

LEGAL PHILOSOPHY AND EVALUATIVE CONSIDERATIONS

LEGAL PHILOSOPHY AND EVALUATIVE CONSIDERATIONS

By

KENNETH JAMES LLOYD, B.A.

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AUTHOR: Kenneth James Lloyd, B.A. (University of Guelph)

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### ABSTRACT

This thesis investigates a number of questions of concern to recent legal theorists, especially as regards the points of connection between "positive law" and non-positive elements in the functioning legal system. Competing theoretical perspectives on "law" and the philosophical implications of these are treated as fundamental to understanding current debates in legal philosophy. The view that evaluative judgements must enter legal theory is defended against Hans Kelsen's ambition for a "pure theory of law". Factors significant in the identification of law and, specifically, whether non-positive considerations are involved in this is an important controversy that is explored. A view in which moral arguments sometimes enter into the determination of law is defended against Joseph Raz's "sources thesis" in which law is exhausted by taking account of "authoritative positivist considerations".

Issues concerning foundations for legal philosophy are addressed both at the outset of the work and in the final chapter. It is argued that a legal theory that pictures "law" as having institutional sources is preferable to Ronald Dworkin's picture of law as "interpretation". Dworkin's theory of law is considered in various dimensions, and several problems with his approach to legal philosophy are identified.

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## INTRODUCTORY REMARKS

This work is intended to advance an understanding of a vital issue in legal philosophy: the extent to which legal philosophy is value free. Debate on this question has lately been enlivened by the development of several sophisticated theories of law which, though corresponding to previous work in many respects, contain major elements which are substantially reworked. It is an objective of this thesis to address the question of value in legal philosophy within the context of this recent literature.

For those of us who accept that "the law", however plausibly conceived, is in some sense value-laden, we face two immediate questions. One question we should feel compelled to address is, what is law? Very much depends on our answer to this question if indeed it admits of any strict answer. I will attempt to show early in this thesis why this is a particularly complex sort of question. The second question, which this thesis more extensively treats, is exactly how this purported value-ladenness should be understood.

In this thesis I approach these questions from the point of view that some might characterize as a moderated



legal positivism. But as legal positivism admits of many points of view on these questions, this characterization is only vaguely informative. I subscribe to what I take to be one of legal positivism's central claims: that a conception of law must proceed from an analysis of institutional rules. Conceived in this way, law is always a matter of social fact. This amounts to my saying, with some qualifications that will become apparent, that there is such a thing as positive law. Because of this, I am committed to the view that the existence and content of a particular positive law is an issue which is in a sense distinct from questions of its desirability. The separability of the question of the existence of a particular law from the question of its merit or demerit follows from the proposition that a law's existence depends entirely on facts about a particular social practice, that in no sense is its existence a question of merit. It is readily admitted, perhaps even celebrated, that a particular rule always remains susceptible to our moral evaluation of it. Indeed, the enactment, change or repeal of laws is so often prompted by moral considerations that any positivism which questions this observation fails to understand an important aspect of the social significance of legal rules.

The important place of laws in social life, in regulating affairs and behaviour, invites critical reflection upon their content by legal officials, legislators or other

critics. It is well to realize that moral criticism directed toward a valid law has no bearing on its validity, because validity is purely a function of facts about the particular legal system of which the law in question is a part. A legal system's rules for validity are exclusively what make law valid. This does not rule out the possibility that validity may depend on evaluative arguments if a legal system provides for resort to such argument. But it clearly does rule out the claim that some theorists have made, that validity partly or wholly depends on a law's moral justifiability regardless of the provisions for validity in particular legal systems.

What I have said thus far serves to distinguish my position from most theories of natural law of which there are many interesting variants. Two of these will be discussed in the course of my arguments in this thesis since they contain highly developed criticisms of the sort of position I have outlined.

An entirely different challenge to positivism is presented by Ronald Dworkin in his Law's Empire and in his earlier work Taking Rights Seriously. His concept of law derives not from an analysis of institutional rules, but from an analysis of the way judges decide cases in a court of law. Dworkin's theory of "law as integrity" is ultimately descended from his concerns about judges deciding "hard cases" in which the applicability of a legal rule or rules to the facts of a case is uncertain. In Taking Rights

Seriously, Dworkin criticized legal positivism for its inability to realistically depict adjudicative practice in hard cases. A proper explanation shows how decisions in hard cases are justified. In Law's Empire, Dworkin's critique is widened as he argues that even in easy cases, where a rule clearly applies to the facts of a case, positivism fails for the same reasons.<sup>1</sup> It is my view that these claims cannot be defended; that a reasonable account of judicial behaviour in hard cases is available without resorting to the "interpretation thesis" that Dworkin advocates. It is incumbent upon me to show how the distinction between positive law and moral-critical input in hard cases survives in spite of Dworkin's arguments to the contrary.

Against Dworkin and the natural law theorist, I maintain a distinction of sorts between matters of social fact and questions of the morality of such facts. This does not presuppose any alliance with the philosophical movements of empiricism or logical positivism which have traditionally maintained a complete and unqualified fact-value distinction. On the contrary, it maintains a conception of "facts" which is completely alien to these traditions. Because the distinction I maintain between fact and value in legal theory is so informative of my disagreements with "Law as Integrity" and natural law theories, I have adopted this controversy as a central theme to which I continually return in this thesis.

Some introduction to the general concerns of legal

philosophy, at least as I understand them, may be useful to the reader. This is designed to acquaint the reader with the subject area of this thesis by moving from the general task to the particular problems.

Legal philosophy, as carried on today, is quite separate from usual discourse among lawyers and law students. As a general rule, law as practiced by lawyers does not demand a rigorous investigation into the nature of law or the justification of legal institutions. Rather, a concept of law in some rudimentary form is assumed uncritically by each practitioner. One might go so far as to say the lawyer is quite disinterested in legal philosophy and might think it disagreeably esoteric or even pointless. Though many of the most well-known legal philosophers are also lawyers, their acquaintance with the philosophical was probably not a significant part of their legal training. The legal philosopher, with one eye on the dogmatics of law as practiced, pursues his branch of philosophy because she believes it to be worthwhile and perhaps because it is both intellectually challenging and practically important.

The legal philosopher is constrained in two ways as she undertakes her study. Her legal theory must cohere as closely as possible with the way law is practiced within a particular community she is addressing. It would be pointless to fashion an attractive theory which has no

applicability, if only because the understanding that such an exercise can yield would be minimal. Thus it is the philosopher's task to make sense of "law" and legal systems as they presently are.

Secondly, in the opinion of many legal philosophers, legal theory depends on political theory to some degree.<sup>2</sup> I share with Leslie Green the view that legal theory can aspire to be no more than one part of a general social and political theory. Consider that when we come to describe social reality, we come with a set of needs and interests which influence the way in which it is perceived. Since the analysis of a legal system involves the description of human activities, the role played by interests in selecting relevant features becomes very explicit. Conceptual analysis is not a "neutral" activity then, but involves normative commitments as to what is central or important in setting up a theoretical framework. Since selecting foundations on which to build a theory is determined by resort to arguments from a general political theory, a legal theory is part of this larger general theory. Legal theory cannot pretend to operate as a "neutral" enterprise divorced from larger disputes. There is a range of conceptual disputes in legal theory at present, but a constraint upon settling these disputes is our ability to solve complex disputes in political theory.<sup>3</sup> The effects of seeing legal theory tied to other important questions should be obvious. A legal

theory which attempts to fashion some idea of what "the law" is, without going beyond law as it appears in statutes and cases, is in danger of becoming remote or abstract from the reality of a legal system as a social institution of some complexity.

Both of these constraints upon legal theory help to direct legal philosophy down constructive pathways. Both suggest to the legal philosopher that a concept of law is a way to conceptualize social reality. But as Joseph Raz notes, we must take care not to weigh the success of any analysis of the concept of law in virtue of its theoretical sociological fruitfulness, where the "law" is something we are merely content to establish intellectually like the "electron". It falls to legal theory to elaborate and explain those ideas which are central and significant to the way the concept of law plays its role in people's understanding of society.<sup>4</sup> The care required in this explanation and elaboration is considerable and the possibility for error staggering. Our efforts to provide complete clarity and intelligibility are hampered by the fact that the culture and tradition, of which the concept of law is a part, contain various and sometimes conflicting ideas. The legal philosopher often cannot demand too much precision and must constantly weigh his own and competing conceptions against a backdrop of social reality of which he, too, is a part. Despite the various impediments to absolute clarity,

there is much room to manoeuvre towards a better understanding.

Legal philosophy then provides an opportunity to bring together political, social and moral philosophy on some important questions. This is as much an opportunity for creating confusion as it is a chance to bring diverse insights to bear on specific problems. Nowhere has a general confusion been more rampant, and a need for critical thinking been more called for, than in considering the points of contact between morality and the "law". The considerable amount of contemporary literature devoted to this subject indicates both an ongoing debate about such connections and a great interest in the issues that stand on its immediate periphery. But whereas in the past a stand on these issues has served to distinguish natural lawyers from strict positivists, there has lately been a debate over important methodological assumptions and their impacts rather than an outright split on whether the identification of law necessarily requires resort to moral arguments. This is perhaps partly due to the considerable history of the dialogue itself, a dialogue that has led to the emergence of new competing conceptions of law which treat the various questions about the possible connections between law and morality more sensitively and thoroughly. And one cannot here discount the importance of the constraint imposed by legal practice itself upon any of the current conceptions.

For each theory must, to a considerable degree at least, reflect the functioning legal system itself if it is to achieve and retain any credibility.

The discussion to this point has introduced broad areas of contention that are addressed in this thesis. I shall now provide a brief summary of the chapters that follow. Concern about an adequate starting place for legal theory is the subject of chapter one. Here Ronald Dworkin's judicial perspective is shown to be in opposition to the perspective called institutionalism. In contrast to Dworkin's theorizing from judicial practice, in which concerns of political morality are thought to play a vital role, institutionalism begins by constructing theory from convictions about the nature and importance of certain political institutions.<sup>5</sup> A theory of the relations between law and morals ultimately depends on the selection of a starting point, on a doctrine of the nature of law. Positivism, which I address in subsequent chapters, is to be understood as a subspecies of institutionalism, because its focus on social facts shows that it considers the political institution, legal rules, to be the best foundation for analysis of municipal legal systems. Chapter two attempts to lend plausibility to the institutional outlook by defending the thesis that law is institutional fact.

In chapter three, I identify the central difficulty in adopting John Finnis' theory of natural law, which is its



all too casual acceptance of a meta-ethical position that is implausible. I attempt to expose difficulties of the same magnitude that arise when Dworkin argues that law can be understood as a narrative authored by "a community of principle" whose attention is fixed upon concerns of political morality. The investigation of these problems, which lie at the heart of Finnis' and Dworkin's theories of law, is meant to draw attention to the less problematic institutional viewpoint.

There have been recent attempts to refine H. L. A. Hart's concept of law to include reference to a point of view that sees law as essentially having moral merit. Chapter four addresses the plausibility of this proposed refinement and concludes that a misleading depiction of the range of attitudes to legal rules is the result of such an adjustment. The problem concerning the alleged moral obligation to obey any particular law is explored in the context of this adjusted concept of law, and the stand taken by Hart on the question of moral obligation is defended.

In chapter five, several questions relating to distinctions between 'law that is' and 'law that ought to be' are explored and several insights from previous chapters are brought forward. Important controversies concerning the possible resort to moral argumentation in identifying legal rules are discussed. One aim of the chapter is to identify the various levels at which evaluative considerations might

enter legal theory in the institutionalist approach.

In writing this thesis, I have tried to introduce a range of philosophically significant issues, as treated by recent legal philosophers, that relate broadly to popularly supposed connections between law and morals. I adopted the topical approach for the form of this thesis, knowing full well that this form might obscure some unexamined relations which exist between 'the problems' I treat. But since one brings to legal philosophy a range of individual questions and concerns, it seems reasonable to attend to these individually.

Notes to Introductory Remarks

1 In fact, Dworkin charges that positivism fails to address justification at all in its assuming that convention exhausts the intrinsic normative power of past decisions. See Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard University Press, 1986), p. 135.

2 Leslie Green, "The Political Content of Legal Theory," Philosophy of the Social Sciences, 17 (1987): 1.

3 Green, p. 16.

4 Joseph Raz, "Authority, Law and Morality," The Monist, 68 (July 1985): 321.

5 See Green, p. 9 and Joseph Raz, "The Problem about the Nature of Law", The University of Western Ontario Law Review, 21 (1983): 212.

## CHAPTER ONE: WHAT IS 'LAW'?

### I The Basic Intuition About "Law"

One of the problems associated with inquiring into the nature of law is the question of one's starting point, for the assumptions made in choosing this will determine what one will consider either pertinent to or quite separable from this nature. Joseph Raz has identified three distinct perspectives on this question evident in recent legal philosophy.<sup>1</sup> It will be especially instructive to take note of two of these and examine their distinctive merits before moving on to the theoretical controversies with which we shall be principally concerned in this thesis.

Many legal philosophers assume a starting point for doing legal theory which Raz distinguishes as one, usually unstated, "basic intuition" about the nature of law:

The law has to do with those considerations that it is appropriate for the courts to rely upon in justifying their decisions.<sup>2</sup>

This intuition, though general and constructed to capture a range of basic assumptions, focuses on the activities of lawyers and courts of law. What accounts for the popularity of this intuition among legal theorists? Theorists who have been trained as lawyers might be more inclined than others to

uncritically adopt this "basic intuition" since their training and legal activities practically presuppose it. It is natural that the lawyer possesses this intuition since her activities are dominated by litigation in court, actual or potential. Raz offers this as one explanation for the unreflective possession of this "basic intuition". In so doing, he suggests a role for indoctrination in the process of a person's developing perspective on the nature of law. One carries into legal theory what one has understood from the perspective of a lawyer for some time.

The "lawyer's perspective" on the nature of law is now within our grasp. Raz asserts that this perspective consists in the unquestioning acceptance of the above-stated intuition as the starting point for legal philosophy and as determining its subject matter.<sup>3</sup> The presence of both elements distinguishes the "lawyer's perspective" on the nature of law, but Raz is quick to point out, quite rightly, that one can accept the "basic intuition" without subscribing to the view that it is either a starting point for or necessarily determinative of the subject matter of legal philosophy. The significance of this observation will become apparent with an elucidation of the institutionalist's perspective on the nature of law.

A quite different perspective than the lawyer's is manifested by a legal philosopher who first explains the nature of the political system and then proceeds to explain

the nature of law by placing it within the political system.<sup>4</sup> Such a theorist might well be or have been a lawyer, and he may accept the "basic intuition" generally accepted by lawyers. But nevertheless, he rejects the "lawyer's perspective" because it focuses narrowly on only one facet of social organization, namely lawyers and the courts. To adopt this competing perspective, to examine lawyers and courts in their location in the wider perspective of social organization and political institutions generally, is to take up "the institutionalist's perspective" on the nature of law. To attempt legal philosophy from this perspective is to practice the "institutional approach" to legal theory.

Though there are other significant points of view, such as "the linguistic approach" to legal theory,<sup>5</sup> it is the two I have just described that Raz principally treats in "The Problem about the Nature of Law". What follows is a criticism of Raz's placement of particular theorists within these two perspectives.

The implied target of Raz's attack in his paper is the philosopher who adopts fundamentals for a theory of law uncritically. But Raz is not interested in addressing just any unreflective assumptions. Since he is investigating recent perspectives on the nature of law, he is most interested in criticizing major theories of law which he argues rest on soggy assumptions. To explain and justify his criticisms, Raz naturally gravitates towards a defense of his

own theory of law which is a species of institutionalism. However, he is careful to note where he introduces support for his own theory and I think he does not unduly hinder the general investigation because of his taking these steps.

I hope to show in the following Section, that his analysis of Hans Kelsen's assumptions is useful and instructive, and that his characterization of the "lawyer's perspective" helps us to be mindful of the dangers of conceiving of 'law' too narrowly for the purposes of legal theory. Where Raz falls somewhat short, however, is in his appreciation of Ronald Dworkin's fundamental assumptions. The casual reader may suppose, from what Raz has to say, that Dworkin is the unreflecting lawyer par excellence of legal theorists; but this would probably be an overstatement. As we shall see in Section III below, rather than justify his fundamental assumptions before developing his theory, Dworkin leaves it to his legal theory to justify his "lawyer's perspective". Perhaps this is less than desirable philosophically: one ought to begin theory on reasonably justified premises. But whether one perceives a requirement to have sound foundations for theory or not depends on how one understands legal philosophy itself. There is important controversy on this point which I shall explain in this chapter. In any case, Raz raises important issues concerning fundamentals for doing legal theory, among them the important argument that fundamental assumptions must be defensible

ones.<sup>6</sup> To these issues we now turn.

## II Kelsen And The Lawyer's Perspective

Hans Kelsen's theory of law has been the subject of much critical attention in recent years. Raz is especially interested in investigating the sorts of assumptions Kelsen made about the nature of law. Hence, his attention is focused on the philosophical grounding of Kelsen's theory.

Raz argues that if we assume that Kelsen adopted the "lawyer's perspective", we uncover a rationale for his fundamental views about how the subject of legal theory should be determined. The "lawyer's perspective" would have tempted Kelsen to embrace two of his best known doctrines:

If law consists of considerations appropriate for courts to rely upon, then it is tempting to regard all laws as addressed to courts. Furthermore, if one thinks of every law as determining the result of a class of potential disputes, then it is tempting to regard every law as stipulating a remedy.<sup>7</sup>

If Kelsen had the "lawyer's perspective", this could explain his advocacy of these doctrines. But how do we account for Kelsen's view that legal theory must be pure of all moral argument, all sociological facts, and other "alien" elements?<sup>8</sup> This "purity" doctrine appears to be Kelsen's own invention which requires that one distinguish between legal considerations and extra-legal considerations which a court may rely upon in making decisions. I shall expand upon this element in Kelsen's philosophy shortly. For the moment,



however, we should be careful to avoid a source of confusion that is invited by Raz's comparison of theorists thought to subscribe to the "lawyer's perspective".

Raz considers it to be an essential element of the "lawyer's perspective" that there be an impulse to "determine the subject matter" of legal theory. Kelsen's considerable efforts to make such a determination is one reason why Raz was inclined to attribute the "lawyer's perspective" to him, or so it appears. Yet it is of the utmost importance to stress that adoption of this "perspective" does not require acceptance of two related but crucial convictions of Kelsen's: that legal theory is engaged in arriving at a purely descriptive science of law and that what is known as "law" is necessarily free of sociological, political and moral elements. As we shall see, Ronald Dworkin appears to be a strong advocate of the "lawyer's perspective", for he seems to meet the conditions Raz has laid down for the acceptance of this view. But in no sense does Dworkin find amenable the suggestions that legal theory should be free of moral and political elements and that legal theory, properly understood, should be engaged in determining a scientific object. Dworkin's and Kelsen's approaches to legal theory are, in fact, so dissimilar that ascribing a single type of perspective to both, as Raz does, seems somewhat inappropriate. What is more, the most crucial difference between Dworkin and Kelsen seems exactly to be a question of

perspective, the former insisting that the only legitimate theoretical perspective is one that understands "law" from the point of view of a judge deciding cases in a court of law, the latter apparently insisting that any theoretical perspective is legitimate only insofar as it accepts that "law" is a "scientific object" free of alien elements. All this underscores the need to recognize that Raz's "lawyer's perspective" is a highly abstract device which should not mislead the reader into supposing that any more than the most abstract similarities hold between Kelsen's and Dworkin's philosophies. Having admitted that there are unique and crucial differences in outlooks on legal theory that Raz's "lawyer's perspective" might obscure, we may return to a consideration of Kelsen's particular views.

Kelsen's ambition for "purity" was probably based on a conviction that epistemological considerations should be of utmost concern to any legal philosopher. For Kelsen, legal theory was to be understood as a purely descriptive science that studies what judges and legislators create:

The science of law has to know the law - as it were from the outside - and to describe it. The legal organs, as legal authorities, have to create the law so that afterward it may be known and described by the science of law.<sup>9</sup> (Emphasis added)

This passage suggests that what is to be known as "law" will be what is strictly known via law reports and statute books, the creations of judges and legislators.

It is important to note that the "basic intuition"

does not specify what kinds of considerations courts may consider. Raz observes that Kelsen held that courts may rely upon both "legal" and "extra-legal" considerations.<sup>10</sup> Enacted law, case law and customary law belong to the former, and all other considerations that courts rely upon in justifying their decisions belong to the latter. Kelsen held that no matter what legal considerations a court relies upon, in no case can these be moral considerations. Even in "hard cases" where judicial discretion is required because no established rules clearly apply, no resort to moral considerations can be understood as a resort to legal considerations. Given his essentially emotivist theory of ethics which prohibits the recognition of moral views as proper objects of cognition, Kelsen took it as self-evident that the "science of law" had to be, if it truly was to be a science, free of all moral considerations. For legal theory to be "scientific", only morally neutral considerations could be understood as "legal" ones.

Raz uncovers faulty reasoning in Kelsen's moral purity argument that undercuts his reasons for restricting law to only "legal considerations". We can readily accept that the task of legal theory is to study law. If we then raise the question whether law is such that it can be studied "scientifically", there are two clear options open to us. One option is to say that if law is such that it cannot be studied scientifically, then we may properly conclude that

legal theory is not really a science. Alternatively, one can hold that if the law does involve moral considerations and therefore cannot be studied scientifically, then legal theory will study only those aspects of law that can be so studied. This would amount to asserting the purity argument even more forcefully. An argument that is not acceptable, which Kelsen apparently makes, holds that since only morally neutral considerations can be studied scientifically, the law is such that its study does not involve moral considerations.<sup>11</sup> This is just to presuppose uncritically the appropriateness of scientific treatment.

Kelsen knows that courts do rely on moral considerations when the law runs out. But Raz has shown he has no good reason to insist that legal theory should be free from moral considerations. Provided that we are right to attribute the "lawyer's perspective" to Kelsen, the logic of his own doctrines can be used against him:

... if enacted and case law can be represented as instructions for courts to apply sanctions in certain circumstances, so can those moral considerations that it is appropriate for courts to rely upon.<sup>12</sup>

Raz thus exposes a major fault with Kelsen's approach to legal theory. And he has done this without questioning Kelsen's theory of ethics which is a popular strategy for Kelsen's critics. So we must conclude that Kelsen has not properly defended his "legal"/"extra-legal" distinction. But at least he has not jumped to a conclusion, which the "basic

intuition" logically permits, that all considerations that it is appropriate for courts to rely upon in justifying their decisions are "legal" considerations. Another prominent theorist has, however, done just that.

As Raz notes, Ronald Dworkin clearly does assume that all considerations proper for courts to rely upon are "legal" and offers no argument to justify this view.<sup>13</sup> I shall compare the essentials of Dworkin's views on this issue with Kelsen's. It will become apparent that Raz is not successful in exposing a major defect in Dworkin's approach.

While Kelsen and Dworkin both adopt the "lawyer's perspective" on the nature of law, each has different ideas about the boundary of the "legal"; the former seeking to define narrowly these considerations in a way which allows for a "science of law", the latter arguing that the courts must treat as pertinent to legal decisions any matter that is significant in arguing for the rights of litigants. While Kelsen is interested to protect the nature of law from non-scientific "alien elements" such as moral or political considerations, Dworkin is adamant that both of these elements are and should be critical for legal argumentation and decision-making at all times. Without these elements, we cannot even begin to understand the nature of law. Dworkin insists that all considerations that courts legitimately use are legal ones; that there is not something one might call the "strictly legal", such as enacted law, case law and

customary law, as distinct from such considerations of political morality as might bear upon a case. He perceives a "seamless web" of considerations that the lawyer is bound to apply in all cases coming before him.<sup>14</sup> In contrast, Kelsen distinguishes, as extra-legal, all matters that a judge might use when he applies his discretion in hard cases where the established law, i.e. the "strictly legal", has run out. In spite of these significant differences, Kelsen and Dworkin both identify the theory of law with a theory of adjudication on the basis of their view that the law has only to do with those considerations to which it is proper for judges and lawyers to appeal in adjudication. This is a view which is quite natural if one assumes the "lawyer's perspective."

So Dworkin's problem, as Raz sees it, is quite different from Kelsen's. Unlike the latter for whom it is of paramount importance, Dworkin ignores a vital question which arises for him given his "lawyer's perspective" on the nature of law: "Which of [Hercules'] considerations constitutes the law?"<sup>15</sup> His ideal judge, "Hercules", counts as legal whatever he considers appropriate to the matter before him. Yet as Raz observes, Dworkin does not provide any reasons for this wide designation of the legal, but merely assumes this unsupported position.

### III Dworkin's Starting Point For Legal Theory

The debate that develops between Raz and Dworkin on

the designation of "the legal" is one we can follow only by comparing elements of their particular theories. Raz's theory is but one version of the institutionalist approach, and therefore, before we explore this debate, we should be clear about what is specific to Raz's theory and what is true of institutionalism in general.

The institutionalist's approach to legal philosophy is a general view about the starting place for legal theory. As noted earlier, it first explains the nature of the political system and then proceeds to explain the nature of law by placing it within the political system. This approach is shared by many prominent theorists including Jeremy Bentham, John Austin and H. L. A. Hart. Raz considers Hart to be a typical exponent of this approach. Firstly, Hart's discussion of the emergence of "secondary rules" and of the minimum content of natural law, together with his discussion of the separateness of states, address the nature of law as a political system. Secondly, Hart examines the law, as involving the emergence of new kinds of political institutions (both legislative and judicial), against the context of social and political needs.<sup>16</sup> Not all institutionalists proceed in this exact manner, but they all share a view about the centrality of political institutions for legal theory.

It is important to add that the institutionalist can consider the "basic intuition" a sound one. As Raz notes,

"there is no doubting the importance of the legal profession and of the judicial system in society". Yet as Raz also notes, "their importance in society results from their interaction with other social institutions and their centrality in the wider context of society."<sup>17</sup> It is for this reason, then, that institutionalists characteristically reject the "lawyer's perspective" as far too narrow a view. It is also the reason why the essence of the institutionalist's critique of a theory offered exclusively from the "lawyer's perspective" is to express misgivings about the legitimacy of its uncritically accepted starting point: that the subject matter of legal philosophy is determined wholly by what are considerations proper for courts to rely upon in justifying their decisions.

Raz expresses these misgivings rather forcefully. He charges that such a starting point is completely "arbitrary" on the ground that there is no good reason for starting critical reflection at this point. I think this charge of arbitrariness is too strong, at least as it applies to Dworkin's legal philosophy. As an institutionalist, I might think it a strange or perplexing point of departure that requires some defense, but to say it is arbitrary suggests that no defense either is or would be offered. In fact, however, Dworkin does offer a defense of sorts in Law's Empire. He makes a case for why "legal theory", as he understands it, must start by assuming a judge's viewpoint.



His main reason is that, without adopting this perspective, we cannot understand the significance of a claim of law:

We ... study formal legal argument from the judge's viewpoint, not because only judges are important or because we notice everything about them by noticing what they say, but because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice.<sup>18</sup>

Note that in this passage, Dworkin makes secondary the consideration of the importance of the judiciary and attaches primary significance to understanding claims of law. The effect of this, as I see it, is to make the "starting place" a desire to understand propositions of law as judges understand them, even if this entails adoption of a viewpoint - the lawyer's perspective - that some would characterize as "narrow".

Dworkin adds another reason for choosing the court-centred perspective that relates to explanatory virtue. He claims that "judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal."<sup>19</sup> Dworkin does not fully explain this remark, but the suggestion seems to be that judicial reasoning has aims or properties, useful for explaining and understanding legal discourse in general, that other forms of reasoning, as applied to law, do not. He seems to be claiming that "narrowness" in viewpoint is an advantage because, from the perspective of a judge, we can understand more about "law" than from any other viewpoint including those of the

politician or citizen. If this is true, and only the articulation of a theory of adjudication can show whether it is true, then we must at least admit that Dworkin has reason for adopting his particular perspective. Hence, Raz's charge of arbitrariness may be too strong to apply here. This is not to say, of course, that we should agree with Dworkin's methodology. In fact I suspect, perhaps like most institutionalists do, that we cannot even have a good theory of the propositional aspect of legal discourse without realizing that this aspect is part of a wider context of social interaction. Are we merely interested, like Dworkin, in discovering how the rights of litigants are determined by judges in courts, or do we want legal philosophy to address this question and more? It will pay the reader to keep this question in mind when we speak of Dworkin in this thesis.

Raz's present critique of Dworkin is composed of two offensives. One is to show that Dworkin's narrow perspective is left unjustified. I have suggested, to this point, that this line of offense is not as good as Raz has supposed. The second is to argue that the concerns of any theorist with the "lawyer's perspective" is completely captured by his own theory of law. The success of this second offensive can only be measured by considering disputes between Raz's and Dworkin's particular theories of law. It is to these that we now briefly turn.

## IV Raz, The Legal And The Non-legal

Raz assumes that any adequate account of the proper grounds for a claim of law must explain how law is authoritative. He defines authority in such a way that people cannot accept law as authoritative unless their tests for what counts as law wholly exclude evaluative judgements. As we shall see later, Raz advocates the "sources thesis" which holds that the existence and content of every law is fully determined by social sources.<sup>20</sup> He argues that the sources thesis follows from the claim that law is authoritative, and will be readily embraced by one whose view of what constitutes an adequate legal theory is not that of the narrow lawyer's perspective.

We are most interested, for the present, in one aspect of Raz's legal theory: his distinction between the "legal" and the "extra-legal". Raz keeps his institutionalism clearly in view as he develops his theory of law by moving from an examination of political authority to a view about law. Raz perceives it to be a trait of authoritative social institutions generally that they necessarily exhibit a stage in their processes of making decisions during which argumentation ranges over what might be done and how desired effects might be achieved. This he calls the "deliberative stage".<sup>21</sup> The logical end to a deliberative discussion, on the other hand, is also

necessary. This is the point at which a decision is made about what will be done. This Raz calls the "executive stage", when a decision is made and acted upon. The basis for this strict separation of the deliberative and decision stages is discovered by analyzing how a personal decision is made. According to Raz, "a decision is reached only when the agent both reaches a conclusion as to what he ought to do and forms the belief that it is time to terminate his deliberations."<sup>22</sup> To make a personal decision then, is necessarily to put an end to deliberation, to accept a decision as settling what to do.<sup>23</sup> In a sense, then, the decision functions as "authoritative" in one's practical reasoning.

This model of personal decisions is thought to be analogously applicable to authoritative institutions generally, since it is typical of such institutions that they do issue settled courses of action which are conceived to be authoritatively binding. In both personal and institutional cases, we find the existence of a stage at which deliberation is ongoing or not yet complete which is distinct from the decision and the "executive stage" of decision-making. In the case of legal institutions, "the law" is found in these decisions in this executive stage, because here are found expressions of settled courses of action which are no longer questioned by the decision-makers and which are therefore presented and conceived as being authoritatively binding.

Such "authoritative positivistic considerations", as Raz prefers to call them, are what we should understand as the law. It follows from this view of the legal that law is necessarily settled - at least so far as it extends; in no sense can the existence and content of law be controversial among decision-makers.

Raz notes that Kelsen's particular theory would have been better advanced under his (Raz's) version of the institutional approach, because Kelsen would then have been able to make sense of his legal/extra-legal distinction among matters which courts may consider. On this version of Kelsen's theory, one could distinguish between executive considerations, which are authoritative and not generally open to question, and deliberative considerations which are open to argument and which are frequently of a moral character. This picture would have the courts applying both legal (i.e. authoritative positivist) and non-legal considerations. While the courts would be conceived as relying on both executive and deliberative reasons, the law would be restricted to the first kind of reason only.<sup>24</sup> This would manage to vindicate Kelsen's unjustified insistence on the legal/extra-legal distinction.

Dworkin, of course, would reject the distinction between the executive and deliberative stages. He would also deny that only executive considerations which are authoritatively binding can properly be understood to be

"legal". Dworkin would consider the distinction between executive and deliberative decisions to be artificial and unwarranted by what courts actually do. In his view, a judge does not and should not make this sort of distinction. In the discussion of "law as integrity", Dworkin insists "that the law - the rights and duties that flow from past collective decisions and for that reason license or require coercion - contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them."<sup>25</sup> A judge's role as the advocate for past and present collective decisions requires that considerations of political morality take no back seat with respect to the decision-making process.

Dworkin's differences with Raz can be encapsulated in the following way. Whereas he and Raz can agree that the courts, in making their decision, apply both the sorts of considerations that Raz chooses to distinguish as "authoritative positivist" and "non-legal" considerations, they differ as to where "the law" lies in all of this. Raz makes it clear that the law necessarily "belongs" to authoritative positivist considerations only, whereas Dworkin, as we have seen, believes that "the law" is neither of these in particular. Rather, any and all considerations to which Hercules might repair in making his decisions are the raw materials justifying Hercules' claim of law. Such considerations are "legal" by virtue of Hercules' attention

upon them when considering a case.

Comparisons of these theories, beyond this issue about "legal" and "non-legal" considerations, is a complex undertaking. Whereas Raz clearly shares the "institutional approach" with other theorists whose particular theories are quite different from his own, Dworkin's methods are unique to modern legal philosophy. Dworkin has reinterpreted the enterprise of this philosophy itself.<sup>26</sup> Legal philosophy, for Dworkin, aims to understand how claims of law are made and justified in ordinary adjudication. Legal theory is just a theory about adjudication. The viewpoint is narrowly restricted, but this is thought, by Dworkin, to have no adverse affects. To the contrary, Dworkin believes we can derive grand insights from this perspective that are not available to the "detached theorist", i.e. to one who does not "struggle with the issues of soundness and truth" participants in adjudication face.<sup>27</sup>

Dworkin has also constructed anew the sort of outlook on legal philosophy that is directly opposed to his own. The theories Raz and Kelsen developed are examples of "the plain-fact view" of legal theory that Dworkin most strongly attacks:

Law exists as a plain fact, ... and what the law is in no way depends on what it should be.<sup>28</sup>

Though this "plain fact view" is Dworkin's "target", the question whether law is controversial and whether the

identification of law ever requires resort to moral arguments, were issues debated among institutionalists long before the arrival of Law's Empire. As we shall see in later chapters, there are many institutionalists who readily accept, in opposition to Raz, that identifying law can require resort to moral arguments, but they hold that only facts about the legal system in question can make this a possibility. H. L. A. Hart took such a position, and I shall explain his and similar views later.

The above notwithstanding, it should be stressed that the level of "unsettledness" about claims of law accepted by Dworkin is much "deeper" than institutional theories hold is possible. Dworkin insists that law is an "interpretive process", a critical feature of which is continuous deliberation. Each decision-maker must construct or have at his disposal a theory of what political morality requires in each and every case. This means that what the law is for any case is always unclear until "constructive interpretation" is undertaken by the decision-maker. It also means that there can be no value-free identification of what the law is, since argumentation about what political morality contributes to interpretation is an indispensable element. Certainly Raz's view of these matters is vastly different from Dworkin's. The "personal decision" analogy cannot possibly accommodate the continuous unsettledness that results from the "constructive interpretation" thesis. There is room for some



measure of consensus, albeit small, between these otherwise divergent theories. Making the necessary adjustments for the respective theories, one can see that Raz and Dworkin generally agree on the basic features of courts of law. Perhaps the "basic intuition", a proposal concerning courts which the both accept, presupposes some such conception. According to Raz, the basic features of courts of law which express their authority are as follows:

1. They deal with disputes with the aim of resolving them.
2. They issue authoritative rulings that decide these disputes.
3. In their activities they are bound to be guided, at least partly, by authoritative positivist considerations.<sup>29</sup>

When Raz provides these features he might be unaware of the extent to which someone who did not subscribe to his legal/non-legal considerations distinction, such as Dworkin, can support them. Apart from Dworkin's probable rejection of the language used in the third item, his Herculean perspective can accommodate the substance of all three claims. The third characteristic would probably be adjusted by Dworkin to read that the courts are guided partly by past authoritative decisions. He would balk at the "positivist" adjective on the ground that it imports a dubious and a theoretically loaded notion which he goes to some length to discredit in Law's Empire. But since Raz explains that he means by this third point only to underscore the consequences of its complete negation, that such a negation would remove

an important standard that courts do use,<sup>30</sup> there is not complete disagreement here. Dworkin readily admits the importance of courts being guided, in a sense, by past authoritative decisions even if he disagrees that Hercules is "bound" by them in precisely the way Raz means them to be binding. Our intuitive understanding of the nature of courts of law represented by these authoritative decisions yields a final constraint on an adequate doctrine of the nature of law as far as Raz is concerned: that law consists only of "authoritative positivist considerations". But this, it is obvious, is related to Raz' contention that executive rulings exhaust the meaning of "law". While this is a point which Dworkin will not concede, that Raz and Dworkin can agree to some minimal extent on these features is an important observation. They compete with each other to make legal practices philosophically intelligible.

The few comparisons I have made serve to introduce the reader to a range of active theoretical controversies in legal philosophy. Even the purpose of legal philosophy itself is under debate. Let us turn finally to another important question which Raz raises.

#### V The Evaluative Content Argument

Some legal philosophers have supposed that legal theory can be free of evaluative elements. Kelsen's now

familiar notion of the philosophical study of law as neutral or "scientific" was particularly clear on this question:

... uncritically the science of law has been mixed with elements of psychology, sociology, ethics and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines ... which obscures the essence of the science of law ...<sup>31</sup>

Kelsen is twice attacked by Raz in "The Problem about the Nature of Law". There was criticism for lack of rigour in Kelsen's reasoning toward distinguishing "the legal" from "the extra-legal", and now there is an argument to be made which contradicts Kelsen's view about the freedom of legal theory from evaluative content.

Raz holds that one cannot defend the doctrine of the nature of law without using evaluative arguments, though these, in his opinion, need not necessarily be moral arguments about the "goodness" of some element. On this view, legal theory necessarily includes evaluative judgements about the relative importance of various features of social organization. Such judgements reflect our moral and intellectual interests and concerns.<sup>32</sup> Leslie Green interprets Raz well on this point:

On [Raz's] view, law is part of the executive stage of social decision in any society in which it exists. This makes the test for identifying law value-free (since it does not depend on moral arguments), but the whole doctrine is itself value-dependent, for it rests on a

distinction which would be of no importance if it did not mark a judgement about what features of social order are significant and about how they are.<sup>33</sup>

Contrary to what Kelsen had supposed in arguing for a pure science of law free from evaluation, there is no escaping having to make at least some sort of judgement about the significance or importance of features of social order when one does legal theory.

According to Green, institutionalists need political theory (a theory about the nature of certain political institutions) as an account of the basic political institutions in society, whether they be sovereigns or courts, and some way of supporting the claim that these institutions are indeed basic.<sup>34</sup> In this sense, Raz requires political theory to defend his doctrine of the nature of law. Green asserts that both Raz and Dworkin would agree that there is political content in legal theory, but the way each incorporates political elements is very different. Raz is concerned to establish what is central to our understanding of something. His is a purely theoretical interest which does not involve weighing the moral value of the features chosen as central. Dworkin's judgements, on the other hand, would involve moral-political judgements of the sort Raz avoids.

For Raz, the evaluative element enters legal theory only because a doctrine of the nature of law requires a defense of the features one has selected as central. But for

Dworkin, political theory enters legal theory constantly. The most obvious source of political content is found at the core of "law as integrity", Dworkin's theory of law. To be able to make a claim of law, a theorist or judge must construct a theory of political morality which best justifies the community's legal record on the question at hand. Adjudication necessarily involves political theory on this view.

Whether evaluative arguments enter when a defense of the relative importance of various features is called for or whether it enters each and every time "constructive interpretation" is used to determine what political morality requires, it is a significant factor in legal theory. Clearly, the only way to avoid the inclusion of this evaluative component in legal theory would be to propose a "science of law" the purpose of which was to describe those parts of "the law" that could be treated scientifically.

## VI Concluding Remarks

Let us now summarize some of the most significant elements in the comparisons that have been made in this chapter. In this discussion, we have seen two strongly opposed theories emerge. Dworkin argues that law is an "interpretive process" and that legal theory is constrained by considerations of political morality at every level. Raz

has advanced a "plain fact" view about "the law" which carefully and systematically locates the boundary of the "legal" and the "non-legal". In arguing for the presence of distinct deliberative and executive stages in legal reasoning, he has allowed the law some autonomy from political-moral deliberation. Dworkin would think it disastrous if the law was allowed some autonomy from political-moral deliberation, for in no sense could the rights of litigants be found if this were to happen.

Raz concluded that the "lawyer's perspective" was arbitrary as a starting point for legal theory and that we thus have reason to reject it. But Dworkin would respond by arguing that Hercules' perspective is precisely the best point of view from which to understand the nature of law. Consider that if law is most fundamentally an "interpretive self-reflective attitude", then the point of view of a participant in the legal reasoning process is probably the least arbitrary starting point. The "basic intuition" that the lawyer's perspective has at its base, that law has to do with considerations that it is appropriate for courts of law to rely upon, is thus enhanced by the theoretical stance that Dworkin takes with respect to the nature of law. Such a "Herculean attitude" requires both acquaintance with and sensitivity to the features of society that make interpretation possible. This may block, to some small degree, the institutionalist's complaint that Dworkin

disregards the larger social reality in which the law is moored.

I have argued there is nothing uncritically assumed in Dworkin's adoption of the "lawyer's perspective". Whatever reasons we have for preferring the "lawyer's perspective" to another approach will be the outcome of an inquiry into the acceptability of particular theories themselves. We have uncovered some basic assumptions unique to Raz and Dworkin, assumptions that we will want to investigate carefully in due course. One is Dworkin's assumption that only the participant in a social practice can understand the nature of that practice, in this case, judicial reasoning. The second is Raz's assumption that a detached perspective can yield an understanding of law. I shall return to this issue shortly.

It is awkward that we have to understand Dworkin's theory of law before we can understand why he selects the participant's "narrow" viewpoint. This is uncomfortable philosophically speaking. Certainly orthodoxy does not appear to constrain Dworkin's work: he has gone out of his way to "reconstruct" legal philosophy so that it focuses on elements judges might consider essential to "law". Dworkin claims that judges do not share Raz's and Kelsen's "plain fact" view about the boundary of law. But Dworkin's attack on this view is directed at particular theories. It is not clearly directed at the "institutional approach" itself.

This prompts us to ask whether Dworkin's "revolutionary" thinking is really called for. Combining Raz's desire for systematic philosophy and Dworkin's rejection of the "plain fact" view, we get a very provocative question: Given that institutionalists take an acceptably "wide" approach to legal theory, that they can defend this approach before a particular theory is fully articulated, and that the institutionalist need not necessarily hold the "plain fact" view of law, then why bother "reconstructing" legal philosophy? This question leads us to the sort of theory proposed by H. L. A. Hart in which the "plain fact" view is rejected.

The question also leads us back to the issue about theoretical perspectives. Dworkin insists that the participant's point of view is essential for understanding claims of law. Implied by this insistence is the rejection of the analytical or "detached" approach that characterizes institutionalism. This detached theoretical viewpoint is one feature distinguishing the institutional approach, though it may not be exclusive to that approach, and it leads the philosopher away from the participatory engagement that Dworkin insists is critical to understanding. Raz epitomizes the theorist's detachment Dworkin eschews when he discredits the viewpoint of a lawyer engaged in courtroom practice as too narrow and argues for a broader outlook. But is it true that an institutional approach will necessarily



fail to explain how judges decide cases? Many theorists, as we shall see in the next and following chapters, are not sure that it would necessarily fail in this important task.

The approaches to legal theory presented here, complete with a range of disagreements and points of common concern, have served to set out a framework of questioning for what follows in this thesis.

Notes to Chapter One

1 Joseph Raz, "The Problem About the Nature of Law," The University of Western Ontario Law Review, 21 (1983): 203-218.

2 Raz, p. 207.

3 Raz, p. 208.

4 Raz, p. 212.

5 The "linguistic approach" is demonstrated by one who takes the inquiry concerning the nature of law to be an attempt to define the meaning of the word "law". See Raz, p. 204.

6 Raz, p. 218.

7 Raz, p. 209

8 Hans Kelsen, The Pure Theory of Law, (Los Angeles: University of California Press, 1967), p. 1.

9 Kelsen, p. 72.

10 Raz, p. 210.

11 Raz, p. 210.

12 Raz, p. 210.

13 Raz, p. 211.

14 Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977), p. 115.

15 Raz, p. 211.

16 Raz, p. 212.

17 Raz, p. 212.

18 Ronald Dworkin, Law's Empire (Cambridge, Mass.: Harvard University Press, 1986), p. 14.

19 Dworkin, Law's Empire, p. 15.

20 Joseph Raz, The Authority of Law (Oxford: Clarendon Press, 1979), p. 46.

- 21 Raz, "The Problem ...", p. 214.
- 22 Joseph Raz, Practical Reason and Norms (London: Hutchinson and Company, 1975), p. 67.
- 23 One can, of course, enter into the deliberative stage again. This happens when executive decisions are formally questioned as to their validity or conclusiveness. See Raz, "The Problem ...", p. 215.
- 24 Raz, "The Problem ...", p. 215.
- 25 Dworkin, Law's Empire, p. 227.
- 26 David Lyons, "Reconstructing Legal Theory", Philosophy and Public Affairs, 16 (Fall 1987): 379-393.
- 27 Dworkin, Law's Empire, p. 14.
- 28 Dworkin, Law's Empire, p. 7.
- 29 Raz, "The Problem ...", p. 213.
- 30 Raz, "The Problem ...", p. 213.
- 31 Kelsen, p. 1.
- 32 Raz, "The Problem ...", p. 218.
- 33 Leslie Green, "The Political Content of Legal Theory," Philosophy and the Social Sciences, 17 (1987) p. 11.
- 34 Green, p. 11.

## CHAPTER TWO: INSTITUTIONALISM'S FLEXIBILITY

### I Law As Institutional Fact

In this section we are going to assume the plausibility of the institutional approach to the nature of law; that the analysis of law as a particular kind of social institution will best reveal its nature. While we might admit that this initial starting point explains little in and of itself, at least it seems not to obscure the popular picture of "law" as a set of directives issued by authoritative officials and legislators, applied by courts, and enforced through the use of organized sanctions. We do observe society regularly depending on the relative fixity of the products of authoritative deliberation, products the institutionalist typically identifies as law.

Now we shall examine a version of the institutional approach and consider its particular merits as a theory of law. This discussion demands some explanation as to what "the law" is as one social institution among other social institutions. It also demands that we make explicit those problems and limitations that arise for the particular theory we are studying. There are several important criticisms directed by recent legal philosophers against all species of

institutionalism. We shall address these with respect to the particulars of this version of the institutional approach. We shall, above all, be interested to see the extent to which this theory admits of considerations of value in its concept of law and if, as Raz's general remarks indicated, the institutional perspective is always committed to considering evaluative debates about the existence and content of laws as extra-legal.

To this point, the sense (or senses) in which the word "institution" has been applied has not been directly addressed. If we question the fecundity of the word for our purposes, we might usefully refer to Fowler's Modern English Usage for a start. Here it is noted that cricket, five o'clock tea, the House of Lords, Eton, the Workhouse, marriage, a hospital, capital punishment and the Law Courts are all institutions. At least on the authority of that record of present usage, the word seems a fertile conceptual region. Obviously, some of these examples are social institutions in that they are organizations of people which retain their organizational identity over time and are getting on with some job in an organized way. Social institutions such as courts, parliaments and police forces obviously exist to perform legal functions, but these should be recognized as distinct from "institutions of the law" of which contract, trust, ownership and marriage are examples.<sup>1</sup> We shall return to the importance of making this distinction

shortly.

When Neil MacCormick notes that "law is an institutional fact", he readily admits that he does not mean to speak as though such a "fact" exists on the level of brute creation. The portrayal of law as "fact" is hardly the importation of a strict empiricism into this inquiry. Rather, as McCormick takes some care to explain, there is a question for all of us as to how to treat law as something real as opposed to something fictional. There is thus the importation of metaphysical realism to be sure and the consequential treatment of law as real. He adopts from John Searle the distinction between "brute facts" and "institutional facts"<sup>2</sup> and notes that law is one of the latter:

If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing wax or for that matter cabbages, but rather along with kings and other paid officers of the state on the plane of institutional fact.<sup>3</sup>

It makes sense to say that the existence of a contract, for example, between a bus company and its individual riders is a matter of institutional fact as is the existence of a properly approved statute. Searle's contribution to this discussion is his contention that the institution behind institutional facts is a system of rules. Obviously, if we are concerned to see law as an institutional fact, behind such facts in some way will exist a legal system which is a system of rules. Understanding law as an institutional

phenomenon will take this sort of form from a philosophical perspective.

But there is another important perspective on law as an institutional phenomenon; that is the sociological one. This perspective considers the law as institutional in the sense that it is in various ways made, sustained, enforced and elaborated by an interacting set of social institutions such as those I mentioned earlier. The sociological understanding of this phenomenon, MacCormick notes, is reflected in common discourse where "the law" is taken to mean the courts, legal professionals and the police. The philosophical angle, on the other hand, is reflected in typical academic discourse as the set of rules and other norms by which these social institutions are supposed to be regulated and which they are supposed to put into effect.

These separate notions of how "the law" is an institutional phenomenon are both considered relevant to the general inquiry into the nature of law. Much of the arguments that will be given here reflect this position. The philosophical perspective that perceives a system of some sort lying behind such things as contracts and statutes clearly is an important area for finding out what law is. This is the area that the academic lawyer cum legal theorist like MacCormick feels most well equipped to investigate. But before moving on to his analysis of law as a system of rules, we should take note of the importance he ascribes to the

sociological understanding of law. A full understanding of the "whole of the law" cannot be had by the legal philosopher who is interested to explain the internal structure of legal systems. This is so because there are certain purposes and values that legal institutions demonstrate in their normal functioning which address the wider social structure within which "the law" operates. There is no access to an understanding of these purposes through a strict attention to legal rules, for as MacCormick points out, rules themselves do not have purposes except in the sense that people ascribe purposes to them. That it is possible to ascribe purposes to rules "depends on the manner of operation of the social institutions concerned with law, and on their having institutional purposes and values not necessarily identical with the individual purposes and values of any one of the persons involved."<sup>4</sup> The proper, harmonious and purposeful operation of the law in its concrete application is primarily a function of a social institution, namely the courts. Thus, "the law" in its normative significance is not confined to an analysis of valid rules. Rather, this analysis is but a part of jurisprudential concern which is also interested in law as an institutional phenomenon in the sociological sense. Why such institutions have the aims that they do is a question best addressed by the sociologist in MacCormick's opinion.<sup>5</sup> It will form the sociologist's contribution to jurisprudence which MacCormick considers a joint adventure of lawyers,



philosophers and sociologists.<sup>6</sup>

As we have seen, to say that law is a matter of institutional fact in the philosophical sense is to say there exist 'institutions of the law' such as contract, trust, marriage and so on. Such a fact depends for its existence upon a class of acts whose performance the law treats as operative in bringing this fact into existence.<sup>7</sup> A legal system lays down institutive rules which state when a rule can be said to exist.<sup>8</sup> But while a "rule of recognition" recognizes valid laws, an "institutive rule" recognizes contracts, etc.) An institutive rule sets out when a contract comes into existence. If a contract comes into existence in virtue of an institutive rule, then certain consequences for those making contracts will follow from this. Rules which lay out what consequences will follow are termed consequential rules. There is a third set of rules governing when a contract or other institution of the law ceases and these are called terminative rules. All the concepts we normally think of as institutions of the law, marriages, incorporation, etc., must be understood to have in common within their meaning the existence of institutive, consequential and terminative rules.<sup>9</sup> This is a general picture of such institutions, however, and we must leave room for the practical possibility that laws may never be formally terminated.

This systematization allows the daunting mass of

legal material to be seen in some of its aspects as relatively simple sets of interrelated rules such as our example of contract has indicated. It also allows the treatment of large bodies of law in an organized and generalized way. This discussion of how rules of law are interrelated suggests a philosophical model of legal validity: "the existence of a valid rule of law, as of a valid contract, is a matter of institutional fact".<sup>10</sup>

## II The Problem Presented By The Common Law

The model of the conditions for legal validity sketched above seems to fit legislatively posited law very well, but it runs into significant difficulty when addressing the grounds for the validity of common or customary law. What is depicted above as being the necessary and sufficient criteria for establishing the validity of statutes does not seem helpful in cases involving common or customary laws because these cannot easily be conceived as being valid in virtue of clearly statable institutive rules. Thus we seem to come upon an important limitation to the analysis of law as a system of valid rules. At this point in his inquiry, MacCormick goes on to explain why such an analysis indeed does not exhaustively constitute the concept of law. He notes that certain works of Ronald Dworkin and A. W. B. Simpson have developed awareness of these limitations.

The effect of A. W. B. Simpson's celebrated article, "The Common Law and Legal Theory", has been to loosen the grip of the legal theorist's picture of the common law as a system of rules and to make legal theory on this matter seem less systematic and more realistic. His argument is that the theorist, MacCormick for example, is mistaken who is concerned to see common law as a body of rules forming a system in that the rules satisfy specific tests of validity such as those mentioned above. Simpson points out that the notion that the common law consists of rules which are products of acts of "legislation" by judges cannot be made to work because common law rules enjoy whatever status they possess, not because of the circumstances of their origin, but because of their continued reception over time. "The common law is more like a muddle than a system and it would be difficult to conceive of a less systematic body of law."<sup>11</sup>

Immediately we see that it is MacCormick's "institutive rule" which lays down the conditions for a rule's existence that is problematic as it applies to the common law. The existence of common law does not seem to be determined by clear institutive rules. Rather, such law appears to be a matter of custom for a particular historical community. In many cases, no authoritative body has laid down when a common law rule shall be said to exist, and even in cases where a common law rule was expressed, it is often evident that it may have "existed" in a meaningful sense

before that particular application.<sup>12</sup> How then can the triad of institutive rules which establish necessary criteria of a valid law apply in the case of common law? Simpson expresses the difficulty facing the institutionalist's theoretic ideal thus:

Put simply, life might be much simpler if the common law consisted of a code of rules, but the reality of the matter is much more chaotic than that, and the only way to make the common law conform to the ideal would be to codify the system, which would then cease to be common law at all.<sup>13</sup>

Simpson considers the complete abandonment of thinking of the common law as a system of rules to be in order. MacCormick agrees that it is a mistake to assume that all law can be considered subject to the same institutive rules establishing validity as is the case in enacted law. He concedes that it is an important question as to whether there are clear criteria (e.g. as to what constitutes the ratio decidendi of a case) for the existence of rules of common law.<sup>14</sup> MacCormick, then, addresses Simpson's charge that the legal philosopher's "crisp picture of a set of identifiable rules" which arise from decisions handed down in particular cases is not seen to contrast with the "essentially shadowy character of the common law."<sup>15</sup> MacCormick recognizes that one should not impose system where there is none.<sup>16</sup> The general picture of the common law we have, Simpson asserts, is that it "lacks an authoritative text" and rather exists without being committed to any authentic form of words. Simpson observes

that the common law has for centuries existed "without such props as the concept of the ratio decidendi, and functioned well enough."<sup>17</sup> His observation is taken to support the contention that there appears to be no room whatsoever to admit of the idea that precedent can give rise to clear "rules".

Many theorists, MacCormick among them, are ready to concede that the idea of an 'authoritative text' for a common law rule is somewhat problematic given the difficulties of textual interpretation. The rule established in common law may be unclear, and thought and argument may be required to determine its existence and scope. MacCormick disagrees with Simpson's contention that any conception of rules is always unwarranted in case law. Some judicial precedents contain relatively clear rulings on fairly sharply defined points of law, and others contain implicit rulings of similar, but perhaps less, relative clarity. Others, because of judicial disagreement or simple confusion contain none.<sup>18</sup> Consider the following example of a well-defined point of law as identified by Lord Atkin of the British House of Lords in the case of Donoghue v. Stevenson :

The sole question of determination in this case is legal: Do the statements made by the pursuer in her pleading, if true, disclose a cause of action? I need not re-state the particular facts. The question is whether the manufacturer of an article of drink sold by him in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care

that the article is free from defect likely to cause injury to health.<sup>19</sup>

The Lord's affirmative answer to this clearly defined question clearly serves as the ruling in Donoghue v. Stevenson - the valid rule for which the case stands. As MacCormick properly asserts, in many cases, some such relatively clear rule can be seen to have been established in the judicial decision. Consider, in further support of this position, the following words of Lord Dunedin taken from another case:

When any tribunal is bound by the judgement of another court either superior or coordinate ... it is of course bound by the judgement itself. And, if from the opinion delivered it is clear - as it is in most instances, what the ratio decidendi was which led to the judgement, then that ratio decidendi is also binding.<sup>20</sup>

All of this should be sufficient, then, to make plausible the notion that "rules of law" can often be derived from particular decisions in case law.<sup>21</sup> But what justifies this application of a concept of a rule here? We can answer this by referring to elements of MacCormick's sensitive but persistent drive toward conceptual clarity. It is justified by an overall aim in the organization and exposition of the law: "that the law should be readily comprehensible to and sensibly organized for those who work with it, and that it should also make as much sense as possible to the non-professionals whose lives are regulated by it."<sup>22</sup> The notion of a ratio decidendi - i.e. a rule arising from case law in a particular instance, aids a clear understanding for these

persons and obscures little with respect to the overall nature of the common law as often not admitting of an analysis in terms of rules.

This position stands, of course, in complete contrast to Simpson's conclusion that any analysis of the common law is terms of rules is unhelpful and misleading.<sup>23</sup> Whatever can be said in support of Simpson's views about the direction of legal theory with respect to an intelligent understanding of the common law, it is clear that MacCormick is not interested to press the point that the common law can be exhaustively described in terms of rules of law. We should take care to make MacCormick's final position on the analysis in terms of rules quite clear. The analysis of the interconnectedness of legal rules, MacCormick notes, seems applicable to both statute and case law to an important extent. In these types, there are sufficiently clear criteria for the existence and termination of rules, and there are reasonably clear consequences that follow for judges and others from such rules. On the basis of this, we have a clear concept of "rules of law" as an institutional concept in the the sense we have been pursuing. Rules of law as institutional facts, it is concluded, are one of the central features of legal systems and we should have an incomplete picture of "the law" without them. These rules, however, do not exhaustively constitute our concept of law for this is at least partly constituted by an understanding of the social institutions

which make, sustain, interpret, apply and enforce the law.<sup>24</sup> This is one of MacCormick's most important observations for our present discussion. I am in support of his argument that the use of the concept of a rule is warranted in some cases of the common law, such as in the case of Donoghue v. Stevenson, and find it does not impose any obscurity but rather aids in understanding how the cohesion of ideas over cases over time proceeds.

### III The Presumptive Validity Thesis

Now if one rejects the picture of the common law as a collection of readily identifiable rules, it is important for the institutionalist to explain how legal validity is conferred upon contracts, etc., in a way that accounts for "the shadowy character" of common law. MacCormick moves from certain questions raised by Simpson to the important claim that "all the norms in question when we apprehend "the law" in its entirety cannot be assumed to exist 'validly' in virtue of clearly statable institutive rules."<sup>25</sup>

MacCormick argues that the institutive rules that determine when a valid rule, contract, etc., can be said to exist, to be terminated, etc., do not lay down necessary and sufficient conditions for legal validity. Rather, these institutive rules are thought to express "presumptively necessary" conditions as follows:



These conditions are necessary for validity except in cases in which it can be shown that some strong argument from legal principle justifies waiving, or making an exception to, some of them, and that no similarly strong counter-argument can be made against doing so.<sup>26</sup>

Institutive rules make clear at least what are the "ordinarily necessary" conditions for having, for example, a valid contract. Yet such rules also allow for a degree of flexibility in order to cover unusual cases. Decisions in such cases are rationalized by the use of arguments from principle.

Consider an instance in which conditions sufficient for the existence of a valid contract were considered to have been met even though the ordinarily necessary conditions were not clearly met. In the case of a person presuming to purchase a house without normal legal conveyance, one might think that the purchaser has no valid contract to buy the house in spite of his having made payments. Here it would seem that rules of validity have not been met. Yet, in England and Scotland, the principles of justice and fairness have led to decrees forcing the seller to make good the agreement by executing the proper conveyance.<sup>27</sup> In such cases the facts were such that they were construed as sufficient to cause the courts to act in favour of the purchaser.

Alternatively, there are unusual cases in which the ordinarily necessary conditions for validity appear to have

been met, and yet they are deemed insufficient to actually determine validity. Such was the result in the celebrated case of Riggs v. Palmer.<sup>28</sup> The facts of the case are that Elmer murdered his grandfather who in his will had left Elmer the bulk of his estate. Elmer suspected that the grandfather might change his will and leave him nothing since the old man had recently remarried. Elmer's crime was discovered and he was subsequently convicted and sent to jail. The residuary legatees under the will, the grandfather's daughters, sued the administrator of the will demanding that the property go to them instead of Elmer. In spite of the fact that all the expressed requirements of the law would appear to have justified Elmer's inheriting the property, the majority of judges decided in favour of the daughters inheriting. To justify its decision the court referred to the principle of common law that "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or found any claim upon his own iniquity, or to acquire property by his own crime." According to MacCormick, the existence of that principle as an established principle of common law justified treating the defendant's having murdered the testator as a vitiating circumstance depriving the will of its apparent validity even though no such exception was written into the act.<sup>29</sup>

MacCormick seems to stop somewhat short of a complete analysis of the judgement in Riggs. Moreover, his conclusion

that "the argument on principle is taken as justifying the conclusion that a will may be invalid even though all expressed requirements of the law have been met" may be somewhat misleading. The important issue was whether a "plain meaning" of the statutes constituted an acceptable interpretation of them or whether a proper interpretation of them denied validity to the testator's will.<sup>30</sup> Consider the following excerpts from Riggs:

It is quite true that statutes regulating the making, proof, and effects of wills and the devolution of property if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer. (emphasis added)

It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.

It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it.

According to the judge's views expressed here, it seems misleading to say, as MacCormick does, that "all expressed requirements of the law have been met". The notion of "expressed requirements" is problematic since, on the view of the court, certain requirements are left unexpressed. The majority of the judges in Riggs recognized this. If a proper interpretation would have denied Elmer the inheritance, in what sense can we suggest that the statute indicates one thing and the principle another? The determination of the

decision clearly shows the principle intrinsic to understanding the meaning of the statute. The judges did not decide on the plain meaning of the statute and then reject that in favour of a principle. It appears they rejected "plain meaning" as a proper technique of interpretation altogether.

Allow me to apologize, on behalf of MacCormick, for his misleading conclusion about Riggs. When MacCormick draws attention to "expressed requirements", he only means to show that his presumptive validity thesis can account for the decision in the case. He does not mean to convey the impression that the Statute itself requires one thing and the principle another. Rather, he insists that the conditions of validity which we suppose to be laid down by an institutive rule have to be actively "read in the light of relevant legal principles".<sup>31</sup> This clearly makes principles not separable from but intrinsic to the interpretation of the statute. In order to state this position with the precision it deserves, let us consider H. L. A. Hart's version of it:

It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice; and they may be formulated in general terms as principles, policies, and standards.<sup>32</sup> (emphasis added)

On this account, a working body of rules includes principles

such as the one used to determine Riggs. This appears to be a position Hart has always clearly held.<sup>33</sup> It conforms with the arguments MacCormick has made for the significance of principles in judicial reasoning.

We might have another question concerning the use of the term "legal" by MacCormick. Is it proper to speak of principles as "legal principles" in the way that MacCormick does? Let us take him up on this issue. At one point, he argues that principles belong within the genus "law" on the basis that principles interact with the rules, underpin them, hedge them in, qualify them and so on.<sup>34</sup> At another place he explains in what sense he applies the term "legal" to principles:

There is a relationship between [institutive rules] and principles of law, but it is an indirect one. The rules which are rules of law are so in virtue of their pedigree; the principles which are principles of law are so because of their function which those who use them as rationalizations of the rules thus ascribe to them.<sup>35</sup>

Is such an indirect relationship sufficient to make us use apply the term "legal" to principles? MacCormick thinks it is, and he provides the following argument:

When we view the law in action what we see is a constant dialectic between what has been and is taken as settled, and the continuing dynamic process of trying to settle new problems satisfactorily and old problems in what now seems a more satisfactory way.<sup>36</sup>

As an institutionalist, then, MacCormick parts company with those who propose very strict characterization of "the law" and, hence, what properly falls within the legal. In his

Legal Reasoning and Legal Theory, MacCormick gives serious consideration to discretionary questions frequently raised by judges such as the following : "How ought we to justify decisions concerning the interpretation and application of our criteria of validity?" He considers this a "legal" problem, i.e. legal in the sense that it is a problem with which judges must grapple in deciding cases at law. MacCormick reasons that since such questions are concretely raised within courts of law, one should be reluctant to treat these as being non legal simply on the basis of a definitional fiat.<sup>37</sup> Talk of legal principles guiding judges in discretionary situations is perfectly intelligible since they are associated with and vital to effective adjudication. MacCormick's position on what counts as "legal" clearly reflects his adoption of the "basic intuition" we spoke of in the previous chapter; that the law has to do with those considerations that it is appropriate for courts to rely upon in justifying their decisions. But like Dworkin,<sup>38</sup> MacCormick seems to have also adopted the conclusion that all the considerations a court may use are legal.

In spite of this, it is difficult to completely appreciate the source of MacCormick's concern regarding the "legal" status of principles. The argument from "constant dialectic" seems a very weak one, and it does not appear that his theory necessarily requires the designation. Though this dialectic is certainly a fact, we could just as easily

describe this as dialectic of the legal and non-legal as Raz might do. Even Joseph Raz would agree that judges do more than apply pre-existing law. Perhaps MacCormick fears that the "non-legal" and "extra-legal" designations of Raz and Kelsen as applied to principles are somehow derogatory and that the label "legal" is an appraisive term. But most probably, MacCormick's adoption of the "basic intuition" is of a form that, like Dworkin's, does not distinguish between legal considerations a court may use and non-legal considerations.

We might next ask what distinguishes legal principles from other kinds. MacCormick supplies a rough criterion for what counts as a legal principle. We may understand legal principles to which judges may resort in justifying discretionary decisions as political principles of a certain character:

Principles which are legal principles are also political, in the sense that they are concerned with the good governance of the polity ...<sup>39</sup>

Even with the criterion in mind that legal principles concern the good governance of the polity, we only have a vague notion of what counts as a legal principle.

There are good reasons why we should not to use this adjective loosely. One is that MacCormick's argument for "law as institutional fact" might seem unwarranted philosophically if we also accept the "dialectical argument" that principles also belong to law. MacCormick defends against a conflict

between these two arguments in his paper, but the confusion that can develop is obvious. This argument concerning "institutional fact" seems to be indispensable to the more or less Hartian institutionalism that MacCormick claims generally to defend.<sup>40</sup> I conclude that since MacCormick's usage of the term "legal" invites confusion, we are better off signifying the importance of principles by describing how they are used in adjudication. This is essentially what Hart does in the passage I quoted above.

Let us summarize MacCormick's views thus far and draw out some conclusions. Simpson charges that legal philosophers mistakenly suppose that the common law can be represented as a system of rules. MacCormick responds by arguing that "the law" is not to be understood as being exhausted by a set of rules which exist through time as "valid" rules of law. The presumptive validity thesis appears to have been developed in order to account for the kind of indeterminacy in the law to which Simpson draws our attention. In many areas of the common law there is at any given point in time a considerable degree of flexibility and unpredictability. Indeed, notes MacCormick, "there is no area of law in which we can ever state with certainty that there is none."<sup>41</sup> Any formulation of an institutive rule of an institution has to be read in the light of relevant legal principles already established and of possible new ones based on conceptions of the purpose of the institution in the



context of changing social conditions and values.<sup>42</sup>

The aim of MacCormick's presumptive validity thesis is to shed light on adjudicative processes. His views invite comparison with Ronald Dworkin who is similarly engaged. It is to such comparisons that we now turn.

#### IV The Question Of Perspective

MacCormick might be seen to share Ronald Dworkin's preoccupation with the reasoning judges use in deciding cases. In what follows, I shall compare their views on two issues. The first is their respective characterizations of judicial thinking. The second is a question which Dworkin ties to an understanding of judicial argument: the appropriate point of view from which to study adjudication. The aim here is to grasp to what extent an institutionalist, like MacCormick, can address Dworkin's concerns without denying the very illuminating observation that law is "institutional fact".

Clearly, there is common ground with Dworkin's plea in Taking Rights Seriously that we must take full account of principles and other standards as well as legal rules if we are to have an adequate theory of law or of legal reasoning. On this point, there is probably common ground with nearly all legal theories, for no one seems to deny that judges frequently do apply arguments from principle. In spite of

this, Dworkin and MacCormick disagree over the methods courts use to make judgements which utilize these principles. They disagree about the role of legal principles in adjudication. Their differences are more obvious than ever when we consider Dworkin's theory of law as fully expressed in Law's Empire.

MacCormick holds that the method of legal reasoning used in justifying decisions is sometimes purely deductive and logical in character, i.e. a decision is justified by logical argument from sound legal premises and findings of fact.<sup>43</sup> Other times, purely deductive justification is not possible and forms of reasoning such as we saw expressed in Riggs v. Palmer are used. Indeed, MacCormick goes to some length to explain the limits of deductive justification in his Legal Reasoning and Legal Theory and to explain and argue the importance of its alternatives. In contrast to this depth of analysis, Dworkin "explains" all instances of judicial reasoning within one sweeping general claim: that legal judgements meld various dimensions of interpretation into one opinion by applying convictions about "fit" with existing legal texts, convictions about how this fit constrains judgements of textual substance, and how convictions about fairness and procedural due process contest with one another. The resulting judgement will express an interpretation which the interpreter believes makes the legal community's record the best it can be from the point of view of a theory of political morality.<sup>44</sup>

It is important to see why these two models of judicial reasoning are very different despite the fact that they purport to account for the same activity. Dworkin's work is, without doubt, an attempt to picture an ideal of judicial reasoning. It is a theory which moves backwards, in a sense, by picturing how the judge's ideal judge, "Hercules", would decide cases before drawing out an account of how actual judges attempt to justify their decisions. The layout of Dworkin's Law's Empire masks this unusual and possibly philosophically dubious approach by discussing concrete cases like Riggs first and offering the only "acceptable" explanation of outcomes in such cases afterwards. His analysis of competing models for explaining these outcomes, "conventionalism" and "pragmatism", presupposes one essential part of his own theory of adjudication: the point of view of a judge deciding cases. This, if nothing else, loads the dice in favour of "law as integrity". Dworkin argues that, from the point of view of a judge, none of the competing theories will do. But we might ask whether we need depict an ideal judge in order to comprehend judicial reasoning? This seems unnecessary if resort to real judges and real decisions is all that is necessary for us to gain such understanding. Need we perceive theoretical models for adjudication through the eyes of judges such that the only alternatives to "law as integrity" are the weak "ideal" alternatives

"conventionalism" and "pragmatism"? Again this seems unnecessary if an understanding of adjudication can be drawn by a legal philosopher, such as MacCormick, from extensive appeal to real law, real judges and real decisions. We might be left wondering, then, what is special about Dworkin's "point of view of a judge" and why can't other philosophical approaches take it into account.

MacCormick has followed Dworkin's philosophical development for some time. In "Law as Institutional Fact", he tried to accommodate some of Dworkin's concerns.<sup>45</sup> And in Legal Reasoning and Legal Theory, he addresses elements from Taking Rights Seriously.<sup>46</sup> In the remaining part of this chapter, I am interested to compare their views on the question of judicial perspective that Dworkin raises in Law's Empire.

One way of gaining a depth of understanding of judicial reasoning is to reflect personally on the meaning and importance of claims of justification and not to attempt to take up a scientific or neutral perspective which will not provide a comprehensive understanding of judicial practice. MacCormick argues that a full understanding of a legal system is not possible "unless I 'get myself inside it' to the extent of grasping the conception or conceptions of justice and the good by which it is animated."<sup>47</sup> Here is some common ground with Dworkin, for in Law's Empire, the latter argues that a social scientist who offers to interpret (relate an

understanding of) a social practice such as a legal system must join in the practice he proposes to understand.<sup>48</sup> Dworkin borrows from Jurgen Habermas the observation that a social scientist should at least be a "virtual" participant in the practice he means to describe. Further, the investigator must "stand ready to judge as well as report on the claims his subjects make, because unless he can judge them, he cannot understand them."<sup>49</sup>

Let us observe that Dworkin's position does not dismiss descriptive sociology of law as impossible, rather it points to the limitation that we cannot think of it as purely descriptive. There exist many arguments in recent philosophy of social science as to exactly how pure of evaluative elements any descriptive sociology can be. For example, judgements as to the scope of theoretical inquiry and as to the inclusion or exclusion of phenomena for study all involve evaluative input.<sup>50</sup> Such arguments have largely displaced the former notion that a completely evaluatively neutral social science was possible.

Now we have seen McCormick make the case, in the article "Law as Institutional Fact", that there is an important role for sociological explanation in jurisprudence. Specifically, he felt that questions concerning why social institutions have the aims that they do have are best addressed by the sociologist.<sup>51</sup> Some years later in his book, Legal Reasoning and Legal Theory, he made the above point

that a full understanding of a legal system is not possible "unless I 'get myself inside it' to the extent of grasping the conception or conceptions of justice and the good by which it is animated." My contention is that these statements are not contradictory on the basis that the former statement can now be understood to mean that the investigation of such institutional aims must be made by an engaged viewer. He must be engaged to the extent that he joins with others in the practice in having a view upon its aims. The major shift in the tenor of these two claims reflects McCormick's later awareness that he as well as a professional social scientist have something useful to contribute to investigating the way social institutions operate.

MacCormick holds that a well-informed reflective individual, who takes part in the social institutions he is interested to investigate, can make a significant contribution to understanding at the level of values and purposes. To the extent that investigating social institutions is her classic domain, the sociologist has a part to play in our understanding the social institution of "the law".

But let us be clear. "Joining" the practice sufficiently to understand it does not require that the sociologist agree with "the conceptions of justice and the good which animate the legal system". On the contrary, one

may retain competing conceptions of these and thus maintain a series of normative judgements which remain quite separable from the study of the practice itself. This amounts to, as McCormick points out, a genuine distinction that remains between a legal system as it is and the normative evaluation of what is described.<sup>52</sup>

And if there is some doubt that the "descriptive" enterprise itself is misconceived or that the analysis of legal reasoning defies concrete analysis, let us recall that there are respects in which "law" is entirely factual. McCormick further defended his position concerning the immediacy of social "facts" during an address to a recent conference at McMaster University:

Institutional facts are not raw experiences, but experiences read and interpreted through the medium of rules. This in turn implies that it is by a hermeneutic understanding of legal talk or discourse and of the way in which our action and judgement may be oriented to rules that we can comprehend the facticity of legal facts. ...<sup>53</sup>

And if we have any doubts as to the immediacy of these facts to our understanding as opposed to other things we take for granted as "factual", he has this to say:

Brute existence, indeed, seems to me ... to be more problematic than institutional facticity. It is easier to lay hold of truths in which you can have solid confidence in the cultural world than in the world viewed (or aspirationally viewed) without cultural assumptions.<sup>54</sup>

The point here is that we have no fear of engaging in descriptive analyses of legal systems nor need we fear that

anything is lost by doing so. Because of the immediacy of institutional facts and our capability to pronounce quite explicitly on what conditions a proper understanding of them, description of the essentials of a legal system can remain sufficiently separable from our own judgements of their value to us personally. The investigator can describe with a minimum of his personal evaluative input what the principles of a legal system are in order to grasp, in its entirety, what a legal system is and what it expresses. Thus it is possible to keep distinct the description and the evaluative appraisal of a legal system. Further, keeping these distinct seems to serve the aim of clear thought and clear discussion about law. But pursuing this separation does not contradict what we have said about "joining" the legal system we are intent to describe. McCormick argues, I think successfully, that insisting on this separation is "not to say that any law could be grasped at all or its principles and its rules understood if it were not appreciated that for those who willingly subscribe to a legal system it is oriented towards values, oriented towards ordering society in what they consider to be a good and just way."<sup>55</sup> There is simply no ambiguity or conflict here.

So McCormick's institutionalism is not completely defiant of taking up what Dworkin has called the "internal participant's point of view" on the character of legal practice. I think McCormick would agree that it would



further a sociology of law if the investigator "struggled with the issues of soundness and truth" that participants in the practice face in seeking to justify their decisions.<sup>56</sup> In Law's Empire, Dworkin conceives of this "struggle with the issues of soundness and truth" on a particular case to be resolved by a judge's producing theory about how past decisions should be understood. That is to say, adjudication is essentially the construction of a political theory. It is difficult to judge whether, or to what extent MacCormick would go along with the philosophy of interpretation that Dworkin uses to fuse participation with theory construction. But we do know that MacCormick holds fast, as I think he should, to a position where not all past decisions are thought a priori open to question as Dworkin's philosophy of interpretation supposes. In Dworkin's view, past authoritative decisions carry no weight with respect to current decisions unless they are "constructively interpreted". No past decisions, therefore, can be thought to immediately and clearly apply to a present case on this view. Against Dworkin we might argue that there surely are cases for which a rule applies more or less clearly and there are those which are not clearly covered by a rule. We cannot forecast in advance where a case will fall "in the spectrum from the pellucidly clear to the long-shot try-on".<sup>57</sup> But we also cannot tell in advance whether anything approaching Dworkin's "constructive interpretation" will be necessary.

It seems reasonable to say that whereas for Dworkin, taking up the "participant's perspective" involves doing "constructive interpretation" in whatever manner is appropriate to the case, MacCormick sees instructions for adjudicators somewhat differently. Dworkin's philosophy of interpretation seems well at odds with MacCormick's general acceptance of certain "facts" about precedent in law. In a particularly illuminating way, and in accordance with the picture MacCormick has argued for, Hart describes some pairs of contrasting "facts" about adjudication:

First, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. ... Secondly, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. Thirdly, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts that are bound by it of the following two types of legislative activity. On the one hand courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted from the precedent, and admitting some exception to it not before considered, or, if considered, left open.<sup>58</sup>

Dworkin's theory of adjudication seems to distort these facts to the extent that past decisions are not, on his theory, to be regarded as having authoritative status with regard to a present case without being constructively interpreted first. It is in this way that a charge that J. L. Mackie once made against Dworkin still stands: that Dworkin's theory allows judges to play fast and loose with the settled law.<sup>59</sup> It

takes considerable effort to align Hart's facts about precedent in law with an ideal model of adjudication such as Dworkin proposes. We are thus struck with the contrast between the non-ideal realistic account that Hart and MacCormick present and the ideal "Herculean" form of judicial thinking.

It seems correct to me that facts about how adjudication is actually carried on must be "accommodated" by and located within a comprehensive understanding of the "working law". To achieve this understanding, it seems plausible that we have to "join" in the actual process of adjudication. It does not seem as obvious that if we do join in this activity we necessarily do "constructive interpretation".

#### V Concluding Remarks

The point of this section has been to argue that the institutional view of the nature of law need not distort any critical aspect of judicial reasoning. We saw that Simpson's arguments against the legal philosopher's insistence that all law can be conceived as a "system of rules" gave way to an adjusted perspective on the conditions of the validity of legal rules, a view that seems in accordance with the way judges actually reason when they decide cases like Riggs v. Palmer. In spite of the observation that institutive rules

are only presumptively necessary for determining legal validity, we saw that rules as institutional facts are an important part of "the law" that cannot be ignored if we hope to understand it. We saw that recognition of arguments from legal principle open a legal system to the influences of changing social conditions and emerging values, the impacts of which are part of "the law" if comprehended in its entirety. From our general discussion of the role of principles in legal argumentation, we can understand how principles express the underlying purposes of detailed rules and specific social institutions, in the sense that they are seen as rationalizing them in terms of consistent, coherent and desirable goals.<sup>60</sup> This is true even though there are many instances in which evaluative elements needn't be directly applied in order that a decision is reached. And these particular instances do not make irrelevant evaluative elements which are closely allied with the purposes and values of the social institution of law, but rather these remain relevant to any decision by standing as the rationale for the decision.

Notes to Chapter Two

1 Neil MacCormick, "Law as Institutional Fact," The Law Quarterly Review, 90 (1974): 110.

2 John Searle. Speech Acts (Cambridge: Cambridge University Press, 1966), p. 50-53.

3 MacCormick, p. 103.

4 MacCormick, p. 128.

5 MacCormick, p. 128-129.

6 MacCormick, p. 129.

7 MacCormick, p. 104.

8 MacCormick's "institutive rules" seem to be analogous to H. L. A. Hart's "rules of recognition" to some degree. See H. L. A. Hart, The Concept of Law. (Oxford: Clarendon Press, 1961), p. 77. But while a "rule of recognition" recognizes valid laws, an "institutive rule" recognizes contracts, marriages, incorporation, etc.

9 MacCormick, p. 107.

10 It may be helpful to point out that Hart might distinguish two types of "secondary rule" determining the existence of a contract: a secondary rule of contract which tells us when we have a valid contract and a secondary rule of recognition which tells us when a rule is a valid legal rule. On MacCormick's model, these both appear to be institutive rules. The validity of a statute, to take another example, clearly depends on institutive rules being followed, i.e. on its being duly passed in Parliament, on its being given Royal assent, on its terminative rules which describe when the statute ceases to exist and on its consequential rules stating what properly follows from its existence.

11 A.W.B. Simpson, "The Common Law and Legal Theory," in Oxford Essays in Jurisprudence, ed. A.W.B Simpson. (Oxford: Clarendon Press, 1973), p. 99.

12 Simpson, p. 95.

13 Simpson, p. 86.

14 MacCormick, p. 111.

- 15 Simpson, p. 87.
- 16 MacCormick, p. 112.
- 17 Simpson, p. 77.
- 18 Neil MacCormick, Legal Reasoning and Legal Theory, (Oxford: Clarendon Press, 1978), p. 84-85.
- 19 Donoghue v. Stevenson, House of Lords [1932] A.C. 562.
- 20 Lord Dunedin, The Mostyn [1928] A.C., at 73; in Rupert Cross, Precedent in English Law. 3rd edition. (Oxford: Clarendon Press, 1977), p. 62.
- 21 MacCormick, "Law as ...", p. 112.
- 22 MacCormick, "Law as ...", p. 118.
- 23 Simpson, p. 88. This particular view of Simpson's seems comparable to the position adopted by "the American Realist School" of jurisprudence which has characteristically emphasized the liberty which a later judge enjoys of disregarding what his predecessors said in the cases cited to him. One might say there is only one "rule" that judges of the Realist persuasion follow: "The rule is quite simple, if you agree with the other bloke you say it is part of the ratio; if you don't you say it is obiter dictum, with the implication that he is a congenital idiot." See Rupert Cross, Precedent in English Law (Oxford: Clarendon Press, 1977), p. 50-53.
- 24 MacCormick, "Law as ...", p. 112 and 128-129.
- 25 MacCormick, "Law as ...", p. 111.
- 26 MacCormick, "Law as ...", p. 123.
- 27 MacCormick, "Law as ...", p. 123.
- 28 Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).
- 29 MacCormick, "Law as ...", p. 124.
- 30 See Wilfrid Waluchow's analysis of Riggs in "Hart, Legal Rules and Palm Tree Justice", Law and Philosophy, 4 (1985): 49-70.
- 31 MacCormick, "Law as ...", p. 126.

32 H. L. A. Hart, "Problems of Philosophy of Law" in The Encyclopedia of Philosophy, ed. Paul Edwards (London: Collier Macmillan Publishers, 1967), Vol. 6., p. 271.

33 Hart, The Concept ...", p. 121.

34 MacCormick, Legal Reasoning ..., p. 244.

35 MacCormick, Legal Reasoning ..., p. 233.

36 MacCormick, Legal Reasoning ..., p. 245.

37 MacCormick, Legal Reasoning ..., p. 63.

38 See Joseph Raz, "The Problem About the Nature of Law", The University of Western Ontario Law Review, 21 (1983):211.

39 MacCormick, Legal Reasoning ..., p. 238-9.

40 MacCormick, Legal Reasoning ..., p. 231.

41 MacCormick, "Law as ...", p. 127.

42 MacCormick, "Law as ...", p. 126.

43 See MacCormick, Legal Reasoning ..., p. 36-37.

44 Ronald Dworkin. Law's Empire. (Cambridge, Mass.: Harvard University Press, 1986), p. 410-411.

45 MacCormick, "Law as ...", p. 112.

46 MacCormick, Legal Reasoning ..., p. 229-258.

47 MacCormick, Legal Reasoning ..., p. 239.

48 Dworkin, p. 64.

49 See Dworkin, p. 422, note 14.

50 See Chapter One, p. 33 and Raz, "The Problem About the Nature of Law", p. 218.

51 MacCormick, "Law as ...", p. 129.

52 MacCormick, Legal Reasoning ..., p. 240.

53 Neil MacCormick, "Smashing the Two-way Mirror" in Antifoundationalism and Practical Reasoning, ed. Evan Simpson (Edmonton, Alberta: Academic Printing and Publishing, 1987.,

p. 213-214.

54 MacCormick, "Smashing ...", p. 213-214.

55 MacCormick, Legal Reasoning ..., p. 239.

56 Dworkin, p. 14.

57 MacCormick, Legal Reasoning ..., p. 228.

58 Hart, The Concept ..., p. 131.

59 See John Mackie, "The Third Theory of Law", Philosophy and Public Affairs, 7 (1977):3-16.

60 MacCormick, "Law as ...", p. 127.



## CHAPTER THREE: LAWS, MORAL INTUITIONS AND NARRATIVES

### I Natural Law Revisited

We have noted in passing that the institutionalist typically insists on a genuine distinction between the description of a legal system as it is and the normative evaluation of the law which is thus described.<sup>1</sup> Moreover, it is not the case that the validity of rules in such a system necessarily depends on questions of their morality. There is no necessary criterion for legal validity which requires laws to be just to be valid. Institutive rules themselves supply the ordinarily necessary and presumptively sufficient conditions for legal validity. Because upon gaining legal validity rules become legal rules, we can state a further position: it is not a necessary truth that laws satisfy certain demands of morality, even if in fact they often do.<sup>2</sup> This argument has historically been directed against theories of law which have asserted that no morally iniquitous laws can be valid.

Some recent theories of law which are critical of the institutionalist's treatment of moral-legal interaction do not appear to oppose the institutionalist's conception of legal validity. Instead they criticize the institutionalist

for not perceiving some fundamental evaluative structures upon which a legal system practically depends. For John Finnis, these structures are the "basic values" toward which all human enterprises are ultimately directed. Legal theory is ultimately moral theory to Finnis, in the sense that all questions regarding a legal system ultimately lead back to the "basic goods". It is his insistence that there are such goods which is the main object of my criticism here. Otherwise, his arguments about the prominent place of practical reasoning in legal systems is quite illuminating. The institutionalist need have no quarrel with the proposal that practical reasoning must have its foundation in values. Assuming a certain set of values, they can be used to justify the validity of derivative values or of rules or other reasons for action. But for legal philosophy to proceed with a notion of unquestionable "goods" toward which practical reason is necessarily directed is a separate issue.

A structure of an entirely different sort is expounded by Ronald Dworkin in Law's Empire. A legal system for him is not unlike a piece of literature; it has a "plot" in some sense and a purpose related to the continuity and coherence of "the work" taken as a whole. "Law" is created by reference to concerns of political morality expressed in "the work" to date and by committed moral argumentation that can be brought to bear on all of the past judicial and legislative decisions to yield a justified current decision.

The very idea of "law" is to be grasped from the point of view of a judge who typically strives to serve the "plot" in the judgements of cases coming before him or her. A judge thereby advances the story that a legal system is in its most essential aspect.

Let us evaluate Finnis' "basic good" theory first and then move on to problems of similar magnitude in Dworkin's theory of "law as integrity". This examination will not be wholly destructive by any means. A by-product of our criticism will be the exposure of a measure of agreement between these theorists and the institutionalist views we have been pursuing.

The fundamental concern of sound 'natural law theories' is to understand the relationship(s) between the particular laws of particular societies and the permanently relevant principles of practical reasonableness.<sup>3</sup> The object for Finnis is to show how these permanent requirements are necessarily involved in the act of positing law. Notice that there is no mention of a proposal often attributed to "natural lawyers" that the moral principles in question determine particular laws:

The concern of the tradition, has been to show that the act of "positing" law (whether judicially or legislatively or otherwise) is an act which can and should be guided by moral principles or rules; that those moral norms are a matter of objective reasonableness, not of whim, convention or mere 'decision'; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that

institution ... , and (c) the main institutions regulated and sustained by law.<sup>4</sup> (Emphasis added)

Finnis seems to reject any account of moral norms that sees their origin in belief, cultural or traditional, or "invention" by people who have interests they want served. This aspect of his "natural law" theory, rather than any wish to "minimize the range and determinacy of the positive law" is a crucial one. This suggests that natural lawyers intend minimal upset to those in favour of the force and importance of positive law. It also backhandedly suggests that those who see little else than the positive law, like Kelsen perhaps, do not have a completely different picture of law. Rather, they just have part of the whole in their grasp. The impression thus conveyed is that the natural lawyer's understanding of law is the tradition actually in place in Anglo-American legal systems.

The tradition of natural law is interpreted by Finnis to show the strength of the bond between moral principles and positive law in the most concrete terms:

What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that "morality" thus affects "law", but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges and citizens.<sup>5</sup>

Someone outside "the tradition" need not disagree with the aim of supplying a rational basis for these activities so far as one can be given. In fact we have seen in chapter two

that the institutionalist can be concerned to find justification for legal decisions. But in contrast to the "natural law" tradition, as Finnis seems to understand this, the philosophers normally in support of institutionalism do not think justification can have its ground in some "permanently relevant principles of practical reasonableness".

Finnis proposes that the relevant principles are a matter of "objective reasonableness" and that these are discoverable unchanging goods for man. These are apprehended "by a simple act of non-inferential understanding. One grasps an object of one's own inclination which is experienced as an instance of a general form of the good for oneself and everyone."<sup>6</sup> This appears to be in accordance with Aquinas' view that "inclination" is a guide to the natural law:

Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being both provident for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.<sup>7</sup> (Emphasis added)

In such acts of practical understanding, we grasp the basic values of human existence. The basic values Finnis has identified are as follows: Life, Knowledge, Play, Aesthetic Experience, Sociability (friendship), Practical Reasonableness and 'Religion'. Other such values may be

discovered, assures Finnis. A question which arises from this account is this: Has Finnis not proposed a false dichotomy in insisting that these values are solely matters of objective reasonableness, as opposed to matters of "decision or convention"? Is it not plausible that moral beliefs and cultural influences play a role in one's having inclinations toward what is good? It is difficult to grasp at all what Finnis means by "a natural inclination" if it does not include such usual influences on the formation of moral convictions.

Finnis' most precarious assumption is that these goods are indeed self-evident. We might find that our "intuition" about what is good is quite different from the items listed here, if indeed intuitions of this sort are possible at all. Or we might find alien to our experience the whole notion of an "intuition" about what is basically good. Perhaps a less abstruse way to put all this is that we experience inclinations to have or to pursue good things or good states of affairs. But are even these really "self-evident" to us? It seems rather that these might often be the products of considerable careful thought, and in no sense do these present themselves to us in the way Finnis suggests. MacCormick presents the more plausible account of how we apprehend such principles, at least with respect to law :

... to some extent we find them and to some extent we make them. We find them to the extent that previous judges and doctrinal writers have expounded broad

statements of general norms which make sense - in their view - of congeries of interrelated rules and precedents. ... We make them precisely by trying to make our own sense of the rules and precedents which confront us, taking fully into account the efforts of our predecessors, giving them the more weight according to their number and authority.<sup>8</sup> (Emphasis added)

It appears Finnis leaves out of his account the "making" aspect that MacCormick mentions. But Finnis' more puzzling account of principles should not prevent us from examining his "basic aspects of well-being". For my part, I am not in disagreement with any one of these as goods. This is not to say, however, that we should not seriously entertain the possibility of some fundamental disagreement and possibility of counter argument. Even the most persuasive of Finnis' arguments, that concerning the self-evidence of the value of knowledge, contains an element that Jan Narveson finds quite seriously flawed:

It is not plausible, I think, to suppose that every normal person does have the urge to question. Philosophers, understandably, may tend to think so, but we are hardly a random sample. Now Finnis may well not care about this. But if not, why not? Is it plausible to say that F is self-evidently good, even though most people may not give a hoot about F?<sup>9</sup>

I think we can agree with Narveson that Finnis' goods might not be universally shared or thought of as self-evident by everyone. And this is something we can grasp even if we do hold the items in question as valuable ourselves.

Aquinas attempted to deal with this problem of universal self-evidence by offering two explanations. He explained that a man's reason may be hindered because of

concupiscence or some other passion and that the natural law can be blotted out from the human heart by evil persuasions, vicious customs and corrupt habits.<sup>10</sup> To this explanation, I am not sure a reply can or should be given. The self-evidence theory, on this view, is self-validating: all claims of ignorance of the natural law can be completely discounted since such ignorance is a result of evil or corrupt actions or thoughts not in accordance with the natural law. Another problem is that it remains unclear how that which would otherwise be self-evident could be "blotted out" in one's consciousness. Aquinas' other explanation is somewhat more interesting. He argues that "knowing" what is truly good is a matter of personal capability:

... we must say that no one can know the eternal law as it is in itself, except God and the blessed who see God in His essence. But every rational creature knows it according to some reflection [of the eternal law], greater or less. ... Now all men know the truth to a certain extent, at least as to the common principles of the natural law. As to other truths, they partake of the knowledge of truth, some more, some less; and in this respect they know the eternal law in a greater or lesser degree.<sup>11</sup>

This position is hardly satisfying even if it does somewhat help explain a perspective on relative abilities to perceive the self-evident. It suggests that those who "don't give a hoot about 'F'" have some special handicap. Such persons may have less than perfectly reasonable cares, or so it seems from Aquinas' account.

It is this argument from "participation in the truth"



that Finnis appears to defend in his account of the self-evidence of the natural law. Finnis defends his self-evidence thesis in chapter three of his Natural Law and Natural Rights where he alludes to the forms of reasoning employed by Aristotle and Aquinas. Self-evidence is, to this way of thinking, nearly equivalent to the notion of sound judgement.<sup>12</sup> Sound judgements as to what are the principles of theoretical rationality cannot be demonstrated, but they are nonetheless obvious to reflective people:

... although [such principles of theoretical rationality] cannot be verified by opening one's eyes and taking a look, they are obvious - obvious to everyone who has experience ...<sup>13</sup>

It seems more satisfactory to speak of sound judgement rather than self-evidence. The connotation of the former includes the component of experience while the latter has an a priori air about it.

Finnis' claims about "basic forms of the good" meet great resistance from those elements of modern philosophy which ask whether in principle there could be a list of objective goods. One argument against their possibility is to be found in John Leslie Mackie's Ethics - Inventing Right and Wrong which takes its inspiration from the moral philosophy of David Hume. In what Mackie calls "the argument from queerness", it is argued that if we were aware of any such objective values, this would have to be by way of some special faculty of moral perception or intuition, utterly

different from our ordinary ways of knowing everything else.<sup>14</sup> Finnis appears to meet this charge directly, informing us early in his work that "when discerning what is good, to be pursued, intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically)".<sup>15</sup> He further claims that "there is no good reason for asserting that the latter operations of intelligence are more rational than the former". Mackie rejects this possibility outright charging that such an account misrepresents what we do when we consider what is good: "The suggestion that moral judgements are made or moral problems solved by just sitting down and having an ethical intuition is a travesty of actual moral thinking."<sup>16</sup> Mackie's reaction is not unlike the person who finds no "intuition" about what is good forthcoming; certainly no self-evident goods in any case. All he finds are subjective inclinations which may or may not be shared by others. These inclinations may be formed or influenced by education or cultural influences or any sort, but they are not to be described as intuitions about what is unquestionably good. It is a deeper problem to grasp what Finnis means by saying that the process of intelligent activity that gives rise to any moral judgement is altogether different from other forms of intelligent activity. This notion is a peculiarly Rationalistic one that Mackie and I are unable to comprehend

without further explanation on Finnis' part.

My own philosophical tendencies seem to favour Mackie's rejection of Finnis' basic objective goods on the basis of the argument from queerness. I note this, however, without being entirely clear on what such objectivity is for either Mackie or Finnis.<sup>17</sup> Finnis' moral intuition thesis is made the more novel by his assertion that these basic goods for man make no reference at all to human nature, but only to human good. His arguments in no sense rely, even implicitly, on the term 'human nature' nor any conception of it.<sup>18</sup> The point here is that we can find out what is basically good without having to find out what "human nature" is really like, either historically or scientifically. Thus, even if we find ourselves inclined to attach some natural importance to certain goods which seem to be necessary for man to live among other men, this is not the form in which the basic goods are properly apprehended for Finnis. This position signals an essential difference with theories of human nature which have attempted to identify some universal elements of practical morality. But it does not signal an incompatibility. Arguments from human nature can be a basis for moral concern even if these do not enter into the sort of analysis Finnis is providing. If some theory of human nature were true, Finnis' moral theory, as much as all others, would have to take it into account.

Unlike Finnis, many philosophers, with an eye on the

implications for legal theory, have made attempts to describe some requirements of the good life by reference to human nature. This has been the more attractive view of "natural law" for many people who find Rationalism intellectually alienating in all or some of its aspects. H. L. A. Hart recognizes the common sense in what he calls "traditional natural law doctrines" which seeks to identify some constant universal elements of practical morality. He had in mind David Hume's claim that systems of law and morality generally suppose that the society of other individuals is necessary for human survival; that such association is made possible through some attention paid to considerations of equity and justice. Hobbes too, Hart notes, saw the modest aim of survival a pre-legal necessity.<sup>19</sup> Hart's advocacy of a "minimum content of natural law" proceeds directly from the assumption that survival is an aim of human beings:

Reflection on some very obvious generalizations - indeed truisms - concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable.<sup>20</sup>

The distinguishing feature of this piece of reasoning is its qualification, "as long as these hold good". The implication to be taken seriously here is that human nature could be otherwise. This blocks any claim to an eternal, unchanging and necessary natural law that men by their nature value their own survival. If membership in a "suicide club" became fashionable, we would have to make some major

reassessments.<sup>21</sup>

Let us take care not to exaggerate any tension over the issue of the unchangability of human nature. Hart clearly stresses that if the condition of man and the world were to change, then the minimum content of natural law would change. On this point, it is not clear that Aquinas would disagree.<sup>22</sup> It does not seem essential to Aquinas' view that the basic features that Hart mentions, e.g. vulnerability, limited altruism, etc., are eternal and neverchanging. All we can say is that if some "natural lawyer" did hold that the natural law is necessarily fixed, he or she would be claiming this in opposition to the views of both Aquinas and Hart.

There is some question, however, as to the acceptability of Hart's minimalism. Hart states that these truisms disclose the core of good sense in the doctrine of natural law. But Finnis asks whether this really can be the "core" of what the true natural lawyer is interested to expound. Naturally, Finnis thinks it absurd to talk so restrictedly about human goods. He notes that Hart's truisms concern only one aspect of the whole "setting" in which persons seek their various ends, namely survival.<sup>23</sup> It is Finnis' suggestion that such natural facts or aims about human beings call for a more extensive investigation that will at least uncover the basic values he has mentioned. The "core of good sense" taken from natural law can and should,

in Finnis' view, go beyond the modest minimum that Hart proposes in virtue of what is apprehended intuitively. Finnis then tries to show how Hart's "natural law" component should be expanded to include the values enumerated above, e.g. Knowledge, Play, ... etc.

Now, we may concur with Finnis that the truisms Hart has recognized belong in one category called the good for man. There should be no disagreement over this proposal. But we are loath, for the reasons already mentioned, to say that anything in this category is there in virtue of some act of moral intuition. Finnis' critique of Hart on this matter can make no impression if his claim to intuiting further basic goods leaves us cold. If Finnis has basic goods that can be reasonably placed before us for consideration, that is a different matter and one which we shall enthusiastically entertain. I would nominate the several basic goods that Finnis mentions as goods I find suitable for this category. We may then debate their merits and perhaps there will be reasonable disagreement. I think there are arguments to support these as goods, many of which Finnis has taken care to expound. But his refusal to treat these arguments as separable from his self-evidence thesis presents us with an unacceptable difficulty.

## II Law And The Limits of Practical Reason

Whether we accept Finnis' self-evidence thesis or not, his favouring the pursuit of practical reasonableness in practical affairs is probably a less divisive issue. The apprehension of what is practically reasonable for each of us is to be gained by the intelligent consideration of what is worth pursuing. Intelligent consideration for the natural lawyer proceeds in accordance with "natural law" of course, but the process of this reasoning is acceptable to someone outside the tradition. Consider the acceptability of Aquinas' notions of derivation and determination with respect to principles one might hold:

... something may be derived from the natural law in two ways: first, as a conclusion from principles; secondly, by way of a determination of certain common notions.

...

Some things are therefore derived from the common principles of the natural law by way of conclusions: e.g., that one must not kill may be derived as a conclusion from the principle that one should do harm to no man; while some are derived therefrom by way of determination: e.g., the law of nature has it that the evil-doer should be punished, but that he be punished in this or that way is a determination of the law of nature.

Accordingly, both modes of derivation are found in the human law. ... <sup>24</sup>

Since the goods Finnis has identified can be "participated in, and promoted, in an inexhaustible variety of combinations of emphasis, concentration and specialization", we always have with us the problem for intelligent decision: What is to be done? What may be left undone? What is not to be done?

These concerns obviously have applications in legal reasoning as well as moral reasoning since, as we have seen, there are opportunities in legal decisions to further social aims or purposes.

And now we have two questions. First, how does one know whether a decision is practically reasonable, i.e. that it reflects participation in the many dimensions of good that the agent recognizes? Finnis notes Aristotle's response to this question:

An adequate response to that [query] can only be made by one who has experience (both of human wants and passions and other conditions of human life) and intelligence and a desire for reasonableness stronger than the desires that might overwhelm it.<sup>25</sup>

We might question whether some form of ultra-Rationalism has crept in to this account of personal reasoning toward what is good if by "human wants" he refers to some necessarily fixed items. But the central point does not escape us; that practical reasoning is reasoning towards the realization of that which is of value. Certainly, the institutionalist need have no quarrel with the proposal that practical reasoning can have its foundation in values. He can readily agree that assuming a certain set of values, it is possible to use them to justify the validity of derivative values or of rules or other reasons for action.

Our second query asks whether practical reasonableness identifies one course of action as the right one. MacCormick points out that while reason alone,



rationality of itself, rules out quite a lot of the things we might be tempted to do, it does not rule out everything. It may fall short of eliminating all but a single necessary course of action. Inevitably, we are led back to having recourse to authorities:

Many possible courses of action are excluded discursively as irrational (discursively impossible), some are rendered obligatory (discursively necessary) by reason alone applied in the circumstances of a given case. But quite often more than one course will prove discursively possible (permissible), none being discursively necessary (obligatory).

Thus the necessary and the impossible fall far short of covering every case. A plurality of courses almost always lies open, sometimes because of conflicting courses arising out of competing projects. Even if everyone behaved solely as rational practical discourse reveals to be permissible, that is, even if everybody always acted rationally (in the relevant sense), we should not always know what to do. There would be inevitable conflicts, not necessarily resolvable through rational practical discourse. So it becomes a datum of practical discourse that we need in such matters to have recourse to authorities.<sup>26</sup>

Finnis explicitly supports this view of the limits of practical reasoning's abilities to distinguish clear courses of action. In a recent article he notes that "...while there are many ways of going and doing wrong, there are also, in most situations of personal and social life a variety of incompatible right options ...".<sup>27</sup> Our question about the determination of a single course of action is thus well addressed.

A centrepiece of Finnis' political thinking is the notion of the "common good": the requirement of practical reasonableness of fostering the common good of one's

communities. "For there is a 'common good' for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion and freedom in practical reasonableness are good for any and every person."<sup>28</sup> A legal order is necessary for achieving the common good, for even in a community of angels there may arise coordination problems which can best be resolved by authority and regulation. When Joseph Raz makes the same point, he argues that a society of angels has all the reasons that we have for having legislative authorities and an executive.<sup>29</sup>

While there might be little controversy over that aspect of Finnis's "definition of law" which states that law is "directed to reasonably resolving any of the community's co-ordination problems", his holding that the law has an orientation to the common good seems to be less popular.<sup>30</sup> Within Finnis' definition of the "focal meaning" of law, which is quite lengthy, we find all the elements of the institutionalist view as well as this peculiar business about the common good. Hence, Finnis lives up to his aim of attempting to take the understanding of the positive law one step further. The problem we encounter is accepting Finnis' meaning of the "common good". What sort of "shared objective" is presupposed when speaking of the common good? If the basic goods are contestable as we think they might be, how are we to think of law as serving some discrete end like this? Most importantly, how can the institutionalist enlarge

his understanding of the law if this element is unclear to him?

The problem here, as Neil MacCormick points out in his book review of Natural Law and Natural Rights, is that "law" for the institutionalist is a less contested concept than the "common good":

I can know what 'the law of the land' is, and can claim that it objectively is the law of the land while I remain in doubt over what is in the common good or whether there is any objective truth of that matter. So on the principle that one should not explain the obscure by reference to the more obscure, I hold back from accepting Finnis' proposal as to the focal meaning of law.<sup>31</sup>

This criticism undermines Finnis' hope to enlarge our understanding of the institutionalist's concept of law. Finnis does identify some important tasks that the law may fulfill in a community, most of which I have not mentioned. These could have been advanced just as well by someone of the institutionalist persuasion. The institutionalist may accept that the important aims of a political community are commonly expressed in a legal system and he can readily accept the coordinative function of law in safeguarding some set of conditions which needs to obtain if each of the members is to attain his own objectives. He can agree to this without thinking that there is 'common good' for human beings in the concrete forms that Finnis proposes.

The institutionalist's critique of Finnis' theory of law need not dispute the proposition that a legal system

might recognize a scheme of values which it seeks to further. Practical reasoning toward achievement of what is thought a good state of affairs seems to be a general attribute of legal systems. The likely difficulties in accepting Finnis' legal theory are the more Rationalist tendencies that penetrate to the heart of it.

Because the "greater understanding" that Finnis hoped to supply us with is all predicated on moral assertions, the essential factual components of legal systems (its rules) were conceptually inseparable from concerns of what the law ought to be or ought to express. That the law represents service to the common good and the basic values behind it, is the central example. But because we have difficulty considering inseparable the description of the nature of law with considerations of what is or is not morally required, the conceptual separation of what is the law (even if we do not have an entire grasp of this all the time) and what we find morally acceptable or unacceptable about its requirements remains possible. Finnis' effort to unite these has been unsuccessful.

### III The Law Is Like Literature Argument

This interest to enlarge the institutionalist's understanding of law is a popular project in recent legal philosophy. Ronald Dworkin's theory of "law as integrity" is

another such attempt. One of the most noteworthy initiatives in Law's Empire is the subject of criticism in this section. It is that theories of literary interpretation can yield a better understanding of how "law" is made and sustained by judges in courts of law. It is my view that the effects of this insight, while being featured in Dworkin's arguments, are largely superfluous and do not advance our understanding of law. I shall try to show why I think this is so.

Law as integrity insists that legal claims are always essentially interpretive judgements and that such claims "interpret contemporary legal practice seen as an unfolding political narrative."<sup>32</sup> Judges apply "constructive interpretation" to past legal decisions, which is "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong", in order to reach a decision on a case before them.<sup>33</sup> This is the way judges do understand legal claims, asserts Dworkin, and thus an important focus of attention for any legal theory of law should be the grasp of this political "narrative". We should perceive a community's legal record as a political narrative because without this insight we cannot understand legal reasoning itself.<sup>34</sup> The dimensions of the theme, point or plot of the narrative the judge constructs constrain the process of judgement itself. The judge does not discover or invent "law", rather he "interprets" it.

It is a fundamental assumption of Dworkin's theory of law that law is this political narrative. I call this fundamental to his theory because if a community's legal record is indeed like literature, then it becomes plausible to apply a theory of literary interpretation in order to understand it. If this application becomes plausible, then it is fair to say, as Dworkin does, that the established law, i.e. that which the institutionalist insists is "the law", is "preinterpretive"; that it is not the central sense of law at all. Dworkin is then free to argue that the central sense of law is essentially "interpretive", or is always an open question until interpretive issues are resolved by a particular judge. One of the consequences of this radical proposal is that the institutionalist's insistence that the description of law should be kept separable from its evaluation becomes unworkable. If the institutionalist is describing the preinterpretive elements, these, Dworkin might admit, are separable from questions of their value. But if he intends to apply a conceptual separation at the level of the central sense of law, he will be frustrated. If law is essentially interpretive, then what the law should be is also, at least partially, what it is. This is so because evaluative arguments from political morality must be brought to bear on the synthesis of law in its central sense.

Exactly how does Dworkin see that law is like literature? The following passage, I think, displays the

essentials:

The judge's decision - his postinterpretive conclusions - must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible. But in law as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgement that trades off an interpretation's success on one type of standard against its failure on another.<sup>35</sup>

The "chain of law" is constantly constructed as new decisions in law are made. This "chain" gains its essential moral-political integrity by a judge applying a theory of political morality in order to make his present decision and all relevant past decisions justified by the same or similar reasoning from the theory.

Dworkin maintains that his theory, "law as integrity", "asks a judge deciding a common law case ... to think of himself as an author in the chain of common law."<sup>36</sup> I would ask whether someone who held that present decisions must have moral-political coherence with past decisions and events need necessarily see himself as an author of a "chain novel". It seems that if we put the "law is like literature" assumption into question, then Dworkin's criteria of "fit" and the furtherance of "the chain of law" are put into question. If these devices are shown to be unserviceable, then the aims of coherence and consistency in legal decisions must be explained in some other way.

To understand Dworkin's impulse to see law as one "work", we have to speculate about his key interest in making the analogy to literature in the first place. He wants to take a holistic view of the nature of law: that law is a process of justification reaffirming itself constantly through considerations given to moral-political integrity.<sup>37</sup> There is little wonder, given this, that Dworkin speaks of this holistic process asking judges to look at their task holistically, i.e. as if they add to "a work". The judge is but "integrity's" agent. Because holism is presupposed and because the common law is compounded serially, making the common law is like writing one work with different authors over time. Again, because holism is presupposed, statutes, constitutions and customs have to be interpreted as if they form part of a continuing narrative as well.

One way we can make this chain novel idea work is to make a claim for the false consciousness of judges; that they are really trying to further the aims of a novel rather than simply doing what they think they are doing. But what would be the warrant for thinking this if we can explain their actions in simpler terms? The institutionalist, as we shall see, can do this. Further, it is a strange business to speak about a plot and of parts "fitting" to this plot if there is no obvious grasp of a novel or anything like one available. While Dworkin does call the chain novel comparison a "fantasy",<sup>38</sup> he does not let this prevent further direct



analogies with the process of adjudication. We are left groping for the narrative image Dworkin sees so clearly. In this respect we are just as lost as we were when trying to make sense of Finnis' "basic values". Thus, the argument from queerness directed against the purported existence of "basic values" in Finnis' theory might be directed against Dworkin's assertion that there is a single work encompassing all the written material of a community's legal record. The epistemological leg of Mackie's "argument from queerness" will note that knowing this "work" is utterly different from our ways of knowing works of literature. It will ask whether we can therefore recognize it as a "work" at all.

Surely Dworkin is setting out the analogy with literature for explanatory purposes. There will be important disanalogies but we should expect that these will not frustrate the purposes of drawing the analogy in the first place. But even if we accept this proposal, we still need to have a firm grasp of the purpose in drawing the analogy. I shall argue that the only purpose evident is making Dworkin's thesis itself more plausible. Dworkin seems to adopt the analogy on the dubious ground that laws and novels have 'authors'. He then asserts that "constructive interpretation" is the best theory for understanding what a text means. But notice we could have adopted a theory of interpretation in adjudication without any reference to Dworkin's analogy, without making the queer claim that law is

like literature or that law is a narrative.

It is worth making quite clear that the analogy between law and a work of literature is the strongest sort of analogy as far as Dworkin is concerned. Indeed it appears that the narrative character of the law is unquestionable for Dworkin. We are expected to interpret contemporary legal practice as 'an unfolding political narrative'<sup>39</sup> much in the way we interpret a stretched canvas as 'a painting' and a collection of papers between covers as 'a book'. On this view law is "a work". This proposal could be effectively challenged by showing in what important respects the analogy is too weak to be useful. In a recent article, "The Hermeneutics of Adjudication", Roger Shiner makes such an argument:

I shall argue here that the similarity between law and literature is largely superficial, and that the differences between law and literature are more striking and significant than their similarities. While it is clearly not false to assert that appellate adjudication is a matter of interpreting a text, the nature of appellate adjudication is more obscured than illumined if it is regarded as analogous to the creation and criticism of a work of literature.<sup>40</sup>

Here the superficial analogy between law and literature is readily pointed out: both law and literature are concerned with 'texts'. But the "black letter text" of a poem or novel is fundamentally a fixed, determinate series of inscriptions in a language, whereas "black letter texts" of the legal sort do not exhaust legal materials. Thus we expose Shiner's first argument, the content of which harkens back to my

discussion in chapter two of indeterminacy as to what a rule requires:

Judges do characteristically formulate in words the ratio decidendi of the case before the court when rendering a decision; they state the rule for which they take the case to stand. It is a commonplace, however, that, unlike a charter, constitution, or statute, the words used in the statement of a ratio by a judge have no canonical status. The material facts of a common law case, rather than anything that might straightforwardly be called a 'text,' ultimately determine for what the case stands as an authority. The common law is thus not a matter of fixed texts, and in the matter of fact-situations, not a matter of texts at all. Insofar as the law contains the common law, it contains something for which there is no analogue at all in literature.<sup>41</sup>

The second argument also focuses on the issue of "a text". The ways in which a "text" in literature and a "text" in law are fixed are quite different. The literary work is permanently fixed. Its existence is traceable to a particular act or series of acts by a particular artist, at least in the paradigm case. Legal texts, on the other hand, are vulnerable to deliberate modification and destruction. "A statute can be repealed and replaced by another. A common law precedent is not always followed; it can be distinguished or overruled."<sup>42</sup> Shiner argues that works of literature could not play their characteristic role in human life if they were "subject to evanescence" as is law. At least according to how we usually understand them, works of literature are inherently enduring while laws as texts are inherently transitory.

Shiner asserts that the whole art of legal drafting

is the art of eliminating as far as possible ambiguities of meaning in the texts of statutes and opinions. Of course, some uncertainty as to strict meaning must be preserved, since a system of laws must balance the need for certainty against the need to accommodate an uncertain and changing world.<sup>43</sup> This brings us to Shiner's third criticism:

The art of the literary artist is to combine fixedness of text with multiplicity of meaning. The art of the legal draftsman is to combine transitoriness of text with elimination of multiplicity of meaning. To say that each of these persons is alike in that they are both composers of texts is to obscure these crucial differences.<sup>44</sup>

Fourthly, we have to consider that in literature we can distinguish the position of the artist as creator of the work and the critic as interpreter of the work. If one turns to common law adjudication, the distinction between the judge as artist and the judge as critic becomes arguably impossible to draw.<sup>45</sup> In this respect again, the analogy breaks down. Shiner's general conclusion is that "although both the literary and the legal enterprises involve the interpretation of texts, it does not follow simply from the fact that literary interpretation has certain properties that legal interpretation also has these properties."<sup>46</sup> Dworkin's concern to see law as a narrative in the sense that one sees it as a chain novel has such difficulties to overcome.

It appears that Dworkin latches onto the narrative proposal by pursuing the notion of statutory intention to unreasonable limits. Early in Law's Empire, he dissuades us

from taking a narrow view of intention in the sense that we could discover this from the meanings of the words of the statute itself. He suggests the best way to understand social practices is to imagine them as works of art that can be "interpreted" as we ordinarily interpret these objects. Legal practice being a form of social practice is therefore open to this treatment. The best way to characterize our search for intention is that we "interpret" for ourselves the purpose of the object before us (in this case, the community's legal record) and thus arrive at the "author's intention" which we seek. We do not, however, find an intention in the sense of finding a fact or facts about the state of mind of an author. We must apply an abstract purpose to the community's legal record in order to interpret it. Further, when applying an abstract purpose to an object we naturally attempt to express the meaning of the object in the most illuminating way. The sort of purpose Dworkin argues is appropriate to apply is a political-moral one which strives to produce coherence in moral principle over the legal record as a whole. Dworkin is thus able to make new sense of the search for statutory intention by explicitly involving in this search "constructive interpretation", interpreting the work in its best light with respect to a theory of political morality. The point I would like to stress is that this only works if we have an unproblematic grasp of the 'work' which constructive interpretation can

identify as its object. A critique of Dworkin's analysis of the object to be interpreted is to be found in Gerald Postema's "'Protestant' Interpretation and Social Practices". Dworkin assumes that the object of competing interpretations can be identified independently of any particular interpretation. Can the point or purpose of a social practice really be stated independently of the rules and activities that make up the practice, as Dworkin supposes?

... as Dworkin himself realizes, practice-meaning is holistic and the meaning of components of the practice are, in a sense, theory dependent. But, then, will not different theories of that practice as a whole yield different actions, different objects?

Of course, there may be some description of the practice behaviour under which consensus about the object could be achieved. Perhaps this is what Dworkin has in mind. But this description leaves the behaviour "brute" or "uninterpreted", at least relative to the practice. And then, it is no longer clear why we should treat consensus regarding the behaviour thus described as relevant to understanding the practice.<sup>47</sup>

It should now be clear that understanding legal reasoning as narrative is not an attractive proposal. A separate but related proposal, suggested by Dworkin's account of "constructive interpretation" should now be addressed: whether we can understand legal reasoning without viewing it as political narrative. The issue of coherence in principle presents an excellent point of comparison between Dworkin's views and those who do not use narrative imagery to support their theories of adjudication. Many theories appear to hold that the pursuit of coherence in law is desirable and thus worth fostering and preserving. Each decision is, in some

sense, part of a whole picture and should not be generally regarded as a discrete entity floating within the loose confines of a legal system. Raz perceives the inter-connection of rules in a legal system to be explained in the following way:

By its very nature the justification of a rule is more abstract and more general than the rule it justifies. Therefore, just as it justifies this rule it could justify another. If this rule is justified as a way of achieving a certain purpose, or of protecting a certain value, so might other rules be if they promote that same purpose or protect the same value in different ways or under different circumstances.<sup>48</sup>

Dworkin himself has been an important advocate of the view that legal reasoning does not merely consider the facts of a case and how established rules and principles can be brought to bear on them, but also directs considerable attention to the ideal of coherence in the body of decisions taken. But Dworkin has the distinction of being the only theorist who thinks that such coherence is realized as a result of "constructive interpretation" on the part of judges over time. Other theorists perceive only a commitment on the part of lawmakers to make the many sorts of rules of a developed legal system 'make sense' when taken together. Raz, as well, notes the importance of ensuring that one's decision does not retard the pursuit of values enforced in other decisions.

A difficulty that Dworkin leaves somewhat unresolved involves his notion of a "community of principle" and its role in creating a distinctly political narrative. This

concept of a "community of principle" is crucial to Dworkin's theory of adjudication, for the demands of this "community" are to be considered by the Herculean judge in arriving at a properly justified decision. As opposed to the usual conception of a community, which is a collection of discrete persons whose interests may or may not form a coherent picture, we are asked to accept that the "community of principle" has its own life, in a sense, and can be considered a moral agent.<sup>49</sup> The "community of principle" demands that the community's legal history express moral-political integrity in principle. It requires its agent, the judge, to decide cases according to convictions of justice and fairness dictated by the "community of principle" through its legal history. Judge's individual decisions are not to be considered by them to be discrete additions to a narrative, for, in this case, the resulting "novel" could amount only to a series of discrete and isolated episodes in which integrity with a whole is missing. Rather, it is the existence of the history of a "community of principle" that makes each judge's contributions part of a continuing "chain". This suggests the "author" of this chain novel is essentially the community of principle, since the judge acts entirely as its agent and serves no other interests. Against this proposal, one might argue that we have an ambiguous concept of "author". It seems most satisfactory to consider the judge the "author" of the narrative, even if he or she



interprets and advances the interests of this continuous "community" in the courts. It seems less plausible to ascribe authorship to a "community of principle" that does not exist, as others authors do, in lived time. Hence, we are left with an actual judge in real time who must draw on principles accessible to all interpreters of the law in order to assist his decision-making. Perhaps in adjudicating, such a judge forms a theory of political morality, as Dworkin insists he must, which guides his interpretation of legal history on a question. But such a judge need not see himself as an agent of a "community of principle" in order to strive for coherence in principle. As long as he values coherence in principle for any reason, his interpretive attitude and the decisions he makes should be adequate to striving for integrity in the legal history of which his decisions become a part.

It seems we can understand legal reasoning without being intent on picturing a political narrative in place. We can also avoid, as Dworkin hopes, the unhelpful and ancient question whether judges find or invent law. Dworkin need have no quarrel with the institutionalist on this matter of finding or inventing law. He or she does not hold that judges find law in prior decisions as one might find gold nuggets in a streambed. At least our "finding" law is not as simple as that might suggest. As H.L.A. Hart has pointed out, the very fact that rules are formulated in language and

are thus open to our interpretation, prevents us from pursuing the ideal that the exact ways a rule should be applied is known certainly and in advance.<sup>50</sup> Neither is law invented by judges, and this is just because some measure of interpretation of statutes or prior decisions is often required. Prior decisions are a rich source of arguments that can often be extended to address the facts of a present case. They are extended by considering reasoned analogies between cases which are different. Thus, as MacCormick notes, a rule remains extendible to an indeterminate number of cases even if the best argument from analogy remains controversial:

The whole point of argument by analogy in law is that a rule can contribute to a decision on facts to which it is not directly applicable; cases of 'competing analogies' involve rules pulling in different directions over debatable land between.<sup>51</sup>

What is at stake is an attempt to secure a value-coherence within the legal system. As Raz points out in his own terms, "argument by analogy, used in lawmaking, involves interpreting the purpose and rationale of existing legal rules; these are equally essential for a correct interpretation and application of the law."<sup>52</sup>

Since a judge must provide a reasoned argument for his decision and is not free to make arbitrary judgements and since, if he does not take earlier arguments into consideration, he is likely to become the object of much serious professional criticism, it appears judges are not

free to "invent" law. An institutionalist can avoid these "ancient" problems in the sorts of ways I have mentioned while regarding the narrative concept as a needless extravagance for legal theory.

In his earlier work Dworkin has explained how coherence is practically obtained, saying that "men and women have a responsibility to fit the particular judgement on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility."<sup>53</sup> In Law's Empire, Dworkin wants to build into this "responsibility" the duty to select the best competing interpretation of the narrative in order to make the narrative the best example of its genre it can be. He appears to want to tack onto the responsibility to be practically reasonable a new sort of object of consideration, the "chain of law".

The Dworkinian political narrative is tied to his views on "integrity" in a community's legal history. I must say something about "integrity" itself. Integrity in a community's political morality requires that the government extend to everyone the substantive standards of justice or fairness it uses for some.<sup>54</sup> In adjudication this is known as treating like cases alike. Dworkin also argues that commitment to consistency in principle is valued for its own sake.<sup>55</sup> As "integrity" applies to adjudication, those responsible for deciding what the law is should see law as

coherent in principle and enforce it as coherent in that way.<sup>56</sup> Dworkin thinks this sufficient to establish law's authority and legitimacy. But in taking this position, he ignores the fact that law's authority and legitimacy depends on its having an institutional source. John Finnis, in a recent article "On Reason and Authority in Law's Empire" points out the weakness in Dworkin's treatment:

Dworkin's theory of law, and of law's authority or legitimacy, is weakened by his failure frankly to acknowledge the case, not merely for making "past politics decisive of present rights" in accordance with an ideal and virtue of "integrity", but for creating and applying rules whose legal and moral authority is directly and simply ascribed to their source, authoritative enactment or judicial adoption or some other form of "convention".<sup>57</sup>

From this it seems that Dworkin can avoid rules and their institutive legitimacy only at the cost of an adequate account of law's authority.

A second difficulty is with Dworkin's deontological claim that consistency in principle is "valued for its own sake". Apparently, consequentialist arguments for such consistency carry no weight with him. But it seems there are good consequentialist arguments for striving for consistency in principle. One that Raz stresses is the need to avoid practical inconsistency. If authoritative decisions are reasons for action, and are meant to be explanatory and guiding, then formulating them such that practical inconsistency is avoided will be justified. Another argument is that consistency in principle might avoid unintended

consequences that cannot be foreseen. The maintenance or achievement of social stability might thus be obtained. Consider how Raz sees this "conservatism" made manifest in lawmaking:

Most law-making decisions are concerned with extending existing doctrines, successively adjusting them to gradually changing technological, economic, or social conditions and introducing small alterations to avoid the undesirable and unintended consequences of applying rules to circumstances that were not foreseen when those rules were laid down.<sup>58</sup>

Other good consequences may be produced by achieving coherence, but I need not offer them here. It is sufficient to point out that Dworkin ignores all such arguments in favour of his deontological commitment to consistency in principle as being intrinsically valuable. But why he does is not entirely clear.

To underscore the availability of a competing account of coherence in law and to readdress Dworkin's charge that no account should depict judges finding or inventing law, we should again take notice of an illuminating passage from MacCormick's Legal Reasoning and Legal Theory:

We find [principles existing in law], to the extent that previous judges and doctrinal writers have expounded broad statements of general norms which make sense - in their view - of congeries of interrelated rules and precedents. 'Making sense' implies showing that there is some value or values which is advanced by adherence to the rules in question. We make them precisely by trying to make our own sense of the rules and precedents which confront us, taking fully into account the efforts of our predecessors, giving them the more weight according to their number and authority.<sup>59</sup>

No doubt MacCormick is showing in what sense "finding" and

"making" can be properly said to be employed in legal reasoning. An example of "finding" a principle embedded in the existing law might be taken from Lord Atkin's decision in Donoghue v. Stevenson. Lord Atkin found that "In English law, there must be and is, some general conception of relations giving rise to a duty of care, of which particular cases found in the books are the best instances."<sup>60</sup>

Perhaps, since MacCormick's remarks above were part of a criticism directed against Dworkin's earlier work, it is this account which Dworkin feels is better replaced by the idea of an unfolding political narrative in his more recent Law's Empire.<sup>61</sup> On this point I can only speculate that Dworkin does think this account of legal reasoning should be replaced by the theory of law as integrity with its peculiar narrative component. In any case, this mixed account of the making and finding of the elements which secure the coherence of a legal system seems to be in accordance with Dworkin's interpretive judgements that combine backward and forward-looking elements.<sup>62</sup> And it is fairly clear that pursuing such a programme could result in the entire set of laws forming a coherent whole. But there is no suggestion, nor need there be one, of this whole being a narrative. And it does not seem necessary or even better to propose a constructive interpretive method for realizing this coherence since no greater understanding appears to be gained by it.

## IV Concluding Remarks

In the end, am I merely being churlish in refusing Dworkin his political narrative account? After all, Dworkin does say the theory of the integrity of the political narrative is a "large view".<sup>63</sup> This suggests that I am attempting to quibble with a broad characterization or a bigger picture of what is going on in a legal system. I find that, as with Finnis, the ambition to propose a "larger view" is something the institutionalist is bound by his commitment to clear thinking to view with great suspicion. If the institutionalist can find no reason to propose an overarching structure like a political narrative or if he finds objectionable the suggestion that there are "basic values" which structure legal systems, then he is bound not to employ them. This is not to say that I disagree with Finnis that his basic values are ones which are indeed basic, and not to say that Dworkin's ambition to pursue consistency in principle is unacceptable. I can and do agree with the merits of these proposals without subscribing to the objectionable features I have mentioned.

How fares the institutionalist's aim to keep the questions of a legal system's description separate from its evaluation in all that has been said in this chapter? Finnis falls far short of unifying these questions for the reasons that MacCormick states so well:

Those of us who remain sceptical about Finnis' meta-ethical claims will, I think, remain resistant to his proposal to accept his characterization of the focal meaning of law as requiring an orientation toward the common good. ...

Given that law is what it is, it can neither be operated nor fully understood without acceptance that it does and must serve some - doubtless both contestable and not wholly coherent - scheme of values. ...

My final disagreement with Finnis then amounts only to a disagreement about writing elements of that moral position into a characterization of the focal meaning of law.<sup>64</sup>

The essential problem that Finnis fails to recognize is that honest and reasonable people can and do differ even upon ultimate matters of principle and yet they can agree about what the law is. This is no less true for the officials of a legal system than it is for ordinary persons. Their ultimate grounds for action and judgement are based in their affective natures even if these reasons are in important ways socially moulded. This very important ethical insight blocks the success of Finnis' moral theory and hence, his legal theory loses plausibility.

Dworkin has had a long-standing ambition to block the separation of legal facts and legal values.<sup>65</sup> His proposal of the political narrative is yet another attempt to unify these. The narrative itself allows no gap to arise between the description of law and the framing of critical principles against which to test the merits of actual laws. This is certainly the case for the judge who is testing against the narrative various possible judgements to see which one makes



the narrative the best it can be. It is the judge's point of view which is the appropriate one for considering the separability of these questions as far as Dworkin is concerned, and we have found no reason to reject this as one useful perspective on the nature of law.

Let us allow, then, that the institutionalist might be persuaded to accept the picture of law as some sort of narrative, but not under Dworkin's conditions. The theorist will propose, as Raz does, that judges do more than apply existing law. In this light, attempts to further the "novel" are all discretionary. When they are not employing their discretion, judges just work within the existing narrative.

I suggest that the invention of the narrative was undertaken to seal over what Dworkin takes to be an objectionable gap between what law is and what it ought to be. There seems no other reason for his advocacy of an idea that is otherwise superfluous for legal theory. Those of us who find the narrative account an unnecessary embellishment of legal theory have no difficulty, however, in keeping these questions for the most part quite separable.

Notes on Chapter Three

1 Neil MacCormick, Legal Reasoning and Legal Theory, (Oxford: Clarendon Press, 1978), p. 239-40.

2 An example of a case in which they do is found in the Canadian Charter of Rights and Freedoms where some demands of common morality are identified and protected by law.

3 John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980), p. 281.

4 Finnis, p. 290.

5 Finnis, p. 290.

6 Finnis, p. 34.

7 Thomas Aquinas, Summa Theologica, I-II, qq. 91, aa. 2, in Introduction to St. Thomas Aquinas. ed. Anton C. Pegis (New York: The Modern Library, 1945), p. 618.

8 Neil MacCormick, Legal Right and Social Democracy, (Oxford: Clarendon Press, 1982), p. 137.

9 Jan Narveson, "John Finnis Natural Law and Natural Rights," The Windsor Yearbook of Access to Justice, 1 (1981): 335, and see John Finnis, p. 81.

10 Aquinas, S. T., I-II, qq. 94, aa. 6, p. 645.

11 Aquinas, S. T., I-II, qq. 93, aa. 2, p. 631.

12 Finnis, p. 68.

13 Finnis, p. 69.

14 John Leslie Mackie. Ethics, Inventing Right and Wrong, (Middlesex: Penguin Books Ltd, 1977), p. 38.

15 Finnis, p. 34.

16 Mackie, p. 38.

17 A similar perplexity to mine is expressed in Ronald Dworkin's essay "On Interpretation and Objectivity" where he confesses that his moral beliefs seem to rest entirely on personal convictions. Dworkin observes that, as far as he can tell, claims about moral beliefs being

objective seem to put in more emphatic form what can be expressed perfectly well as personal conviction. See Ronald Dworkin, "On Interpretation and Objectivity," in A Matter of Principle, ed. R. Dworkin, (Cambridge, Mass.: Harvard University Press, 1985), p. 171.

18 Finnis, p. 50.

19 See H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961), p. 187.

20 Hart, p. 188.

21 Hart, p. 188.

22 See Aquinas, S. T., I-II, qq. 94, aa. 5, p. 643-644 on whether the natural law is subject to change.

23 Finnis, p. 82.

24 Aquinas, S. T., I-II, qq. 95, aa. 2, p. 649-650.

25 Finnis, p. 101.

26 Neil MacCormick, "Smashing the Two-Way Mirror" in Antifoundationalism and Practical Reasoning, ed. Evan Simpson (Edmonton, Alberta: Academic Printing and Publishing, 1987), p. 207-209.

27 John Finnis, "On Reason and Authority in Law's Empire," Law and Philosophy, 6 (December 1987) p. 371.

28 Finnis, Natural Law ..., p. 155.

29 See Joseph Raz, Practical Reason and Norms, (London: Hutchinson and Company Ltd., 1975), p. 159.

30 Finnis, Natural Law ..., p. 276.

31 Neil MacCormick, "Natural Law Reconsidered," Oxford Journal of Legal Studies, 1 (Spring 1981): 108.

32 Ronald Dworkin, Law's Empire, (Cambridge, Mass.: Harvard University Press, 1986), p. 225.

33 Dworkin, Law's Empire, p. 52.

34 Dworkin, Law's Empire, p. 225.

35 Dworkin, Law's Empire, p. 239.

36 Dworkin, Law's Empire, p. 238-239.

37 Further help toward grasping Dworkin's impulse to holism might be obtained by referring to H. L. A. Hart's 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream,' in his Essays in Jurisprudence and Philosophy, (Oxford: Clarendon Press, 1983), p. 123-144. Here Dworkin is convincingly characterized as "the noblest dreamer of all".

38 Dworkin, Law's Empire, p. 237.

39 See Dworkin, Law's Empire, p. 225, for example.

40 Roger Shiner, "The Hermeneutics of Adjudication", in Antifoundationalism and Practical Reasoning, ed. Evan Simpson (Edmonton, Alberta: Academic Printing and Publishing, 1987), p. 234.

41 Shiner, p. 237.

42 Shiner, p. 238.

43 Hart, The Concept of Law, p. 125.

44 Shiner, p. 240.

45 Shiner, p. 241.

46 Shiner, p. 244.

47 Gerald J. Postema, "'Protestant' Interpretation and Social Practices", Law and Philosophy, 6 (December 1987) p. 283-320.

48 Joseph Raz, The Authority of Law, (Oxford: Clarendon Press, 1979), p. 203.

49 See Dworkin, Law's Empire, p. 167-168.

50 Hart, The Concept of Law, p. 125.

51 MacCormick, Legal Reasoning ..., p. 155.

52 Raz, The Authority of Law, p. 208. Raz also holds that indirectly, interpretation no less than law-making, involves evaluating different goals. This might be thought to run counter to his analysis of legal decision-making, since if some evaluation is required in order to understand an "executive decision" properly it would appear we have never left the "deliberative stage". To this suggestion Raz offers

the rather weak argument that "the fact that the same kind of arguments are used in applying and creating laws does not show that there is no difference between the two activities." The conceptual distinction between law-making and law-applying functions of courts remains, argues Raz. See The Authority of Law, p. 209.

53 Ronald Dworkin, Taking Rights Seriously, (Cambridge, Mass.: 1977), p. 160

54 Dworkin, Law's Empire, p. 165.

55 Dworkin, Law's Empire, p. 167.

56 Dworkin, Law's Empire, p. 167.

57 Finnis, "Reason and Authority ...", p. 379.

58 Raz, The Authority of Law, p. 200.

59 MacCormick, Legal Right and Social Democracy, p. 137.

60 Lord Atkin in Donoghue v. Stevenson (House of Lords [1932] A.C. 562) in MacCormick's Legal Reasoning and Legal Theory, p. 157.

61 Dworkin, Law's Empire, p. 127-128.

62 Dworkin, Law's Empire, p. 225.

63 Dworkin, Law's Empire, p. 225.

64 MacCormick, "Natural Law Reconsidered", p. 108-109.

65 Dworkin, Taking Rights Seriously, p. 7.

## CHAPTER FOUR: INSIDERS, VIRTUAL PARTICIPANTS AND OBLIGATION

### I Hart And The Internal Point Of View

One issue that bears on the general inquiry into the interaction of law and morals is the question of moral attitudes to "law". Much attention has been given to the "internal point of view" on legal rules ever since H. L. A. Hart used it as a basis for rejecting command theories of law. In this chapter, I examine current debate on the nature and centrality of the internal point of view for the concept of law. It is my own view that efforts by John Finnis and Philip Soper to refine the concept of law to include the attitude of an internal moral point of view on legal rules are not warranted by their respective arguments. Such theoretical adjustments only serve to distract attention from the significance of the "detached" viewpoint that is possible toward legal rules.

The proper starting point for our discussion is Hart's original elucidation of the "internal point of view", for here are found important themes that MacCormick, Raz, Finnis and Soper in their turn address. If a group has certain rules of conduct, there are two possible outlooks on such rules, observes Hart. The internal point of view is

typical of a person who uses rules as standards for the appraisal of their own and other's behaviour. Such persons probably are not consciously aware of "rules" as such, but more immediately available to them are the rule-dependent notions of obligation or duty. When, for instance, such persons see the red light of a traffic signal, they interpret it as a signal for them to stop in conformity with standard rules of social behaviour. The external point of view, on the other hand, is typical of the person doing "descriptive sociology", who is content merely to record regularities of observable behaviour in this group. He will notice which deviations from the group's normal actions will meet with a hostile reaction or punishment. Such information may allow an external observer to live among those in the group without incident, but his reasons for action will not be of the same sort as those in the group. He merely acquiesces to the rules of the group in order to avoid negative sanctions. Such an external observer or "outsider" living with the group will not share the rule-dependent notions of obligation or duty since these are available only to one who takes the standards of behaviour expressed by the group to be his own standards.<sup>1</sup>

In his discussion of the significance of primary and secondary rules, Hart elaborates on the importance of the internal point of view in the following passage:

Under the simple regime of primary rules the internal

point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view is required for the analysis of the basic concepts of obligation and duty. With the addition of the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis. These include the notions of legislation, jurisdiction, validity and, generally, of legal powers, private and public."<sup>2</sup>

Hart believes reference to the internal point of view is necessary to account for the basic concepts of obligation and duty. Since he regards these social attitudes as significant for understanding legal systems, the internal point of view deserves some explanatory priority in his analysis. One important reason for such priority is that the concepts of obligation and duty are critical components for a functioning legal system:

On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>3</sup>

Hart notes that such officials must regard these as common standards of official behaviour and appraise critically their own and each other's deviations or lapses. This is clearly a manifestation of the internal point of view which other theorists have later called the insider's view or the participant's perspective.



Neil MacCormick was perhaps one of the first interpreters to seek from Hart a clearer stand on the significance of this internal perspective. In his paper "Legal Obligation and the Imperative Fallacy", he takes issue with Hart over the ability of the external viewer to conceive of legal obligation properly. Hart appears to think that the outsider can distinguish from his perspective those rules that insiders speak of in terms of 'obligation' and those that they do not:

What is important is that the insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.<sup>4</sup>

MacCormick argues this is neither a necessary nor sufficient condition for such obligations to be thought to be held. He offers counter examples to make his case.

The parable of the good Samaritan is plainly intended to imply that the Samaritan had an obligation to assist the Jew. ... But we do know that there were at that time very heavy social pressures against co-operation between Jews and Samaritans. So Hart's criterion [of social pressure] is not a necessary test of obligation. On the other hand, there is heavy social pressure in an Oxford common room that men should wear trousers, not shorts or skirts, yet clearly it would be inaccurate to speak in this context of having a duty to wear trousers. There is simply a rule about the correct way to dress. So Hart's criterion is not sufficient either.<sup>5</sup>

Thus, there are situations in which obligations exist in the relevant sense in spite of there being no intense social pressure against the action which is held to be obligatory, and there are other situations where heavy social pressure does exist but no duty or obligation can be said to properly

exist.<sup>6</sup>

The deficiency of Hart's test for obligation is that it is a criterion specified in terms of the "external point of view", argues MacCormick. Only from the "internal point of view" does it become clear when serious social pressure is exerted even though no duty is thought to exist. By using the social pressure test, the external observer cannot distinguish between substantive social criticism, e.g. doing x is doing wrong, and procedural social criticism, e.g. doing x in manner m is doing x wrongly. The external observer, who only is able to perceive some measure of social pressure, will not be able to distinguish the different functions of rules to which social pressure is often applied. As MacCormick notes, "some rules function as substantive guides to conduct, guiding us as to what ought or ought not to be done, others as procedural guides, laying down in what manner this or that ought to be done."<sup>7</sup>

It appears that MacCormick's requirement that obligations are only associated with substantive standards of conduct is ~~not~~ at all inconsistent with Hart's stated requirements:

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate is great. ...<sup>8</sup>

From the "internal point of view", one might describe the requirements necessary for rules to impose obligations in

just Hart's words. The only criticism of Hart that MacCormick appears to provide - and MacCormick himself prefers to call it a "modification"<sup>9</sup> - is that "in law and morals, the concepts 'duty' and 'obligation' are only to be grasped by appreciating a difference in function in group life between procedural and substantive standards of conduct."<sup>10</sup> The upshot of this line of criticism is that we may safely assume that all external perspectives that address the concepts "duty" or "obligation" presuppose a grasp of the critical parts of the "internal" perspective on rules.

Further "refinements" of Hart's position are offered through criticisms expressed in a later work of MacCormick's.<sup>11</sup> We turn now to those further criticisms. In his account of the internal aspect of norms, Hart rejects the view that this aspect is a matter of feelings about conduct:

The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure. ... To feel obliged and to have an obligation are different though frequently concomitant things.<sup>12</sup>

MacCormick suggests that this observation, though well founded, might have led Hart to ignore important affective elements in the internal perspective, specifically the volitional element in the internal aspect of rules.<sup>13</sup> Hart fails to give anywhere a single specific explanation of the relationship between the various intertwined conceptions which are central to his theory. What is the relationship

between the 'internal aspect', the 'internal point of view', 'internal statements' and 'acceptance of rules'? Central to such conceptions, says MacCormick, is the volitional element of the insider's point of view. Only such norms as are actually willed by some people as common patterns for a social group can be thought of as actual social norms. The prevalence of a committed group is what allows variant 'delinquent' or 'rebel' positions to be understood as such. These are comprehensible only in apposition to those volitionally committed persons. Further, an understanding of the social norms and rules of a group involves an assumption of some people's will as underpinning and sustaining the patterns of group conduct.<sup>14</sup>

Does this mean that what determines 'internality' of a statement is the will of a speaker? No, answers MacCormick, what determines this is the understanding of the speaker. Thus if an outsider forms an understanding of the group's norms to the extent of being able to make 'internal' statements, his knowledge of the group's conduct is greatly enhanced. MacCormick concludes that Hart creates an ambiguity in his discussion of the internal/external distinction. It is not clear from Hart's account whether the distinction relies on levels of understanding of a group's norms or relies on degrees of volitional commitment. The social anthropologist may go beyond a crude level of understanding by appreciating conduct of a group in terms of

the categories which for an agent are crucial. However, this is internality only at the level of understanding. The observer may remain detached and uncommitted as regards the actual norms, in which case he is still an outsider in a sense. Thus there is an important distinction Hart fails to appreciate fully between gaining internal but 'detached' understanding of a group's norms and having actual commitment to such norms.<sup>15</sup>

Let us be clear before going on. MacCormick holds that normative legal language is to be explained best by reference to the "volitional" acceptance of the rule or rules in question. The "volitionally internal" point of view is had by a person who, in some degree and for reasons which seem good to him, has a volitional commitment to observance of a given pattern of conduct as a standard for himself and for others.<sup>16</sup> The reasons for commitment may differ among individuals. For example, it is quite possible that a liberal, a Marxist and a conservative judge could all accept the same rules but have differing reasons for accepting them. Of course a judge's "acceptance" of legal rules for example need only be an acceptance that these are the rules and that it is his duty to apply them as required by the society's rules for adjudication. As Hart has noted, legal officials may base their allegiance to the legal system on many different sorts of considerations:

... calculations of long-term interest; disinterested

interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.<sup>17</sup>

Such allegiance to the system is best understood as "weak acceptance" of the rules and is a minimum condition for the proper functioning of a legal system. A judge may believe that these rules are morally defensible himself ("strong acceptance"), but whether he does or not is irrelevant to whether the rules and thus the legal system of which they are a part can be thought to exist or not. It appears that MacCormick wants to leave room for such "weak acceptance", for he distinguishes what he calls the "cognitively internal" point of view from which conduct is appreciated as being used by the agent as guiding standards.<sup>18</sup> This perspective, while being sufficient for an understanding of norms and the normative, presupposes the "volitionally internal" or the strongly committed "internal point of view". MacCormick allows for weak acceptance when he says that one can conceive of volitional commitment of others independently of one's own will, but not independently of one's beliefs about the will of other members of the social group.<sup>19</sup> It is this claim that "weak acceptance" presupposes the existence of "strong acceptance" that is offered as a refinement or modification to Hart's analysis of obligation.

## II Finnis' Central Case Viewpoint

One of the hazards of stressing the importance of

commitment for the internal point of view is that someone might exaggerate its significance to support a basic claim that law is essentially a moral concept. MacCormick has distinguished the committed point of view in order to account for the widespread use of normative language. But he has not made the further claim that the commitment of some insiders shows that the "central case" of law necessarily includes reference to such commitment. It could be that MacCormick's treatment of the committed element invites John Finnis to make this further claim about the necessary moral basis of the very concept of law. It was perhaps inevitable that natural lawyers would seize this opportunity given the fertile ground that MacCormick and other interpreters of Hart have exposed.

Finnis argues that there is a "central case" of the internal point of view that legal positivists do not distinguish in their analyses:

The central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness but also are practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.<sup>20</sup>

The insider's commitment is to be thought of in such terms and the concept of law is to recognize this attitude as the most important one.

Positivists typically describe the internal viewpoint

as having an amalgam of very different viewpoints. Certainly Hart and MacCormick allow for this in their analyses. But Finnis seizes the chance to distinguish the morally committed viewpoint from all others which are "watered down" or "deviant" versions of this central case. In so arguing, Finnis resorts to two 'tools' Hart employed in The Concept of Law: (i) distinguishing the central or focal meaning for the use of an expression from the questionable applications of the expression,<sup>21</sup> and (ii) distinguishing the central case where a rule clearly applies from those "penumbral cases" where there is some uncertainty concerning a rule's applicability.<sup>22</sup> Finnis argues that these tools can be used to show that the morally committed viewpoint on legal rules is the only one that truly applies to the analysis of a legal system. Hart does not employ these tools to show this, whereas Finnis insists that he must. The description of the internal viewpoint which Hart treats as having an explanatory priority for explaining "obligation" or "duty" contains this central case, Finnis contends, which must be clearly articulated. Without taking this step the description of legal orders is incomplete. Finnis argues that given the technique of analysis by central case and focal meaning, which elsewhere Hart has used with such fruitful resolution, there seems to be no good reason for his refusal to differentiate the central from the peripheral cases of the internal point of view itself.<sup>23</sup>



Hart's enumeration of some of the possible types of "internal" attitudes to the rules of a legal system are all attacked by Finnis as being deviations from a central case viewpoint in which legal obligation is treated as at least presumptively a moral obligation. Finnis admits that Hart's "unreflecting inherited or traditional attitude" and the "mere wish to do as others do" are attitudes which will up to a point tend to maintain in existence a legal system if one already exists. But they will not bring about the transition from the pre-legal social order of custom or discretion to a legal order, Finnis charges, "for they do not share the concern, which Hart himself recognizes as the explanatory source of legal order, to remedy the defects of pre-legal social orders." Similarly, Hart's man who is moved by "calculations of long-term interest" waters down any concern he may have for the function of law as an answer to real social problems.<sup>24</sup> Finnis' immediate conclusion is that these considerations and attitudes are parasitic upon the practical viewpoint that brings law into being and maintains it as a developed social order. Another reason for allegiance that Hart distinguished was "a disinterested interest in others". Finnis argues that "if disinterested concern for others is detached from moral concern, as it is by Hart, then what it involves is quite unclear." Finnis draws the following conclusion from this critical examination of the range of "internal" attitudes:

If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation, ... a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the [internal point of view].<sup>25</sup>

The consequences of Finnis' taking this further step in the way he does are unwelcome. Firstly, it is not at all clear, given the range of commitments possible, that any insider who is not practically reasonable about the specific range of concerns Finnis identifies in his moral theory has a "watered down" or "deviant" viewpoint. Finnis would have to show that his moral theory was true for this to be unquestionably the case. The conceptual analysis employed after determining the existence of an internal point of view need not necessarily distinguish those who are "practically reasonable" from others who are also committed. Further, if we refine our conception of the central case of a legal system by building in a moral element, by holding that legal orders necessarily must succeed in serving the common good, we are committed to writing into the description and explanation of law a clearly contestable conception of the common good. The more satisfactory position is that legal orders should aim at a conception of the common good, however wide of the mark they fall. This was the basic concern MacCormick expressed earlier where he pointed out his unwillingness to write in this moral element on the grounds

that "the law" is a less contested concept than the common good.<sup>26</sup>

Both MacCormick and Finnis allow for the existence of bad laws which do not ensure basic civil liberties and both discuss at length the ill effects of such laws on the social fabric.<sup>27</sup> But while MacCormick sees such laws as simply undesirable, Finnis sees them as deviations from the "ideal case" in which law actually secures his particular conception of social justice. Finnis argues that the basic authority of law is undermined by its inability to secure social justice. I think we can readily accept this claim. But Finnis' logic is highly questionable when he argues that because unjust laws create no moral obligation whatsoever for someone with the 'proper' internal point of view, an unjust law is not 'law' in the focal sense of the term.<sup>28</sup> We can agree that unjust laws create no moral obligation to obey, but it does not follow from this that unjust law is not law. It does not follow unless we accept the natural lawyer's assertion that there is something such as 'ideal law' and that no human enactment which deviates from this standard is properly conceived as law. Finnis appears to underplay the important observation that law exists not necessarily in accordance with rationally discoverable principles of right, but as institutional fact. A moral position may be taken up which holds that law ought to be 'aimed' at social justice and if it is, then it gives rise to moral obligation. But whether

anyone in fact has such obligation is not relevant to the question whether the particular law in question exists or not. Finnis sees law as allied inseparably with the moral requirements of justice since he has written in a moral position into the focal sense of "law".

### III Moral Duty And Philip Soper

Philip Soper has lately joined the battle over appropriate methodology for legal theory sharing Finnis' concern that positivist theories ignore the importance of moral duty in setting out the basic concept of law. His attack on Hart's methodology is very similar to Finnis' and indeed carries the force of this critique forward. In what is nearly a restatement of Finnis' problem, Soper expresses his fundamental criticism:

... by analyzing the concept of law at the outset and then deriving implications for obligation, one prejudices the question of whether the obligation to obey is part of the data to be accounted for in the theoretical construct. The virtue of the moral approach to legal theory is that it accepts the persistent association of obligation and law as elements of a legal system that must be explained; to ignore this feature is to prejudice in advance one's conclusions concerning the nature of law and its relevance to moral duty.<sup>29</sup>

Like Finnis, Soper is anxious that we do not obscure the importance of the moral duty that many people see as coextensive with legal duty. His concern is that legal theory be able to answer the question, "What must law be if it is to obligate?" Soper's ready answer to this moral

concern is that law should be just and serve moral ends. All we need to bring the concept of law and the concern for moral obligation together is the claim made in good faith by those in legal authority that they serve the interests of the entire community. Like MacCormick and Finnis, Soper believes that law should be aimed at some valuable ends. Like MacCormick but unlike Finnis, he holds that such ends and ultimate values are ultimately disputable.<sup>30</sup> Like Finnis he asserts that the claim to be serving the common good is conceptually linked with the very idea of law.<sup>31</sup> Why does Soper take this view? As we shall see, it is because he finds no other position that sufficiently distinguishes legal systems from coercive regimes. The only dependable way to tell them apart is that the officials of the former make a good faith claim that their legal rules are just.

Let us first deal with this question of obedience that Soper considers to be of such great importance. For Soper, an obligation to obey that law does not directly follow from its success in actually serving "the common good". Finnis requires that law be consistent with the requirements of practical reasonableness and that any laws inconsistent with these requirements cannot yield even a prima facie moral obligation to obey.<sup>32</sup> In contrast, Soper argues that a good faith attempt to meet the requirements of practical reasonableness is all that is required for at least a weak sense of prima facie moral obligation to obey.<sup>33</sup> It

is the honest claim made by officials that the law is just that Soper conceptually links with the idea of law.<sup>34</sup> To make this proposal work, Soper has had to restrict Hart's official "attitude of acceptance", which underlies the rule of recognition, to one that embraces and defends the rules as just.<sup>35</sup> This modification is "borrowed" from Joseph Raz's arguments in The Authority of Law that when judges make "internal statements" - those statements made in applying the law, using it as a standard by which to guide, criticize and evaluate those actions to which the rule applies - they mean to assert its binding force. Statements made by a judge from this "internal" point of view are fully committed normative statements.<sup>36</sup> Raz asserts that it is a necessary condition, if a legal system of a particular structure is to constitute the law of a particular society, that judges either believe or pretend to believe in the moral justifiability of the law.<sup>37</sup> Such claims about a judge's necessary attitude toward legal rules opens onto an ongoing debate in which Hart has taken an active part. An explanation of Hart's dissatisfaction with Raz's position above will expose a serious challenge to Soper's view that a system of rules is a legal one only if judges believe the rules to be just.

An examination of the evolution of Raz's legal philosophy strongly suggests to Hart that the inclusion of this expression of moral approval as a necessary component of acceptance is a mistake. According to Hart, the view is

based on a mistaken cognitive account of normative propositions of law:

Insistence on this [expression of moral approval on the part of judges] is I think a consequence dictated by the general reason-based and cognitive explanation of normativity which is a feature of Raz's theory of practical reason and which connects the idea of duty with a special sort of reason for action the existence of which is an objective matter of fact.<sup>38</sup>

Hart does not dispute Raz's cognitive account of moral judgement in terms of objective reasons for action. But he finds little reason to accept such a cognitive interpretation of legal duty in terms of objective reasons or the identity of meaning of 'obligation' in legal and moral contexts which this would secure:

Far better adapted to the legal case is a different non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a categorical reason to do but, as the etymology of 'duty' and indeed 'ought' suggests, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be properly demanded or exacted from them. On this footing, to say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action. ...

Given the existence of a legal system whose courts accept specific rules of recognition, detached statements of legal obligation may be made by those who accept neither its rules of recognition nor any of its subordinate laws, either as guides to their own behaviour or as standards for the evaluation of the conduct of others.<sup>39</sup>

Hart's remarks above serve to reinforce the views he expressed in The Concept of Law,<sup>40</sup> but he is the first to admit that this debate concerning obligation is an important

ongoing one among legal philosophers. Though Raz's position on "acceptance" is different from his own, Hart notes that Raz's views on this question do not undermine the legal positivist's contention that the existence of law and legal systems is purely a matter of social fact. Hart observes that Raz is careful not to stipulate as a condition of the existence of a legal system that the belief which a judge may either hold or pretend to hold that there are sound moral reasons requiring compliance with the law as such be true. In a relevant passage in The Authority of Law, Raz contends that "it makes sense to judge the law as a useful and important social institution and to judge a legal system good or even perfect while denying that there is an obligation to obey its laws."<sup>41</sup> Indeed, Raz argues there is no obligation to obey the law even in a prima facie sense. As Hart notes, Raz's position on political obligation here makes the moral component of the judge's acceptance very small indeed.<sup>42</sup>

With these matters in mind, we return to Soper's view that a system of rules is a legal one only if the people in authority believe that the rules are just. Since Raz has described judicial acceptance as necessarily involving an expression of moral approval, his criticism of Soper on this point is particularly incisive. Raz points out that whatever mileage Soper hopes to gain toward a theory of "natural law" by making the above assertion, its real significance is minimal. "Whether it is an essential feature of law that its



officials believe in its value or merely that they claim that they do, both properties are on the factual side of the fact/value distinction."<sup>43</sup> It is quite plain that official belief in the moral justifiability of the law, if it exists, is a fact about the legal system in question, and hence this proposal in no way implies that laws are actually moral or just. Soper's "belief component" is thus perfectly consistent with legal positivist theories of law. Having noted the extent to which Soper's argument about official belief is a non-starter as an element of natural law theory, we should attend to his unique treatment of obligation.

Soper's "moral approach" locates the idea of obligation in the concept of law not by observing, as Hart does, that various normative attitudes are often or sometimes or always found in legal systems, but by showing that an obligation to obey is a matter of moral theory.<sup>44</sup> It is necessary for us then to consider what moral theoretical argument can be given to support this position.

Soper's foundation or first premise is one that Finnis holds as well - there are tasks to be done and law and legal officials do them. We may grant this observation I think. Secondly, those in authority are trying to perform those tasks in good faith aiming to serve the common good. Soper concludes that therefore, official effort deserves a citizen's respect and provides her or him with a moral reason to obey, though this is only a prima facie reason.<sup>45</sup>

Raz makes short work of this argument. Soper's reasoning fails to make obvious the connection between respect and obedience. His argument is most weakened by the fact that respect needn't necessarily express itself in obedience to legal directives. Such respect may express itself in many ways, not all of which require obedience. Raz notes that sometimes respecting those in authority means disobeying them.<sup>46</sup> Consider the following argument. Participation in a joint enterprise fails to establish an obligation to obey since such participation merely requires doing what contributes to the success of the enterprise. If one perceives that the actions of one in authority leads to the failure of that joint enterprise, then respect for them as joint entrepreneurs requires frustrating them rather than obeying them.<sup>47</sup> Raz correctly observes that respect arising out of the existence of a joint enterprise may actually undermine any obligation to obey an unjust government rather than necessarily providing a moral reason to support it. Soper's argument that obligation to obey is a matter of moral theory therefore fails.

Raz has similar complaints about Ronald Dworkin's treatment of obligation in Law's Empire. For that reason, a short detour into Dworkin's picture of law and how it supposedly generates obligation would be in order. Dworkin relies heavily on the concept of a "community of principle" in which "we have a duty to honor our responsibilities under

social practices that define groups and attach special responsibilities to membership."<sup>48</sup> There are conditions that a "true" community must possess if there is to be obligation.<sup>49</sup> There must be obligations of reciprocity between members, the recognition of the equal value of lives of members, and the community must aim toward justice by ensuring that law expresses the community. If these conditions are met, people in the community have obligations whether they want them or not.<sup>50</sup> Raz wonders why, in spite of anything Dworkin has said here, we are bound by simply being members of any such community.<sup>51</sup> Raz observes that it is an empirical fact that members in good standing do sometimes deviate in obedience to a community rule. He suspects the linkage between membership in a community and obligations to follow a community's rules at all times is less strong than Dworkin suggests. Raz argues that none of Dworkin's conditions, nor all of them taken together, necessarily bind a citizen to obey, even if they might sometimes obey. The source of tension here is whether Dworkin's conception of community is realistic. The problem Raz raises is similar to the one he has with Soper. It can be the case that a citizen has no moral obligation to obey the law even when all the proposed conditions are met.

#### IV The Question Of Obedience To Law

Having called into question one of Soper's central

arguments in A Theory of Law, let us follow his critique of legal positivism further. Another of Soper's angles of criticism calls on the positivist to further defend his stand on the normativity of law against its prior rivals, the command theories of Bentham and Austin. Soper finds that the best argument against Austin's coercive model of legal systems is this "good faith claim" doctrine. According to Soper, Hart's argument against Austin is too weak:

One might concede [as Hart does] that organized coercive systems could exist and might still be legal systems, content with the modest claim that the normative attitudes described are important features found in most standard legal systems. Unfortunately, this response [to Austin] is so modest as to be no response at all.<sup>52</sup>

Hart's description of the normative component allows that the normative attitude toward law is just one among many features that happen to be found in most mature legal systems. Soper is concerned that this normativity can thus be dismissed as a merely contingent feature of legal systems. To advance beyond the coercive model, to challenge Austin's definition of law squarely, Soper proposes two requirements which in his view must be met:

... first, one must describe the normative attitude that is essential to law in a way that distinguishes it from any exercise of de facto power; and second, one must defend as a matter of definition the claim that this particular attitude is an essential part of what is meant by a legal system.<sup>53</sup>

These "requirements" are meant to show how far short Hart falls in his challenge to Austin in The Concept of Law. We may perceive a strong sympathy with Finnis' objection that

Hart fails to elucidate the central case of the internal point of view, one that would make strong moral acceptance of the rules the centre of theoretical attention. But whereas Finnis criticized Hart's lack of extension of the method of conceptual analysis where it seemed obviously warranted, Soper is concerned to show how without distinguishing the character of the central case viewpoint, Hart cannot pull sufficiently clear of the Austinian model of law as essentially coercive. We shall reply to Soper's particular charge after describing his difficulty with Hart's account of normativity.

There is a tension in Hart's account of normativity that has lately attracted much critical attention and which Soper exploits.<sup>54</sup> Let us consider the problem. Hart's description of a legal system is designed to preserve the feature of obligation for an insider. Austin's idea of orders backed by threats is supposed to be replaced by the idea of rules accepted by citizens and officials. Soper notes that Hart's descriptions of a society's rules of obligation on the one hand and of the official acceptance on the other differ markedly. Rules of obligation are characterized by serious social pressure to act in ways that are thought essential to a prized feature of social life and that typically conflict with self-interest. In contrast, official acceptance of rules may be based on many different considerations; calculations of long-term interest; an

unreflecting inherited or traditional attitude; or the mere wish to do as others do. Soper asserts that the official attitude of acceptance displays the weakest sense of normativity being little more than an explication of voluntary acquiescence. He concludes that this acceptance is no different from the attitude implicit in the coercive model Hart's account was meant to replace: the organized sanction.<sup>55</sup> This is the same complaint J. C. Smith made of Hart's analysis of obligation in his book Legal Obligation, and hence is not a new revelation.<sup>56</sup>

Hart's discussion in chapter eight of The Concept of Law might seem somewhat at odds with the picture of legal obligation Hart painted in chapter five where he discusses the idea of obligation.<sup>57</sup> But the tension here can be explained and Hart's position can be clearly distinguished from Austin's coercive theory. We might argue that a healthy "moral" legal system will be one in which the strongly committed attitude exists and that such an attitude toward the legal rules exists within most legal systems, at least to a degree. If this is plausible, then this is quite at odds with Austin whose view does not seem to provide a plausible explanation of how this is possible.

It is important to observe here that having an attitude of strong moral obligation to obey legal rules is different from the normative commitment to rules that officials have in a healthy legal system. As Hart notes:

... when judges or others make committed statements of legal obligation it is not the case that they must necessarily believe that they are referring to a species of moral obligation.<sup>58</sup>

Hart's position on "acceptance" is designed to permit a wide range of degrees of commitment even at the most basic level of legal theory. Perhaps this can partly be explained by noting that Hart considered that one should always maintain a critical moral stance toward legal rules regardless of any connection with popular morality that a legal rule might suggest. Hart was careful not to "define out of existence" those attitudes to legal rules that are not of the strongest morally committed variety.<sup>59</sup> As Joseph Raz notes, Hart thought an account of law correct only if it makes room for those with differing degrees of acceptance. "An account based on a stronger notion of recognition, one which claims that the law exists only if its subjects believe in moral reasons for the validity of its rules, is vitiated by not making room for such people."<sup>60</sup> Soper's theory of law which insists on leaving out of account those with weak acceptance would, in Hart's words, "fail to do justice to the complexity of the facts" about societies that live by rules.

Hart and MacCormick believe that one can willingly embrace rules for a variety of reasons. Soper's concern is that the rules must be embraced by officials because they are believed to be just. Unless they are embraced for this reason, one cannot distinguish law from force.<sup>61</sup> The

response we may give to Soper is a straightforward one. Insiders are aware whether legal directives rest on "acceptance" by citizens in general or on mere force. As Raz notes:

Legal officials do not see themselves as gunmen writ large. They accept the system. That fact is understood in the society at large. This is not an empirical generalization but a conceptual truth. Law is a public institution the general features of which (i.e. the features that make it law) are known to the public.<sup>62</sup>

It is important to remind Soper and others who make similar criticisms that Hart was concerned to articulate what is at minimum essential if a rule of recognition, and hence, a legal system can exist at all. It is misleading for Soper to suggest that weak acceptance by officials is practically equivalent to the attitude of Austin's sovereign because even a judge who is not himself fully committed to the rules as his own standards still must be aware that these rules are supported by those who do take them as guides for their own conduct. No doubt if Soper understands law as something which necessarily obligates in the prima facie moral sense, Hart's "weak" acceptance and the attitude of Austin's sovereign will appear similar. But again, there is a danger in not taking seriously the position of those who have weak acceptance. Any careful theorist should be able to take this attitude into account without ignoring the importance of the fully committed attitude for legal theory.

To be sure, shared social interests and purposes



often create the strong attitude of acceptance, but Soper seems blind to the possible existence of wider human interests than those which might ground this strong acceptance. As Raz notes, he is blinded by his single-minded concentration on the question why one should obey the law. The basic maxim which Soper lays down, that the law is such that it is (prima facie) obligatory to obey it, is in conflict with the "sources thesis" which Soper also holds. The sources thesis asserts that the identification of the content and the existence of law is a matter of institutional fact. Raz notes the tension between the sources thesis and this maxim: Soper makes the existence of law always a moral question, and thus he contradicts his own view that what is law is determined by the views, attitudes and actions of those subject to the law.<sup>63</sup>

While his inconsistency itself makes me reluctant to adopt Soper's approach, it is really his claim that law exists only if the rulers claim to rule in the interests of the governed that is truly the most substantial point of disagreement. As for this claim, we should be mindful, as Raz is, of "the possibility of theocratic states whose governments govern in pursuit of divine commands and interests which may radically conflict with the interests of the governed."<sup>64</sup> We may think law to be good law if it aims at justice and bad law if it does not, as MacCormick and Finnis surely do. But it is extravagant to assume, as Soper

does, that the central case of law is one in which the official belief in its justice necessarily prevails, for the simple reason that some judges can do their job well and still remain "outsiders".

Soper is too subtle to argue outright that purely coercive regimes are not legal systems. He notes there is no point in denying that our existing classificatory scheme permits calling coercive systems legal despite the absence of moral authority. His concern is that these are "borderline cases" of such systems, and that because they are, we might not exactly know what to say if asked whether such systems are legal or not.<sup>65</sup> Soper's perplexity is understandable given his "moral approach" which insists that law is such that it ought to be obeyed. But this is not a problem for anyone, whether "theorist" or "insider", who sees moral obligation and legal obligation as separate but frequently concomitant phenomena. Any initial confusion we may have is capable of a speedy and satisfactory resolution in my view. Our classificatory scheme that allows coercive systems to be called legal is adopted not for convenience, but because we have reasons of theoretical virtue such as clarity and explanatory fruitfulness. In addition, we should, for moral reasons, forego any theory of law which suggests or implies that whatever is 'law' properly so called is conclusive of the moral question what I am to do.<sup>66</sup> It seems to me well within the reasonable grasp of ordinary people to accept

Hart's argument for the autonomy and supremacy of critical morality which serves to banish the sort of perplexity Soper mentions. Hart's moral argument is as follows:

So long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.<sup>67</sup>

One wonders if Soper has not painted a picture of law that is more abstract and morally objectionable than the positivist theory he hoped to replace. The only way I can see to leave Soper's perplexity intact is to consider acceptable some unreflective intuition about what counts as law. But this would suppose that our initial prejudgements of this question are a satisfactory ground for building a theory of law. Granted that one has to start theory somewhere, but that in no sense guarantees that our initial assumptions are ones we should keep if they are found unsatisfactory later on.

Now let us finally address Soper's main theoretical criticism that if we analyze the concept of law first and then derive implications for obligation, we run into error.<sup>68</sup>

Even if we assume as Soper does that the motivation to do legal theory rests on the moral question "what ought we to do?", it is not clear that the institutionalist has wrongly

prejudged his inquiry into the nature of law by "ignoring the persistent association of obligation and law as elements of a legal system." "On the contrary", asserts Raz in defending the positivist's approach, "there can be no progress in deciding what is to be done in the political sphere except by focusing attention on the prominent features of social institutions, features of which may make a difference to the issue of obedience."<sup>69</sup> Treating "obligation" after the essentials of a concept of law rather than trying to include it as an essential of that concept is preferable for this reason. It is the institutionalist's view, and Hart's view in particular, that if we look to the prominent political features of a social group in order to provide an analysis of a municipal legal system, we should, by analyzing such a structure, obtain a better understanding of differences between law, coercion and morality as types of social phenomena.<sup>70</sup> The analysis should proceed in this order if one is to avoid the distortion that occurs if one assumes that an moral obligation to obey is necessarily part of the concept of law.

## V Concluding Remarks

Finnis and Soper wish to propose an internal moral point of view on legal rules that entails the attitude that the rule in question is just. But this is not required in order to make the claim that the minimum requirements for the

existence of a legal system are met, nor is it a morally desirable adjustment to make. The internal point of view on legal rules is an attitude attributed to participants by a theorist. The theorist recognizes the seriousness of the social pressure behind the rules.<sup>71</sup> This attitude is a socially common one and hence it must be addressed and explicated in the analysis of municipal legal systems. But this internal point of view which he explicates need not necessarily include the claim that the rule in question is morally good. For example, the participant may have no opinion about the rightness or goodness of taking his hat off in a church, even if he accepts and contributes to the practice of doing so. Linkage between participation in a social practice and a moral attitude about the practice is not always present and, in fact, may be frequently absent.

It is not the case that all positivist theories ignore the moral duty that insiders typically express toward legal rules. And a real advantage of accepting positivism is one that Hart stressed; that we are better able to appreciate and assess our moral reaction to law if we accept the separation of law and morals. There is no turning away from the moral dimension in legal systems for the positivist. But the deeper controversy, whether moral obligation should be thought essential to the very concept of law admits of a straightforward answer for the positivist. Admitting moral obligation as essential to the concept of law encourages an

unrealistic view about the range of possible attitudes toward legal rules. Soper and Finnis appear to be in pursuit of an ideal concept rather than one that explains the relevant social practices accurately.

If we adopt Soper's view, that law is necessarily such that it prima facie morally obliges, we might be less likely, as Bentham thought, to question its moral acceptability. Hart's warning about the need for moral scrutiny of legal rules is an appeal to the practical consequences of accepting that nothing is really "law" unless it passes a substantive moral test as well as a "formal sources" test. As Neil MacCormick explains, if we accept the broader moralistic conception of law, we risk enhancing the moral aura which states and governments can assume, even if our true hope is, as Soper's appears to be, to cut out of the realm of "law" evil and unjustifiable acts of legislation and of government. And beyond this practical concern is a moral argument:

The argument of last resort here is an argument for the final sovereignty of conscience, and how best to preserve it. Nobody, I suppose doubts that legal positions can be abused, and demands made of people which it may be right for them to defy and perhaps even morally mandatory on them to resist. Natural lawyers counsel that we should withhold here the term "law"; positivists, that we may allow the term "law" precisely because we shall insist that legality is not decisive for obedience. Obedience is a moral question, and hence a question distinct from that of legality.<sup>72</sup>

The aim of this chapter has been to show that the positivist methodology survives the attacks of those who

criticize it for a failure to recognize as central to law, a moral attitude towards legal rules. The discussion has furthered an understanding of the interaction of morals and law by showing how an "internal point of view" is important for legal theory in spite of the fact that the concept of law itself needn't include a moral component to be workable. One further conclusion we may draw is that considerations of methodology run very close to the dispute about where moral obligation belongs in legal theory. I take this to be an important insight. But methodological proposals such as those of Finnis and Soper entail arguments that have to be better supported if a so-called "moral approach" to legal obligation is to be successful.

Notes on Chapter Four

- 1 H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961), p. 86-87.
- 2 Hart, p. 96.
- 3 Hart, p. 113.
- 4 Hart, p. 84.
- 5 Neil MacCormick, "Legal Obligation and The Imperative Fallacy," in Oxford Essays in Jurisprudence, ed. A.W.B. Simpson, (Oxford: Clarendon Press, 1973), p. 119.
- 6 MacCormick, p. 119.
- 7 MacCormick, p. 121.
- 8 Hart, p. 84.
- 9 MacCormick, p. 124, note 27.
- 10 MacCormick, p. 126.
- 11 Neil MacCormick, Legal Reasoning and Legal Theory, (Oxford: Clarendon Press, 1978), p. 274-292.
- 12 Hart, p. 85-86.
- 13 MacCormick, Legal Reasoning ..., p. 288.
- 14 MacCormick, Legal Reasoning ..., p. 289-290.
- 15 MacCormick, Legal Reasoning ..., p. 291-292.
- 16 MacCormick, Legal Reasoning ..., p. 292.
- 17 Hart, p. 198.
- 18 MacCormick, Legal Reasoning ..., p. 292.
- 19 MacCormick, Legal Reasoning ..., p. 287-288.
- 20 John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980), p. 15.
- 21 Hart, p. 4.
- 22 Hart, p. 123.



- 23 Finnis, p. 13.
- 24 Finnis, p. 14.
- 25 Finnis, p. 14-15.
- 26 Neil MacCormick, "Natural Law Reconsidered," Oxford Journal of Legal Studies, 1 (Spring 1981):108.
- 27 See Finnis, p. 353 and Neil MacCormick, Legal Right and Social Democracy, (Oxford: Clarendon Press, 1982), p. 52-59.
- 28 See Finnis p. 360.
- 29 Philip Soper, A Theory of Law, (Cambridge, Mass.: Harvard University Press, 1984), p. 10.
- 30 Soper, p. 149.
- 31 Soper, p. 55.
- 32 Finnis, p. 359-60.
- 33 Soper, p. 176, n. 55.
- 34 Soper, p. 55.
- 35 Soper, p. 176, n. 56.
- 36 Joseph Raz, The Authority of Law, (Oxford: Clarendon Press, 1979), p. 154-155.
- 37 Raz, p. 155, note 13.
- 38 H. L. A. Hart, Essays on Bentham (Oxford: Clarendon Press, 1982), p. 157.
- 39 Hart, Essays ..., p. 159-160.
- 40 Hart, The Concept of Law, p. 197-199.
- 41 Raz, p. 249.
- 42 Hart, Essays ..., p. 158.
- 43 Joseph Raz, "The Morality of Obedience," Michigan Law Review (February, 1985):740.
- 44 Soper, p. 176, n. 57.

- 45 Soper, p. 79.
- 46 Joseph Raz, "The Reality and the Ideal" - a series of eight lectures given at The University of Toronto Faculty of Law, September 9-25, 1987. Matter in question from 18 September, 1987.
- 47 Raz, "Morality of ...", p. 747.
- 48 Ronald Dworkin, Law's Empire, (Cambridge, Mass.: 1986), p. 198.
- 49 Dworkin, p. 201.
- 50 Dworkin, p. 201.
- 51 Raz, "The Reality and the Ideal", 18 September, 1987.
- 52 Soper, p. 25.
- 53 Soper, p. 26.
- 54 See Soper, p. 172, n. 22.
- 55 Soper, p. 30-31.
- 56 J.C. Smith, Legal Obligation, (London: Athlone Press, 1976), p. 32.
- 57 Soper, p. 172, n. 22.
- 58 Hart, Essays ..., p. 160-161.
- 59 Hart, The Concept ...", p. 88.
- 60 Raz, "The Morality of ...", p. 737.
- 61 Soper, p. 174, n. 38.
- 62 Raz, "The Morality of ...", p. 737.
- 63 Raz, "The Morality of ...", p. 738.
- 64 Raz, "The Morality of ...", p. 740.
- 65 Soper, p. 157.
- 66 Neil MacCormick, H.L.A. Hart, (Stanford, Cal.: Stanford University Press, 1981), p. 160.

- 67 Hart, The Concept ..., p. 206.
- 68 See Soper, p. 10.
- 69 Raz, "The Morality of ...", p. 733.
- 70 Hart, The Concept ..., p. 17.
- 71 Hart, The Concept ..., p. 84.
- 72 Neil MacCormick, "A Moralistic Case for A-Moralistic Law?", Valparaiso University Law Review 20 (Fall 1985): 10.

CHAPTER FIVE: LAW THAT IS, OUGHT TO BE,  
AND THE CASE FOR SUBTLETY

I Some Is/Ought Issues In Legal Theory

Many significant issues for legal theory are raised by pursuing the distinction between 'is' and 'ought' where it might reasonably be made. At least two general questions have already been treated in this thesis: whether legal theory can be done without addressing 'ought' questions, and whether legal decisions are derivable without recourse to moral convictions, i.e. whether the law is a matter of what 'is' rather than what 'ought' to be.

The first question is a general problem which arises if the transition from statements of what is the case to statements about what ought to be the case is unexplained.<sup>1</sup> The problem has led to an important controversy for legal theory. The view often attributed to St. Thomas Aquinas and natural lawyers in general is that ethical norms can be derived from facts about the natural world. It has fallen to such theorists to show how such a derivation is possible. John Finnis has attempted to clear up what he takes to be a misunderstanding of Aquinas' views on this question, noting that classical exponents of natural law theory have not nor

have needed to make any inferences from facts to norms. As we have already seen, norms are not, according to Finnis, inferred from either speculative principles, from facts, nor from metaphysical propositions about human nature. They are not inferred or derived from anything at all, but are rather grasped "by a simple act of non-inferential understanding," by "expressing one's nature from the inside in the form of one's inclinations."<sup>2</sup> In Finnis' view, it is wrong to suppose, as has often been done, that the very phrase 'natural law' means that the norms referred to in any theory of natural law are based upon judgements about nature. This is certainly not true of Aquinas' theory of natural law, argues Finnis. While Aquinas notes that human virtue is in accordance with the nature of human beings and human vice contra naturam, it is misleading to take this as his most significant position. In Finnis' view, there is no question that Aquinas' explanatory priorities clearly show that the criterion of conformity with or contrariety to human nature is reasonableness.<sup>3</sup>

Finnis' interpretation of Aquinas has met with mixed reaction among legal philosophers. Some have accepted Finnis' interpretation of Aquinas on this issue, taking it as a sign that "no single grand divide between soi-disant [legal] positivists and soi-disant natural lawyers truly exists."<sup>4</sup> Other theorists have been cautious, perhaps being suspicious that there is evidence to support the more

conventional interpretation disputed by Finnis; that Aquinas does attempt to derive natural laws (ought) from facts about human nature (is).<sup>5</sup> Certainly all seem to agree that if Finnis is correct, then a very long-standing issue is laid to rest at least as concerns this important exponent of natural law theory. For my part, I find Aquinas' position to be, at best, ambiguous and hence consider Finnis' interpretation debatable. But as to the larger question, whether there can be a direct discovery of desirable ends, I am not undecided as to how this should be resolved. It seems a reasonable view to me, as it was for Hume, Hart and MacCormick, that we can rationally discover and debate what are appropriate means to given ends, but that ends themselves are not rationally discoverable or debatable themselves.

There is at least one sort of transition from 'is' to 'ought', even if it is a trivial one, that seems to be well explained by the view of law that I have been pursuing. The unique character of legal systems can allow an immediate and intelligible move from institutional facts to an understanding of what legally ought to be done or what is legally required. Questions of what ought to be done legally are sometimes clearly answered by finding out what legal norms there are in a legal system. Though I take this simple matter to be generally uncontentious, the reader will expect some explanation of the qualification "sometimes". The reasons for this qualification have to do with the 'open

texture' of legal rules which allows for some uncertainty as to what a rule requires in specific circumstances.<sup>6</sup>

Another parallel to the general derivation problem is the question whether what the law 'is' immediately imposes an obligation on a citizen to obey it - whether what the law "is" determines what the citizen "ought" to do. On this there is some interesting ongoing controversy as we have seen in the last chapter. This issue would seem to rest where we left it, where we needed a theory of political morality to explain why the very existence of a law shows that we ought to obey it. A theory that proposes respect for law must show how respect entails having an obligation to obey. Given the sound arguments to the effect that the existence of law is not decisive of the question of obedience, it seems most plausible to maintain that what the law "is" does not determine what the citizen is morally obliged to do.

The second major question I raised, whether legal theory can be done without addressing 'ought questions', can now be addressed. There are three separate dimensions to this question that I wish to explore: (i) the possibility that evaluative argument is involved at the "meta-theoretical level" in showing what a defensible theory of law should be like, what it should include, and what issues it should address, (ii) the possibility that a proper theory about legal systems must include reference to values, and (iii) the possibility that evaluative arguments must always be, or may

sometimes be, involved in identifying "laws". I distinguish these three issues for the purposes of my analysis only. They may not be clearly separable in any particular theorist's work.

Setting out what a legal theory should be like involves adopting and defending a perspective on the nature of law. Let us recall Hans Kelsen's perspective, the most startling and austere outlook on what a defensible theory should be like. Kelsen claims that the only legitimate form of knowledge is the purely scientific, and he makes it clear that the only acceptable conceptual framework for legal theory is one that regards the law as a scientific object. What is more, he states that such an approach is unquestionably the correct one:

[The] aim is to free the science of law from alien elements. This is the methodological basis of the theory.

Such an approach seems a matter of course.<sup>7</sup>

No rigorous defense of this outlook on the phenomenon of law is given by Kelsen, but it is important to appreciate that he considered that even significant political structures such as norms can be intelligibly apprehended as scientific objects.<sup>8</sup>

The most interesting aspect of Kelsen's views about the approach to legal theory is his rejection of the possibility of doing legal theory from a non-scientific perspective. Kelsen proposes a restricted notion of what sort of facts may count in doing legal theory by dispensing



with all approaches that "obscure the strict essence" of law as a scientific object by including elements from sociology, psychology or political theory in that essence. The result is, as Leslie Green points out, the absurd denial that there can be any sociological concept of law or the state.<sup>9</sup> Kelsen's meta-theoretical view about what counts as a good legal theory is in stark contrast to those 'meta' positions that attempt to ground their theories in facts about social organization.

Joseph Raz argues that one must resort to evaluative arguments about the relative importance of various features of social organization in order to defend a theory of law.<sup>10</sup> Arguments for the importance of features of social organization are the proper starting place for legal theory. The better metatheoretical perspective is not one that aspires to be evaluatively neutral, but rather is one in which evaluative or 'ought' questions are central. Kelsen's notion of a pure science of law is not per se what makes his perspective objectionable. What is amiss is Kelsen's apparent failure to recognize that what one takes as essential to the science of law depends on arguments as to what is important for explanatory purposes. Yet including such an evaluative element in the science of law was straightforwardly rejected by Kelsen.

In defense of Kelsen, I wish to point out again that there is nothing unsound about his ambition to formulate "a

science of law" provided that he realizes that selecting scientific objects is a function of his views about what objects are important for explanatory purposes. It is not clear that he appreciated this factor. Scientific inquiry, no less than political or sociological inquiries, is not evaluatively "neutral", but rather remains theoretically controversial in the sense that some other scientist might propose other objects as centrally important. No special immunity from controversy is bought by proposing scientific treatment.

It is a significant insight that setting out to do legal theory involves this evaluative element of selection. It means that a starting place for legal theory is not a wholly "descriptive" one, but is at best largely descriptive of the social features in question. H. L. A. Hart's claim that what he was doing in The Concept of Law could be understood as an exercise in descriptive sociology,<sup>11</sup> could be seen to work against this insight. But since "descriptive sociology", if it is possible at all, must itself be dependent on evaluative arguments in the way Raz has noted, Hart's claim might be interpreted as relatively innocuous.

The next question is how to understand the basis for selecting important features for theoretical purposes. Consider that for John Austin, a sovereign and her subjects were of central importance. Presumably, this political relationship illuminated a great deal that was otherwise

obscure. For Hart, the law as a system of rules followed by courts and other officials was the key to understanding law and its relationship with other social realities. Here and elsewhere Hart is maintaining a view about the relative importance of features of social organization and makes these the focus of theoretical attention. What we select as important social features reflects our moral and intellectual interests and concerns, notes Raz.<sup>12</sup>

Some further explanation of this is in order.<sup>13</sup> Consider that we have certain moral puzzles or matters we want resolved concerning the state, law, etc. For example, we want to know if an unjust law can be properly considered law. Such puzzles must be dealt with sensibly and clearly. A theory which enables us to deal with these problems (and not other problems less pressing to us) is, all else being equal, preferable to one which does not. It is in this sense that we understand Raz's contention that our choice of a theory might reflect our moral concerns but not be determined or influenced by moral arguments. Most importantly, the theory we choose is to be commended on explanatory grounds, not moral grounds. And this should be the case even though the questions the theory helps us to deal with are moral questions.

Note the observation that a defense of a doctrine of the nature of law need not necessarily involve moral arguments, eg. that the feature selected is good.<sup>14</sup> For

instance, an argument that a sovereign is an important feature for legal theory to address involves no endorsement of a sovereign as a good political institution. To take Raz's view here leaves open the option to separately criticize a political system even if its most important elements have served as explanatory tools in legal theory.

John Finnis' particular 'meta' view appears to be that the decisive ground for accepting or rejecting a theory of law is whether the theory recognizes the aim of helping people to be practically reasonable. Finnis' reasons for selecting natural law theory from among its competitors are the 'meta' aims of grounding legal theory in Aquinian metaphysics, and/or educating those in care of the community:

A theory of natural law need not be undertaken primarily for the purpose of ... providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, primarily to assist the practical reflections of those concerned to act, whether as judges or as statesmen or as citizens. But in either case, the undertaking cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge of which requires the assistance of descriptive and analytical social science.<sup>15</sup>

Sociological and political conceptions are inescapably involved in doing legal theory for Finnis, but these are influenced by attention to fundamental principles of practical right-mindedness which is "the good and proper order among men and individual conduct." The upshot of this is that Finnis does not seek to remove what Kelsen would consider 'alien' elements, but like Hart considers them

indispensable elements for doing legal theory. What is more, Finnis would, I think, accept Raz's contention that defending a theory of the nature of law involves evaluative arguments. But whereas Raz explicitly notes that such evaluative arguments needn't be moral arguments, I suspect Finnis would take exception to this by including arguments as to what is unquestionably good for man, and how these goods inform the theorist from the outset in expounding a theory of law. That this is a precarious position should be obvious. Because Finnis makes any acceptable theory of law parasitic upon his meta-ethical position, it seems likely that a rejection of his doctrine of objective goods prevents the recommendation of his theory on moral grounds. But it is not altogether clear that Finnis is not without resort to non-moral evaluative arguments about what is important in social organization and thus what is within the range of a defensible theory. He may claim explanatory virtue for his theory independent of any arguments to the effect that his theory should be adopted because it promotes and sustains objective goods.

With Ronald Dworkin, we have an entirely different perspective than any of the theorists just mentioned. The meta-theoretical defense of his theory appears to involve the argument for the value of taking up the judge's point of view as she decides cases in courts of law. Dworkin's reason for interest in this perspective can be extracted from his

opening chapter of Law's Empire: "People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament."<sup>16</sup> Here is expressed concern for how individuals are treated in a functioning legal system. A manifestation of this concern forms a key feature of the theory Dworkin develops: the justification of political coercion is to be found in the rights and duties that flow from past collective decisions.<sup>17</sup> Borrowing Raz's insight, this is a moral interest Dworkin brings to bear on questions of "law", and hence his theory will "reflect" this moral concern.

Before we get too comfortable ascribing a "theory" to Dworkin as some critics have done,<sup>18</sup> it is well to note in what respects "law as integrity" is lacking in the typical theoretical foundations. No facts about social institutions form the bedrock of Dworkin's legal theory. Only a series of proposals concerning legitimate claims of "law" are gathered together along with critiques of competing models. Restricting the inquiry to the viewpoint of a judge and aiming to explain how cases are decided is clearly what Dworkin does in his most recent work. He maintains that strict attention to the practices of judges supplies a useful paradigm for understanding what it means to claim that law exists. Dworkin takes care to say that he does not select judges because they are "important", but because only by selecting their viewpoint in actual legal argumentation can

we grasp what a claim of law really means.<sup>19</sup> Emphasis is placed on a proper understanding of the claim of law.

We are thus prevented from ascribing central theoretical importance to the institution of the judicial role. Rather, theoretical attention is turned toward Dworkin's more conspicuous moral interests. The full weight of Dworkin's project is borne by the proposal that the constructive interpretation of the political morality of past decisions will determine what law we have. Dworkin's moral interests are clearly the paramount pre-theoretical considerations. Support for Green's assertion about political content is most conspicuous. For Dworkin, no instance of "law" can be determined without resort to a theory of political morality. Because of this, defending his approach at this meta-level is entirely reducible to a moral position that can be exposed by the following chain of inquiry: Why does the existence of "law" depend on its justification by a theory of political morality? Because political morality of past decisions is the only acceptable ground for making a claim of "law". Then we ask, why should we assume that law does justice or that legal decisions are justifiable? Here the main defense appears to be the circular reasoning that an ideal judge, Hercules, makes these assumptions because he accepts "law as integrity".<sup>20</sup> Only someone with the understanding of the claim of law that this theory insists upon can justify political coercion.

Dworkin must defend against those who would argue that judges do not apply anything like constructive interpretation, and do not accept the "ideal" in the form of Hercules that Dworkin maintains they do or should. In such a hypothetical controversy, we would probably find support for Raz's contention that defending a doctrine about the nature of law involves evaluative arguments, in this case an evaluation of how judges reason in deciding cases.

This brief examination of several theorists has indicated that defending a doctrine of the nature of law involves resort to evaluative arguments as to what is important. It is plausible that Raz, Green, Hart and, to some extent Finnis, all stand more or less firm in maintaining that doing legal theory depends on selecting and defending what are important explanatory foundations for beginning to understand the nature of law. Dworkin stands alone in making his defense depend entirely on an assumption about the necessary moral defensibility of the claim of law. Kelsen stands alone in rejecting the interest-dependence of legal theory.

The second dimension to the question whether legal theory requires reference to 'ought questions' addressed the possibility that a proper theory about legal systems in general must include reference to values. If a legal system is essentially a social institution whose purposes serve some wide political aims, then any general theory of law must at



least take these values into account.

That legal systems serve a scheme of values can be a claim made by a legal theorist who undertakes an analysis of legal systems generally from a "detached" or "scientific perspective". Alternatively, the claim can be made by someone who is a participant in a particular legal system. Such a participant might have an attitude toward the values that his legal system expresses, and propose that all legal systems are or should be like his in serving this or some other scheme of values. This participatory perspective is not difficult to comprehend. More easily misunderstood is the detached perspective of the legal theorist on this question of values. For this reason, some elaboration is required.

As a theorist, Hart held that one cannot understand the development of a legal system without distinguishing the internal point of view on social rules which explains the normative attitude that citizens and officials normally express toward their legal rules. If analyzing a legal system involves observing and accounting for rule-governed behaviour of a social group, and if such behaviour can best be explained by considerations of what the group generally regards as important and valuable, then such an analysis necessarily involves attention to normative elements. And that is true even if the theorist herself takes a detached perspective on the social rules in question. It is by

reference to the social rules lying behind the development of mature legal systems that we must accept the value-relevance of legal systems.

It is instructive to compare John Austin's views on the nature of legal systems with those of Hart. For Austin, a legal system's most basic components are a sovereign and his commands. Such commands are respected by the populace and legal officials not because they are their own reasons for action, in an internal sense, but because they originate with a sovereign who has the means and the intention to inflict a "sanction" upon anyone who fails to comply with the rules. This was sufficient, Austin thought, to account fully for the observed behaviour toward rules in a functioning legal system. Hart, too, wanted to account for such behaviour. His point of view, as an external observer of such systems, was the same as Austin's: one could assert or assume attitudes attributable to participants by noting their behaviour toward the rules. The most significant difference between Austin and Hart is to be found in their descriptions of what was generally true about such systems. Austin, as we have noted, accounted for participant behaviour toward rules wholly by reference to a sovereign and his commands. Hart, on the other hand, explained the behaviour otherwise, by positing "the internal point of view on legal rules". The "internal point of view" remains attributable to participants from an external viewpoint.

The external point of view manifested by Austin and Hart is a philosophically sound position because it aims at an inquiry of a general sort, looking to describe the general characteristics of legal systems. To propound a general theory about legal systems from this perspective does not require that the theorist share the views or attitudes of any of those whose behaviour he studies. Value judgements on the part of such a theorist enter at a different place. The theorist must, at some point, probably at the outset of his inquiry, select what features of a legal system are central for the purposes of his descriptive enterprise. This evaluative step is taken at the meta-level I spoke of earlier, where what is important for explanatory purposes is selected. Hart's difference with Austin does not occur at this meta-level, for both theorists shared the same views concerning what features are important to select for doing legal theory. Rather, in virtue of these meta-theoretical aims, Hart was led to a different legal theory which furthered the shared aims to a greater degree through his doctrine of "the internal point of view." For both Austin and Hart, there is no evaluative element included in the analysis of legal systems once this meta-theoretical judgement has been made. To assert that legal systems generally express a scheme of values does not require knowing what those values are. It is in this sense that we can say that legal theory concerning legal systems can be

evaluatively neutral.

The final dimension to the question, whether legal theory requires reference to 'ought questions', addressed the possibility that law can always be identified without resort to evaluative arguments. This issue is perhaps the most currently controversial of the three I raised and is best given some sustained attention. It is important to note that nothing we have said concerning these issues thus far determines an answer to the identification problem.

This outstanding question, whether the law is a matter of what 'is' rather than what 'ought to be', is the general subject of the remainder of this chapter. Upon this question there is renewed controversy among legal theorists, Dworkin's input being the most recent cause for clarifying one's particular position. Three viewpoints on this question dominate the contemporary literature. These are represented by Ronald Dworkin, Joseph Raz and H. L. A. Hart and his interpreters. It will not be my task to show why my preference, the latter, is the best choice among them, for it is beyond my capacities to completely and soundly dismiss the merits of the competing positions. I merely wish to explain the complexion of recent legal theory on this last is/ought question and weigh the merits and defects of each as I see them. My argumentative task will be to show that the moderate position survives the attacks of Dworkin and Raz who seem to be most at odds with each other but who nonetheless

share a rejection of this 'middle' position. The controversy is best framed against the backdrop of Dworkin's attack against what he understood as the positivist's position. It is best to begin by considering how he and Hart characterized the positivist outlook.

It is perhaps fair to observe, as some recent reviewers of Law's Empire have, that Dworkin's theory of law was incomplete until the publication of this latest work. The various essays Dworkin presented in Taking Rights Seriously, A Matter of Principle, and the various written defenses of his views, form a coherent picture only in light of the theory proposed in Law's Empire. Be that as it may, some clear direction for his attack on what he took to be the essentials of the legal positivist position was evident in the earliest of these works. Most notable among his former writings is the refusal to accept the positivist's separation of law and morals.

The traditional target of "legal positivism" was the natural lawyer's claim that norms otherwise identifiable as "law" would not, in fact, qualify as law if they were sufficiently unjust. Hart's discussion of laws and morals in chapter nine of his Concept of Law invited renewed criticism by natural lawyers and newly emerging "nonpositivists" like Dworkin. In his Taking Rights Seriously, Dworkin concentrated his attention on problems with "hard cases". His initial essay on this subject, "Hard Cases", could have

left the impression, as it did with Soper<sup>21</sup> that he did not deny that further reference to content is unnecessary for determining a norm's legal status if indeed one can determine a norm is law. The subsequent discussion will show that, as it stands, the following proposal is harmless to Hart's position. In a review of this book, Philip Soper summarized the "hard cases" challenge well:

In some cases, one cannot determine whether the norm is law at all without first inspecting content; in these cases, at least, the separation of fact and value becomes blurred and the conclusion that the norm is law may entail the conclusion that the norm is not unjust (at least not egregiously so).<sup>22</sup>

This was one of the important arguments in Taking Rights Seriously. Only lately, as a result of the arguments in Law's Empire, has it become clear that a reference to content is always required for a norm to be established as law.<sup>23</sup> This confirms the suspicions of those who thought Dworkin was proposing a radical new thesis.

Now there can be no question, I think, that what Soper suggests is correct; that a dogmatic adherence to a strict separation of what the law 'is' and what it 'ought' to be runs into difficulty with respect to "hard cases". Here is a situation in which the law that 'is' merges in a sense with the law that 'ought' to be. The attack on Hart embodied in Dworkin's early essay argued that this fact about hard cases was essentially incompatible with Hart's theory. Unfortunately for the early Dworkin, Hart seems to have been

aware of this "merging" situation and had given it some brief, but alas not all too obvious, attention. The mistake seems to originate in thinking that the is/ought distinction is a kind of Hartian dogma.

Those familiar with Hart's work will know that he is notoriously 'cagey' and even vague on some important issues. This appears to be no less true about his stand on whether what the law is can sometimes be dependent on its content. Philip Soper and David Lyons directed Dworkin's attention to Hart's apparent recognition that sometimes in some legal systems the legal status of norms depends on their content.<sup>24</sup>

The most straightforward indication of this is found in The Concept of Law:

In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values ...<sup>25</sup>

Since Hart was attempting to treat the concept of law as it is displayed in its various forms in all legal systems, one cannot discard this observation as an insignificant one.

Most theorists regard Hart as endorsing "the weak social thesis" that sometimes in some systems the identification of law can depend on moral considerations.<sup>26</sup>

The absence of any explicit endorsement of this thesis on Hart's part is not troublesome when one realizes it is consistent with his claim that it is possible that there be a system of law in which, as a matter of contingent social fact, the accepted tests for legal validity require that a standard or decision not

violate certain moral values or principles specified in the rule of recognition. As Wilfrid Waluchow notes in his paper "Herculean Positivism", this view is perfectly consistent with the rejection of natural law and the view which insists that if legal validity is in some way, in some particular system, a function of <sup>moral</sup> validity, it is only because the rule of recognition makes it so.<sup>27</sup> This position compares favourably with Soper's characterization of Dworkin's concern with "hard cases" and the blurring of the fact/value distinction. The main difference is that Hart relies on the rule of recognition to explicitly bring about these special criteria for the identification of law and so in this way there are no grounds for applying moral arguments for identification purposes in any and every legal system. These connections between law and morals are contingent in nature.

## II Legal Positivism And Hart's Weak Social Thesis

We might now ask whether Hart's apparent support for the weak social thesis run against the basic tenets of legal positivism? The answer to this depends upon what one takes these basic tenets to be. What is most basic to legal positivism is a question upon which Hart has been, once again, hard to pin down. In his end notes to The Concept of Law, Hart identifies five positions that positivists have been thought to contend in various combinations.<sup>28</sup> Hart



leaves it to us to determine which of these apply to him. Let us examine these individually.

That laws are "commands" is clearly rejected by Hart in his critique of Austin. Hart notes that self-proclaimed positivists like Kelsen rejected Austin's command theory. It is then not the case that command theories are basic to legal positivism.

That the analysis or study of meanings of legal concepts is to be properly distinguished from historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions, etc., was a view to which Bentham, Austin, and certainly Kelsen subscribed. Such "positivists" shared a conviction that legal theory should form its own philosophical foundations. Kelsen, as we have noted, was especially adamant that legal concepts be kept free of "alien elements" from ethics, psychology, sociology and political theory. It is not hard to say where Hart stood on this question. As arguments in The Concept of Law show,<sup>29</sup> he thought that some sociological concepts, like the concept of a "social rule" were indispensable to legal theory. Hart produced a sociological theory about the defects in pre-legal society that were cured when a legal system was adopted. Legal philosophy certainly has its distinct questions, but many of the concerns from which these questions spring might be properly considered political or sociological concerns. A concept like

"legitimate authority" seems to have origins in political theory, even if a particular conception of that concept may be unique to legal philosophy. I would argue that many contemporary "positivists" like Hart would not find objectionable the inclusion of appropriate concepts from other areas of inquiry even though legal theory remains distinct in virtue of its unique problems.

That a legal system is a 'closed logical system' in which correct decisions can be deduced from pre-determined legal rules by logical means alone seems well at odds with Hart's theory and the theory of any other legal positivist. It is sufficient to demonstrate Hart's resistance to this claim by recalling Hart's observation that nothing can eliminate the duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under rules.<sup>30</sup> The "open texture" position would seem to frustrate this particular "positivist" approach. Hart's rejection of a simple mechanical jurisprudence appears to be as clear as is Dworkin's.

That moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof seems most obviously a view attributable to Kelsen. In his development of a "pure theory of law" his non-cognitivist ethical position is made clear and seems to be the major reason for his own subscription to the separation of law and morals. But Kelsen's ethical position is not widely shared

among those who hold other allegedly "positivist" views. Hart argues that non-cognitivism is not sufficiently conjoined with legal positivism to be a significant factor in the controversy over the separation of law and morals. Hart begs us to consider what would follow from the rejection of non-cognitive theories of morality as to the nature of the connection between the law as it is and the law as it ought to be.<sup>31</sup> Nothing regarding the distinction in question follows from taking up such a position. The only result is one which would not make any appreciable impact on this distinction:

The only difference which acceptance of this view of the nature of moral judgements would make would be that the moral iniquity of such laws would be something that could be demonstrated; it would surely follow merely from a statement of what the rule required to be done that the rule was morally wrong and so ought not to be law or conversely that it was morally desirable and ought to be law. But the demonstration of this would not show the rule not to be (or to be) law.<sup>32</sup>

One needn't subscribe to non-cognitive ethical positions to be able to make sense of the distinction between law that is in place and law that is not. As Hart notes, "proof that the principles by which we evaluate or condemn laws are rationally discoverable, and not mere 'fiats of the will', leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws."<sup>33</sup>

Finally, that there is no necessary connection between the law that is and the law that ought to be is another view usually attributed to legal positivists. This

view was shared by Bentham, Austin and Kelsen, notes Hart, and there is some inclination to take it as essential to all forms of legal positivism. Austin's famous dictum that 'the existence of the law is one thing while its merit or demerit is another' does stand as a popular "positivist" slogan. But we should not take this slogan to be the core of legal positivism because its meaning is highly ambiguous. The way this alleged separation is understood currently divides those who might be labelled as "legal positivists".

As an indication of the ambiguity surrounding "the separation", consider the following account. Jules Coleman notes that one could take the separation of law and morals to mean any of three things.<sup>34</sup> It could mean "that there exists no convergence between the norms that constitute a community's law and those that constitute its morality" or it could mean "that one can identify or discover a community's law without having recourse to discovering its morality." The former understanding is an empirical claim which is shown inadequate by demonstrating the shared moral and legal prohibitions against murder, theft, battery and the like. The latter is an epistemic claim about how, in a particular community, one might go about learning the law. Coleman allows it may well be that in some communities - even those in which every legal norm is a moral principle as well - one can learn which norms are law without regard to their status as principles of morality. A third possible interpretation

seems to be the one that Dworkin attacks in his Taking Rights Seriously: "that being a moral principle is not a truth condition for any proposition of law (in any community)." <sup>35</sup>

This claim would be false if any legal system has a rule of recognition that specifies truth as a moral principle among its conditions of legality. Clearly, Dworkin attacks this claim in his "The Model of Rules I", but Hart explicitly allows for such an instance as I have noted above.

Hart's position that law and morals are separate appears to be the simple claim that a community's law and its standards of morality are conceptually distinguishable; that there is no constitutive relationship between law and morality. Supposing that Hart is a positivist, the separability thesis commits positivism to the following proposition:

... that there exists at least one conceivable legal system in which the rule of recognition does not specify being a principle of morality among the truth conditions for any proposition to be law. Positivism is true, then, just in case we can imagine a legal system in which being a principle of morality is not a condition of legality for any norm: that is, just as long as the idea of a legal system in which moral truth is not a necessary condition of legal validity is not self-contradictory. <sup>36</sup>

It will come as no surprise then that in the view of many legal theorists, John Austin's comment about the separation of the description and evaluation of law should not be understood as suggesting that the existence of a valid law is necessarily independent of all questions of moral

merit. Rather, as Wilfrid Waluchow points out, the proposition must be read as denying that the former is necessarily dependent on the latter.<sup>37</sup> The weak social thesis, which holds that the identification of law can sometimes depend on evaluative considerations, but only provided that facts about the institution itself make that possible, is compatible with MacCormick's presumptive validity thesis discussed in chapter two. In the absence of such an expressed provision, there is no warrant for saying that law must meet moral requirements to be valid. The weak social thesis is not a recently devised position. It is apparent that Bentham and Austin had in their turn endorsed it. Both held that "in the absence of an expressed institutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law."<sup>38</sup> Can there be any question then as to how Austin's dictum should be understood?

One might say that if there is one essential point upon which these and other theorists often labelled "positivists" agree, it is that position I mentioned at the beginning of this thesis: that some social practice lies at the background of every claim of law, and that this is true even in cases where that practice itself makes morality decisive. But even holding this basic position allows for further 'internal' disagreement between those holding the weak social thesis and those who, like Joseph Raz propose a

stronger thesis.

In sharp distinction to the weak social thesis is the view expressed by Joseph Raz in The Authority of Law and elsewhere in his writings. Raz argues for the "sources thesis": that a law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example).<sup>39</sup> The sources of law are those special authoritative facts by virtue of which it is valid and which identify its content. In his view, it is not the case that the identification of law ever involves evaluative arguments. Raz apparently holds the position that Dworkin squarely attacked in his "The Model of Rules I", that no rule of recognition could specify truth as a moral principle among its conditions for legality. Dworkin's interpretive thesis from Law's Empire presents the most radical challenge to Raz's thesis, for if law is always determined, in part, by interpreting the requirements of political morality, no separation of the questions of the identification of law and the requirements of political morality is ever possible.

### III Raz And The Sources Thesis Revisited

The final arguments in this thesis come out of this debate between Dworkin's "law as integrity" theory, the weak

social thesis and the sources thesis. It is evident that the weak social thesis must defend against the extreme claims of both Raz and Dworkin in order to remain a viable alternative to them. I intend to involve Finnis' natural law theory, but only after this dispute has been aired.

Let us consider Raz's general project, his position in its essentials, and then turn to his criticisms of the weak social thesis and of Dworkin. Raz calls his sources thesis a "systematizing or tidying-up thesis" which organizes our ways of conceiving and understanding the workings of social institutions, especially legal institutions.<sup>40</sup> He evidently focuses our attention on the dangers of being misled by confused thinking on the subject or by an exaggeration of the importance of features which will turn out to be less significant once a proper investigation has been made. Any such investigation in his view will not, however, result in a system that is completely exhaustive, and hence the offer of a "systematizing thesis" on his part is not aimed at setting out the theory of law. There is no complete theory of law in his view, only sets of theoretical questions that shift from one to another as we proceed in legal theory.<sup>41</sup> No one theoretical picture is likely to completely encompass the range of questions we may have about such a complex social practice.

Normally Raz notes these objectives for legal theory at the end of a battle in which he has claimed victory over



those who put emphasis on different features. But I am putting these up front where, although seeming more precarious, they show what legal theory, in Raz's view, should aim to do. His intuition brought to bear on the question whether we can have a picture of the relationship between law and morals is suggestive of Hart's observation that "there are many different types of relation between law and morals and there is nothing which can be profitably singled out as the relation between them."<sup>42</sup> Perhaps Raz is expressing a notion of reasonable ambitions for legal theory that also serve as a caution against the natural propensity to identify law with morals.

In my view, the most basic theoretical assumption that Raz makes is that a correct account will set limits to what can count as law. If we refer back to the various interpretations of Austin's dictum, it is clear that Raz would emphasize the strict epistemological interpretation: that one can, for any legal system, identify legal norms without regard to their moral status. Raz has arguments to defend this limitation position, the most important of which follows. He argues that legal theory demands attention to the authoritative nature of law since this explains the most about law as a social institution. The presence of authoritative rulings in a society indicates the existence of an institution claiming authority over members of that society. Since it is of the very essence of the alleged

authority that it issues rulings which are held to be binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in justificatory argument.<sup>43</sup>

A further elaboration of this is obviously required. Raz distinguishes two features possessed by any directive capable of being authoritatively binding:

First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate.<sup>44</sup>

Both features reflect the 'mediating role' of authority. The first simply notes that the function of authority in a society is <sup>to</sup> make rulings, not on authoritative reasons, but on dependent reasons, i.e. reasons upon which the authority based his decision to issue a particular directive. The authority is justified if following its directives will render it more likely that we will better comply with dependent reasons which apply to us independently of the authoritative ruling. The second proposes that one who has authority is a sort of 'arbitrator'. This arbitration role is best understood via an arbitrator analogy:

Suppose that an arbitrator, asked to decide what is fair in a situation, has given a correct decision. That is, suppose there is only one fair outcome, and it was picked out by the arbitrator. Suppose that the parties to the dispute are told only that about his decision, i.e. that he gave the only correct decision. They will feel that they know little more of what the decision is

than they did before. They were given a uniquely identifying description of the decision and yet it is an entirely unhelpful description. If they could agree on what was fair they would not have needed the arbitrator in the first place. A decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.<sup>45</sup>

By this analogy, Raz has distinguished what counts as an authoritative decision by showing that it is unhelpful if the decision cannot be identified without resort to the reasons or considerations on which it purports to adjudicate. Raz concludes that the identification of a rule as a rule of law consists in attributing it to the relevant person or institution as representing their decisions and expressing their judgements. Such attributions can only be based on factual considerations, e.g. It is true that judge M decided that X. Moral argument can establish what legal institutions should have said or should have held but not what they did say or hold.<sup>46</sup>

This is Raz's strongest argument for the sources thesis. If it is sound, it produces strong support for the epistemological claim that law can be always identified without resort to evaluative arguments of any kind. Similarly, it supports a rejection of both the weak social thesis and Dworkin's "law as integrity". On both these theories, one cannot identify the law without at least sometimes engaging in moral argument.

## IV The Razian Critique Of The Weak Social Thesis

Let us take Raz's attack upon the weak social thesis first.<sup>47</sup> If one cannot identify the law in the above way, it complicates matters greatly. One cannot understand the dynamics of interpretation in hard cases if one cannot always distinguish between applying the law that is and using discretion to decide what the law ought to be. These problems can be directly traced to "deep mistakes" that the weak social thesis makes. Firstly, it identifies interpretation with application of law. In Raz's theory one applies the settled law and one uses interpretation to settle what the law is when that question is unclear. These operations are quite separable and yet the weak social thesis treats them as one. Secondly, this thesis mystifies the connection between law and its authoritative sources. No clear source is always available if one must sometimes resort to moral argument. In contrast, Raz's theory demystifies this connection.

Thirdly, the weak social theorist, in holding that law includes those considerations which are implied by legal decisions, simply misrepresents what is really the case in practice.<sup>48</sup> Institutions can and do sometimes reject the premises of an argument as to what is law while retaining the conclusions if these premises are flawed. Other premises that support the conclusion are put in place of the former

ones. This process would appear to run counter to the weak social theorist's claim that law includes what is implied by decisions.

The most serious mistake in Raz's view is that the weak social thesis supposes that in some systems there must be a necessary resort to moral arguments if something is to be declared law. This is a mistake because even in such systems, law and morality are interwoven contingently, not necessarily. Resort to moral arguments is not always made in such systems, but only in special cases. Only on occasion do courts resort to moral arguments in legal systems where there is a Charter of Rights or an equivalent institution of law.

Let us reply to this most serious 'mistake' first. Is it really the case that legal systems in which the rule of recognition requires reference to moral principles only do refer to such principles in special cases? Raz presumes that arguments from a Charter of Rights are applied where the endangerment of any of those rights becomes an issue. He assumes there is no reference to the Charter in all other cases. But this account reflects the most superficial interpretation of legal practice while not accounting for the legal reasoning involved in the practice. Consider the influence on legal reasoning of the "primacy clause" of the Constitution Act of Canada, Part VII, Section 52:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, to the extent of the inconsistency, is

of no force or effect.

Since nothing can count as law if it counters the relevant rights or principles, it is fair to say that reference to these is indeed necessary. No one can safely assume that because every judgement does not have a section devoted to arguments showing accordance with the Charter, such a reference is not made by those in authority. Raz might believe that if the issues a proposed law raises have no obvious relationship to those of the Charter, then the Charter is irrelevant in that instance. But to hold this is to effectively deny that the rule of recognition demands that all laws be compatible with the Charter to be law. Whether or not a Charter issue ever arises with respect to a legal rule, it remains the case that for any law, a condition of its validity is that it not contradict the Charter.

Against another of Raz's complaints, it might be argued that an interpretation of legal practice for a weak social theorist can allow for a substitution of new arguments for old behind a legal decision. In this case, the 'law', seen as encompassing arguments and a decision, has been 'changed' even if the actual wording of the decision appears to be the same. It does not appear to me that this way of looking at this feature of actual legal practice would be unacceptable.

The first "deep mistake", the identification of interpretation with application of a law, can only be seen as

a mistake if law is always a settled matter. If law can always be identified without resort to evaluative arguments, then a distinct separation of the processes of application and interpretation is possible. Yet we have reason to think that law is not always so identifiable because it is not always a settled question what the law requires. In those legal systems where the rule of recognition requires resort to moral questions, what the law requires is understood only through interpretation. This application of law to specific situations can be inseparable in some instances from interpretation of what a rule requires. Only if it is always true that law is 'settled' can application and interpretation processes be clearly distinguished. Raz's charge that there is a mistake loses credibility if it can be the case that what the law requires cannot be settled without resort to evaluative arguments.

According to Raz's position that I outlined in chapter one, only after a properly performed executive decision has been made can we consider that law has been set down. The weak social theorist might attempt to attack Raz head-on by arguing that the authoritative nature of executive decisions is not decisive for the question of law; that the picture of 'law' can be considerably more complex. Certainly, to take issue here is to agree with Raz's assertion that if law cannot be identified by his method then it "complicates matters greatly." This complexity seems to

be tolerable to weak social theorists who assert that considerations implied by decisions are to be sometimes included in law. No doubt, Raz's thesis proposes a simple connection between law and its authoritative sources, but some will argue this is not to be seen as a "demystifying" act but rather as an attempt to capture a complex matter by too simple a theory. Raz himself notes that while it is true that the sources thesis prevents confusion and serves clarity by separating the description of the law from its evaluation, this claim about clarity presupposes, rather than supports, the sources thesis.<sup>49</sup>

#### V The Weak Social Thesis Defended

The most sophisticated defense of the weak social thesis is, of course, one that shows internal defects in Raz's own thesis. Counter attacks of this type have been rarely successful perhaps owing to the rigour of Raz's argumentation. A conspicuous feature of Raz's thesis is the arbitrator analogy which establishes the mediating role of authority. If this account is found defective, we may legitimately question whether law is really like arbitration and hence whether what Raz builds on this notion is well grounded. If dispute settlement is not the prime function of law at all times, then some doubt is cast upon the internal workings of Raz's strong social thesis. Wilfrid Waluchow has



recently cast some doubt on the arbitrator analogy by indicating that arbitrators are free to call upon the parties in dispute to reconsider the issue in dispute. The arbitrator may recognize an educative role of his station, i.e. "he may wish the parties to see that they really do have the ability and means to discover fair solutions themselves and to encourage them to try harder at future rounds of negotiation."<sup>50</sup> In such an instance, the arbitrator might issue a decision whose interpretation requires some appeal to the very question at issue: fairness. This possibility runs counter to Raz's claim that arbitrators must provide a decision independent of the considerations on which it purported to adjudicate.

A second counter-argument of Waluchow's undermines Raz's view that the arbitrator's directive must always replace dependent reasons for the parties in dispute. Raz holds that recourse to dependent reasons in interpreting the arbitrator's decision would defeat the purpose of adjudication. Waluchow notes the possibility that other, non-dependent moral reasons may enter into the identification or interpretation of the directive without necessarily thwarting the normal purpose of adjudication:

There might, for instance, be agreement on some moral principle necessary for interpreting the arbitrator's directive. In such a case, the necessity to appeal to moral reasons may be no hindrance at all.<sup>51</sup>

Waluchow's arguments allow for considerably more latitude in

arbitration than Raz's analogy allows. If the arbitrator's aims include more than strict resolution of the dispute in question, as the above instances would indicate, then we have a considerably wider perspective on the role of arbitration in a legal system. All this invites the question whether Raz is correct in seeming to assert that the overriding function of law is to provide a settled, public and dependable set of standards for private and official conduct. While Dworkin identifies this as the fundamental positivist view of the primary function of law,<sup>52</sup> the weak social theorist like Waluchow calls this matter into question. His conclusion on this issue, which rests on the possibility of moral arguments being decisive of the question of law in some systems, is as follows:

Positivists do not and need not conceive of the relative certainty, determinacy, predictability and social co-ordination which law can sometimes bring as its only virtues or as virtues of overriding importance. That the set of public standards for private and public conduct should not, e.g. violate certain fundamental moral rights or tenets of justice enshrined in a constitutional charter is a value, along with certainty and the like, which a positivist might - and indeed should - embrace as ends or values towards which law sometimes does and ought to strive.<sup>53</sup>

Waluchow and others have noted that some degree of unsettledness in some legal systems is widely accepted as a reasonable price to pay for the sake of other values of at least comparable importance to certainty.<sup>54</sup> This serves to distinguish the weak social theorist's position from, not only Raz's, but from the target of Dworkin's complaints about

positivism in "The Model of Rules I". In order not to mislead as Dworkin might, it is not 'certainty' in the sense used with reference to 'hard facts' that is at issue here, for Raz does not hold a view that sees law in this light. Against those who would accuse positivists generally of importing logical positivist doctrine into legal theory, Raz constantly makes plain that his separation of evaluative questions from questions of law is not dependent on a view that moral truths are uncertain and therefore cannot count as law. Rather the separation for him is the result of the authoritative nature of law and the arguments which support this thesis. The weak social theorist finds questionable some elements of this thesis and in particular, stresses that a theory should not lose sight of the possibility of morality being decisive of the question of law in some legal systems.

Now let us turn briefly to Dworkin's dissatisfactions with the weak social thesis. His attack against the weak social thesis involves showing the position to be an unstable version of his own theory. The weak social thesis is deficient for several reasons. First and foremost, no clear theory of interpretation is offered. Without employing a concept like "a community of principle", which Dworkin explains in chapter six of Law's Empire, there can be no confidently stated difference between mere judicial opinion and understanding what political morality requires. Since this concept of interpretation is so rudimentary, it cannot

either satisfactorily justify our social practice nor be used to understand the concept of "fit" so important for choosing between competing alternative judgements. Most importantly, it does not recognize that law is a matter of constructive interpretation, of imposing purpose on an object or practice in order to make of it the best possible example of the genre to which it is taken to belong. The weak social thesis does not seem to embrace law as an essentially interpretive enterprise and, hence, fails to properly grasp what law means for the participant, i.e. the judge. As was the case with Raz's main complaint about the weak social thesis, Dworkin thinks that the fundamental insight about what law is, is obscured and confused in such a theory. But Dworkin uniquely complains that the weak social theorist does not go far enough in recognizing the importance of morality in Anglo-American legal systems.

Let me answer Dworkin's specific complaints above as best I can. Recall that in my critique of Dworkin in chapter three, I argued that "soft-conventionalism", as a theory about determining law in hard cases, is quite plausible. The weak social thesis which asserts that sometimes, in some systems, law may be identified by resort to moral arguments is compatible with soft-conventionalism. By this I mean that a weak social theorist can offer soft-conventionalism as a theory of interpretation. This would block Dworkin's complaint that no clear theory of interpretation is offered.

Arguing against Dworkin's other complaints is more difficult because Dworkin himself sets the criterion for an adequate theory: law must be understood as an essentially interpretive enterprise. While this is an understanding somewhat attributable to the soft-conventionalist, Dworkin's particular view of "interpretation" prevents an unqualified adoption of the proposal. I suggest that the weak social theorist, who accepts soft-conventionalism, wishes only to concede that identifying law is sometimes a complex task that involves reasoning and debate. Without presupposing the legitimacy of Dworkin's requirements for a theory of law, all the weak social theorist can do is to show he can explain how judges decide cases in other than Dworkinian terms. Of course, it is open for the weak social theorist to criticize specific elements of Dworkin's "law as integrity" in an effort to make room for his own explanation. Certain perplexities surround major elements of Dworkin's thesis, and it is to these that we now turn our attention.

#### VI Remaining Dworkinian Puzzles

I choose to combine Raz's and the weak social theorist's criticisms of Dworkin's theory because they run parallel in many places and because their differences lie in controversies with which we now have some acquaintance. Raz's primary puzzlement is that Dworkin combines the

questions, What counts as law? and How should judges decide cases?, without arguing why these are one and the same question. He leaves it for his theory to show why they are the same. Nowhere does he provide an explanation for the relationship between law and institutions and this seems to be because he takes the judge's point of view as the only basic element that a theory of law requires as a foundation. Raz and the weak social theorist consider this an awkward place to start legal theory especially given the obvious relevance of social facts for the analysis of the question of the nature of law. The source of any perplexity for non-Dworkinians here is a meta-theoretical dispute as to what a theory of law should include and what issues it should address. Does Dworkin's theory satisfy our questions about "law" or does it just raise further questions? Perhaps it satisfies some queries, but certainly it raises perplexity as well. A discussion of some of these follows.

Dworkin asks that one try to understand how legal decisions reflect a political morality, an ideology.<sup>?</sup> He asks one to assume that a single person's view lies behind a series of legal precedents. We are encouraged in this way to take up an ahistorical perspective on a series of individual judgements. The object is to form a coherent picture of law on an issue. Such an approach to interpretation can only work if we accept two fundamental Dworkinian ideas: "the community personified" and the ahistorical nature of legal

decisions. In his recent lectures at the University of Toronto, Raz raised some penetrating questions. We can ask whether, in the light of the concrete historical character of legal decisions, we have good reason to take up this ahistorical perspective. Secondly, we wonder whether we have reason to perceive a community in this special personified way. Raz is loath, as would be the weak social theorist, to accept either of these strange ideas just to make Dworkin's interpretation thesis workable. This sense of caution meets with my concerns about the aim to see a narrative in place of history that I discussed in chapter three. When Dworkin asserts that integrity speaks with one voice, we might ask, "Who is this voice?" The weak social theorist might, I submit, also ask this question without disturbing his rather less than Dworkinian interpretation of interpretation.

One additional criticism that Raz makes of Dworkin's theory is a particularly cutting one because it attacks the moral bedrock of 'law as integrity'. In his discussion of "the claims of integrity", Dworkin notes that integrity cannot be a virtue in a utopian state but only in an actual state with real people whose politics are evolutionary rather than axiomatic.<sup>55</sup> Integrity is a virtue because one can be true to one's principles just by following integrity. Much of Dworkin's discussion of integrity and coherence in the body of legal history is devoted to showing these to be virtuous in themselves. This strikes Raz and others as an

odd proposal. Is there anything wrong with incoherence in itself? Is incoherence itself a defect?

Raz points out that incoherence is only a sign that we are mistaken about one or more of our views.<sup>56</sup> Incoherence then is not moral or immoral in itself, but only signals that a mistake has been made. Political integrity cannot be a virtue as Dworkin argues it is.<sup>57</sup> When one cares about coherence, one is caring about whether a mistake or several mistakes have been made. It is not the case that when we know some of our views are false we are somehow paralyzed into not acting upon them. Yet Dworkin suggests that a legal system that does not see political integrity as a virtue is somehow so paralyzed. This is simply not the case. And because it is not the case, Dworkin cannot claim that incoherence is bad or immoral in itself. We strive for coherence in our legal affairs only because we wish to avoid mistakes which are themselves undesirable. The weak social theorist can agree with Raz's analysis of this question rather than taking 'integrity' itself as a virtue and thereby positing moral significance where it does not belong. Since Dworkin's virtue of political integrity "assumes a particularly deep personification of the community or state",<sup>58</sup> a rejection of this as a virtue further subtracts credibility from the notion of a community personified.



## VII Concluding Remarks

Many such problems stand in the way of accepting the theory expounded in Law's Empire even if the whole of Dworkin's concerns over time are well met by it. Clearly, a whole raft of strange proposals is involved in accepting 'law as integrity' and it seems to me that one who sees nothing to be gained by entertaining them will not take the plunge. And yet there are those who think the central appeal to political morality in deciding cases at law, the deep concern for justification, is 'law as integrity's' claim to victory over competing theories. Their instincts have told them that there is never an essential difference between the law that is and the law that ought to be and Dworkin, to their relief, has given full sail to this pretheoretical intuition.

The special way that Dworkin brings about the merging of the is/ought question leaves the impression that his theory values justification more than any other approach. Yet another look at Finnis' theoretical aims will displace Dworkin's claim to the deepest sort of justification and will clearly place Dworkin among legal positivists who seek legal justification only in contingent social beliefs. We must return to the level of basic conceptions to flesh out the challenge to the claim of a Dworkinian victory over the competition.

Raz has said that the popular conception of law is

that it is settled and knowable without resort to further argument. In his recent lectures at the University of Toronto, he asserted that this conception must be met by a theory if the theory is to be serviceable and acceptable to us. He noted that if a theory failed to comply with our conception of law, we should discard the theory rather than the conception. I think Raz's point here is simply that a theory of law should not displace the common conception of law as "settled". Rather a theory should explain or make sense of our conceptions. This outlook invites an interesting comparison with Dworkin. Raz's conception of law as "settled" is attributable to the populace in general, while Dworkin's conception of law as an essentially "interpretive enterprise" is the one Dworkin feels is attributable to judges deciding cases. Both Raz and Dworkin are proposing theories which they take to suit particular conceptions.

Should one be satisfied with serving conceptions of "law" already extant, or should a theory of law be a more ambitious and, in some sense, more fundamentally grounded system? It is common to the three positions we have been examining that "the general concepts they use for doing legal analysis are no more than manifestations of the various concepts peculiar to particular peoples",<sup>59</sup> to put it in Finnis' words. For Raz, the 'common conception of law' will do nicely, for Dworkin 'the judges conception of law' is the

relevant one. John Finnis and natural law theories generally are more ambitious in this regard. These set about to establish critically justified criteria for the formation of general concepts, presumably because they find any concepts in place to be deficient. "A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct."<sup>60</sup> This ambition sets natural law theories apart as to their general orientation in legal theory, but for reasons I have given, their task is one I and many others cannot join. The ambition is doubtless a noble one, even if some of us do find it unrealistic or strange to raise the possibility of such basic justification. It is this form of legal theory, rather than Dworkin's, that claims the deepest sort of justification, for it should not escape our notice that Dworkin's theory is wholly based on judges' conceptions however morally misguided they may be. Finnis would regard Dworkin's concern for justification to be only 'skin deep' or no deeper than an ideology which itself may be completely at odds with "the good". This difference is sufficient to strongly distinguish Dworkin's theory from natural law theories even if, in other respects, he appears to be a close cousin of Aquinas.<sup>61</sup> Certainly, Dworkin's Hercules relies on contingent social attitudes, acts and beliefs like the positivists do and hence, those who seek justification in Finnis' sense would seem to be as

dissatisfied with Dworkin's approach as they might be with positivism.

I have at various places in this thesis had complaints about Raz, Dworkin, and Finnis that have all contributed to the plausibility of the position of the weak social theorist. But it is fairly clear that, in spite of the many issues raised by the question distinguishing between the law that is and the law that ought to be, I have reached an impasse of sorts. Can we have a picture of the relationship between law and morality? An affirmative answer presumes, as Raz has noted, that there can be a theory of law which can be a completely exhaustive system.<sup>62</sup> Further, it presumes that there is but one relationship between law and morality. I do not presume that such a theory exists and neither does the weak social theorist, for all his concern for the involvement of evaluative questions in legal theory generally. In a real world with real people, a picture of the interaction between law and morals can only be had by shifting our philosophical attention from one theoretical question to another. This is doubtless the method of 'positivist theories' which do not presume to give an exhaustive account of how morality and law interact. Fortunately for them, the interaction of law and morals is sufficiently complex and unsystematic in actuality that they appear yet to have the upper hand.

Notes to Chapter Five

1 Thus, I take David Hume's problem to be this unexplained transition from is to ought. See David Hume, A Treatise of Human Nature, ed. L.A. Selby-Bigge, (Oxford: Clarendon Press, 1978), p. 469-470.

2 John Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980), p. 34.

3 Finnis, p. 35.

4 Neil MacCormick, H.L.A. Hart, (Stanford, Cal.: Stanford University Press, 1981), p. 162.

5 See Jan Narveson, "John Finnis Natural Law and Natural Rights," The Windsor Yearbook of Access to Justice, 1 (1981):333.

6 H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961), p. 119-120.

7 Hans Kelsen, The Pure Theory of Law, (Berkeley, Cal.: University of California Press, 1967), p. 1.

8 Kelsen, p. 4.

9 Leslie Green, "The Political Content of Legal Theory," Philosophy of the Social Sciences, 17 (1987):1.

10 Joseph Raz, "The Problem About the Nature of Law," The University of Western Ontario Law Review, 21 (1983):218.

11 Hart, p. v.

12 Raz, p. 218.

13 This explanation is taken from a private communication with Dr. Wilfrid Waluchow, 21 January 1988.

14 Raz, p. 218.

15 Finnis, p. 18-19.

16 Ronald Dworkin, Law's Empire, (Cambridge, Mass.: Harvard University Press, 1986), p. 1.

17 Dworkin, p. 227.

18 See Green, p. 7.

- 19 Dworkin, p. 14.
- 20 See Dworkin, p. 239.
- 21 Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," Michigan Law Review, 75 (1977):517.
- 22 Soper, p. 517.
- 23 See Ronald Dworkin, Law's Empire, p. 410 and elsewhere.
- 24 David Lyons, "Principles, Positivism and Legal Theory - Dworkin, Taking Rights Seriously," Yale Law Journal, 87 (1977):415 and see Soper, "Legal Theory and the Obligation ...".
- 25 Hart, The Concept of Law, p. 199.
- 26 Joseph Raz, The Authority of Law, (Oxford, Clarendon Press, 1979), p. 46-47.
- 27 Wilfrid Waluchow, "Herculean Positivism," Oxford Journal of Legal Studies, Vol. 5, No. 2, p. 195-196.
- 28 Hart, The Concept of Law, p. 253.
- 29 Hart, The Concept of Law, p. 89-96.
- 30 Hart, The Concept of Law, p. 119.
- 31 Hart, "Positivism and the Separation of Law and Morals" in Essays on Bentham, (Oxford: Clarendon Press, 1982), p. 83-84.
- 32 Hart, "Positivism and the Separation ...", p. 84.
- 33 Hart, "Positivism and the Separation ...", p. 84.
- 34 Jules Coleman, "Negative and Positive Positivism," Journal of Legal Studies, 11 (January, 1982):142.
- 35 Coleman, p. 142.
- 36 Coleman, p. 143.
- 37 Waluchow, "Law, Morality ...", p. 6.
- 38 Hart, "Positivism and the Separation ...", p. 55.

- 39 Joseph Raz, The Authority of Law, (Oxford: Clarendon Press, 1979), p. 47.
- 40 Raz, The Authority of Law, p. 50.
- 41 Joseph Raz, "The Reality and the Ideal," A series of lectures given at the University of Toronto Faculty of Law, September 7-25, 1987. The matter in question taken from the lecture September 25, 1987.
- 42 Hart, The Concept of Law, p. 181.
- 43 Raz, The Authority of Law, p.52.
- 44 Joseph Raz, "Authority, Law and Morality," The Monist, 68 (1985): 303.
- 45 Raz, "Authority, Law and Morality", p. 304.
- 46 Raz, "Authority, Law and Morality", p. 315-316.
- 47 These 'mistakes' were noted by Raz in "The Reality and the Ideal", September 25, 1987 lecture.
- 48 This position that Raz attributes to the "weak social theorist" does not seem to have an obvious advocate among any theorists mentioned in this thesis. I shortly attempt to reply to Raz on this issue in any case.
- 49 Raz, The Authority of Law, p. 41-42; and see Waluchow, "Law, Morality and the Weak Social Thesis", p. 18.
- 50 Waluchow, "Law, Morality ...", p. 45.
- 51 Waluchow, "Law, Morality ...", p. 46.
- 52 Ronald Dworkin, Taking Rights Seriously, (Cambridge, Mass.: Harvard University Press, 1977), p. 347.
- 53 Waluchow, "Law, Morality ...", p. 31.
- 54 Waluchow, "Law, Morality ...", p. 47.
- 55 Dworkin, Law's Empire, p. 164.
- 56 Raz, "The Reality and the Ideal", September 25, 1987 lecture.
- 57 Dworkin, Law's Empire, p. 166.
- 58 Dworkin, Law's Empire, p. 167.

59 Finnis, p. 18.

60 Finnis, p. 18.

61 See Waluchow, "Law, Morality and the Weak Social Thesis", p. 3.

62 Raz, "The Reality and the Ideal", September 25, 1987 lecture.



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