empowerment to issue norms. Then the possible objection disappears that it is unjust in the extreme to empower one single person to issue norms without constraint. The empowering norm as such, given this presupposition, would not be unjust in the extreme. Only a partial class of its progeny is. That means, however, that the 30 per cent of norms that are unjust in the extreme do not lead to a forfeiture of legal character on the part of the empowering norm as such,[121] and the legal system as a whole does not collapse.

For the record, then: applying the argument from injustice to a legal system as a whole does not lead to consequences that go beyond the consequences of applying the argument to individual norms.[122]

(iii) The Argument from Principles

The argument from injustice focuses on an exceptional situation, that of the statute that is unjust in the extreme. The argument from principles is addressed to the everyday life of the law. Its point of departure is an insight of legal method agreed upon by positivists and non-positivists alike. As Hart puts it, every positive law has 'an open texture'.[123] There are several reasons for this. Of special significance are the vagaries

[121] It is typical that the Federal Constitutional Court, in its *Concordat* decision, does not mention the problem discussed here. Rather, it restricts itself to the inverse question, namely, whether all norms based on the Enabling Act of 24 March 1933 are necessarily to be seen as valid law. The Court answers in the negative: 'Simple recognition of the new system of competence says nothing about whether the statutes and ordinances issued on its basis can be recognized as valid law. For that, what is at issue is their *content*. They cannot be recognized as valid law if they contravene the essence and the possible content of the law.' *BVerfGE* 6 (1957), 309, at 331–2 (emphasis in original).

[122] The character of the legal system as a whole is of significance in a different respect, namely, that of the recognition of states and governments under international law. At issue here is the collision between the principles of effectiveness and legitimacy, with the former predominant in both the theory and the practice of such recognition. See e.g. Knut Ipsen, *Völkerrecht*, 3rd edn. (Munich: C. H. Beck, 1990), at 237.

[123] Hart, *CL* 124, 2nd edn. 128.

of legal language, the possibility of norm conflicts, the absence of a norm on which to base a decision, and, in certain cases, the possibility of making a decision even contrary to the literal reading of a norm.[124] One can speak here of an 'open area' of the positive law, which may be more or less broad, but which exists in every legal system. A case that falls within the open area shall be called a 'doubtful case'.

From the standpoint of positivistic theory, this phenomenon can be interpreted in only one way. In the open area of the positive law, one cannot, by definition, base a decision on the positive law, for if one could do that, the case would not be in the open area. Since only the positive law is law, the judge must decide in the open area, that is, in all doubtful cases, on the basis of non-legal or extra-legal standards. Accordingly, he is empowered by the positive law to create new law essentially as a legislator does, on the basis of extra-legal standards.[125] Over a century ago, John Austin put it into words this way: 'So far as the judge's *arbitrium* extends, there is no law at all.'[126]

By contrast, the argument from principles says that the judge is legally bound even in the open area of the positive (issued and efficacious) law, indeed, legally bound in a way that establishes a necessary connection between law and morality.[127] This is reflected in the decision mentioned above in the context of judicial development of the law, where the Federal Constitutional Court says: 'The law is not identical

[124] Alexy, *TLA* 1.

[125] See e.g. Kelsen, *PTL*, at § 46 (pp. 353–5).

[126] Austin, *Lectures* vol. 2, 664 (Austin's emphasis).

[127] In this sense, see also Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Vienna and New York: Springer, 1982), at 289–90, who calls his argument a 'methodological argument'; similarly Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), at 87, 410, who conceives of law in terms of interpretation: 'Law is an interpretive concept.' See Claudia Bittner, *Recht als interpretative Praxis* (Berlin: Duncker & Humblot, 1988), at 20–5; Marc Maria Strolz, *Ronald Dworkins These der Rechte im Vergleich zur gesetzgeberischen Methode nach Art. 1 Abs. 2 und 3 ZGB* (Zurich: Schulthess Polygraphischer Verlag, 1991), at 98–118.

with the totality of written statutes. As against the express directives of state authorities, there can be in some circumstances a greater law . . .'.[128]

The argument from principles is based on the distinction between rules and principles.[129] Rules are norms that, upon satisfaction of the conditions specified therein, prescribe a definitive legal consequence, that is, upon satisfaction of certain conditions, they definitively command, forbid, or permit something, or definitively confer power to some end or another. For simplicity's sake, rules may be called '*definitive commands*'. The characteristic form of their application is subsumption. By contrast, principles are *optimizing commands*. As such, they are norms commanding that something be realized to the greatest possible extent relative to the factual and legal possibilities at hand. This means that principles can be realized to varying degrees and that the commanded extent of their realization is dependent on not only factual potential but also legal potential. The legal possibilities for realizing a principle, besides being determined by rules, are essentially determined by competing principles, implying that principles can and must be balanced against one another. The characteristic form for applying principles is the balancing of one against another.

This theoretical distinction between norms as rules and as principles leads to a necessary connection between law and morality by way of three theses: the 'incorporation thesis', the 'morality thesis', and the 'correctness thesis'. The necessary connection that can be established with the help of these theses is, first, a conceptual connection, second, simply a qualifying connection, not—as the argument from injustice has it—a classifying connection, and it exists, third, only for a participant in the legal system, not for an observer of the legal system.

[128] *BVerfGE* 34 (1973), 269, at 287.

[129] On this theme, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), at 14–45; Alexy, *TCR*, at 44–110; Jan-Reinard Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), at 52–87.

(a) The Incorporation Thesis

The *incorporation thesis* says that every legal system that is at least minimally developed necessarily comprises principles. In a fully developed legal system, such an incorporation is readily apparent, and the legal system of Germany offers an instructive example. The German Basic Law or Constitution, in affirming the principles of human dignity,[130] liberty,[131] equality,[132] the *Rechtsstaat* or rule of law, democracy, and the social state,[133] has incorporated into the German legal system, as principles of positive law, the basic principles of modern natural law and the law of reason and thereby the basic principles of modern legal and state morality. The same may be said of all legal systems affirming democracy and the *Rechtsstaat*, notwithstanding varying techniques for incorporating principles and different assessments of them.

No positivist will challenge this, provided he accepts that, alongside rules, principles can also belong to the legal system. What he will challenge, however, is that the result is some conceptually necessary connection between law and morality. Several arguments are available to him. One is that it is exclusively a question of positive law whether or not any principles at all are incorporated into a legal system.[134] Were this correct,

[130] *GG* art. 1, para. 1: 'Human dignity is inviolable. To respect and protect it is the duty of all state authority.'

[131] *GG* art. 2, para. 1: 'Everyone has the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral law.'

[132] *GG* art. 3, para. 1: 'All persons are equal before the law.'

[133] *GG* art. 20, paras. 1–3: (1) 'The Federal Republic of Germany is a democratic and social federal state. (2) All state authority emanates from the people. It shall be exercised by the people through elections and voting and by specific legislative, executive, and judicial organs. (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by statute and law' (trans. altered). *GG*, art. 28, para. 1: 'The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social state under the rule of law, within the meaning of this Basic Law' (trans. altered).

[134] Hoerster, *LR* 186; Hoerster, *VR* 2481.

the argument from principles would be defeated in the very first round. It could at best still claim that a connection established by the positive law exists between law and morality. This would be compatible with legal positivism, for the positivist does not deny that the positive law, as Hoerster puts it, 'can guarantee that morality be taken into account'.[135] What the positivist does insist upon is simply that it is up to the positive law to decide whether or not morality is to play a role.

Is it, then, that not only some legal systems, on the basis of positive law, comprise norms structured like principles, but, rather, that all legal systems necessarily comprise norms structured like principles? This question shall be answered from the perspective of a participant, namely, a judge who is to decide a doubtful case, that is, a case that falls within the open area of the legal system and so cannot be decided on the basis of preset authoritative material alone. A criterion for whether or not the judge appeals to principles for support is whether or not he undertakes to strike a balance. The following proposition seems to be true: In undertaking to strike a balance, one necessarily appeals to principles for support. For it is necessary to strike a balance precisely when there are competing reasons, each of which is by itself a good reason for a decision and only fails to lead directly to a definitive decision because of the other reason, calling for another decision; reasons like this are either principles or supported by principles.[136]

[135] Hoerster, *LR* 186.

[136] Günther claims that the distinction between rules and principles ought not to be understood as a distinction between two types of norm, but, rather, solely as a distinction between two types of norm application. See Klaus Günther, *The Sense of Appropriateness*, trans. John Farrell (Albany, NY: State University of New York Press, 1993), at 212–19. By way of rejoinder, it should be pointed out that a model depicting the distinction between rules and principles at the level of norms as well as at the level of application is more comprehensive. Such a model can explain, for example, why a certain type of application takes place. In any case, one cannot forgo the distinction between rules and principles, for only with its help can one adequately reconstruct concepts like the concept of restricting a right. See Alexy, *TCR*, at 178–222.

A positivist can concede this point and still challenge the view that what follows from it is that principles are included in all legal systems in which judges undertake to strike a balance in doubtful cases. The positivist may claim that the simple fact that balancing is undertaken does not mean that the principles being balanced against one another belong to the legal system. They are simply moral principles, he may argue, or principles to be qualified in some other way, and the requirement of balancing one against another is an extra-legal postulate, not a legal one. A response in support of the argument from principles is that, for a participant, the legal system is not only a system of norms qua results or products, but also a system of procedures or processes, and so, from the participant's perspective, the reasons taken into account in a procedure—here, the process of making a decision and justifying it—belong to the procedure and thereby to the legal system.

An opponent of the argument from principles need not rest content with this point either. He may object that the simple fact that the judge takes into account certain reasons, namely, principles, in the process of making a decision and justifying it need not lead to the conclusion that they belong to the legal system. This objection can be dispelled, however, with the help of the argument from correctness. As explained above, a judicial decision necessarily lays claim to correctness.[137] This claim, because it is necessarily attached to the judicial decision, is a legal claim and not simply a moral one. Corresponding to this legal claim to correctness is a legal obligation to satisfy the claim, quite apart from the legal consequences of failing to do so. The claim to correctness requires, in a doubtful case, that whenever possible a balance be struck and thereby principles be taken into account. So the claim to correctness is necessarily unsatisfied if a judge, in a doubtful case, offers the following reason for choosing one of two decisions that are both compatible with the authoritative material: 'Had I struck a balance, I would have arrived at

[137] See above, this text, at 38–9.

the other decision, but I did not strike a balance.' This makes it clear that in all legal systems in which there are doubtful cases that give rise to the question of striking a balance, it is legally required to strike a balance and thereby to take principles into account. Thus, in all legal systems of this kind, principles are, for legal reasons, necessary elements of the legal system.

There is a last resort for the opponent of the argument from principles. He may claim that there can be legal systems in which no case is felt to be doubtful, so that in no case does the question of striking a balance arise. Since decisions can be made in such legal systems without taking principles into account, he may argue, it is not correct to say that all legal systems necessarily comprise norms structured like principles. I shall not pursue here the interesting empirical question of whether there have ever been legal systems in which no case was felt to be doubtful, so that in no case did the question of striking a balance arise. In any event, such a system would not even be a minimally developed legal system. Thus, the following proposition is true: Beginning at a minimum level of development, all legal systems necessarily comprise principles. This is a sufficient basis for establishing, by way of the argument from principles, a necessary connection between law and morality. The thesis that all legal systems necessarily comprise principles can therefore—without thereby defeating the argument from principles—be limited in accordance with the proposition above, namely, to legal systems that are at least minimally developed.

(b) The Morality Thesis

That all legal systems, beginning at a minimum level of development, necessarily comprise norms structured like principles is not enough to justify the conclusion that a necessary connection exists between law and morality. Such a connection is not yet established, then, by the simple fact, say, that the basic

principles of modern legal and state morality are incorporated into all legal systems affirming democracy and the *Rechtsstaat*. Every positivist can say that the incorporation of precisely these principles is based on positive law. And that can be sharpened into the statement that it is always a question of the positive law whether or not principles belonging to a legal system establish a connection between law and morality.

In order to respond here, one must distinguish between two versions of the thesis of a necessary connection between law and morality: a weak and a strong version. In the weak version, the thesis says that a necessary connection exists between law and *some* morality. The strong version has it that a necessary connection exists between law and the *right* or *correct* morality. Here, only the weak version is of interest initially, that is, the thesis that the necessary presence of principles in the legal system leads to a necessary connection between law and some morality or another. This thesis shall be called the '*morality thesis*'.

The morality thesis is correct if, among the principles to be taken into account in doubtful cases in order to satisfy the claim to correctness, some principles are always found that belong to some morality or another. That is in fact so. In doubtful cases, the task is to find an answer to a practical question where an answer cannot be definitively drawn from the preset authoritative material. To answer a practical question in the legal arena is to say what is obligatory. One who wants to say what is obligatory but cannot support his answer exclusively by appeal to the decisions of an authority must take into account all relevant principles if he wants to satisfy the claim to correctness. But among the principles relevant to the solution of a practical question are always principles that belong to some morality or another. These need not be as abstract as the principles of liberty or the *Rechtsstaat*. Often, they are relatively concrete, as are the principles of non-retroactivity or environmental protection. In terms of content, too, some—say, the principle of racial segregation—

can be sharply distinguished from the principles of a democratic constitutional state. What is significant here is only that these principles are at the same time always principles of some morality or another, whether or not this morality be correct.

A positivist could object that this is not incompatible with his theory. Indeed, legal positivism emphasizes precisely the requirement that the judge decide in doubtful cases on the basis of extra-legal standards, a requirement that includes the decision based on moral principles.[138] This objection, however, misses the decisive point, which is that principles, first, according to the incorporation thesis, are necessarily components of the legal system and, second, according to the morality thesis, necessarily include principles that belong to a morality. This dual quality of necessarily belonging at the same time to law and to morality means that the judge's decision in doubtful cases is to be interpreted otherwise than in positivistic theories. Principles that are, according to their content, moral principles are incorporated into the law, so that the judge who appeals to them for support is making his decision on the basis of legal standards. Calling on the ambiguous dichotomy of form and content, one can say that, according to form, the judge's decision is based on legal reasons, but, according to content, it is based on moral reasons.

(c) The Correctness Thesis

What has been shown so far is simply that the argument from principles leads to a necessary connection between law and some kind of morality. The obvious objection is that this is too little. For when one speaks of a necessary connection between law and morality, one generally means a necessary connection between law and the—or a—correct morality.

[138] See Hart, *CL*, at 199, 2nd edn., at 203–4: 'The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals.'

That is especially true from the participant's perspective. This objection would in fact undermine the non-positivist if the argument from principles were not successful in establishing some kind of a necessary connection between law and correct morality. That the argument does succeed in establishing just such a connection is the substance of the *correctness thesis*. The correctness thesis is the result of applying the argument from correctness within the framework of the argument from principles.

The correctness thesis presents no problems if the content of principles of positive law is morally required or at least morally permitted. An example would be the six basic principles of the German Basic Law or Constitution, namely, the principles of human dignity, liberty, equality, the *Rechtsstaat* or rule of law, democracy, and the social state. As optimizing commands, these principles require realization to the greatest possible extent. Together they require a realization that approximates a legal ideal, namely, the ideal of the democratic, social *Rechtsstaat*.[139] If these principles or their numerous subprinciples are relevant in a doubtful case, then the judge is legally obligated to undertake an optimal realization of them, geared to the concrete case. He is to answer a legal question that, according to its content, is also a question of political morality. At least some of the arguments with which the judge justifies the balance he strikes have, in terms of content, the character of moral arguments. It follows, then, that the claim to legal correctness necessarily attached to the decision includes a claim to moral correctness. Therefore, in legal systems whose positive law principles have a content that is morally required or at least morally permitted, a necessary connection exists between law and correct morality.

An opponent of the argument from principles may object that this leads to a necessary connection between law and correct morality only in morally vindicated legal systems,

[139] Ralf Dreier, *Rechtsbegriff und Rechtsidee* (Frankfurt: Alfred Metzner, 1986), 30–1.

not, however, to a quintessential necessary connection that applies to all legal systems. He may refer in this context to a legal system like that of National Socialism, which, with its principles of race and absolute leadership (the *Führer*-principle),[140] comprised principles reflecting a morality altogether different from that reflected by the principles of the German Basic Law. How is it that here, he may ask, the application of the argument from correctness within the framework of the argument from principles is supposed to lead to a necessary connection between law and correct morality?

It does not matter at this point that here the argument from principles meets the argument from injustice. What is decisive is that even the judge who applies the principle of race and the *Führer*-principle lays claim to correctness with his decision. The claim to correctness implies a *claim to justifiability*. This claim is not limited to the justifiability of the decision in terms of some kind of morality leading to the correctness of the decision; rather, it refers to the correctness of the decision in terms of a justifiable and therefore correct morality. The necessary connection between law and correct morality is established in that the claim to correctness includes a claim to moral correctness that also applies to the principles on which the decision is based.

A critic could object that in this way the link between law and correct morality is so dissipated that one can no longer speak of a necessary connection. The concern now is only with a claim and no longer with its satisfaction, and, in addition, despite the emphasis on correct morality, there is no talk of what correct morality is. Both of these observations

[140] See e.g. Wilhelm Stuckart and Hans Globke, *Kommentare zur deutschen Rassengesetzgebung*, vol. 1 (Munich and Berlin: C. H. Beck, 1936), at 7: 'The responsible leaders of the state are to examine the racial composition of the people entrusted to them and are to undertake due measures preventing at least the further loss of the best racial values and strengthening as much as possible the ethnic core.' And, at 13: 'From the idea of race flows inevitably the idea of the *Führer*. Thus, the ethnic national state must of necessity be a *Führer*-state.'

are correct, but they do not spell the downfall of the connection thesis.

It is easy to see that, outside the realm of the argument from injustice, that is, below the threshold of extreme injustice, the claim alone and not its satisfaction can establish a necessary connection between law and correct morality. To focus on the satisfaction of the claim is to say too much. It is to say that the law, including every single judicial decision, necessarily satisfies the claim to moral correctness, in short, that the law is always morally correct. The latter implies that whatever is not morally correct is not law. A thesis that strong cannot be defended, as shown in the discussion of the argument from injustice. Thus, the issue here cannot be a classifying connection, it can only be a qualifying connection. Below the threshold of extreme injustice, a violation of morality means not that the norm or decision in question forfeits legal character, in other words, is not law (a classifying connection), but, rather, that the norm or decision in question is legally defective (a qualifying connection). The claim to correctness that is necessarily attached to the law, because it includes a claim to moral correctness, is the reason that, below the threshold of extreme injustice, a violation of correct morality leads not, indeed, to the forfeiture of legal character, but necessarily to legal defectiveness. The classifying connection can be called 'hard', the qualifying connection, 'soft'. Even soft connections can be necessary.

The remaining objection is that simply referring to correct morality is too little. This objection cannot be dispelled by providing a comprehensive system of moral rules that permit in every case a certain judgment about whether or not these rules are being violated by a legal norm or a judicial decision. Beyond the threshold of extreme injustice, there is broad agreement about what violates morality, but below this threshold, controversy prevails. This does not mean that, below the threshold, there are no standards whatsoever for what is just and what is unjust. The key is the claim to justifiability implicit in the claim to correctness. The claim

to justifiability leads to requirements that must be satisfied at a minimum by morality in order that this morality not be identified as false morality, and it leads to requirements that must be satisfied to the greatest possible extent by morality in order that this morality stand a chance of being the—or a—correct morality.[141] An example of the failure to satisfy these requirements is the justification of the principle of race as set out in the 1936 commentary of Stuckart and Globke:

> Based on the most rigorous scientific examination, we know today that the human being, to the deepest unconscious stirrings of his temperament, but also to the smallest fibril of his brain, exists in the reality and the inescapability of his ethnic and racial origins. Race stamps his spiritual countenance no less than his outward form. It determines his thoughts and sensibilities, his strengths and propensities, it constitutes his particular character, his nature.[142]

This justification does not satisfy the minimum requirements of a rational justification. Consider only the claim that race determines the thoughts of the individual. Far from reflecting 'the most rigorous scientific examination', this claim is empirically false, which the most quotidian of experience demonstrates.

The qualifying or soft connection that emerges when the legal system is considered as a system of procedures, too, from the perspective of a participant leads not to a necessary connection between law and a particular morality to be labelled as correct in terms of content, but, rather, to a necessary connection between law and the idea of correct morality as a justified morality. This idea is far from empty. Linking it with the law means that not only are the special rules of juridical justification part of the law, but the general rules of moral argumentation are too, for whatever correctness is possible in the area of morality is possible on the basis of these rules. They thwart considerable irrationality and injustice. What is

[141] See Alexy, *TLA*, at 187–205.

[142] Stuckart and Globke, *Kommentare zur deutschen Rassengesetzgebung* (n. 140 above), 10.

more, the idea of correct morality has the character of a regulative idea in the sense of a goal to be pursued.[143] Thus, the claim to correctness leads to an ideal dimension that is necessarily linked with the law.

[143] See Immanuel Kant, *Critique of Pure Reason* (1st pub. 1781, 2nd edn. 1787), trans. and ed. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1997), at A644/B672 (p. 591) (trans. altered): 'On the contrary, transcendental ideas have an excellent and indispensably necessary regulative use, namely, that of directing the understanding toward a certain goal, the prospect of which has the directional lines of all its rules converging into one point.'