CHARTING THE WAY FOR MODERN LEGAL POSITIVISM

CHARTING THE WAY FOR MODERN LEGAL POSITIVISM THROUGH THE CHARTER

By

MICHAEL GIUDICE, B.A.

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AUTHOR: Michael Giudice, B.A. (University of New Brunswick)

SUPERVISOR: Dr. Wil Waluchow

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Abstract

Legal systems such as those in the United States and Canada, which include fundamental rights of political morality in their constitutions, present an interesting and difficult problem for legal positivists. Are such moral standards to count among the existence or validity conditions of laws, or are they better understood as fundamental objectives or justification conditions which laws may or may not achieve or respect in practice? The first option, known as inclusive legal positivism, expands the traditional positivist separation thesis to mean that although there is no necessary connection between law and morality in general, it is possible that in some systems it is a necessary truth that laws reproduce or satisfy certain demands of morality. The second option, known as exclusive legal positivism, denies this possibility, and maintains instead that it is never a necessary condition that laws reproduce or satisfy certain demands of morality, even if such demands are constitutionally recognized. On the exclusive account, in the context of constitutional states such as the U.S. and Canada, the separation thesis is expanded to mean that there is no necessary connection between the existence and content of laws and the demands of political morality typically included in constitutions. In this thesis I defend exclusive positivism and argue that it best follows from the traditional positivist commitment to separate *existence conditions* of law from *justification conditions* of law, and further, avoids what I take to be decisive problems with inclusive positivism. Specifically, I argue that Joseph Raz's notion of a directed power, and not reliance on an inclusive rule of recognition, best explains the duty of judicial review in Charter cases. The fundamental rights of political morality recognized in the Charter are best understood as constitutional objectives which all subordinate laws in Canada ought to respect, yet may fail to do so in practice. Finally, I argue that the concepts, distinctions, and arguments deployed in the internal positivist debate are also of value in the wider and ongoing debate between H.L.A. Hart and Ronald Dworkin over the nature of law.

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Introduction

In the philosophy of law, providing an understanding of the relation between law and morality has been and is an ongoing yet elusive task. One central question is whether appeal to moral reasons must, can, or cannot figure in determinations of law. Legal positivists maintain that the existence of law is best explained as a matter of social fact or human creation. The existence or validity of law is determined, on the positivist account, by reference to some identifiable social fact or human act, whether it is the will (Bentham) or command (Austin) of a sovereign, a social rule of recognition accepted by officials (Hart), or simply official acts in all their varieties (Raz). Recently, legal positivists have split into two opposing camps, largely in response to Dworkin's critical and controversial observation that principles of political morality always figure in judicial decisions and hence determinations of law.[1] Dworkin concluded that since these principles are not identifiable by reference to social or historical facts alone, but arise from careful consideration of the moral dimension of legal doctrine and practice, the positivist claim

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[1]The characterization of the inclusive-exclusive positivism split as Dworkin-induced, although true to a certain extent, is used mainly for theoretical purposes, and is not grounded strictly in historical accuracy.

that all law is a matter of social fact is false. Hence Dworkin defends the view that appeal to moral reasons *must* figure in determinations of law. In response, legal positivists have divided into an exclusive and inclusive camp. Inclusive positivists, such as Wil Waluchow and Jules Coleman, argue that moral principles can be accounted for in Hart's explanation of the concept of law, which understands law as a union of primary rules of obligation and secondary rules of change, adjudication, and recognition. On the inclusive account, a legal system may, but need not, include moral reasons in its criteria of legal validity, which make up the legal system's rule of recognition. Moral reasons may be included in a legal system's rule of recognition if the system includes a charter of fundamental rights of political morality for example, or if there is a long-standing customary practice of judges or other officials appealing to moral reasons in their legal decisions. Thus, on the inclusive account, appeal to moral reasons *can* be part of the determination of existing law, but only if the particular social practice or legal system makes it so. Opposed to the inclusive account stands exclusive positivism, which maintains that any identification or determination of law *cannot* involve appeal to moral reasons or argument. Exclusive positivists maintain that any appeal to moral reasons or principles involves the *evaluation* of pre-existing law or the possible *creation* of new law, which can either be required or source-authorized by pre-existing law or result from official discretion. For example, Joseph Raz, the most notable exclusive positivist, maintains that appeal to moral reasons in judicial or legislative decisions is often best understood as the exercise of a directed law-making power, which is required by pre-

existing law. Thus, though possibly part of the grounds for the evaluation or creation of law, what is crucial on the exclusive account is that demands of morality may never figure as part of the determination of the existence or validity of pre-existing law; such a possibility is ruled out by the traditional positivist commitments of the separation between law and morality and the social foundations of law.

In this thesis I shall argue that only the exclusive positivist response to Dworkin is successful; including moral principles in the criteria of existence or validity of law simply fails to account for certain salient features of our ordinary understanding of law, and further, is inconsistent with the central commitments of legal positivism. Thus, at stake in the internal positivist debate is the very direction, content, and meaning of modern legal positivism, issues which have been brought to the forefront in light of Dworkin's attack on positivism and closer attention to adjudication of constitutional rights of political morality initiated by Waluchow.[2]

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[2]Hence I disagree with Keith Culver's recent characterization of the inclusive-exclusive positivism debate as one merely about the *application conditions* of a shared positivist concept of law (no necessary connection between law and morality). See Culver, "Leaving the Hart-Dworkin Debate," 51 *University of Toronto Law Journal* (2001): 367-398, at 382. This view might seem plausible, for example, if it were true that inclusive positivists claim the best explanation of charter societies such as the U.S. or Canada, while exclusive positivists claim the better explanation of legal systems such as that of Great Britain, which contain no constitutionally entrenched rights of political morality. As my thesis will make plain, inclusive and exclusive positivists disagree about the best explanation of the same type of legal system, and such disagreement is meaningful and open to resolution. Inclusive and exclusive positivists cannot share a concept of law if by "no necessary connection between law and morality" they mean significantly different things.

In chapter one I examine inclusive legal positivism's response to Dworkin, with a particular focus on Wil Waluchow's account of Canadian Charter cases.[3] I argue that his claim that judicial reliance on moral reasons in Charter cases may be understood to involve the discovery or determination of pre-existing law fails to account for certain salient features of our ordinary understanding of law. Most importantly, I argue that inclusive legal positivism is inconsistent with traditional legal positivism's central commitment that law is at bottom a matter of social fact, and that this inconsistency is best highlighted by careful re-consideration of Hart's explanation of rules of recognition.

In chapter two I take a closer look at Dworkin's theory of law as integrity, which serves for Dworkin as a refutation of all positivist theories of adjudication and law. I argue that Dworkin's theory also fails to explain, like inclusive positivism, the relation between official appeal to moral reasons and the existence of law. Specifically, my arguments revolve around the observation of a multiplicity of viable purposes in theorizing about law (of which only some are moral), and a particular distinction between determinations of laws and determinations of cases which Dworkin fails to observe.

In chapter three I present and defend exclusive legal positivism, and argue that it does not fail to account for our ordinary understanding of, among other things, appeal to moral reasons and change in the law. I argue that Joseph Raz's Sources Thesis and

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[3]As the title of my thesis suggests, throughout I shall rely, as Waluchow does, on the Canadian Charter to test the competing theories of law. Thus, although part of my thesis is to evaluate competing philosophical theories of law, I also aim to further our understanding of the Charter and its adjudication.

notion of a directed power, and not an inclusive rule of recognition or theory of law as integrity, best explain the status of pre-Charter challenged laws and the duty of judicial review in Charter cases. My conclusion here is that the traditional positivist separation thesis ought to be given the further content that there is no necessary connection between the existence or validity of law and constitutionally recognized rights or demands of political morality.

In chapter four I suggest that the expansion of the separation thesis upon which exclusive positivism relies, which I explain in terms of a distinction between existence conditions of law and justification conditions of law, allows us to make further sense of Dworkin's distinction between rules and principles in adjudication. Observation of such expansion, I suggest, ought to count largely in favour of exclusive positivism as a philosophical theory of law. My aim is to show that the arguments, distinctions, and concepts deployed in the internal positivist debate between inclusive and exclusive positivism are also of distinct value in the wider debate between H.L.A. Hart and Ronald Dworkin, a debate which has occupied philosophers of law for over three decades.[4]

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[4]The debate is also likely to continue for a while yet, following Dworkin's recent contribution "Thirty Years On," 115 *Harvard Law Review* (2002): 1655-1687.

Chapter 1. Inclusive Legal Positivism

In this chapter I shall present inclusive legal positivism's response to Dworkin's provocative argument that legal positivism cannot account for the role of principles in the law. I shall argue that although inclusive positivism offers a coherent response, it does not in the end succeed in its explanation of appeal to moral reasons in law. Specifically, I shall argue that inclusive positivism abandons the traditional positivist commitment that law is at bottom a matter of social fact, and that this failure can be explained by careful re-consideration of Hart's notion of a rule of recognition. Following Waluchow, throughout this chapter I shall make use of Canadian Charter cases.

1.1 Dworkin's Attack on Positivism

In "The Model of Rules I," Dworkin attributes the following central commitment to legal positivism:

> The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not

> with their content but with their *pedigree* or the manner in which they were adopted or developed.[1]

Dworkin intends this commitment to reflect Hart's explanation of the rule of recognition, which is an official practice of acceptance whereby citizens and especially legal officials recognize certain criteria as definitive of the membership of rules in the community's group or system of laws. As Hart explains it, the rule of recognition "...will specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[2] Dworkin argues that this fundamental commitment of legal positivism simply does not accurately explain or describe actual practice or the existence of law since principles, which are logically different from rules, often figure largely in determinations of law.[3] According to Dworkin, the rule of recognition cannot account for principles because principles, which are widely seen to function as binding legal standards, do not emerge from typical sources of law included in rules of recognition such as legislative

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[1]Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 17. Hereinafter *TRS*.

[2]H.L.A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994). Hereinafter *CL*.

[3]The logical distinction between rules and principles, on Dworkin's account, is that rules function in an 'all-or-nothing' fashion whereas principles have a dimension of weight which point to a particular decision but do not absolutely require it. See *TRS* at 22-28. In chapter 4 I shall examine this distinction in greater detail. I shall suggest that although a logical distinction does exist between the nature of rules and justificatory principles, Dworkin's explanation of the distinction is actually consistent with exclusive positivism.

enactments and judicial precedents. Rather, principles emerge not from some test of pedigree, but from a "..sense of appropriateness developed in the profession and the public over time."[4] Dworkin concludes that since principles do not originate from some social fact, such as official recognition, but rather originate from a sense of fairness and justice, the positivist claim that all law is a matter of social fact is false.

Dworkin also argues that in addition to the fact that principles cannot be captured by the test set out by the rule of recognition, neither can they be included as part of the rule of recognition itself. As Dworkin observes, this solution could lead to either of two results for legal positivism's explanation of law, both of which are unsatisfactory. First, including principles in the rule of recognition may mean that the rule of recognition is simply "the complete set of principles in force."[5] As Dworkin claims however, this simply amounts to the unilluminating tautology that all law is law. Second, the rule of recognition may try to list all the principles in force. Yet this would also fail, since principles are "...controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle."[6] If this were true of principles they could not be part of a legal system's rule of

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[4]*TRS* at 40. This thesis is more fully developed in Dworkin's *Law's Empire*, where he argues that the law is the best moral and political interpretation of legal practice as a whole, which flows from past political and legal decisions and through present and future decisions. See *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), especially ch. 7. I shall examine Dworkin's theory in greater detail in chapter two.

[5]*TRS* at 44.

[6]Ibid.

recognition which is meant to provide "conclusive affirmative indication" that a rule is a member of the group. Nonetheless, the route taken by inclusive legal positivists is to argue that principles and moral reasons in general may be included in a legal system's rule of recognition.

1.2 The Emergence of Inclusive Legal Positivism

Inclusive legal positivists dispute the central commitment attributed by Dworkin to all positivists, that the tests of validity or the rule of recognition concerns only the *pedigree* of rules and not their content. Inclusive positivists maintain that even though the criteria of validity or existence of law are a matter of social fact or social convention, what citizens or especially officials accept as criteria is not restricted in content.[7] In fact, as Hart states in the 1961 edition of *The Concept of Law*, and repeats in the Postscript published posthumously in 1994,

> In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation

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[7]Jules Coleman explains this commitment of inclusive positivists through the use of a distinction between the *grounds* and *content* of criteria of legal validity. See his *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) at 107ff.

> may yet no less scrupulously conform to justice or morality.[8]

Although Hart leaves the possibility of inclusive positivism at this, Wil Waluchow provides a thorough and useful analysis of the instantiation of the inclusive positivist thesis to show that it is not only a conceptually possible theory of law, but also makes good sense of actual legal systems. Waluchow sets out the inclusive legal positivist thesis precisely as follows:

> A distinguishing feature of inclusive legal positivism is its claim that standards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do figure in attempts to *determine* the existence, content, and meaning of valid laws.[9] [emphasis added] [author's notes omitted]

So morality *may*, but need not, be included as part of the criteria for the validity or existence of law. If it is included, then moral merit is a necessary condition of validity.[10]

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[8]*CL* at 204. See also pp. 247, 250, and 269 in the Postscript. It is important to note that Hart also disputes Dworkin's claim that principles cannot be identified by their pedigree. *CL* at 264-265.

[9]Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994) at 2. Hereinafter *ILP*.

[10]Waluchow's version of inclusive positivism is what is now referred to as a "necessity version," in which conformity with morality may be a necessary condition for the existence and validity of law. There is also a "sufficiency version," whose primary defender is Jules Coleman, in which conformity with morality may be sufficient for the existence and validity of law. For an account of both versions, see Jules Coleman, *The*

According to Waluchow, the inclusion of moral provisions in part of a legal system's constitution, such as the *Canadian Charter of Rights and Freedoms*,[11] is one way in which the inclusive positivist thesis may be instantiated. It is also important to note, for later purposes, that Waluchow uses 'determine' in the above quotation as equivalent to 'discovery', in which laws which fail to meet the standards of morality included as part of the criteria for validity are not valid or existing law in the first place.

As evidence that inclusive legal positivism is not only a conceptually possible theory of law but also explains and illuminates ordinary understanding of actual practice, Waluchow cites the practice of judicial review in Canada. He focuses particularly on the legal validity of norms challenged on the ground that they violate a recognized moral right or consideration in the Charter. Waluchow identifies the nature and purpose of Charter interpretation as follows:

> It is reasonably clear... that the Supreme Court of Canada believes that the interpretation of the Charter should be governed by the objects or interests it was meant to protect. If so, then it is also reasonably clear that moral argument will often figure in Charter challenges. If one must interpret the Charter in light of its objects, and those objects are often rights and freedoms of political morality, then it follows that one cannot

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Practice of Principle, especially ch. 8. Since my primary concern in this thesis is with philosophical theories of law which purport to explain actual legal phenomena, I will focus only on necessity versions of inclusive positivism, of the sort contemplated by Hart and extensively defended by Waluchow. However, the argument in section 1.3, if successful, also applies to sufficiency versions of inclusive positivism.

[11]Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11. All sections of the Charter cited will be to this Act.

> determine what the Charter means, and thus the conditions upon legal validity which it imposes, without determining the nature and extent of the rights of political morality it seeks to guarantee. Yet one cannot do this without engaging, to some degree at least, in substantive moral argument.[12]

Waluchow provides a useful analysis of *Andrews* v. *Law Society of B.C.*[13] in which he supports the claim that substantive moral argument does in fact figure in determinations of law or legal validity.

The issue in *Andrews* was whether the citizenship requirement imposed by the Law Society of British Columbia[14] amounted to discrimination under the equality guarantee of section 15 of the Charter.[15] As Waluchow points out, section 15 makes it unconstitutional for any law or other legal instrument to discriminate against persons, unless such discrimination can be justified as a reasonable limit under section 1 of the Charter.[16] Citing MacLachlin JA (as she then was), Waluchow claims that section 1

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[12]*ILP* at 144-145.

[13]4 W.W.R. 242 (B.C.C.A.).

[14]*Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 42.

[15]Section 15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[16]Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

plainly requires moral deliberation.[17] According to Waluchow, one cannot determine the nature and purpose of a Charter right which is intended to protect against unjustified discrimination without engaging in substantive moral argument. Even without reviewing Waluchow's analysis of *Andrews*, we can accept that he has established that moral deliberation does figure in Charter cases. What is more controversial is his argument that this moral deliberation, in the case of *Andrews* as well as others, is best viewed or explained as part of the test or discovery of pre-existing valid law, which is in turn explained by a rule of recognition that in Canada includes standards of morality. Thus on the inclusive positivist account the citizenship requirement of the Law Society of B.C. was *found* or *discovered* to be invalid, and so was not made invalid by the Court's decision.[18] Waluchow concludes that,

> In determining the constitutional status of laws in Canada, courts must often consider their 'moral merits'. For good or ill, in Canada the existence of law is not one thing, its merit or demerit another thing entirely. The two have been joined by Canada's rule of recognition and the Charter it validates.[19]

It seems clear that Waluchow has provided a plausible and coherent response to

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[17]*ILP* at 152.

[18]Likewise, the inclusion of the right not to be subjected to a citizenship requirement to practise law in section 15 (equality) of the Charter (and to pass the section 1 threshold) was *found* or *discovered*, and not made or created by the Court.

[19]*ILP* at 154-155.

Dworkin's argument that principles cannot be included in the rule of recognition of a legal system. As Waluchow's analysis of *Andrews* clearly suggests, at least in Canada and by analogy the United States as well, principles are not so controversial, numberless, or changing as Dworkin would have it. The principle of equality is clearly included, in a stable fashion, in the Charter. So if the Charter forms part of Canada's rule of recognition or ultimate criteria for the existence or validity of law, it is not overly difficult to identify the moral principles it includes.[20] However, it still remains to be seen whether Waluchow has provided the most persuasive descriptive-explanatory account of the adjudication of a Charter which requires appeal to standards of political morality, and thus successfully instantiated the inclusive positivist thesis. In the remainder of the chapter (and later in chapter three) I shall argue that there are fundamental problems with Waluchow's positivist account of Charter challenges. My argument will thus suggest that we ought to investigate alternative positivist explanations and hence re-evaluate whether principles and appeal to moral reasons are best accounted for using Hart's rule of recognition.

1.3 Inclusive Legal Positivism: A Successful Response?

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[20]Other easily identifiable moral principles found in the Charter and hence Canada's rule of recognition (on Waluchow's account) are a principle of autonomy (section 2 for example) and a principle of due process (sections 7-14).

I shall now argue that inclusive legal positivism fails to provide an adequate response to Dworkin. I shall present two arguments against Waluchow's account of Charter cases and then offer an explanation why inclusive positivism was bound to fail.

On Hart's account, a descriptive-explanatory theory of law must illuminate or clarify our ordinary understanding of law.[21] In a similar context, Benjamin Cardozo once said that an "[a]nalysis is useless if it destroys what it is intended to explain."[22] Also, a positivist explanation of law must be consistent with the positivist commitment that law is at bottom a matter of social fact (law as it is) and not morality (law as it ought to be).[23]

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[21]It was on these grounds, namely illumination and clarity, or explanatory power for short, that Hart rejected Austin's theory of law. Hart argued that Austin's imperative theory, which understood law in terms of orders, threats, habits, and a sovereign simply did not account for and actually obscured many of our ordinary understandings of law, for example the notion of a rule (which involves an internal aspect of acceptance and not simply the prediction of harm), the continuity of laws when habits must come to an end (e.g. when there is a change in government), the range of application of laws (the notion of an absolute or unlimited sovereign makes little sense in constitutional democracies), and the variety of laws (power-conferring rules such as rules of will-making and contract are not plausibly explained in terms of orders and threats). See Hart, *CL*, generally chs. 1-5.

[22]Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, partially reprinted in Clarence Morris, ed., *The Great Legal Philosophers: Selected Readings in Jurisprudence* (Philadelphia: University of Pennsylvania Press, 1971) at 525.

[23]Joseph Raz identifies the theoretical value and justification of this positivist commitment nicely as follows: "First it explains how there can be not only good and bad law, but also law and governments lacking all (moral) legitimacy, as well as those that are (morally) legitimate. Second, it explains why we cannot learn what the law in a certain country, or on a certain matter, is simply by finding out what it ought to be. Third, it explains how two people, one believing the law to be legitimate and the other denying its legitimacy, can nevertheless agree on what it is." Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 170.

Waluchow's account of Charter cases, which aims to instantiate successfully the inclusive positivist thesis, fails to satisfy both these Hartian, positivist commitments.

Waluchow argues that in Charter cases such as *Andrews*, the appeal to reasons and arguments of political morality to determine the meaning of Charter rights and the existence and validity of subordinate laws is best understood as a process of discovery. The rule of recognition in Canada, which includes standards of political morality, simply directs judges to determine what is already law. So in *Andrews* for example, the court simply found the citizenship requirement of the B.C. Law Society to be invalid or non-existent and similarly found the Charter right to equality to include such a protection. The first problem with this explanation however is that it runs counter to the prevalent view that the Charter significantly increased the law-making or authoritative role of the courts. Consider the following observation made by Robert Sharpe and Katherine Swinton:

> The amendment of the Canadian constitution in 1982 to include the *Charter of Rights and Freedoms* brought about a fundamental change in Canadian law and politics. The *Charter* significantly increased the law-making power of Canadian courts. Decisions on many important public issues, formerly within the exclusive authority of Parliament and the provincial legislatures, are now subject to judicial review. Charter litigation has become an important tool used by interest groups to advance their political ends. Canadian courts now play a central role in deciding how the law should deal with such intractable issues as abortion, mandatory retirement, the legitimacy of laws restricting pornography and hate propaganda, and the definition of what may properly constitute a

criminal offence.[24]

Indeed, observations such as this one explain the phenomenal increase in interveners with the advent of Charter litigation, as civil liberties groups, human rights groups, religious groups, and feminist groups among others now turn to the courts instead of (or at least in addition to) Parliament or the legislatures to effect changes in public policy and law.[25] The inclusive positivist thesis that appeals to moral considerations in Charter cases are best understood as the discovery or determination of pre-existing law thus seems quite implausible and obscuring, especially when it is observed that those providing the moral considerations are often interveners and interest groups, who view Charter litigation as a new avenue to change or shape public policy and law. Indeed, it is the very nature of interveners, who are for the most part political groups, to argue for change in the law or attempt to have their interests, or the interests of those whom they represent, recognized as law. This understanding of Charter litigation is only possible if we view the courts, in part, as authoritative law-makers, and not simply as the discoverers of what is already law in important Charter cases.

The second and more important problem for inclusive positivism can be stated in

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[24]Robert Sharpe and Katherine Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 1. For concurring observations see notes 25 and 27.

[25]This phenomenon is well documented and evaluated in F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000).

the following linked questions: First, how does inclusive positivism account for 'laws' which would, if challenged, be determined unconstitutional yet, as a matter of social fact, are never challenged before the courts or other authorities? Must inclusive positivism deny legal validity and hence existence to these norms which continue to be practised and in that way *recognized* by legal officials? Simply put, is inclusive positivism insufficiently sensitive to the practice-oriented or customary (indeed 'positive') reality of law? Recall that on the inclusive account, in cases such as *Andrews*, the Court did not make the citizenship requirement of the B.C. Law Society invalid with its decision. Rather, the Court simply declared that the requirement was already invalid and hence non-existent, presumably since its enactment, or, if it predates the Charter, since 1982. The problem with this account is that there is no necessity that the citizenship requirement of the B.C. Law Society ever be challenged. Indeed, for a great many laws which would, if challenged, be declared at variance with moral considerations contained in the Charter there is no necessity in any of them ever coming before a court or other official body to determine their constitutionality. Does inclusive positivism run the risk of maintaining that there may be a different 'law' in Canada, one which is largely independent of official practice?[26] For example, not only would there be norms which are practised and

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[26]It is important to note that this is a conceptual challenge, not an empirical one. It may be that all but a few laws do not meet the Charter's requirements, since with its enactment all Canadian jurisdictions (except Quebec) engaged in a review of their statutes and made amendments to a large number of statutes in light of perceived Charter violations.

recognized by legal officials which are not valid existing law, but there also would be norms which are not practised or recognized by legal officials but which *are* valid existing law. This would be the inclusive positivist view, to continue the example, of the law in Canada prior to *Andrews* and *Vriend v. Alberta*,[27] since prior to *Andrews* the citizenship requirement was not valid law while prior to *Vriend* the inclusion of 'sexual orientation' was a valid, existing part of Alberta's *Individual's Rights Protection Act*,[28] despite the Alberta legislature's conscious and explicit choice to exclude 'sexual orientation' from the list of prohibited grounds of discrimination. Indeed, such a view seems clearly out of line with the general positivist view that law is a matter of social fact or human creation. Although moral argument may as a matter of social fact be required by a legal system's constitution, it is not a matter of social fact that legal officials of a system with a Charter will necessarily or always observe (or agree on) the moral requirements in practice.[29] This difficulty for inclusive positivism is avoided if it is

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[27][1998] 1 S.C.R. 493. See Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Oxford: Oxford University Press, 2001) at 3, 132, 152

[28]R.S.A. 1980.

[29]It is possible to argue that, as a matter of social fact, the citizenship requirement to practise law in B.C. was invalid before *Andrews* and that the inclusion of sexual orientation in Alberta's *Individual Rights Protection Act* was valid prior to *Vriend*. The argument would run as follows: As a matter of social fact, both B.C. and Alberta recognize the Charter as law and as a matter of social fact they intend their laws to be consistent with the moral provisions contained in the Charter. Therefore, as a matter of social fact, the decisions of the courts in *Andrews* and *Vriend* were simply discovering what was in fact pre-existing law in B.C. and Alberta, and the alternative view, that the law in B.C. and Alberta was changed with *Andrews* and *Vriend*, is only plausible if we

acknowledged that legal validity or recognition must ultimately rest with what officials actually recognize or practise, even if such practice occasionally deviates from constitutional or moral objectives. Indeed, a central motivation behind Bentham's, Austin's, and Hart's insistence on the separation thesis was to alert citizens, officials, and theorists to the fact that laws may fail to satisfy demands of morality, and thus require critical moral evaluation to decide questions of obedience, application, enactment, or repeal.[30] Though I shall defend this thesis in greater detail in chapter three, we can say provisionally that the traditional positivist insistence on the separation thesis remains undisturbed regardless of whether or not demands of morality are explicitly recognized in a legal system's constitution or otherwise.

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unduly restrict what as a matter of social fact B.C. and Alberta intended as law. However, this argument still seems to make the anti-positivist claim that the law is different from what is actually practised and recognized, and as I shall try to show in later chapters, we have good reason not to accept this view. Further, it is important to note that even though official bodies such as the B.C. and Alberta legislatures may intend to respect constitutional requirements in their practices, they may still fail to do so. In other words, what one intends is not always the best explanation of what one actually does. Further, perhaps the better explanation of the intentions of the B.C. and Alberta legislatures is that although they intend to respect Charter rights in their laws and legal practices, if they are later shown to have violated Charter rights (by way of judicial decision) or perceive themselves to have violated Charter rights, they would have their laws or practices changed or make the change themselves.

[30]See H.L.A. Hart, "Positivism and the Separation of Law and Morals, " reprinted in Keith Culver, ed., Readings in the Philosophy of Law (Peterborough, Ontario: Broadview Press, 1999) at 116-122; H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994) at 207-212; John Austin, *The Province of Jurisprudence Determined*, partially reprinted in Culver, at 110-112; and Jeremy Bentham, *A Fragment on Government*, J.H. Burns and H.L.A. Hart, eds., with an introduction by Ross Harrison (Cambridge: Cambridge University Press, 1988), ch. IV, para. 19.

To return to Hart's conceptual framework, is there an explanation why moral principles or reasons cannot be included in rules of recognition? I believe there is. The explanation lies in observation of the problem of including a legal system's constitution (or part of it) as part of its rule of recognition. Recall Waluchow's explanation of the nature of laws in Canada:

> In determining the constitutional status of laws in Canada, courts must often consider their 'moral merits'. For good or ill, the existence of law is not one thing, its merit or demerit another thing entirely. The two have been joined by Canada's rule of recognition and the Charter it validates.[31]

The problem with this claim can be stated in the following question: Is a Charter which is 'validated' or, more accurately, *recognized*, by a rule of recognition then part of the rule

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[31] *ILP* at 154-155. It is important to note that the language of s. 52(1) of the *Constitution Act, 1982* suggests that the Canadian constitution ought to be understood as part of the rule of recognition in Canada. It reads " The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." It appears then that the Constitution of Canada establishes a necessary condition for the existence or validity of all laws in Canada. However, upon closer consideration, the section reads '...any *law* that is inconsistent...' which means that laws must first exist, and hence are valid (under some prior rule of recognition), before they can be inconsistent with constitutional provisions. Thus, the problem with identifying constitutions (such as that of Canada) with rules of recognition is that we must maintain that there may be laws (necessary for an inconsistency to exist) which at the same are not laws (because inconsistent with constitutional provisions). Such a problem is avoided, as I shall argue throughout this thesis, if we accept the more intuitive view that constitutional provisions such as Charter rights are best understood partly as objectives which subordinate laws may or may not achieve or respect.

of recognition itself? I believe we have good reason to doubt this claim.

It is important to make plain what it is about the rule of recognition that determines legal validity.[32] Consider a legal system in which officials (and most citizens as well), as a rule, recognize a constitution, the enactments of Parliament and the legislatures, and judicial precedents as law. We may be tempted to say that the constitution, Parliamentary and legislative enactments, and precedents form part of the explanation and content of that legal system's rule of recognition. However, it does not in fact follow that the constitution, enactments, and precedents determine legal validity in that system. To so claim collapses the distinction between (i) official recognition, a special social act which does determine legal validity, and (ii) what officials in fact recognize, or the result of the social act.[33] In other words, officials do not recognize criteria of validity, but rather they recognize laws.[34] Legal validity is identified with recognition, and not with what is

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[32]In what follows I take Hart's explanation of the rule of recognition to be correct and philosophically illuminating, and simply argue that a constitution or part of a constitution as an example of part of a rule of recognition is mistaken. In other words, although the explanation is correct, the example upon which inclusive positivism relies is fatally flawed.

[33]In an otherwise illuminating exercise in the application of Hart's notion of a rule of recognition to the United States, Kent Greenawalt fails to acknowledge or consider this distinction as applied to official recognition and constitutions. See Greenawalt, "The Rule of Recognition and the Constitution," 85 *Michigan Law Review* (1987): 621-671.

[34]It is important to keep in mind that when talking about the rule of recognition we are talking about ultimate criteria of validity or the foundations of a legal system.

recognized.[35] Let me elaborate.

The rule of recognition is a social rule, which means that it is constituted solely by the practice or custom of officials,[36] whereas, for example, a legal system's constitutional requirements, and especially a Charter, are not necessarily social rules (or constituted by social rules) but can be created, amended or otherwise changed by the practice of officials.[37] Recognition, by its very nature, must come from people or officials, not constitutions or morality included in constitutions.[38] Consider Hart's explanation of the rule of recognition:

> It may, as in the early law of many societies, be no more than that an

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[35]I believe this is substantially the same observation Les Green wishes to make when he writes "...on Hart's theory the rule of recognition is not to be identified with the *constitution* but with the practices of recognition that are expressed when the constitution is applied. For whether a written constitution is a source of law is also a question for whose answer we must turn to the rule of recognition." See Green, "The Concept of Law Revisited," 94 *Michigan Law Review* (1996): 1687, at 1706.

[36]'Practice' or 'custom' here means, as it did for Hart, the convergence of behaviour and critical reflective attitude (internal point of view).

[37]Joseph Raz provides an excellent account of why we should not identify rules of recognition with constitutions in his "On the Authority and Interpretation of Constitutions: Some Preliminaries," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 160-162. It also seems reasonable to argue that since constitutions are law, which means they satisfy some condition of validity, they cannot therefore be part of an *ultimate* rule of recognition, which is itself not valid but simply 'shown' or 'accepted' by citizens and especially officials. See Hart, *CL* at 101-110.

[38]If this argument is successful, as I think it is, then it also rules out sufficiency versions of inclusive legal positivism.

> authoritative list or text of the rules is to be found in a written document or carved on some public monument. No doubt as a matter of history this step from the pre-legal to the legal may be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is a very important one: *what is crucial is the acknowledgement of reference to the writing or inscription as authoritative, i.e., as the proper way of disposing of doubts as to the existence of the rule.*[39] [emphasis added]

Thus, on Hart's account, what determines legal validity is ultimately the 'acknowledgment' or recognition of an authoritative text, such as a constitution or more loosely, a precedent, and not what that authoritative text may require. Without the acknowledgment or recognition, there is no legal validity. For example, assume that the law requires valid wills to be signed by three witnesses. What makes this rule valid is that it has been recognized (by enactment for example) and is practised by those whom we identify as officials in the legal system. Further, what makes wills which conform to this rule legally valid is not simply conformity with the rule, but rather conformity with a rule which has received official recognition. In other words, wills which conform to the rule (and thus the rule itself) are legally valid because officials recognize them as such. This becomes apparent when we consider wills which conform to the rule that valid wills must be signed by two dentists. Although such wills may be valid according to that rule, they are not *legally valid* because they are not (nor is the rule) recognized by the relevant

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[39] *CL* at 94-95.

legal officials. If recognition by legal officials is removed, then legal validity is removed as well. By analogy, in Canada the *Charter of Rights and Freedoms* is law because it is officially recognized. This suggests that the Charter, and the constitution itself, acquire validity by a more ultimate criterion of validity. This more ultimate criterion of validity is simply official recognition. Officials in Canada converge in their behaviour of appealing to the Charter and constitution as law, and take a critical reflective attitude to those who diverge from this practice. Thus, constitutions, Parliamentary and legislative enactments, and precedents are valid law because they are recognized as such, whether such recognition comes from ministers of Parliament, legislators, lawyers, judges, or the public. We may also note that recognition may come in a variety of forms, such as enactment, amendment, repeal, *stare decisis*, overruling, invalidation, or general acceptance. Again, however, what has been enacted, amended, repealed, etc., are not and cannot be criteria of validity, which constitute a legal system's rule of recognition. Only laws are enacted, amended, repealed, applied, etc.

Thus, I believe we have good reason to doubt Waluchow's claim that constitutional provisions, such as the moral provisions in the Charter, are best understood as criteria of validity, and not simply as laws[40] which have been recognized by officials by a constitutional amendment. I think the observation, among others, that officials of a legal

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[40]Of course, this is not to suggest that constitutional law such as the *Canadian Charter of Rights and Freedoms* is not a special and important kind of law. I shall give an alternative explanation of the nature of the rights and provisions in the Charter in ch. 3.

system may or may not observe constitutional requirements in their decisions (although they all recognize the constitution as law) lends plausibility to the above conception of the rule of recognition and legal validity. The Law Society of B.C., with its citizenship requirement, is one example where legal officials did not, as it turned out, observe a moral requirement in the Charter. Yet, since legal officials did in fact practise and recognize the citizenship requirement, this seems to have made the citizenship requirement valid, although it was subsequently invalidated by the Court.

1.4 Conclusion

I believe the arguments in this chapter have cast sufficient doubt on inclusive legal positivism's claim to have successfully responded to Dworkin's observation that appeal to moral principles often figures in determinations of law. Specifically, I argued, through a review of Waluchow's analysis of Charter cases, that inclusive positivism obscures the ordinary and justifiable understanding that the advent of Charter litigation brought with it a significant increase in judicial law-making power. More importantly though, I argued that careful consideration of pre- or non-Charter challenged laws clearly suggest that the inclusive positivist explanation of such laws is inconsistent with the traditional legal positivist commitment that law is at bottom a matter of social fact. This is revealed once it is acknowledged that legal officials may fail to observe constitutionally recognized moral requirements in their practices, yet such practices still possess many salient features of

law, especially among which is social or actual recognition. Nonetheless the arguments of this chapter, at this point perhaps non-conclusive, will receive further support in chapter three.

Before turning to exclusive legal positivism's alternative response to Dworkin I shall examine in detail Dworkin's own theory of appeal to moral reasons in determinations of law in the next chapter. We have seen that positivism cannot maintain that appeal to moral reasons *may* figure in determinations of law, and so will now examine whether a non-positivist can maintain that appeal to moral reasons *must* always figure in determinations of law.

Chapter 2. Dworkin's Law as Integrity

Inclusive legal positivists maintain that determinations of law may include or incorporate appeal to moral reasons, and that such a possibility is compatible with the positivist claim that law is still at bottom a matter of social fact. In chapter one I argued against the inclusive positivist thesis, on the central ground that inclusion of moral argument in determinations of law is in fact inconsistent with the traditional positivist claim that law is at bottom a matter of social fact. In this chapter I examine a different philosophical theory of the relation between law and morality, which maintains that determinations of law *must* include moral argument, and that law is not at bottom a matter of social fact. The theory is presented in its strongest form by Ronald Dworkin, Hart's student and dominant critic. I shall examine Dworkin's theory, which he terms 'law as integrity', and argue that, like inclusive positivism, it also fails to explain adequately the relation between appeal to moral reasons and the existence of law. Specifically, my arguments revolve around the observation of a multiplicity of viable purposes in theorizing about law (of which only some are moral), and a particular distinction between determinations of laws and determinations of cases which Dworkin fails to observe.

2.1. Dworkin: The Inevitable Moral Dimension to Law and Legal Theory

Dworkin supports the thesis that all determinations or identifications of law must involve arguments of substantive morality by arguing for two related claims: first, he argues that law is at bottom an interpretive concept, which ultimately requires arguments of political morality to determine its content; and second, all legal philosophy (or 'jurisprudence' as Dworkin calls it) is part of adjudication or legal decision-making (whether actual or hypothetical), and so is inevitably morally committed. In this chapter I shall challenge both of these central claims.

Let's start with the first claim, namely that law is an interpretive concept which requires arguments of political morality. (I shall examine the second claim in section 2.4.)

In the 'Model of Rules I' Dworkin highlights the moral significance of judicial decisions[1]:

> Day in and day out we send people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all of this as speaking of such persons as having broken the law or having failed to meet their legal obligations, or having interfered with other people's legal rights...We may feel confident that what we are doing is proper, but until we can identify the principles we are following we cannot be sure that they are sufficient, or whether we

[1]Although Dworkin intends his account to apply to all types of legal decision-making (legislative, prosecutorial, etc.), I shall focus, as he does, on the process of judicial decision-making.

are applying them consistently.[2]

Later, in *Law's Empire*, Dworkin again writes:

> There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.[3]

What Dworkin is trying to establish, as others[4] have also attempted, is that all judicial

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[2]Dworkin, "The Model of Rules I," in *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 15.

[3]Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 1-2. Hereinafter *LE*.

[4]For example, Raz notes "Judges, perhaps more than anyone else, follow the law because they believe they are morally required to do so. There can be no other way in which they can justify imprisoning people, interfering with their property, jobs, family relations, and so on, decisions that are the daily fare of judicial life." "On the Authority and Interpretation of Constitutions: Some Preliminaries," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 160. Elsewhere Raz states more explicitly, "[c]learly courts' decisions affect both defendants or accused and plaintiffs in substantial ways, and every decision by one person which significantly affects the fortunes of others is, whatever else it may be, a moral decision." "On the Autonomy of Legal Reasoning," in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (Oxford: Clarendon

decisions are a species of moral[5] decisions. This follows, quite unobjectionably, from the observation that any human decision (judicial decisions included) made by a rational person which affects, or can be reasonably expected to affect, the lives or interests of another human being makes that decision a moral one, regardless of whether the person treats it as such.[6] Thus all judicial decisions which have effects such as protecting a right to equality, not allowing a murdering heir to inherit from his victim, or forcing a business to honour its obligations to customers, are also moral decisions since they play a role in shaping and affecting people's lives.

From observations such as these, Dworkin reasons quite correctly that if judicial decisions are in fact moral decisions, then it follows that we ought to have some sort of understanding of the process which can make these morally *justified* judicial decisions. In other words, Dworkin has observed that his object of study, the process of judicial decision-making, is also a process of moral justification, and that we ought to have some understanding of how the process of judicial-decision making yields morally justified decisions. This understanding is best supplied, according to Dworkin, by what he calls 'law as integrity', which I shall turn to shortly.

Press, 1996) at 327-328.

[5]It must be noted that this use of 'moral' is not equivalent to 'morally good' or 'justified'. For example, someone faced with a moral decision could decide very poorly or immorally.

[6]Thus, the rational would-be murderer who desists from murdering her victim solely because of a monetary offer was still faced with a moral decision, even though the interests (a moral consideration) of her victim were not considered in her actual decision.

Dworkin also argues that the process of judicial decision-making is inherently a morally committed task by a similar route, grounded more in empirical observation than in examination of the nature of legal decisions. It will be recalled from the introduction and chapter one that Dworkin observes that judges also frequently resort to arguments of principle in their decisions, to supplement (and sometimes change) the direction provided by statutes and previously decided cases. Dworkin argues that such resort to moral principles indicates that what the law is does not hinge solely on simply applying pedigree criteria to particular cases, but rather the actual criteria or 'grounds of law' are fundamentally a matter of moral argument. To explain this alleged fact about law, in *Law's Empire* Dworkin draws a distinction between two different types of disagreement about law.[7] The first type of disagreement is empirical disagreement. Judges and lawyers disagree empirically about what the law is when they agree about how the law is to be identified, for example by checking what is in the statute books, but disagree about what the statutes actually contain. The second type of disagreement is theoretical disagreement. Judges and lawyers disagree theoretically about what the law is when they disagree about how the law is to be identified, or what the 'grounds of law' really are. For example, are the grounds of law exhausted by what is explicitly contained in statutes or been decided in past cases, or do they include principles of political morality which can be seen to justify past political decisions and provide justification for future

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[7]*LE* at 3-6.

decisions?[8] As Dworkin points out, judges do often appear to engage in theoretical disagreements about what the law is and when they do, their arguments are of a moral nature.[9] Dworkin further argues that legal theorists (and here he means legal positivists) who view such theoretical disagreements simply as illusions, i.e. that any theoretical disagreements are simply disagreements about how the law should be extended or changed, and not about what the law really is, are mistaken. Dworkin's central piece of evidence against this view is the observation that when judges appeal to arguments of political morality and attempt to discover the true force of past political decisions, they view their answers not as what the law should be or how it should be extended, but rather they believe they have discovered what the law really requires.[10] Thus Dworkin argues that because judges often engage in theoretical disagreements about the grounds

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[8]By 'political decisions' Dworkin means both decisions of the legislatures and courts.

[9]To substantiate this claim, Dworkin relies on cases such as *Riggs v. Palmer* 22 N.E. 188 (1889) and *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A. 2d 69 (1960).

[10]*LE*, especially chs. 1, 4, and 5. It is important to note however that the underlying assumption that in adjudication right answers are always there to be discovered is just that, only an assumption. Assumptions may be defeated or shown to be defeated. As John Mackie has observed, "there is a distinction - and there may be a divergence - between what judges say they are doing, what they think they are doing, and the most accurate objective description of what they actually are doing. They may say and even believe that they are discovering and applying an already existing law, they may be following procedures which assume this as their aim, yet they may in fact be making new law." Mackie, "The Third Theory of Law," in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, New Jersey: Rowman and Allanheld, 1983) at 163.

of law, and such disagreements hinge on arguments of political morality, what the law is must be fundamentally determined by moral argument. Hence all determinations or identifications of law must involve or include moral argument.

2.2. Law as Integrity

Dworkin argues that the moral argument involved in identifications or determinations of law is best explained by his theory of law as integrity. Law as integrity explains the process of judicial decision-making as follows: a judge constructs a political theory which best fits and justifies current legal and political practices in their entirety (or as speaking in 'one voice'), such as precedent-following and legislating, as well as the actual precedents and statutes which have been decided under those practices. The judge then constructs her decision to the case at bar which follows from her political theory. The decision ought both to fit past political decisions (as best as possible) and be consistent with the principles that justify those past decisions as well as present and future decisions. While the 'fit' aspect or dimension requires consistency with actual past decisions, the 'justification' aspect or dimension requires the judge to place the practice or line of past political decisions (as well as potential future decisions) in their best moral light. Such 'constructive interpretation'[11] is meant to develop or better the law or practice as a

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[11] *LE* at 52-53.

whole. Further, Dworkin suggests that the task of the ordinary judge in actual cases can be viewed as a limited emulation of a Herculean judge who has the time and skill to develop a comprehensive political theory of legal and political practice as a whole, which includes and organizes all the particular decisions and principles embedded in those decisions, and who in turn decides cases in accordance with his political theory.[12] Such a theory of judicial decision-making, Dworkin argues, best explains a practice which is inherently geared towards moral justification. It also explains why judges pay such close attention to precedents and statutes in hard cases, as they attempt to interpret the law and thus uncover principles which would both respect past decisions and also justify present and future decisions. Further, and most important for our purposes, Dworkin concludes that since what the law is or really requires depends on our best moral and political interpretation and argument, law is at bottom a matter of moral and political argument, and not social fact.

2.3. Critique of the Inevitable Moral Dimension to Law

The common response to Dworkin's first claim, namely that law is essentially an interpretive concept which ultimately requires arguments of political morality to determine its content, is that he confuses the *meaning* of a concept or rule with the criteria for its

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[12]Hercules was first introduced in "Hard Cases," in Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

application.[13] As Hart argues in the Postscript, officials may agree on the meaning of law, but disagree about its application in particular cases. Thus what the law is is still a matter of social fact, even though its application may be a matter of disagreement which may require resort to arguments of political morality. Although I believe this response to be along the right lines, I think an expanded response to Dworkin is available. As I shall now argue, Dworkin has only shown that the process of judicial decision-making is inherently a matter of argument of political morality, but not that law is.

I contend that Dworkin confuses *determinations of laws* with *determinations of cases.*[14] Determinations of laws are made simply by looking to past political decisions (i.e., decisions of the legislatures and the courts). Determinations of cases are then the decisions which are made in particular cases given the state of the law and any demands of justice judges must or choose to take into account. Determinations of laws are made without resort to morality, while determinations of cases, which are a species of moral decisions as Dworkin correctly points out, do require or rely on arguments of political morality.

What reasons do we have for believing that a distinction between determinations of

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[13]See Hart, *CL* at 246. See also Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001) at 116-118.

[14]This is a direct consequence of Dworkin's failure, pointed out by many, to distinguish between a theory of adjudication and a theory of law. See, for example, Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994) at 32ff, and Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. edn. (Oxford: Clarendon Press, 1995) at 202-203.

laws and determinations of cases exists, and that such a distinction will illuminate our understanding of the nature of law? I shall offer two arguments to show that the distinction is an illuminating one. The first argument relies on the observation that Dworkin in fact operates with a similar distinction. Recall that in his theory of law as integrity, a judicial decision must both fit and justify past political decisions. Yet how are these past political decisions to be identified, and are they not themselves law or laws? If past political decisions are simply the past decisions of legislatures and superior courts, then identifying these decisions as laws seems to follow naturally. Further, this identification can be done before or without the past decisions ever coming before a judge to be applied in a particular case. Thus, before cases like *Andrews*, it is possible to say of the law or laws in Canada that there exists a constitutional right to equality and that there exists a law in B.C. to the effect that citizenship is a necessary requirement to practise law in that province. These identifications or determinations of laws can be done without resort to arguments of political morality. However, to decide (and hence to determine the case) whether such a citizenship requirement is constitutional does require resort to arguments of political morality. The point is that two separate stages can be identified, and that a distinction between determinations of laws and determinations of cases explains the division in legal reasoning. The distinction also makes sense of common statements such as "given the current state of the law, recovering for emotional damages in cases like this one is likely," or "given the current statute of wills, you can distribute your estate in this way," or "given our current understanding of Charter rights, it

is unclear how the Supreme Court would decide the constitutional status of the new anti-terrorist legislation." Common statements such as these are best explained, I believe, by distinguishing between what the law is and how judges, lawyers, and citizens will, could, or might apply or use the law. To return to Dworkin's argument that judges must come up with decisions in particular cases which best fit and justify past political decisions, I submit that these past political decisions can and must first be identified or determined, and that such decisions are commonly regarded as law.[15] Further, it is the identification or determination of laws which the positivists contend is a matter of social fact, which does not necessarily require resort to arguments of political morality. Dworkin can only deny this reality by conflating determinations of laws with the process of judicial decision-making. Whereas the latter may be necessarily a matter of argument of political morality, the former clearly is not.

A second argument for the distinction between determinations of laws and

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[15]Hart was of course well aware that Dworkin himself invokes a test for identifying law similar to that of the positivist rule of recognition. Hart writes "In the terminology of *Law's Empire*, the legal rules and practices which constitute the starting-points for the interpretive task of identifying underlying or implicit legal principles constitute 'preinterpretive law', and much that Dworkin says about it appears to endorse the view that for its identification something very like a rule of recognition identifying the authoritative sources of law as described in this book is necessary. The main difference between my view and Dworkin's here is that whereas I ascribe the general agreement found among judges as to the criteria for the identification of the sources of law to their shared acceptance of *rules* providing such criteria, Dworkin prefers to speak not of rules but of 'consensus' and 'paradigms' and 'assumptions' which members of the same interpretive community share." [author's note omitted, emphasis in the original] *CL* at 266. As the above argument suggests, we have good reason for describing 'consensuses', 'paradigms', and 'assumptions' as law.

determinations of cases is that the distinction captures our ordinary understanding of the evolution and development of law in the courts. The distinction captures the ordinary understanding that judges, especially those sitting on superior courts, play an important role in shaping and changing law.[16] This understanding of the precedent-setting role of judges is only possible, however, if we view past judicial (or legislative) decisions as law, since judges must be viewed as changing or developing something (i.e., pre-existing law), if they are viewed as playing a part in the evolution and development of law. But what about Dworkin's observation, upon which he draws throughout *Law's Empire*, that even in hard cases judges still view themselves as discovering or explicating what the law really is or really requires? As this observation is directed primarily against Hart's initial account of judicial discretion, I shall defer to his persuasive response to Dworkin in the "Postscript", quoted here at length:

> There is no doubt that the familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases. But how seriously is this to be taken? There is of course a long European tradition and doctrine of the division of powers which dramatizes the distinction between Legislator and Judge and insists that the judge always is, what he is when the existing law is clear, the mere 'mouthpiece' of a law which he does not make or mould. But it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process. Judges of the stature of Oliver

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[16]As I argued in chapter one and will argue again in the next chapter, in its account of Charter Challenges, inclusive legal positivism also fails to explain our ordinary view of the law-making role of superior courts.

> Wendell Holmes and Cardozo in the United States, or Lord Macmillan or Lord Radcliffe or Lord Reid in England, and a host of other lawyers, both academic and practising, have insisted that there are cases left incompletely regulated by the law where the judge has an inescapable though 'interstitial' law-making task, and that so far as the law is concerned many cases could be decided either way.[17]

Thus, as Hart points out, not all judges share the view that even in hard cases they are still discovering or explicating what the law is or really requires. In some cases they will readily admit that they must exercise a law-making power, however limited it may be.[18] (In the next chapter I shall offer further explanation of Hart's observation, and an argument for when we may determine that a judicial decision has changed or developed the law.) Therefore, the logical consequence of judicial law-making is that there must have been law before the case which was either silent on the issue at hand or vague or indeterminate and in need of judicial determination or creation. Again, I believe this observation is readily explained by a distinction between determinations of laws and determinations of cases, and that only the latter need require resort to arguments of political morality.

It is important to note that although determinations of laws and determinations of cases can be distinguished, the above observation of the law-making role of judges also

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[17]*CL* at 274.

[18]An often cited rule of thumb, at least in Canada, is that judges ought only to make or extend the law in cases or on issues which will result in small or incremental changes to the law, and that decisions which will result in widespread changes to the law or have far-reaching legal ramifications are best left to the legislatures.

suggests their connection. Just as decisions of legislatures create laws from which future determinations of laws are to made, judicial decisions or determinations of cases may[19] create laws from which future determinations of laws are to be made. For example, in common law systems (i.e., systems with a doctrine of precedent or *stare decisis*), determinations of cases in turn influence future determinations of laws, since cases once decided then become law upon which future cases may be decided.

Since so much hangs on the distinction between determinations of laws and determinations of cases, I would like to offer two further considerations in its favour. First, often the law which is relevant to a particular case is clear and well established. All that is needed in these cases is an authoritative determination of fact, namely whether or not the particular law or laws has or have been broken or followed. For example, in tort law, the tort of negligence is fairly clear: if A has a duty to B and breached that duty by not meeting the necessary standard of care, and the breach was the proximate cause of the harm suffered by B, then A is liable to compensate B for the harm done. In cases of negligence then, the law is simply determined by looking to the relevant common law cases from which it arose. The determination of particular cases of negligence, however, simply require establishing, for example, whether or not in fact A breached her duty, harm was suffered by B, and the breach caused the harm.[20] On this understanding then,

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[19]Below and in the next chapter I shall explain the qualification of 'may'.

[20]This is not to say however that in difficult cases our concepts of duty and harm, for example, may not be adapted or developed.

a determination of a case can be viewed simply as the combination of a determination of law and a determination of fact.[21] Again though, determinations of laws clearly seem to be distinguishable from determinations of cases, and such a distinction captures ordinary understanding of a large part of what judges do. I suspect that a large part of what lower court judges do is to make authoritative determinations of fact in their decisions, while leaving the state of the law untouched.

The second consideration I would like to offer for the existence of a distinction between determinations of laws and determinations of cases is based on theoretical motivations. Specifically, not all determinations of laws are made for the purposes of deciding cases or advising clients. Often legal theorists (and not just legal philosophers, but also sociologists, historians, and anthropologists of law) simply want to know what the law is in a certain community or country at a certain period in history for theoretical purposes.[22] Such purposes might include an analysis of the language typically used to frame laws, a comparison of laws across different legal systems or the same legal system at different times, or to investigate a society's laws in relation to its membership (for

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[21]We can thus see that although determinations of cases may change or develop the law, they need not do so. Determinations of cases may simply serve as authoritative determinations of facts and the imposition of sanctions.

[22]Hart is obviously aware of such theoretical purposes when he writes that "[t]hough [*The Concept of Law*] is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law." *CL* at p. v. of the Preface. See also his "Positivism and the Separation of Law and Morals," in Keith Culver, ed., *Readings in the Philosophy of Law* (Peterborough, Ontario: Broadview Press, 1999).

example, do pluralistic communities have distinct laws compared to more homogeneous communities?). Clearly such motivations and purposes suggest that determinations or identifications of laws are separate and distinct from the judicial task of determining cases.

To summarize, I think we have good reason to distinguish between determinations of laws and determinations of cases. Further, it seems that resort to arguments of political morality need only figure in determinations of cases or other official moral and political evaluations of existing law, and not in determinations of laws. (I shall strengthen this claim in the next chapter when I set out and defend exclusive legal positivism.) Therefore, as Dworkin has failed to observe the distinction between determinations of laws and determinations of cases, we have good reason to doubt his claim that law is essentially a matter of political and moral argument. It may be true that determinations of cases (i.e. adjudication) involve arguments of political morality, but it does not follow that determinations of laws involve arguments of political morality as well.

2.4. Critique of the Inevitable Moral Dimension to Legal Theory[23]

The second argument Dworkin uses to support the claim that law is essentially a

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[23]This section draws mainly on the arguments and explanations found in chapter 2 of Waluchow's *Inclusive Legal Positivism*. For a more detailed account of the relationship between value (both moral and otherwise) and legal theories, I would direct the reader to that illuminating and thorough chapter.

matter of political and moral argument is that all legal philosophy, or 'jurisprudence' as he calls it, is part of adjudication or legal decision-making, and so is inevitably morally committed. Dworkin explains why he thinks legal philosophers offer competing accounts of law with judges (and lawyers) in the following passage, quoted here at length:

> Legal philosophers are in the same situation as philosophers of justice and the philosopher of courtesy we imagined. They cannot produce useful semantic theories of law. They cannot expose the common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules. General theories of law, like general theories of courtesy and justice, must be abstract because they aim to interpret the main point of and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about the general part, the interpretive foundation any legal argument must have. We may turn that coin over. Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. *Jurisprudence is the general part of adjudication, silent prologue to any decision at law.*[24] [emphasis added]

Although we may grant Dworkin the claim that judicial decisions are moral decisions, must we also grant him the claim that legal theorists or philosophers offer theories or

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[24]*LE* at 90.

accounts of law which are in competition with those of legal participants? In response, Wil Waluchow argues that we can and should distinguish first between different levels of moral commitment, and that such differences help to distinguish the tasks of legal theorists or philosophers from those of judges and lawyers:

> One crucial difference lies in the level of moral commitment that is involved in the two different enterprises: offering value-relevant, descriptive-explanatory theories versus value-determined interpretive conceptions. Discovering certain elements of legal practice worth highlighting because they are morally relevant in no way commits one to saying that these are elements in virtue of which the practice is actually justified (or unjustified) morally. One can see that the use of coercion is morally relevant without knowing whether and when coercion is ever justified morally. One can give an account which highlights this morally relevant feature of law without arguing or even suggesting that coercion is (or is not) morally justified. In short, one can see moral relevance without making a moral commitment.[25]

Thus, theorists who offer descriptive-explanatory theories of law may be viewed as taking a more detached perspective to legal phenomena: they may observe the moral nature of judicial decision-making yet offer no account of when or how such decision-making is morally justified or yields morally justified decisions.[26] Waluchow further

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[25]*ILP* at 22-23. As Hart also notes, "[d]escription may still be description, even when what is described is an evaluation." *CL* at 244.

[26]It may be objected that such theories will not be comprehensive, but it certainly does not follow that such descriptive-explanatory theories are impossible or useless. For this and similar observations, see generally Keith Culver, "Leaving the Hart-Dworkin Debate," 51 *University of Toronto Law Journal* (2001) at 367.

argues that the identification of theorist and participant is initially suspect by way of these colourful parallels:

> One can offer a theory about what it is to be in love without actually being in love; and it is certainly true that philosophical theories about love are not themselves expressions of love. Call it what you will, but *Law's Empire* is not a love poem. One can also offer theories of sexuality without thereby engaging in sexual behaviour. Theorists do get excited about their theories; but they do not confuse this excitement with the attainment of sexual orgasm.[27]

This is not to say however, as Waluchow points out, that participants' beliefs, claims, and understandings of their practices should not be examined. Any illuminating account of a social practice must take very seriously how the participants themselves understand and view their practice.[28] "But," as Waluchow observes, "it is one thing to say this; quite another to suggest, along with Dworkin, that the only way to characterize the participant's point of view is to take it on oneself and offer claims which are competitive

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[27] *ILP* at 27.

[28] *ILP* at 27-29. As Hart also explains, "[o]f course a descriptive legal theorist does not as such himself share the participants' acceptance of the law in these ways, but he can and should describe such acceptance, as indeed I have attempted to do in this book. It is true that for this purpose the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance." [emphasis in the original] *CL* at 242.

with his."[29]

To summarize, I believe Dworkin's claim that all legal theory or philosophy is part of adjudication, and so there is no line which divides theorist from participant, has been refuted. As Waluchow persuasively explains, theorists and participants may be distinguished in terms of the level of moral (or otherwise) commitment they take towards their object of study or decision. So, it now becomes possible to claim that legal theorists or philosophers may offer accounts or theories of the nature of law which are morally detached, and so the identification or determination of law is not essentially a matter of political and moral argument.

2.5 Conclusion

In this chapter I have called into serious doubt Dworkin's view that law and legal theory are necessarily connected to morality. I attacked his claim that law is an essentially interpretive concept which requires resort to arguments of political morality to determine its content with the observation that such a claim mistakenly runs together determinations of laws with determinations of cases. While the latter may require resort to arguments of political morality, it seems clear that the former does not. I believe that Dworkin's identification of legal theorist with legal participant also fails, as theorists and

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[29]*ILP* at 28.

participants may have different tasks and levels of moral commitment to the law which they study or upon which they must decide cases or advise clients.

Chapter 3. Exclusive Legal Positivism

So far I have examined two accounts of the relation between the existence of law and official reliance on demands of morality. Inclusive legal positivists maintain that appeal to moral reasons may, but need not, figure in determinations or identifications of law. Ronald Dworkin's theory of law as integrity holds that arguments of political morality necessarily figure in determinations or identifications of law, since what law is follows from the best moral interpretation of our legal and political practices as a whole. I have attempted to show that neither of these views adequately explains certain salient features of our ordinary understanding of change in the law, the authoritative law-making role of judges, and the range of purposes in making determinations of law. In this chapter I shall present and defend what I take to be a superior account of the relation between the existence of law and appeal to moral reasons. As I shall argue, exclusive legal positivism, which maintains that appeal to moral reasons may never figure in determinations or identifications of pre-existing law, best explains Charter challenges, and also best explains the appeal to moral reasons in deciding cases in general. Exclusive positivism explains official appeal to moral reasons in cases (Charter or otherwise) as an instance of evaluation of and possibly change in pre-existing law, and not as a possible or

necessary part of the determination or identification of pre-existing law.[1]

3.1. The Exclusive Legal Positivist Account of Charter Challenges

The best known defender of exclusive legal positivism is Joseph Raz. Raz's Sources Thesis accounts for the determination of the existence, content, and meaning of valid laws as follows:

> A law has a source [and hence exists and is valid] if its contents and existence can be *determined without using moral arguments* (but allowing for arguments about people's views and intentions, which are necessary for interpretation, for example). The sources of a law are those facts by virtue of which it is valid and which identify its content.[2] [emphasis added]

Examples of sources of laws are acts of Parliament, statutory regulations, judicially

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[1]For the purposes of this chapter, and since it will not affect the present argument, I shall ignore cases in which judges resort to moral arguments to evaluate pre-existing law but in the end uphold the law. It is important to note however, and as I attempted to demonstrate in the previous chapter, such resort to moral arguments is still not best understood as part of the identification or determination of pre-existing law, as Dworkin and to a certain extent inclusive positivists would have it, but rather such resort to moral arguments is best understood as a question of whether or not pre-existing law ought to be applied or enforced. In the terminology of the previous chapter, such resort to moral arguments figures in determinations of cases, and not determinations of laws. See also note 10 in this chapter.

[2]Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 47-48.

recognized precedents, and customary legal practices observed by prosecutors. In all examples, the existence of law depends on its source, which rests with practice and recognition by legal officials.[3] For Raz, there are two arguments which combine to support the Sources Thesis.[4] The first argument is a descriptive-explanatory argument which maintains that the Sources Thesis best reflects and explains our ordinary understanding of law and its relation to morality. The second argument is a functionalist argument and turns on Raz's account of the authoritative nature of law, in which he argues that only the Sources Thesis is consistent with the authority which law claims for itself. In this second argument, Raz argues that moral reasoning cannot function as a source in the same way as Parliament, ministers, judges, or prosecutors.[5] In the remainder of this thesis I shall only concentrate on the first argument, which I believe, contrary to popular belief, is the stronger argument for exclusive legal positivism. As I shall argue, the first argument derives support from the traditional positivist commitments

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[3]Ibid. at 151.

[4]Ibid. at 48.

[5]As observed in chapter 1, it is open to Raz to claim that 'recognition', by its very nature, must ultimately rest with people (and more specifically officials); because recognition carries an active connotation, it only makes sense to claim that a person recognizes, and not that moral reasons can recognize. This is a different argument, however, from Raz's argument from authority, which claims that moral reasons cannot serve as part of the criteria of legal validity since they would vitiate law's practical authority. For Raz's argument from authority see his "Authority, Law and Morality," 68 *The Monist* 3 (1985): 295-324; and "Authority and Justification," 14 *Philosophy and Public Affairs* 1(1985): 3-29. However, I shall not defend Raz's argument from authority in this paper.

of the social nature of law and its separation from demands of morality. The first argument, which may stand on its own, also avoids making any controversial claims about the authority law claims for itself. Thus, I shall attempt to show that exclusive positivism, and not inclusive positivism, is the better development of traditional legal positivism and shall attempt to do so without relying on the more recent, and hence underdeveloped, argument from the authoritative nature of law.

So, on Raz's account, it is conceptually necessary that where determinations of law involve appeal to moral reasons, existing law is *changed*, or new law is *created*; the sources of laws (which rest solely with official acts) are being added to, repealed, or otherwise changed by the interjection of extra-legal moral considerations. It is important to note, however, that official acts or sources of laws may *direct* or *require* officials to look to extra-legal moral considerations to develop and hence change the law. Indeed, it is this connection between official acts and moral considerations which explains how law is changed in Charter cases, or so I argue below.

In "The Inner Logic of The Law,"[6] Raz identifies a puzzle in legal reasoning which arises from the following question: "How can the law provide the impetus for its own development?" The puzzle is as follows:

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[6]Joseph Raz, "The Inner Logic of The Law," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised edition (Oxford: Clarendon Press, 1996) at 238-253. Hereinafter *EPD*.

> If the law itself points to a certain rule as the right legal rule, is not that rule a legal rule now? If it is, then recognizing it and acting on it is merely acting on existing law. It is not a case of developing and changing the law. But, on the other hand, if acting on, recognizing, or enforcing the rule does change the law, if the rule is not yet a legal rule but will be made legal by its recognition, then how can it be that existing law points to it as the correct legal rule to adopt?[7]

To solve the puzzle, Raz introduces the notion of a *directed power*. A directed power is

> ...a law-making power coupled with a duty to use it, and to use it to achieve certain objectives and only them, regardless of whether or not this power is limited in the corresponding way... Directed powers are the paradigmatic case of the law providing for its own development. Here we find the law providing reasons for the introduction of new legal rules, yet those are not part of the law until enacted by the empowered authority.[8]

Further, directed powers may be of a sort where exercise of moral judgment is required on the part of an authority.[9] For example, a power may be given to a legislature to enact rules for the protection of public safety and the freedom of the individual, which clearly requires moral judgment in its exercise. By analogy, Raz argues that courts may also change and develop the law by means of directed powers, for example when they are required to decide novel cases dealing with the scope of fundamental rights of political

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[7]*EPD* at 239.

[8]Ibid. at 242.

[9]Ibid. at 243.

morality. The analogy solves the puzzle of the inner development of law for new rules may be brought into existence by means of already existing directed powers. In other words, identification of directed powers can be made positivistically, while subsequent moral reasoning in interpretation is legally- or source-authorized reasoning. The important observation is that on Raz's account, appeals to moral reasons are only involved in the creation or development of a *new* rule, and not the determination or discovery of a *pre-existing* legal rule.[10] As Raz points out, "[t]he insight embodied in the sources thesis is the importance of the distinction between those (valid or invalid) moral considerations which have received authoritative public endorsement and those which have not."[11] Further, once a moral consideration has been recognized or legally enshrined in the creation or development of a new rule, this moral consideration now becomes part of the existing law. Any identification or determination of law afterwards based on this new legal rule will no longer be an appeal to the moral consideration, but rather to an existing law, just as the Sources Thesis claims.

Raz's account reads section 15 in the context of *Andrews* as *in part* a finding of a

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[10]Raz makes a similar observation in a recent article on constitutional interpretation, there distinguishing between pre-existing, valid, binding law and the merit of this or that rule: "The merit of a rule may also be grounds for *giving* it binding force, either through the courts, by turning it into binding precedent, or by legislation. But the merit of a rule is not the sort of consideration which can establish that it is already legally binding." Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 157-158.

[11]*EPD* at 249.

legal right to equality possessed by citizens but also as the objective of a directed power of the courts.[12] When confronted with a case dealing with section 15 and a law or rule unjustifiably[13] inconsistent with section 15, the courts are obligated to make new rules or law in accordance with the fundamental principle of equality to achieve the objective of equality before and under the law.[14] The Court in *Andrews* exercised its directed power to strike down the citizenship requirement of the B.C. Law Society, which hitherto had been valid law. In the process, the Court also changed the Charter right to equality and hence made new rights-law. In the remainder of this section and the next I shall defend this understanding of *Andrews* and suggest that it best explains our ordinary understanding of the Charter and the authoritative law-making role of courts.

Before I proceed, it is important to be clear about and emphasize the precise connection between moral provisions in the Charter and directed powers. Stephen Perry

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[12]Recently, Andrei Marmor has also observed that laws which make the validity of other laws depend on certain moral or political considerations, such as the moral provisions one often finds in constitutions, are best understood in terms of Raz's notion of a directed law-making power. See Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001) at 67-69.

[13]Section 1 (reasonableness test) of the Charter is, on the exclusive account, part of the objective of each provision found in the Charter, namely that any infringement of a Charter right must be reasonable and demonstrably justified in a free and democratic society to be constitutional.

[14]Note however that this is not necessarily the case. For example, there may exist a previous case in which a citizenship requirement included as part of the requirements to practise law was struck down as unconstitutional. If this were the case, then in *Andrews* there would be no need for direct appeal to moral considerations but simply appeal to pre-existing law in the form of a judicially recognized precedent.

observes (but does not pursue in any detail) that Raz would probably characterize the moral provisions in the Canadian Charter as directed powers.[15] Insightful as this is, it is inaccurate since the moral provisions or rights in the Charter are held by individuals, whereas directed powers belong to officials such as judges. Rather, as noted above, the moral provisions in the Charter are not directed powers of the courts *simpliciter*, but only constitute the objectives of the directed powers. They are objectives which are cast in terms of the protection of fundamental rights and freedoms, which provide legal recourse to individuals to challenge existing laws. It is the conjunction of the objectives of the Charter coupled with the task of judicial review that constitutes the directed powers of the courts. Further, the objectives of the Charter are not only constitutive of judicial directed powers, but also constitute part of the directed powers of any official who has the duty or responsibility of making, amending, repealing, or otherwise changing or influencing the law, given that any of these changes must be made in light of Charter provisions. This is apparent once we recall that, on Raz's account, judicial directed powers are only one species of directed powers, another species being legislative directed powers. This observation also suggests a partial response to the political objection that the introduction of the Charter brought with it an unjustifiable and undemocratic increase in the social and political power of judges to influence and change

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[15]Stephen Perry, "The Varieties of Legal Positivism," 9:2 *Canadian Journal of Law and Jurisprudence* (1996) 361 at 367, 376.

the law.[16] Although the Charter may have increased the responsibility of judges, it also increased the responsibility of legislators, lawyers, and any other legal official in Canada charged with making, interpreting, or applying law. Observation of this shared responsibility among legal officials will play an important role in the following defense of the exclusive positivist account of Charter cases.

3.2. The Defense of the Exclusive Positivist Account

Contrary to the view that appeal to moral reasons necessarily entails the making or changing of law, Waluchow argues that exclusive positivism simply does not fit our ordinary understanding of the nature and purpose of the Charter. Waluchow points out the following option open to exclusive positivism:

> [I]t is consistent with the exclusive account to claim that the Court's decision, though it was based on the enforcement of a non-legal, moral right, *created a new legal right*. The effect of the decision in *Andrews* would have been to grant a new legal right to lawyers not to be subject to a citizenship requirement. The Court's decision, as an authoritative act with the appropriate pedigree and institutional force, was quite capable of

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[16]For an excellent response to the political objection, see Peter Hogg and Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" 35:1 *Osgoode Hall Law Journal* (1997) 75. Hogg and Bushell argue that Charter cases are best viewed as part of a 'dialogue' between the courts and legislatures, and not an usurpation of democratic power on the part of the courts. They suggest that the courts simply help the legislatures in their responsibility to Charter-proof their laws.

> creating such a legal right, just as decisions of Parliament, which are themselves often based on reasons of political morality, are obviously capable of creating new legal rights.[17] [emphasis added]

As Waluchow observes, this conclusion is counterintuitive for several reasons. First, it is simply counterintuitive since the Charter, *and not the courts*, is "...commonly conceived as a measure which creates and entrenches fundamental legal rights Canadians possess against governments and government agencies."[18] Second, although the standards of political morality such as one finds in the Charter are indeterminate, Waluchow observes that these indeterminacies are not so great as to require the creation of new legal rights on the part of judges in Charter cases.[19] A third reason weighing against the exclusive account, Waluchow argues, is that it simply cannot account for section 24(1) of the Charter:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

As Waluchow claims, exclusive positivism cannot offer any explanation of why any legal

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[17]*ILP* at 158.

[18]*ILP* at 158-159.

[19]Ibid. at 159.

remedy would be appropriate, given that the legal right would only have come into existence with the Court's decision and therefore did not exist beforehand to be infringed.

The question we must consider is whether exclusive positivism is indeed forced to conclude that, in cases like *Andrews*, the Court must have created a *new legal right*. I think exclusive positivism is not forced to such a conclusion. Returning to the exclusive account of *Andrews*, it is important to be clear about exactly how the Court's decision changed and created new law. First, we must distinguish between, on the one hand, the creation of or change in the law in the sense of the creation of new legal *rights*, such as the constitutional addition of the Canadian Charter in 1982, and, on the other hand, the creation of or change in the law in the sense of the creation of new legal *rules* of construction, which give further specification to pre-existing legal rights. In other words, a legal right may embody (or be constructed by) certain rules, which specify or make more concrete and hence *develop* that right. For example, a right to equality in Canada might include, among other rules of construction, the rule that women are not to be denied the opportunity to sit in the Senate,[20] the rule that "spouse" does not include or apply to homosexual couples for purposes of old-age benefits,[21] and the rule that Canadian citizenship is not a requirement to practise law. Further, on the exclusive account, each of these rules of construction is not yet a legal rule and so a part of the

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[20]*Edwards* v. *Attorney-General of Canada* [1930] A.C. 124.

[21]*Egan* v. *Canada* [1995] 2 S.C.R. 513.

legal right to equality until recognized by the courts or explicitly enacted by Parliament.

On the exclusive positivist account then, in *Andrews* the Court did not create any new legal right since the legal right to equality already existed. However, what the Court did create was a new legal rule of construction, namely the requirement of being a Canadian citizen to practise law in Canada qualifies as discrimination which is not demonstrably justified in a free and democratic society. This new rule of construction further specified and hence developed the pre-existing legal right to equality. Further, the Court created the new legal rule of construction by appealing, as directed by law, to fundamental principles of morality (such as the principle of equality).[22] Statutory conformity with these fundamental principles of morality constitute the objective or purpose of the directed powers granted to the courts when required to review the constitutionality of statutes or statutory provisions. Thus exclusive positivists can agree with Waluchow that understanding the Court's decision in *Andrews* as one of creating a new legal right is counterintuitive. However, simply because a legal right may be underspecified or capable of further specification it does not follow that such a right does not exist. Nonetheless, specification by appeal to moral reasons involves the creation of

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[22]It is important to note that the connection between specification and appeal to moral reasons is not a necessary one. Appeal to moral reasons may involve the creation of law wholesale, and not simply the specification or development of pre-existing law. Also, specification may result from purely definitional considerations, such as when 'spouse' is defined to include both husbands and wives. What is important however is that both appeal to moral reasons and specification involve some kind of change in the law, whether or not they are co-extensive in particular cases.

new law, as new rules of construction are created. Returning to Waluchow's objection that exclusive positivism cannot explain section 24(1) of the Charter, it is open to exclusive positivists to claim that section 24(1) protects, first and foremost, the legal rights recognized in the Charter, and only in a secondary sense the rules which *may* (but need not, as we shall see shortly) fall under those rights.[23]

It is necessary at this point to make plain the conception of change involved in the exclusive positivist explanation of the specification of pre-existing legal rights, such as the Charter right to equality before and after *Andrews*. In common law systems or systems which include a doctrine of precedent, any decision X which does not simply repeat existing law but develops the law by rendering it more determinate or by overruling a past line of precedents can typically[24] be said to change the law or make new law. In the

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[23]Admittedly, exclusive positivists must concede that this explanation does not rule out all retroactivity in the specification of the right to equality and any forthcoming remedy under s. 24; inclusive positivists may claim that any remedy provided for by s. 24 must have been, in *Andrews*, for the unjustified infringement of the right to equality which already included the rule of construction not to be subjected to a citizenship requirement to practise law. However, not all retroactive applications of laws are objectionable. While a retroactive application of a law which has the effect of punishing or harming someone is objectionable (since it seriously violates the rule of law or the maxim *nulla poena sine lege*), the application of a retroactive law which has the effect of compensating someone for unjustified infringement of a fundamental right or fundamental principle of justice (though not yet fully recognized in law) by the state is not objectionable. Further, I believe this observation holds on both moral grounds as well as descriptive-explanatory grounds in Charter Challenges and is coherent with the overall exclusive positivist picture I have sketched throughout this chapter.

[24]I say 'typically' because not all decisions which do not simply repeat existing law can be said to change the law. Although a decision may remain legally binding for the parties involved (unless successfully appealed), the decision will not change the law if it is not treated or observed as precedent by future officials. For example, we may say that *R.*

context of *Andrews*, we may say that it changed the law on two fronts: First, the citizenship requirement which was valid has now been invalidated by the authoritative pronouncement of the court. Here it is important to note the nature of the declaration of invalidity or nullification of the citizenship requirement. As Peter Hogg observes, the nullification of unconstitutional laws is always retroactive:

> A judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset...That a court makes new law when it overrules prior doctrine or even when it decides an unprecedented case is not open to doubt; but a court does not make new law in the same way as a legislative body, that is, for the future only.[25]

Elsewhere he writes

> Section 52(1) (the supremacy clause) stipulates that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This language requires a court to hold that an unconstitutional law is invalid. If a law is found by a court to be inconsistent with the Charter of Rights, the court is obliged to strike

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v. Oakes [1986] 1 S.C.R. 103 did not develop and hence change section 1 of the Charter if later judges or other officials systematically ignored it and instead devised their own ways of interpreting and applying the reasonableness test. However, since officials did (and do) rely on and cite *Oakes* in their interpretations and applications of section 1, we may say that *Oakes* did in fact develop and hence change section 1. Further, we would also say that the Court in *Oakes*, though it gave further specification (indeed very useful specification) to section 1 of the Charter, nonetheless did not create section 1.

[25]Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 1339-1340.

> the law down. The effect of such a holding is that the litigation will be determined *as if* the unconstitutional law did not exist.[26] [author's notes omitted] [emphasis added]

Clearly, what Hogg is suggesting, and which makes sense on the exclusive positivist account, is that before any court decision declaring laws to be unconstitutional and so invalid, those laws are indeed valid and do exist. This is what it means for a decision of invalidity to be retroactive. Treating laws *as if* they had always been invalid is not equivalent to those same laws always *actually* having been invalid or non-existent.[27] Further, since what was valid is now invalid, the law has changed.

The second way in which the law changed is that *Andrews* further specified the right to equality by adding to it the rule of construction that citizenship requirements are unconstitutional and hence invalid. This new rule of construction changed the legal right to equality by giving it a specification which may or may not have come about. It may not have come about since *Andrews,* or any other case dealing with the question of citizenship requirements to practise law, may never have come before the courts or have been repealed by provincial legislatures or Parliament. Alternatively, it may not have

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[26]Ibid. at 922.

[27]John Finnis gives much the same explanation of decisions of nullification as Hogg: "...legal rules about void or voidable acts are 'deeming' rules, directing judges to treat actions, which are empirically more or less effective, *as if* they had not occurred (at least, as juridical acts), or *as if* from a certain date they had been overriden by an *intra vires* act of repeal or annulment." [emphasis in the original] *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 353. Hereinafter *NLNR.*

come about if the court in *Andrews* had decided that the discrimination entailed by citizenship requirements *was* justified in a free and democratic society. (Perhaps because of a high unemployment rate of capable Canadian lawyers in B.C.) Consider also the alternative possibilities that (i) Parliament and the provinces had amended the Charter by adding a clause to the effect that the right to equality prohibits citizenship requirements to practise law, because these constitute unjustifiable discrimination, or, (ii) the B.C. legislature decided to repeal the citizenship requirement, citing as its reason perceived violation of the Charter right to equality. Observing that what Parliament and legislatures do is by definition to change or make new law (excluding consolidations), the effects on the law in both (i) and (ii) would represent changes to the legal right to equality and the B.C. Law Society's requirements. Further, it seems plausible to claim that, for example, in (i) Parliament's choice to develop the Charter right to equality by further specifying it and appealing to considerations of morality did not create a new legal right to equality, but simply created a new rule of construction. To create a new legal right to equality would presumably require changing all its current judicial specifications, its wording, and the possible grounds of discrimination it lists. In short, why should the explanation be any different, in a common law and precedent system, if the authority making in effect the same changes to the law (as could Parliament or the provincial legislatures) is the courts?

On the exclusive positivist account, then, the conception of change in the law

involved is one where legal officials of the system, be they judges[28] or legislators, make decisions which do not simply repeat existing law but rather specify or develop existing law or create new law wholesale. As well, since valid law is being changed, legal validity also follows the authoritative decisions of legal officials. I believe the exclusive positivist conception of change and validity better accounts for our ordinary view that the law, in Canada for example, is not static but is in a continuous state of development, and that the Charter (and its development, and hence appeals to moral reasons in general) represents an important part of this ongoing development. Further, this understanding of the Charter is best explained in terms of Raz's Sources Thesis and notion of a directed power, which explain how the law, for example a Charter of rights, can provide the impetus and means for the inner development and change in the law.

Finally I should like to consider explicitly one last reason Waluchow offers against the exclusive account, although my response should by now be clear. Waluchow argues that the exclusive account is completely at odds with the language Parliament chose to characterize the Charter:

> [The Charter] has a special institutional force, clearly described in section

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[28]Although it is certainly true that Supreme Court decisions change the law more so than do lower court decisions. (As well, often lower courts simply function to repeat existing law but make authoritative determinations of fact or exercise their discretionary powers to determine sentences or compensation.) I believe there is much truth in the common wisdom that cases which reach the Supreme Court of Canada do in fact present novel cases involving unsettled law.

> 52(1) of the *Constitution Act*, 1982, which claims that any law that is inconsistent with the Charter is, to the extent of the inconsistency, of no force or effect... Section 52(1) does not say that upon judicial declaration that a legal measure is inconsistent with a (foreign) right referred to, but not granted by, the Charter, the measure shall from that moment on be of no force or effect. Of course inconsistencies do not begin to exist only when judges declare that they exist. On the contrary, a judge will rule that there is an inconsistency only because he believes that a legal conflict already exists by virtue of the Charter and its various provisions.[29]

Thus, exclusive positivists must concede that, in *Andrews*, the citizenship requirement of the B.C. Law Society only became invalid upon the declaration of the Court, and, as Waluchow points out, this flatly contradicts the language of the Constitution. The problem with his argument, however, is that it overlooks an important distinction between (i) the existence of an inconsistency and (ii) the enforcement or recognition of a legal measure or right to remedy the inconsistency. Exclusive positivists need not deny that inconsistencies do not only begin when judges declare that they exist. However, the inconsistency is only recognized and given force and effect once the Court recognizes it by enforcing the existing Charter provision.[30] Inconsistencies may exist, yet go unrecognized if not enforced.[31] Thus simply because a legal measure and a Charter

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[29]*ILP* at 159-160.

[30]Of course, the inconsistency need not necessarily receive recognition from the Court. It is also possible that the B.C. Law Society may give recognition to the inconsistency by amending its requirements.

[31]A clear example of a situation in which inconsistencies existed yet went unrecognized and unenforced is *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721. In this case, the Manitoba Legislature enacted nearly all its laws in English,

provision conflict or are inconsistent, the invalidity or "of no force or effect" of the legal measure does not necessarily follow suit.[32] This explanation better reflects the view that one does not simply rest assured when a law violates a Charter provision given that the law is really non-existent or invalid, but rather one believes that something ought to be done to have the law repealed, amended, or struck down in court. Andrews may have been quite certain that the citizenship requirement of the B.C. Law Society amounted to unjustified discrimination, yet he could not simply decide himself to go ahead and practise

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which was in clear violation of s. 23 of the *Manitoba Act, 1870*, which required all laws in Manitoba to be enacted in both English and French. Thus, for approximately ninety years inconsistencies existed yet went unrecognized and unenforced. Further, and more important for our purposes, all those laws enacted between 1890 and 1985 in Manitoba clearly possessed many salient features of 'law', since they were not repealed, and were in fact used and recognized by all the relevant legal officials (including judges). Thus, if the account of change and validity I have offered is accurate, and validity is best identified with official practice or recognition, in 1985 when the Supreme Court decided to give temporary validity to the laws in Manitoba until they could all be enacted in French as well, this can be viewed simply as an extension of validity which in fact existed all along.

[32]The underlying suggestion of this line of response (which shall be more fully developed in the next chapter) is that the moral provisions explicitly recognized in the Charter are not best understood as conditions or criteria for the existence or validity of law (as inclusive positivists maintain), but rather are better understood as conditions or criteria for the *binding force* of existing law. Courts which find laws lacking the necessary binding force (and hence fail to meet the objectives of the moral provisions) may be directed to subsequently invalidate those laws. In this sense, the moral provisions may also be usefully understood as analogous in function to precepts of natural law. As Finnis points out, the precepts of natural law do not serve as validity conditions for existing law, but are rather the conditions of the binding moral force of existing positive law. A positive law which fails to secure or observe a precept of natural law is one which, under most circumstances, ought not to be obeyed, applied, or enacted, and further, ought to be repealed or invalidated. *Supra* note 27 at 23-29. Thus there may be something to the fact that constitutional law is often equated with the 'supreme' law of the land. It may suggest that constitutional law is more analogous to precepts of some higher law such as natural law rather than to conditions of validity for positive law.

law without first having this fact (if it is a fact) officially and authoritatively recognized.

Here it will be useful to make plain the precise connection between unconstitutionality and invalidity. On Waluchow's account, the connection is a necessary one. If a law is inconsistent with a moral provision in the Charter, then that law is necessarily invalid or does not exist as valid law, regardless of official practice. This follows from the inclusive positivist claim that moral provisions found in a legal system's constitution are part of that system's rule of recognition and hence its criteria for validity. This is the claim I challenged in chapter one. I suggested that this picture is too simple, since it makes an unjustifiable leap from unconstitutionality to invalidity. On the exclusive positivist account, the connection between unconstitutionality and invalidity is a contingent one. It understands the connection in terms of two steps.[33] The first step involves the determination of valid law, in which official acts or decisions (i.e. Raz's sources of laws) are identified. These are determined simply by identifying what officials actually recognize and practise as law. The second step involves the subjection of these official acts or decisions to constitutional requirements, and if the official acts are found (or decided) not to meet the constitutional requirements, then the officials engaged in the review, whether they are judges or legislators, are required to invalidate the official acts. What makes the connection between unconstitutionality and invalidity a contingent one is

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[33]In the previous chapter I explained the two steps in terms of a distinction between determinations of laws and determinations of cases, a distinction which I believe is obscured, though to different degrees, by both inclusive legal positivism and Dworkin's theory of law as integrity.

that the second step, or the duty to invalidate unconstitutional laws, may fail to take place or be carried out. In other words, unconstitutionality does not necessarily mean invalidity, though the two are certainly (contingently) connected. Further, the distinction between unconstitutionality and invalidity allows us to make sense of the ordinary view that laws which are struck down in court as unconstitutional were never 'really' laws in the fullest sense, in much the same way as natural law theorists claim that immoral laws are not 'really' laws. Although unconstitutionality or immorality may pre-exist a court challenge, invalidity or the taking out of existence of laws requires an authoritative determination by a court or some other authority, which signals a change in official recognition and practice. Indeed, if legal validity rests with the recognition of officials, and officials can and do recognize and practise inconsistent laws, then inconsistent laws may be legally valid. Such inconsistencies would then require further acts of recognition to remedy the inconsistencies, and hence change what is legally valid.

3.3. Conclusion

Departing from an analysis of judicial review under the Canadian Charter, in this chapter I have defended the exclusive legal positivist thesis that moral reasons may never be included among the criteria of existence or validity of law. In the next chapter I shall show how the exclusive positivist explanation of Charter challenges, with its distinction between validity (which is strictly a matter of official practice) and constitutionality (which

is an objective of all subordinate laws in Canada, cast in terms of the protection of fundamental rights of political morality recognized in the Charter) alerts us to one important way of expanding the separation thesis and hence its explanatory power. I shall then go on to expand the separation thesis even further, by showing how it can allow us to explain Dworkin's distinction between the role of rules and principles in adjudication in a way consistent with exclusive positivism.

Chapter 4. Expansion of the Separation Thesis

In this chapter I shall explain just how exclusive legal positivism's account of Charter adjudication expands or gives further content to the separation thesis. I shall also offer an explanation of Dworkin's account of rules and principles in adjudication which is consistent with exclusive positivism. My aim here is twofold: first, to return to the initial problem Dworkin raises against legal positivism (identified at the beginning of chapter one), offer an explanation, and identify the consequence my explanation has for inclusive positivism; and second, to show that the arguments, concepts, and distinctions deployed in the internal positivist debate between inclusive and exclusive positivism are also of distinct value in the wider Hart-Dworkin debate.

4.1. How Exclusive Positivism Expands the Separation Thesis

How then does the exclusive positivist explanation of Charter adjudication expand the separation thesis and provide an alternative to including the moral rights contained in the Charter as part of Canada's rule of recognition? Traditionally, positivists have relied on the separation thesis to observe that determination or identification of the law does not

settle the question of what one ought to do, especially in the moral sense of 'ought'. Using Hart's particular formulation of the separation thesis ("it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality"[1]), it can be re-formulated as follows: there is no necessary connection between the *existence* or validity of law and *justification* for applying, obeying or following, enacting, repealing, invalidating, or modifying the law. I shall call criteria for the former the *existence conditions of law* and the latter *justification conditions of law*. The existence conditions of law, as I have argued, are entirely a matter of social sources, which depend on who the officials of the legal system are and what they recognize or practise as law. Simply put, there is nothing more to legal validity or the existence of law than official recognition, although official recognition may come in a variety of forms.[2] To try to give further content to this explanation runs the risk of conflating recognition with what is recognized. The justification conditions of law are the demands of morality which laws or

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[1]Hart, *The Concept of Law*, 2nd ed., (Oxford: Clarendon Press, 1994) at 185-186. Hereinafter *CL*. A central reason driving the separation thesis is the ready availability of empirical examples of morally iniquitous laws. Hart also observes the reason that there is nothing to be gained in theoretical studies of law by excluding the possibility of morally iniquitous laws in our concept of law. *CL* at 209.

[2]I intend this claim to be substantially a restatement of Raz's Sources Thesis which states: "A law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's views and intentions, which are necessary for interpretation for example). The sources of a law are those facts by virtue of which it is valid and which identify its content." See Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 47-48. On my account, sources of law are simply the different forms of official recognition. In other words, a law has a source if it is officially recognized.

legal systems are expected to meet.[3] In other words, laws which satisfy our demands of morality are those which ought to be obeyed, followed, or enacted, while those laws that do not meet our demands of morality ought to be repealed, struck down, or otherwise modified. In my criticism of inclusive positivism and my defense of exclusive positivism's account of Charter challenges, I argued that constitutional rights of political morality, such as the right to equality, are best understood as part of (indeed a very important part of) the justification conditions of law, and not the existence conditions of law as inclusive positivists would have it. I argued for this claim by two related routes: first, by arguing that we have good reason to maintain that a charter of rights or constitution does not form part of a legal system's rule of recognition; and second, by observing that even though we have legally recognized certain objectives or conditions which all our laws ought to meet, in practice our officials may fail to observe our Charter rights. These arguments and observations clearly suggest, I believe, that Charter rights and provisions

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[3]I should also note that justification conditions are not restricted to moral reasons, but may include religious reasons as well. For example, the preamble to Iran's constitution reads: "The Constitution of the Islamic Republic of Iran advances the cultural, social, political, and economic institutions of Iranian society based on Islamic principles and norms, which represent an honest aspiration of the Islamic Ummah." Another possible set of justification conditions are non-moral aesthetic ideals upon which legal officials rely as they carry out their duties and practices as an expression of their commitment to the social appearance of the office of legal official and institution of law. See Keith Culver, "Legal Obligation and Aesthetic Ideals: A Renewed Legal Positivist Theory of Law's Normativity," 14 *Ratio Juris* (2001): 176-211.In light of the recent issue of Sikh constables wishing to wear traditional turbans, continuity and resistance to change in appearance of Canada's Royal Canadian Mounted Police is an example which easily comes to mind here.

function more as objectives or justification conditions for obeying, applying, enacting, repealing, invalidating, or modifying our laws, while leaving the existence conditions as a matter of what the officials on the ground actually recognize, which is a matter of social fact, just as legal positivism has always insisted.

We may also note that legal recognition of our justification conditions, such as constitutional recognition of fundamental rights of political morality, does not thereby transform those justification conditions into existence conditions.[4] This is not to say however that there are no good reasons for giving official legal recognition to fundamental rights of political morality. Such reasons might include a serious attempt to systematize our most fundamental commitments of political morality, make plain our commitment to principles of fundamental justice, or simply to test whether our fundamental commitments of political morality can be made workable in our legal practices. To repeat however, I believe that Charter rights of political morality are not best understood as part of the test of identification or determination of pre-existing law, as inclusive positivists would have it. Rather, they are best understood as fundamental legal instruments of citizens to challenge the justification of the laws which apply to them and also as fundamental objectives of

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[4]Just as I argued in chapter three that unconstitutionality and invalidity are conceptually separate but certainly contingently connected, justification conditions and existence conditions are certainly contingently connected as well. For example, finding or deciding that a law has failed to satisfy certain important justification conditions is often good enough reason to take that law out of existence. However, as I believe I have shown above, this is not done automatically, but requires an official act such as judicial invalidation or Parliamentary repeal.

official duties to strike down unconstitutional laws. As I have attempted to argue, such an understanding, which employs Raz's notion of a directed law-making power and a distinction between existence conditions and justification conditions of law, best explains Charter cases such as *Andrews*.

4.2. A Contribution to a Wider Debate

In this section I shall attempt to illustrate how an expanded separation thesis, understood in terms of the distinction between existence conditions of law and justification conditions of law, and Raz's notion of a directed power, provides a useful way of understanding Dworkin's distinction between the role of rules and principles in adjudication.[5] As I shall also argue, such an understanding will show that exclusive positivism and Dworkin's account of adjudication are in fact consistent, and this consistency has an important consequence for inclusive positivism.

In "The Model of Rules I," Dworkin defines a principle as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other

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[5]It is important to note that I am not the only one who thinks that expansion of the separation thesis is possible and indeed theoretically desirable. For example, Brian Tamanaha has recently argued that the separation thesis ought also to mean that there is no necessary conceptual connection between the existence of a legal system and its efficacy or general obedience. See Tamanaha, "Socio-Legal Positivism and a General Jurisprudence," 21 *Oxford Journal of Legal Studies* (2001): 1-32.

dimension of morality."[6] It will be recalled that in Dworkin's critique of legal positivism, he argued that the positivist test for legal validity did not and could not capture or account for principles and their role in adjudication, but could only capture rules. Thus, as Dworkin claimed, legal positivism failed to account for an important dimension in law, namely that of appeal to principles in judicial decision-making.

Although both rules and principles point to particular decisions, Dworkin draws the following distinction between rules and principles: Rules are applicable in an 'all-or-nothing fashion', and hence are either valid or invalid.[7] Principles, on the other hand, do not have an 'all-or-nothing' status, but rather have a dimension of 'weight' or 'importance'.[8] Whereas if two rules conflict one cannot be valid or relevant to the case at bar, two conflicting principles may coexist since one may be seen to outweigh the other in particular decisions but not in others. Dworkin's most famous example which illustrates the distinction between rules and principles is *Riggs* v. *Palmer*. In summary, Dworkin gives the following account of rules and principles in the context of *Riggs*:

> In cases like [*Riggs*], principles play an essential part in arguments supporting judgments about particular legal rights and obligations. After

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[6]Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 22. Hereinafter *TRS*.

[7]*TRS* at 24,27. It is important to note that positivists have challenged the understanding of the application of rules as an 'all-or-nothing' matter. See Hart, *CL* at 262, and 53n.

[8]*TRS* at 26.

> the case is decided, we may say that the case stands for a particular rule (e.g., the rule that one who murders is not eligible to take under the will of his victim). But the rule does not exist before the case is decided; the court cites principles as its *justification* for adopting and applying a new rule. In *Riggs*, the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way *justified* a new interpretation of that statute.[9] [emphasis added]

The first thing to notice is the striking similarity between Dworkin's account of *Riggs* and my earlier account of *Andrews*. On Dworkin's account of *Riggs*, the court *created* a new rule of construction for the statute of wills, and did so based on an appeal to a fundamental principle of the common law. This act of rule-creation in *Riggs* is not unlike the court's exercise of a directed power to create a new rule of construction for B.C.'s Law Society requirements in *Andrews*. In both *Riggs* and *Andrews*, the courts were directed to evaluate existing law and hence create new rules (hence creating new law[10]) in light of the objectives of the common law or constitution. We may also respond to Dworkin's empirically verified observation that in hard cases in common law practice judges pay even closer attention to past political decisions with the understanding that when judges must exercise their directed law-making powers, they are simply searching

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[9]*TRS* at 28-29.

[10]However, it is important to remember that Dworkin does not consider that the creation of new *rules of law* based on justifying principles of political morality amounts to the creation of new *law*. However, it seems hard to deny that precedent-setting cases amount to the creation of new law. Consider that future courts rely on precedents, lawyers advise their clients on the basis of precedents, and legislatures may refrain from modifying laws themselves if a court has already decided the issue.

hard for the recognized principles or objectives in light of which to make new law.[11]

The second and more important observation for my purposes is that Dworkin's distinction between rules and principles in adjudication can be understood in terms of the difference between existence conditions of law and justification conditions of law. Determinations of the existence of rules are made simply by looking to the actual practice of officials (e.g., rules laid down by legislatures or in judicial decisions), while appeals to principles are made for reasons of justifying the application of existing rules or, as in *Riggs*, to justify the creation of a new rule of interpretation or construction. In other words, determinations of rules are equivalent to determining existing law, while common law principles serve as yet another possible justification condition of existing or desirable law.

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[11]Dworkin's observation plays a crucial role in his careful rejection of conventionalism and legal pragmatism in *Law's Empire*, *supra* note 4. It is also important to note here that Raz's notion of a directed law-making power shows Dworkin's identification of two weak senses of discretion and a strong sense of discretion to be a false trichotomy. As Dworkin argues, the exercise of weak discretion is constrained by binding standards (which may require judgment and a final say) but does not involve the creation or 'invention' of new law. Strong discretion, on the other hand, is not constrained by any standards and does result in the creation of new law. However, the notion of a directed law-making power combines elements of both weak and strong discretion. Directed powers alert us to the possibility that judges (or any other official) may be constrained by binding standards (i.e. by the objectives of the law-making powers) but will nonetheless also be making or creating new law. For Dworkin's account of discretion see his "The Model of Rules I," *supra* note 2. For a response along the lines I suggest see Raz, "Legal Principles and the Limits of the Law" in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, New Jersey: Rowman and Allanheld, 1983) and "Dworkin: A New Link in the Chain" 74 *California Law Review* (1986): 1103-1119.

To avoid possible misunderstanding, it is also important to make plain the relationship between appeal to principles in adjudication and specificity or concreteness of law. This discussion will also reveal a dimension of directed powers not explicitly considered by Raz. Using *Riggs* as a hypothetical example, there are at least three possible scenarios which might arise when appeal is made to the principle that 'no man may profit from his own wrong'. First, assume it to be the case in *Riggs* that the law is unsettled on the issue of whether a murdering heir is allowed to inherit, perhaps because it is a case of first impression and there is a lack of knowable legislative intention. In this scenario, appeal to the principle 'no man may profit from his own wrong' is made to render what is unsettled more settled, by laying down the rule that murdering heirs are not entitled to inherit. So appeal to the principle is made to change the law, in the sense of creating a new rule of construction that gives greater specificity or concreteness to the law.[12] However, to provide greater specificity is not the only possible consequence of the exercise of a directed power.[13] Consider a second scenario in which it is clear that murdering heirs may still inherit, perhaps because relevantly similar decisions from supreme courts have been made in the past or Parliament, Congress, or provincial or state legislatures have enacted legislation to that end. If this were the context, then

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[12]See note 13.

[13]Raz also notes that directed powers may be exercised where the law is precise, and so is the new rule to be created. See his "The Inner Logic of the Law," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed. (Oxford: Clarendon Press, 1996) at 242-243.

appeal to the principle that 'no man may profit from his own wrong' in *Riggs* would also represent a change in the law, but not by rendering what is unsettled more settled or concrete. Rather, it would represent a change in the law in the sense of a change in direction: the rule that murdering heirs are allowed to inherit is replaced with its opposite, the rule that murdering heirs are not allowed to inherit.[14]

So far both these scenarios are well explained by directed *law-making* powers. In both scenarios, appeal is made to a common law principle, which functions as an objective of a directed power, to create new law or change existing law. However, what about a third possibility in which there already exists a rule to the effect that murdering heirs are not permitted to inherit, perhaps because of a previous supreme court decision where a murdering niece was disallowed from inheriting the estate of her aunt? If the court in *Riggs* decides against the murdering grandson, as it did, it would seem that the notion of a directed power, which is a *law-making* power, cannot explain this scenario since no new law is made. Appeal to the principle that 'no man may profit from his own wrong' in this case is made simply to give reason or justification for applying what is already an existing rule of law, that murdering heirs are forbidden from inheriting. To account for this scenario I would thus suggest that the notion of a directed power be

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[14]Of course I am assuming that future judges and lawyers follow this possible decision in *Riggs*, and that Parliament, Congress, or provincial or state legislatures do not try to nullify the decision. Otherwise the decision would only represent an isolated departure from preexisting law and would not amount to a change in the law. My account of official recognition, though vague at the boundaries, is not meant to include isolated departures which are not followed by future officials.

expanded to mean that officials are directed first to evaluate, and second only possibly to change preexisting law. Again, however, I believe this expansion of Raz's notion of a directed power is well justified and explained by the distinction between existence conditions of law and justification conditions of law. Although making existence determinations of law simply involves determining what previous courts or legislatures have laid down or recognized as rules of law, officials may be directed to explore the justification conditions of law, such as common law principles, when making decisions about existing rules. In addition to creating new rules, such decisions may include whether to repeal, modify, judicially strike down, or obey or apply existing rules of law.

There is one final observation to be made in this section. As I have attempted to show, Dworkin can be understood as giving morality or moral principles a place in the justification conditions of law, rather than in the existence conditions of law. As I have also suggested, such an understanding is not inconsistent with exclusive legal positivism, which maintains that moral reasons always figure among the justification conditions of law. This observation is significant, I believe, because of the consequence it has for inclusive legal positivism. Inclusive positivism, which maintains that moral reasons can sometimes be included among the existence conditions of law, loses much of its motivation and initial plausibility if it is in fact true that Dworkin, who is traditionally understood to claim a much stronger connection between law and morality, does not treat moral standards or principles as among the existence conditions of law. This is so because inclusive positivism was meant to occupy a middle ground between, on the one

hand, the exclusive positivism of Raz and, on the other hand, Dworkin's theory of law as integrity or natural law theory.[15] If my analysis of Dworkin is accurate, then there is no such middle ground, since Raz and Dworkin can agree that moral reasons or principles figure among the justification conditions of law, and not among the existence conditions of law.

4.3. Conclusion

In this chapter I have attempted to make plain just how exclusive positivism gives further content to the traditional positivist separation thesis. I have argued that even though moral reasons or rights may be included in a legal system's constitution, such moral reasons or rights do not then become part of the existence conditions of law. Rather, they remain part of the justification conditions for applying, creating, invalidating, or modifying law. I have also argued that Dworkin's account of rules and principles in adjudication is consistent with the exclusive positivist account of official reliance on moral reasons, and that this consistency deflates much of the initial appeal of inclusive positivism.

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[15]Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994) at 3.

Conclusion

In this thesis I have argued that exclusive legal positivism provides a better account of judicial reliance on moral reasons or arguments than does either inclusive legal positivism or Dworkin's theory of law as integrity. Specifically, I have defended the view that judicial reliance on moral reasons is best understood as the exercise of a directed law-making power, and not the discovery (whether possible or necessary) of pre-existing law. To illustrate the defence of exclusive positivism, I have relied throughout on judicial review under the Charter, commonly thought as a central illustration of inclusive positivism. My primary conclusion from the exclusive positivist account of Charter cases is that we must recognize how the traditional positivist commitment to the separation thesis can be expanded. Not only is there no necessary connection between the existence of law and the demands of morality, there is also no necessary connection between the existence of law and constitutional objectives (i.e., legally recognized demands of morality). In other words, moral demands still have the same function or nature, namely to be evaluative or *justificative* standards or conditions for the obedience to, application, enactment, repeal, invalidation, or modification of laws, regardless of whether such moral demands are legally recognized in something like a constitution or

not. I have further argued that once we recognize how the separation thesis can and should be expanded, we are able to recognize how it may explain Dworkin's distinction between rules and principles in adjudication, which has been the leading cause of so much contemporary positivist writing.

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