

creature, and its inventor hasn't given me this information —so how would I know?" The same applies to invented rights not embodied in determinate rules.

My point is this: Rights that do not exist in the moral realm can only be created through and fully embodied in determinate rules. The enactment of nondeterminate "principles" that are supposed to function as weighty considerations cannot create rights and their weights, if those rights and weights have no pre-enactment existence. Put differently, there are no legal principles, legal norms that are neither determinate rules nor references to preexisting moral principles. If incorporation of actual moral principles is not what the enactment of legal principles represents, can legal principles be created merely through enactment? The answer is "no." For there is no way to "create" by an act of human will a real principle, namely, a norm that is not a determinate rule with a canonical formulation but is instead a norm that possesses weight. Again, real moral principles are themselves not human creations. To see that this is impossible, assume that there is, in the moral realm, no free speech principle. Then put yourself in the position of the lawmaker who wishes to create a free speech principle. How can he accomplish this (again, keeping in mind that there is no such moral principle for him to refer to and incorporate by reference). He could, of course, write out a set of instructions for how to apply the "principle," but in that case he will merely have reduced it to a rule with canonical form that is either applicable or inapplicable but lacks weight. And I see no way that lawmakers can create weight, except by issuing instructions for how the principle applies in every conceivable case—which is not only impossible, but if possible would just be the enactment of a weightless rule, albeit an infinitely lengthy and complex one.

If I am correct, then direct enactment of legal principles is not an option. If lawmakers believe that they are enacting legal principles, they are mistaken. If, for example, there is no free speech principle in the moral domain available for incorporation in the legal domain, then enacting a free speech principle is an impossibility, and lawmakers who believe that is what they are doing must be doing something else.

I take no position here on whether real moral principles actually have weight, or whether instead they are complex algorithms whose complexity is taken for weight. (I lean heavily toward the latter position.)

In a recent essay, Tara Smith argues that when lawmakers refer to "concepts" in their enactments, the meaning those concepts possess is not the list of things the lawmakers had in mind, nor is it the criteria the lawmakers were employing in constructing that list. Rather, the meaning of such concepts is the things in the world that the concepts themselves pick out. So when the lawmakers use terms like "cruel," "speech," or "equal protection" in the laws they enact, correct interpretation requires looking not at what the lawmakers meant by those terms but at what sorts of things in the world are really cruel, speech, or equal protection. See Tara Smith, "Why Originalism Won't Die: Common Mistakes in Competing Theories of Judicial Interpretation." I do not want to get into the deep waters of what concepts are and what the relationship is between words and concepts, between criteria and concepts, or among natural, artifactual, and fictional kinds as they relate to concepts. (Is there an "objective" concept of, say, a unicorn or a table that possibly differs from users' criteria?) I want to restrict my comments here to the kinds of concepts that Smith uses as her examples. For one might be tempted to believe that these are what legal principles are: that is, legal principles are the normative concepts referred to in legal enactments.