

vis the weight of competing values, including the value of following democratically enacted rules. Alexy departs from Dworkin —who distinguishes principles from collective goals (policies)—by treating both as principles, the realization of which is to be optimized. How do principles become part of the law on Alexy's account? Alexy nowhere suggests that, as Dworkin contends, legal principles emerge from the mating of legal rules and legal decisions with moral principles — that is, that legal principles are the most morally acceptable principles that “fit” (to an unspecified degree) with the extant legal rules and decisions.

That leaves on the table the possibility that legal principles are posited by lawmaking acts intended to bring those principles into the law. Again, there are two ways principles might be deliberately made part of the law. First, lawmakers might wish to incorporate real moral principles into the law, either in legal standards, or as necessary or sufficient conditions for legal validity. Second, lawmakers might wish to create principles and enact their own creations. To repeat what I said earlier, real moral principles incorporated into standards are hemmed in by rules and subordinated to those rules and to judicial decisions regarding the content of the moral principles. They are thoroughly domesticated and incapable of undermining the settlement function of law —although they do nothing to further it. However, law's settlement function is undermined when real moral principles are incorporated as necessary or sufficient conditions of legal validity but are not subordinated to posited rules and judicial decisions.

In any event, Alexy provides ample evidence that incorporation of real moral principles is not what he is envisioning in the positing of legal principles. For example, he mentions the possibility of positing morally obnoxious principles, such as the “principle” of racial segregation. Obviously, that is not a real moral principle, a principle that true morality contains. Nor is the principle, cited by Alexy, of the “maintenance and support of the manual arts” likely to be a real moral principle rather than, at most, a relevant consideration under some general moral theory.

In still other passages, Alexy speaks of enactment of a principle. I conclude, therefore, that Alexy views legal principles and their weights as capable of being created by deliberate enactment (as opposed to being incorporated from an independent moral realm).

If I have read Alexy correctly, then his position is subject to my earlier critique of the direct enactment of legal principles. Weight cannot be enacted. There may be moral principles that have that dimension; that would depend on whether the best moral theory is one in which there is a plurality of principles that are not lexically ordered. And a complex rule with a number of qualifications and conditions on its application may mimic the dimension of weight. But real weight —and hence legal principles—cannot be enacted. Both direct and indirect enactment of principles with weights are impossibilities. Therefore, there are no legal principles. If that is true, then when courts purport to decide cases by alluding to legal principles and their relative weights, they are making it up. There is no independent realm of legal principles and their weights to which they can be referring.

Well, one might ask, what about legal standards —legal norms that are not determinate rules? Do standards not require judges to fill in their requirements? I would answer that standards do require judges to fill in their requirements, but to fill them in by consulting reasons that preexist the legal system, most notably, moral reasons. A standard essentially instructs the judge to do what is morally