intent and with the expectation of being ultimately vindicated within the community.

Lest one be inclined to decry this attempt to develop a model for decision-making out of Polanyi’s philosophy of science and epistemology, one which can apply to a judge’s interpretation of “the law,” I would remind you of Polanyi’s discussion of “systems of spontaneous order” and “systems of intellectual order” in the tenth chapter of *The Logic of Liberty* (Polanyi, 1951, p. 154ff).

The section of this chapter entitled “Systems of Intellectual Order” takes as its first example . . . the Law, and in particular Common Law” (1951, p. 162).

Consider a judge sitting in court and deciding a difficult case. While pondering his decision, he refers consciously to dozens of precedents and unconsciously to many more. Before him numberless other judges have sat and decided according to statute, precedent, equity and convenience, as he himself has to do now; his mind, while he analyses (sic) the various aspects of the case, is in constant contact with theirs. And beyond the purely legal references, he senses the entire contemporary trend of opinions, the social medium as a whole. Not until he has established all these bearings of his case and reasoned to them in the light of his own professional conscience, will his decision acquire force of conviction and will he be ready to declare it (1951, p. 162).

The operation of Common Law constitutes a “sequence of adjustments” ? both between succeeding judges and (as well) between the judges and the general public. “The result is the ordered growth of the Common Law, steadily reapplying and reinterpreting the same fundamental rules and expanding them thus to a system of increasing scope and consistency” (1951, p. 162).

In this process of discovery of legal principles “embedded” in the matrix of legal precedent, relevant law, facts brought to light by testimony in court, etc., Friedrich rightly affirms that in law, as in science, “. . . tacit knowing plays a decisive role. Polanyi’s insistence that `there are vast domains of knowledge that exemplify in various ways that we are generally unable to tell what particulars we are aware of when attending to a coherent entity which they constitute`, while written with scientific experiment in the foreground of attention, applied equally well to the law” (Langford and Poteat, 1968, pp. 103-104).

IV.

The forgoing analysis, utilizing the categories of Polanyi’s thought, indicates that there is, indeed, “. . . a functioning critical apparatus at work within our legal system,” the legal status of which we can now establish. (In so doing, we will demonstrate that the Hart-Dworkin conundrum is subject to resolution.)

The values of a society have a “fiduciary grounding” in the personal backing given to them “. . . by men who, moved as they are by moral and intellectual passions, perceive and uphold these values with universal intent within a convivial order” (Langford and Poteat, 1968, p. 91). Quite clearly, however, the embodiment of justice in laws and in judicial decisions is both necessarily incomplete and yet also achieved in part by more or less skillful judicial assessment.

These skillful feats, supported by moral and intellectual passions with universal intent, are accredited by and subject to the superintendency of the convivial order within which they are achieved and whose very basis is in turn precisely these same passions (Langford and Poteat, 1968, p. 92).

Hence, both Hart and Dworkin are right, but incomplete, in their interpretations of “the law.” Hart is correct that law is legitimated by appeal to secondary rules and a “rule of recognition.” Yet, as Dworkin rightly argued, some decisions regarding the nature of “the law” can only be settled by appeal to principles (not reducible to rules) within jurisprudence. It certainly appears that “principles” in fact play a role in some judges` arriving at decisions, interpreting their reasoning, and justifying their claims.

At the same time, we now can account for why Dworkin was unable to identify all such principles, as well as why some legal principles remain unnoticed or undiscovered until a judge is forced to rule on a “hard case.”

Important legal principles implicit within the legal framework of legislation, judicial interpretation, etc., are present only tacitly. The principles are present and operative within the jurisprudential community, a community of universal intent. In certain “hard cases,” one or more members of the community are forced (by the incompleteness of explicit case law) to render a decision which requires the application of the tacitly held principle. Under these conditions, that which is “tacit” becomes the object of focal awareness. Accordingly, the “right legal principle,” thus discovered, was present all along.

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