

**MORALITY IN LEGAL PHILOSOPHY**

**MORALITY IN LEGAL PHILOSOPHY**

By

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## ABSTRACT

Moral concerns should be relevant to the choice of the best legal theory on both theoretical and moral grounds because social practices such as law can change due to the theorizing activity. Hart's concept of law provides grounds for claiming that rules of social morality can constrain law in more ways than he admits in his minimum content of natural law. The belief that social morality constrains valid law allows one to treat the question of civil disobedience as sensitively as a legal positivist and leads to neither anarchism nor passivism. At the other extreme, Dworkin's law as integrity interpretation, which claims law is concerned with political morality through and through, leads to morally regrettable consequences when adopted as a normative theory of adjudication. Theoretical difficulties also flow from Dworkin's identification of the role of judge and legal theorist: that a legal theorist must be a participant in any legal system she interprets does not mean she should adopt or exclusively focus on a judge's perspective on that system.

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## INTRODUCTION

One facet of the dispute over the nature of law and legal systems that developed between Dworkin and Hart and other legal positivists was the relationship of a theorist of a social practice to the community under study. While in "The Model of Rules I",<sup>1</sup> the dispute seems to centre on the difference between a rule and a principle, in the later essay, "The Model of Rules II",<sup>2</sup> the difference between a social rule existing or being accepted mentioned in the earlier article now becomes a much more central element, and is the turning point from Hart's sociological approach,<sup>3</sup> which asserts a social rule, to Dworkin's approach, which asserts a normative rule.<sup>4</sup> The social rule theory

believes that the social practice *constitutes* a rule which the normative judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states.<sup>5</sup>

This difference underlies the 'participatory' approach of *Law's Empire*, where the evolving dispute is now characterized in the following terms:

it is essential to the structure of such a practice that interpreting the practice be treated as different from understanding what other participants mean by the statements they make in its operation. It follows that *a social scientist must*

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<sup>1</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard, 1977), pp. 14-45.

<sup>2</sup> Ronald Dworkin, *Taking Rights Seriously*, pp. 46-80.

<sup>3</sup> "Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology." From the Preface to H. L. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), p. v.

<sup>4</sup> Dworkin, *Taking Rights Seriously*, pp. 50-1.

<sup>5</sup> Dworkin, *Taking Rights Seriously*, p. 57.



*participate in a social practice if he hopes to understand it, as distinguished from understanding its members.*<sup>6</sup>

For Dworkin, giving an interpretation of a practice involves making it the best it can be, an exemplar of its genre or form. One weak sense included in the idea that the theorist must be a participant is that she must be capable of understanding the viewpoint of a participant in the practice; one must share a form of life sufficiently similar to them to be able to take on their perspective at least in imagination.<sup>7</sup> This much would be granted by Hart et al. as a presupposition of being able to explain a practice as having an 'internal point of view'.<sup>8</sup>

But Dworkin means much more than this, as the above quote illustrates. In *Law's Empire* he explains what the law is by adopting the perspective of an imaginary judge, Hercules, who must decide cases in a court in a particular legal system. In Chapter 3 I will examine this theory in more detail, with particular attention to the manner in which Dworkin and Hercules participate in the practice of the legal system. I will claim that Dworkin misunderstands the way in which he and Hercules participate in the practice.

Chapter 1 also confronts the question of the way in which a legal theorist participates in a social practice of law. In it I set out my ideas on this issue by examining whether moral concerns should be incorporated into legal theorizing. While Chapter 3 concludes that morality is not the only end which should be pursued, Chapter 1 labours to show that morality should be considered at all. Whether morality should be considered

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<sup>6</sup> Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap, 1986), p. 55 (italics added).

<sup>7</sup> Ibid., pp. 63-4.

<sup>8</sup> Cf. Hart, *The Concept of Law*, p. 55.

hinges, in my argument, on the fact that legal theorists are participants who can affect the practice. If the other participants in the practice are as little affected by the work of legal theorists as the laws of gravity are by the work of physicists, then my argument that moral concerns are relevant to legal theorizing fails. This chapter criticizes recent work of Waluchow's.

Chapter 2 is devoted to a critique of Hart's work on the separation of law and morals that was done early in his career. While the question of the relationship between the theorist and the legal community under study is not front and centre, an answer to it is nevertheless implicit in my own and Hart's engaged appeals to the moral consequences of adopting different legal theories, as well as our arguments for the intellectual coherence of our views. I prove the surprising result that Hart's positivist conception of law has conceptual links to social morality, at least as he construes it. These links are not nearly strong enough to show that all positive laws are worthy of obedience. Indeed, without being forced into the radical view that all existing positive law is null, I show how social morality can be used to make sense of the claim that what human officials declare as valid law occasionally may not be valid law, and should therefore perhaps not be obeyed.

My principal aim in this thesis is to argue for two claims: that moral worth is one criterion amongst others by which a legal theory should be judged; and that morality is one aspect of law, amongst others. The first chapter concentrates on the former claim, while the second chapter focuses on the latter. The last chapter attempts to treat both claims, showing that in neither case is morality the sole concern.

## CHAPTER 1: LEGAL THEORY AND ENGAGED MORALITY

The possibility of choosing a theory on moral grounds is a central note in the chord Dworkin strikes in the following passage and elsewhere.

If the strong version of that [social rule] theory<sup>1</sup> were right then one could not argue that a community was committed to any morality of duty, by its traditions and institutions, except the morality recognized in its uniform social practices, which generally embrace little of much significance. This is, I think, the most important consequence of the social rule theory for jurisprudence, and the most compelling reason for insisting that that theory is wrong.<sup>2</sup>

By wrong, I interpret Dworkin as meaning both theoretically and morally wrong: it is the second of these two strands that takes on greater prominence in his later writings. In this chapter I argue one should consider moral factors when deciding which legal theory one should accept, advocate and act upon.

In his first book Joseph Raz used a temporal distinction, between a momentary legal system and a legal system *tout court*, to criticize Austin's theory of law as the command of a sovereign. The first "contains all the laws of a system valid at a certain moment," while the second contains all of the laws of all of the (necessarily non-empty) momentary legal systems which are subclasses of it.<sup>3</sup> Austin cannot account for the

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<sup>1</sup> The social rule theory "argues, in its strongest form, that no rights or duties of any sort can exist except by virtue of a uniform social practice of recognizing these rights and duties." Dworkin, *Taking Rights Seriously*, p. 48. He also argues for the inadequacy of any weaker form of the theory.

<sup>2</sup> *Ibid.*, p. 80.

<sup>3</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon, 1970), pp. 34-5.

continuity of a legal system upon the change of a monarch; at best he provides a theory of momentary legal systems. In this chapter I hope to highlight the importance of another temporal distinction by showing that purely analytical accounts of particular existing legal systems and of legal systems in general cannot be complete; at best they provide retrospective accounts which are completely accurate. Because humans can and do understand accounts of their practices and modify these practices on that basis, the present is a special moment in which an understanding of our past can affect our orientation towards the future, thereby changing that future. Theories which acknowledge this indeterminacy of the future, and take account of it in their construction, are to be preferred even though they are also incomplete.

This preference could have several modalities. As a preference it is necessarily the result of an evaluative judgement. Four evaluative endeavours can be distinguished, although I do not wish to maintain any one can be strictly separated from the all the others in comprehensive legal theorizing: meta-theoretical, theoretical, normative, and moral. What criteria should be used to judge which theory is better is a meta-theoretical question. It is often the case that different legal theories see themselves as answering different questions. Which theory is better based on a given weighting of meta-theoretical criteria and by how much are questions I am terming theoretical. What action ought to be taken based on the previous judgements is a normative question differing slightly from the less general, moral question of what action ought morally to be taken based on the previous judgements.

Raz divides practical philosophy into a substantive and a formal part, without believing these parts are entirely independent.<sup>4</sup> The argument which follows can be seen as

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<sup>4</sup> Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), p. 10.

showing one way in which the articulation of the results of formal conceptual analysis is subject to substantive considerations. It is based on the idea that advocating a certain understanding of a concept such as 'law' and 'legal system' can affect how this concept is understood by the community under study, which may involve changes to their practices, whether intended or not by the analyst.

Theories which aim solely at improved understanding I term variously descriptive, analytic or detached in this chapter: descriptive emphasizes their aim of grasping an object in the mind; analytic emphasizes that this involves abstraction and selection of important features; while detached emphasizes the refusal of the theorist to use moral grounds to select the best theory. If a theorist were detached in the sense that what she said or published had no possible effect on the self-understanding or actions of the participants of a practice, then the concerns about morally significant consequences which are the focus of my argument would be moot.<sup>5</sup> My interest lies with those who believe that theorists are and should be detached in another sense--that even knowing that, say, morally regrettable results will follow, a theorist should nevertheless press ahead and let the truth be known. Detachment in this sense is an impervious disregard for the moral consequences of theorizing. I contrast this with the engaged theorist, who acts with an understanding that her theorizing can come under the purview of morality, and that she may face dilemmas which may force her to choose between the virtues of speaking the truth and promoting goodness (or rightness).<sup>6</sup>

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<sup>5</sup> The argument as I have developed it presumes a consequentialist morality. It may be possible to develop an analogous argument based on the deontological dictum that people should never be treated as means, but as ends. My optimism springs from the large agreement between the two theories in terms of practical conclusions.

<sup>6</sup> Moral arguments have been advanced to show goodness (or rightness) is always served by speaking the truth. I do not believe this to be so. Although I do not undertake a general defence of this position against, e.g., Mill, I do give at least one counterexample which some will find convincing.

My argument will proceed as follows. I will first show that social theories are at best retrospectively complete. The articulation of what is intended as a descriptive, analytic account may itself change the practice, making that account more or less accurate. Theories can make a difference, though they may not. As well as being a theoretical act, the decision to propound or dismiss, to accept or reject a theory is also both a moral and a meta-theoretical act, and is subject to evaluation on both grounds. I argue that there may be cases in which our theoretical fallibility combined with our expectations of the moral effects of different theories make it preferable to choose a theory on moral grounds. Thus the meta-theoretical criteria for choosing a legal theory should include moral as well as non-moral factors. Before concluding, I address a few issues raised by the discussion, including the ways legal theorists affect legal practice and why the normative concerns argued for will typically include a moral component.

### **Detached Theory**

To aid exposition it is often useful to employ a foil to make one's own position clearer by contrast. The first stages of my argument deal only with simpler and weaker versions of this alternate position. Even in the end, there will still be opportunity for reasonable disagreement if the contrasting position I have chosen is modified in a way I outline. The position I will be arguing against in this paper was adopted by Wil Waluchow in a paper entitled "The Weak Social Thesis"<sup>7</sup> and further developed in his recent manuscript, "Charter Challenges: A Test Case for Legal Theory."<sup>8</sup> In the earlier paper Waluchow finds it "highly questionable"

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<sup>7</sup> W. J. Waluchow, "The Weak Social Thesis", *Oxford J. of Legal St.*, Vol. 9, No. 1, pp. 23-55.

<sup>8</sup> Forthcoming in *Osgoode Hall Law J.*. All page references are to the typescript version.

to reject a theoretical position because its acceptance is viewed as morally and politically dangerous. The truth of a proposition and the practical consequences of its acceptance are, in general, two entirely different matters, as scientific revolutionaries like Copernicus and Galileo were all too aware.<sup>9</sup>

Waluchow makes this statement in the context of an examination of Hart's and Bentham's claim that the failure to keep law and morals distinct would lead to either reactionary or anarchistic thinking, both morally regrettable extremes. Since my concern in this chapter is to establish the importance of morality (broadly construed as including both personal and political values) to the evaluation of competing theories of law, I do not need to examine whether the specific causal connections advanced by the earlier positivists and rejected by Waluchow are indeed legitimate. (Chapter 2 examines Hart's argument in more detail.)

"Charter Challenges" sets out to establish that legal positivism, traditionally associated with the doctrine that "The existence of law is one thing; its merit or demerit is another,"<sup>10</sup> should include moral standards amongst "the possible grounds for determining the existence and content of valid law."<sup>11</sup> It distinguishes two types of legal positivism: Inclusive Legal Positivism,<sup>12</sup> which includes morality in these matters, and Exclusive Legal Positivism,<sup>13</sup> which excludes it. The former proposes that legal systems *may or may not* include morality amongst the grounds for determining the existence and content of valid law, while the latter definitely excludes it. Waluchow believes Inclusive Legal Positivism

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<sup>9</sup> Waluchow, "The Weak Social Thesis", p. 28.

<sup>10</sup> John Austin, *The Province of Jurisprudence Determined* (1832), Lecture V (1954 edition), pp. 184-5.

<sup>11</sup> Waluchow, "Charter Challenges", p. 2.

<sup>12</sup> Waluchow cites, amongst others, Jules Coleman, "Negative and Positive Positivism", *J. of Legal Studies*, Vol. XI (1982), p. 139; David Lyons, "Principles, Positivism and Legal Theory", *Yale Law J.*, Vol. 87 (1977), p. 415; John Mackie, "The Third Theory of Law", *Philosophy and Public Affairs*, Vol. 3 (1977); and W. J. Waluchow, "Herculean Positivism", *Oxford J. of Legal St.*, Vol. 5 (1985), no. 2, pp. 187-210.

<sup>13</sup> Cf., e.g., Joseph Raz, *The Authority of Law* (Oxford: Clarendon, 1979), p. 49.

provides a better theoretical account of law since it is more descriptively accurate. Its acceptance will have important implications to the practice of judges deciding particular cases, such as those exemplified by challenges to the validity or content of laws under the Canadian Charter of Rights. He emphasizes that there are "pragmatic connections here which can easily have a profound bearing on practice",<sup>14</sup> and that "the choice of a philosophic theory concerning the nature of law can have a significant effect upon legal practice".<sup>15</sup> In this more recent paper he hardens his position by stating that these pragmatic results are not just of questionable relevance to the theorizing activity but definitely irrelevant.

One apparent circularity in this reasoning is this: Inclusive Legal Positivism is better since it describes better what judges do and say; yet there are supposed to be practical consequences in what judges say and do which result from judges' choice of Inclusive Legal Positivism as best describing what they say and do. To refuse to allow moral considerations standing when evaluating a social theory, and then to claim that there are practical and presumably moral consequences which proceed from this theory, is to claim that moral considerations are in some sense excluded from the debate about how the practice should develop. It might be supposed that either the theory is taken as having probative force in determining how the practice should develop, in which case it is providing a normative definition, not simply a description; or the theory has no force on its own in determining how the practice should develop, and simply happens to cause changes due the haphazard constellation of occurrent causal factors. Although Waluchow never explicitly confronts this issue, he seems to adopt the second of these alternatives. Thus, even though the practical consequences of his theory can be evaluated morally, one should

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<sup>14</sup> Waluchow, "Charter Challenges", p. 3.

<sup>15</sup> Waluchow, "Charter Challenges", p. 18.



not consider these moral implications in deciding whether to accept his theory of law. The only appropriate criterion is descriptive accuracy--truth outweighs any other virtue. Focusing on the feedback between practice and theory in this account will reveal this construal of Waluchow's position, in order to be true, would have to be either false or incomplete.

As an initial approach to the problem, note that there is a debate within judicial practice about the appropriate way to interpret laws such as the Canadian Charter of Rights and Freedoms. Waluchow claims that Inclusive Legal Positivism is more descriptively accurate since it more accurately reflects how judges interpret these laws. Although he never explicitly states the point, it is clear that his argument for Inclusive Legal Positivism in section II "Inclusive Legal Positivism vs. Exclusive Legal Positivism", combined with his characterization of the various positions in the debate over the proper interpretive approach of judges in section III "Does It All Really Matter?", shows that the actions of the Canadian judiciary in their interpretation of the Charter have been 'activist' rather than 'literalist' or 'intentionalist'. Section II shows that "the [substantive] moral standards employed in *Charter* cases sometimes function as *tests for the existence and content of valid law*,"<sup>16</sup> while section III states that literalist and intentionalist theories are "thought to require political and moral 'neutrality' on the part of judges." For these 'restraint' theories, "constitutional interpretation is a value-neutral activity."<sup>17</sup> Activism, by contrast,

is commonly thought to require that judges take an active part in ensuring that the constitution is consonant with current trends in political morality . . . [and that] reference to political morality is essential to determining what the constitution 'really means' within its contemporary context.<sup>18</sup>

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<sup>16</sup> Waluchow, "Charter Challenges", p. 12.

<sup>17</sup> Ibid., p. 19.

<sup>18</sup> Ibid., pp. 19-20.

The extent to which the two elements of activism in this characterization--its reference to political morality, and the variability through time of the decisions reached using this interpretive approach--are separable is a question that Waluchow does not raise.<sup>19</sup> The first element is the crucial one at this stage in the present discussion. Judges prefer to apply the law, and to be seen to apply the law, rather than to create it or to be seen as creating it. Inclusive Legal Positivism allows them to make recourse to morality without stepping outside the law, while Exclusive Legal Positivism at best portrays them as being called upon by law to step beyond the law.<sup>20</sup> Given their reluctance to approach the archetype of the law-giver, Exclusive Legal Positivist judges would be more likely to shy away from arguments of political morality in interpreting the *Charter*, while Inclusive Legal Positivist judges would not. Inclusive Legal Positivism will provide the theoretical underpinning which activist judges may have been lacking and of which they must have felt the need. As well, it will allow those judges mired in judicial restraint for want of a theoretically acceptable alternative an opportunity to escape from this bog and become more activist, however partial this change of camp may be. In any case, the practical consequences which Waluchow believes would attend each theory's acceptance is that theory's own self-fulfilment. Its acceptance leads to changes in the practice which make the theory more plausible and descriptively accurate.<sup>21</sup>

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<sup>19</sup> Another element which seems to enter the broad activism/restraint debate is the extent to which judges should decide on matters of policy, e.g., the best way to effect racial integration.

<sup>20</sup> I agree with Waluchow that this latter response to his attack would be weak, on the grounds that it saves Exclusive Legal Positivism by conceding the point of the dispute between it and Inclusive Legal Positivism while making the dispute between them merely verbal.

<sup>21</sup> Dworkin makes a similar claim in *Law's Empire*, p. 407, about optimistic and pessimistic (i.e., sceptical) attitudes to the law contributing to their "own vindication."

Consider first the unpromising construal of Waluchow's position which assumes that an analytical theory has probative, normative force; that there is a priority of theory over practice, with theoretical questions answered first, and practical consequences following. Many more practically-minded people take the exact opposite approach, saying this reverses the proper relation. For them, if a social theory's consequences are undesirable, then the theory should be rejected. As both Waluchow and Hogg wryly note, U.S. political 'liberals' were against judicial 'liberalism' (another name for 'activism') before 1937, "when progressive social and economic legislation was threatened by activist judicial review" yet have been for it since 1954, in a period where it made "an important contribution to the elimination of racial discrimination."<sup>22</sup>

It is interesting to note that a number of authors in the philosophy of science such as Feyerabend, Lakatos and Kuhn have rejected the priority of theory over practice in science. If their plausible findings are correct, this would undermine the use of physical science analogies in rejecting the possibility of using the moral consequences of a social theory to evaluate the adequacy of the theory. Feyerabend, for example, writes that a

theory of science that devises standards and structural elements for *all* scientific activities . . . is much too crude an instrument for people on the spot, that is, for scientists facing some concrete research problem.<sup>23</sup>

My main worry, which will become clearer in the course of the chapter, is that Waluchow has tried to use, if not a theory of science *per se*, a methodology of inquiry that is unsuited to his problem: different problems dictate different criteria for measuring success. Because of this, he ends up with a comprehensive theory of law that is too crude for judges in courts facing concrete legal problems and which is too crude to represent their actions.

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<sup>22</sup> Peter Hogg, *Constitutional Law in Canada* (Toronto: Carswell, 1985), p. 99n92, as quoted in Waluchow, "Charter Challenges", p. 19.

<sup>23</sup> Paul Feyerabend, *Against Method* (London and New York: Verso, rev. ed. 1988), p. 1.

While the former may not be a goal of Waluchow's even though he expects pragmatic effects on judges to follow from his theory's acceptance, the latter point is a definite concern of any theory which aims to correctly identify valid law. The most troublesome passage occurs in "Charter Challenges":

The practical implications of a philosophical theory's acceptance (or rejection) have no probative force at all when it comes to considering its truth or adequacy. It has no more force than the fact that acceptance of the Copernican theory had profound, and perhaps somewhat undesirable, social effects. . . . Yet these facts [about the undesirable effects of Copernicanism] in no way argued against the scientific adequacy or truth of what Copernicus had set out to prove. The same is true in philosophy. The theoretical adequacy or truth of a philosophical theory is uninfluenced by the practical effects of its acceptance or rejection.<sup>24</sup>

I hope to show a legal theory's acceptance or rejection can directly affect its adequacy or truth. Given this malleability of truth, moral factors should be considered when deciding how it should be formed by legal theory.

In "The 'Forces' of Law"<sup>25</sup> Waluchow distinguishes theories of law, adjudication and compliance. The first try to describe which propositions of law are true, the second deal with the institutional forces placed on judges in different courts and situations, and the third concern "the (normal *or* exceptional) moral force of the existing law, both for judges and for private citizens."<sup>26</sup> Taken together, these would amount to Waluchow's version of what I call a comprehensive theory of law. All three of these theories are about normative practices. I understand "Charter Challenges" to indicate all this theorizing should be done in a detached rather than engaged manner. Thus the latter two theories are also philosophical theories whose truth should be unaffected by their acceptance or rejection.

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<sup>24</sup> Waluchow, "Charter Challenges", p. 22.

<sup>25</sup> Wil Waluchow, "The 'Forces' of Law", *Canadian J. of Law and Philosophy*, Vol III, No. 1 (Jan., 1990), pp. 53-69. All page references to this article are to the author's proof version.

<sup>26</sup> *Ibid.*, p. 58.

Even if it was accepted that one of them, perhaps the theory of compliance, should be engaged while the other two should be detached, the argument which follows would still show why the two detached theories should be engaged theories in an engaged comprehensive theory of law.

### **Theorizing Affecting the Object of the Theory**

Just as one aim of physical science theories is an improved understanding of our physical universe with an end to using this understanding for applications of use to us, so one aim of social theories such as comprehensive theories of law is an improved understanding of our societies with an end to using this understanding for applications of use to us. Just as a physical science theory is adequate from an applied perspective insofar as it allows us to, say, construct useful technology, so a social theory is adequate from an applied perspective insofar as it allows us to, say, change some social practice in a useful way. Under the appropriate light, an aim of both is seen as furthering human welfare.

Note that this is not intended as an argument for the absolute priority of practice over theory. Just as physical science can be approached in a 'pure' fashion, as an end in itself, so can social theorizing. It may even be that more and better applied social results will accrue given this approach, just as there is widespread recognition applied research in the physical sciences can be limited by a lack of pure or basic research. This question will be examined below. The question I would like to raise now is whether even pure social theorizing can ignore the practical effects of theorizing. After all, moral consequences can be changes in the very phenomena under study in social theorizing, as Waluchow has argued. So even though the practical consequences with which the above mentioned philosophers of science were primarily concerned were not moral, this simply serves to highlight an important disanalogy between the objects of physical science and

social theories: moral consequences are more directly relevant to the object of study of a social theory than to that of a physical science theory.<sup>27</sup>

A crucial difference between a social theory and the natural science theory cited above makes Waluchow's use of an analogy between a theory of law and a theory of physics suspect. The difference springs from the interaction between theory and human practices when the theory is about human practices. While it is at least arguable and commonly accepted that our inquiries do not change the subject matter of discussion in the case of natural sciences such as physics,<sup>28</sup> the same cannot be said so easily of the human sciences. Humans can understand the results of inquiries into their behaviour and modify their behaviour and self-understanding on this basis. Theoretical developments can cause and provide reasons for developments in practice. Any theoretical endeavour which ignores these effects is inadequate to its subject matter, since it ignores an important feature of what it is trying to describe or analyze. Thus, if the question 'What is law?' is construed in such a way that they are ignored, which Waluchow's detached rendering of this question does, then it is an inadequate question for its subject matter. The same is true for detached theories of adjudication and compliance. These general insights guide the following investigation.

### Limits to Social Theory Truth

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<sup>27</sup> I avoid saying moral consequences are irrelevant to physical science theories in order to avoid taking a stand on an issue outside the scope of this paper. The weaker position I adopt allows this as one possibility.

<sup>28</sup> This has been challenged by those involved in the interpretation of Hiesenberg's Uncertainty Principle in quantum physics as well as those scientific anti-realists who hold that our scientific theories contain abstract entities that do not necessarily correspond to an entities in (physical) 'reality'.

Legal theories on their own do not shape the law. Legislators can change it by passing documents such as the *Canadian Charter* which prompt a different style of interpretation. More relevant for our purposes are judges, who as the final arbiters of the law, can also take steps which make one of the possible evolutions (whether theorized beforehand or not) a reality. Their evaluations about the moral merits of different conceptions of law may or may not enter their decision to practice either an activist or restrained style of interpretation.<sup>29</sup> While Waluchow believes one implication of his theory of law is that it provides activist judges with a theoretical basis for their practice and helps restrained judges to become activist, neither an activist nor a restrained judge will be affected solely by what "Charter Challenges" offers. An activist judge needs to know the moral effects of the various theoretical possibilities before choosing an action, effects which this article does not evaluate. A restrained judge, on the other hand, is not provided with an account of why she *should* adopt a style of interpretation which included reference to morality, after she had granted the superiority of a theory of law which allowed a place for both styles. Let us consider these two cases in more detail.

There are two ways in which Waluchow's argument for the practical relevance of legal theorizing would apply to the case of judges who practice an activist interpretive style without knowing about Inclusive Legal Positivism. The first involves an Exclusive Legal Positivist judge who was reluctantly and only mildly activist, viewing his recourse to morality as a law-giving rather than law-applying action. Inclusive Legal Positivism may

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<sup>29</sup> In legal theory, all possible combinations may be found. Thus, moral and theoretical grounds have been used to support a moralistic conception of law in natural law theories; Hart has put forth both amoral and moral arguments for a positivist theory of law; N. MacCormick in "A Moralistic Case for Amoralistic Law", *Valparaiso Law R.*, Vol. 20, p. 1, argues for restraining recourse to morality in the law on moral grounds, developing a point Hart enunciated in "The Separation of Law and Morals" and in *The Concept of Law*, pp. 206-7; and Waluchow states that an amoral theory supports moralistic law (as well as amoralistic law) in "Charter Challenges".

engender a bolder activism in him when the fetter of this scruple is removed. The second case is one in which an activist judge who, if challenged to provide a theoretical basis for judicial activism, would be unable to do so, and would take this as sufficient grounds for changing interpretive styles. If such a judge were able to discover Inclusive Legal Positivism before she had to respond to the challenge of finding a theoretical basis for her activism, then Waluchow's theory would be producing a practical consequence, namely, the fact that she did not change her interpretive style. This judge would be accepting the priority of legal theory over her legal practice.

Consider now the case where the second judge discovered Inclusive Legal Positivism during her search for a theoretical foundation. It needs to be noted that Inclusive Legal Positivism as a theory of law merely shows that *both* activism and restraint are viable interpretive styles, since it claims only that the resolution of legal questions *can, but need not*, require the resolution of questions of morality. For the judge in this case to conclude she should continue her judicial activism, or for the first judge to be further emboldened in his activism, they would need to engage in some reasoning process beyond that required to establish the theoretical superiority of Inclusive Legal Positivism.

For there to be practical consequences of legal theorizing for a judge who practices judicial restraint in the interpretation of documents such as the *Charter*, this judge must also engage in more cogitation than is required to see the merit of Inclusive Legal Positivism as the best general (descriptive/analytical) theory of law. This is the same type of reasoning to which reference was made in the previous paragraph. An argument must be made that she should sometimes resort to moral reasoning when deciding cases in her own legal system. There are two ways in which this can be done. The first, however, is dependent on the second.



The first way is exemplified in "Charter Challenges" itself. It involves showing that authoritative precedent requires reference to morality in certain cases. Waluchow argues convincingly that because of certain decisions of the Supreme Court of Canada and other lower courts, Sections 15 and 1 of the Canadian Charter must now be interpreted in a way which admits moral arguments at several stages. This amounts to showing morality is relevant by precedent. This method is consonant with the position that descriptive accuracy rather than moral merit is the proper basis for judging theoretical adequacy, and that theory has priority over practice. On this account, a judge would develop a detached theory of her own particular legal system, and use this to decide how she should practice adjudication.

More interesting for me is the reasoning which led to the setting of these sorts of precedents in the first place. The previous method is parasitic on the existence of such precedents, for if no such precedents existed a legal system could not evolve from one practicing judicial restraint into one practicing judicial activism. History provides examples of the interpretive styles of legal systems changing, and I would like to cite one particularly marked example. But first a quick characterization of what the interpretive style of a legal system is in order.

The concrete setting in which judges act in their institutional role is a court, which in modern states is only one part of a much larger legal system. When discussing styles of interpretation in different legal systems, I am referring to the actions of judges in courts within such a system, with the interpretive style of a court loosely taken as the one used by most judges in that court most of the time. A theory of adjudication for most if not all modern legal systems would show that generally in such a system courts at the same level practice the same interpretive style, while those of different levels practice different

interpretive styles, with lower courts being more restrained. There is often a great deal of consensus about how precedent binds lower courts, with simple obscurity or outright disagreement rising as one reaches the apex of the appellate courts about the actual and/or suitable degree of activism for the court.<sup>30</sup> This disagreement may be reflected in the division of the justices of these courts on this matter, with the balance of opinion changing in the case of the U.S. Supreme Court with the appointment and retirement of various judges. While a change in the interpretive style at any level would constitute a change in the interpretive style of the legal system, I am most concerned with changes in final courts of appeal, since they are the final arbiters of the law. The combination of what Waluchow calls a theory of adjudication and that part of a theory of compliance which specifies the conditions under which a judge has moral right or duty to try to escape the law's institutional force,<sup>31</sup> inasmuch as these theories describe the actual or counterfactual actions of judges in a legal system, would describe the interpretive style of that legal system.<sup>32</sup>

In 1966 the British High Court explicitly rejected the doctrine of strict interpretation for itself even though they admitted that this modified their "present practice".<sup>33</sup> Strict interpretation, although formulated differently in different jurisdictions, requires that a court be bound by earlier precedents of courts at the same level or by

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<sup>30</sup> This point is made by Raz in *The Authority of Law*, p. 190. He cites *Davis v. Johnson* [1978] 1 All E.R. 1132 where the British Court of Appeal may have overruled its own precedent, even though in the past it was thought to be strictly bound by its own precedents.

<sup>31</sup> Waluchow, "The 'Forces' of Law", p. 57.

<sup>32</sup> Judges' legal powers depend to some extent on what powers they are able to capture and keep in practice, as will be explained below. This is one way in which the moral forces analyzed in a theory of compliance can, but do not necessarily, affect the institutional forces analyzed by a theory of adjudication. The necessary coincidence of these two theories in Hart's thought when the theory of compliance deals only with social morality will be examined in chapter 2.

<sup>33</sup> Practice Direction (Judicial Precedent), House of Lords [1966] 1 W.L.R. 1234.

precedents set by higher courts in the same system. This is clearly a doctrine more amenable to judicial restraint than activism, in that later judges cannot use moral reasoning to ignore precedents which are "in point".<sup>34</sup> An example of the moral regret which can arise from being bound by precedent is found in the case of *Olympia Oil & Cake Co. Ltd. v. Produce Brokers Ltd.* The decision read in part that

I am unable to adduce any reason to show that the decision which I am about to pronounce is right. . . . But I am bound by authority which, of course, it is my duty to follow.<sup>35</sup>

The High Court's decision to allow itself not to follow its own previous decisions if it considered them wrong was a clear step in the direction of judicial activism. The grounds Lord Gardiner cited in the declaration for overturning decisions have a distinctly moral cast:

Their Lordships . . . recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

Without this declaration, the High Court risked the same regret as experienced by the Appeal Court in *Olympia Oil*, without the possibility of the case being subsequently appealed and overturned, as actually happened in that instance.

It is significant that this Practice Direction was justified *not* by reference to previous practice<sup>36</sup> but as an aid to law's "proper development", that is, by a normative appeal to the point of law. This is very much at odds with the detached and therefore retrospective approach at the theoretical level which is my current target. The existence of

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<sup>34</sup> It is also meant to ensure the invariability of decisions of law over time, which makes it more restrained than activist on the second axis identified in "Charter Challenges".

<sup>35</sup> *Olympia Oil & Cake Co. Ltd. v. Produce Brokers Ltd.* (1915), 112 L.T. 744 at p. 750.

<sup>36</sup> Raz, in *The Authority of Law*, p. 184, cites C. Cross as having shown that the Practice Direction was not itself authorized by precedent in "The House of Lords and the Doctrine of Precedent", Hacker and Raz (eds.), *Law, Society and Morality* (Oxford: Clarendon, 1977).

precedents such as these is required in order to make sense of the claim of "Charter Challenges" that legal theorizing has practical importance. But a detached method of theorizing and a priority of theory over practice would prevent judges from setting such precedents. Such a position is thus incoherent.

Different construals of Waluchow's position might be thought to dissolve this inconsistency. For example, one might distinguish different senses in which theory can have priority over practice. Two possible distinctions come to mind: between the level of theorizing about law in general and the level of theorizing about a particular system of law; and between an absolute or thorough-going priority of theory over practice and a moderate or occasional priority of theory over practice. The foregoing inconsistency resulted from taking theory as having an absolute priority over practice at both the general and the particular levels. Can these distinctions save the position?

While the argument above produced an inconsistency by assuming a priority of theory over practice within a single legal system, an analogous problem can be derived at the level of the concept of a legal system, depriving this distinction of any force. The problem within a system was to justify switching interpretive styles when no precedent for the new style existed *within that system*, although the theory of law showed that it was possible. The problem at a general level is to justify switching interpretive styles when there are *no known or imagined legal systems* using the opposing style, or creating a new legal system using a new or unimagined interpretive style.

There are two types of descriptively accurate *general* theories of the role of adjudication in law that are analogous to the two interpretive styles we have been discussing. The more restrained one aims to describe only those systems of law that have

actually existed, while the second also admits as possibilities legal systems which have yet to exist, and may in fact never exist. If there are no known legal systems using a different style of interpretation, then the first type of theory would not countenance the evolution. The only way this theoretical problem could be avoided is if the first two systems of law appeared simultaneously and displayed the two interpretive styles discussed, which is extremely implausible.

The second more open type of theory also lays down bounds on what constitutes an interpretive style. Let us say that whatever is within those bounds is an imagined interpretive style. The problem with these more expansive theories is less pointed, yet real nonetheless. A priority of theory over practice means that such a theory would not countenance the appearance in legal practice of an unimagined interpretive style. I must trust the reader's sense that it is not always the case that social theorists are in advance of the developments in practice. Thus, distinguishing between the priority of theory over practice at the general and the particular levels does not dissolve the inconsistency in this position.

Consider now the second alternative. Suppose, as seems most plausible, that Waluchow intends only that theory can sometimes lead to the reformation of practice, and that practice can sometimes evolve in spite of theory. An accurate description would then state that law has the capacity to evolve into something not described by that theory. But such an admission amounts to a recognition that legal theory, construed as a detached endeavour, is necessarily incomplete. The missing part is those cases (such as the High Court's Practice Direction examined above) in which legal practice reforms itself despite the dictates of legal theory. A detached theory is limited in these cases to retrospective accuracy, since the new practice belies the theory, no matter how accurately the theory had

represented the practice up to that point. Engaged moral evaluations can be seen in some of these cases to be actively choosing a new form for law.

The argument just given for the necessarily retrospective and therefore incomplete nature of a detached theory of law as it is can be rehearsed to show the necessarily retrospective and therefore incomplete nature of a detached theory of law as it should be. Supplementing a detached theory of law with detached theories of adjudication and compliance does not overcome the problem of incompleteness.

Belief in a proposition which is not true can sometimes make that proposition true (e.g., "I am able to do X", while not true before it is accepted, may become true by being accepted). The very choice of an inaccurate or less accurate detached theory based on engaged moral concerns can make this theory the most accurate theory even from a detached standpoint (e.g., judicial acceptance of either Inclusive or Exclusive Legal Positivism). In addition, choosing what is retrospectively the best detached theory might in some circumstances lead to it being less than the best detached theory in the future. (A schematic example where this true about a theory about a particular legal system might be one where legal realism comes to be accepted since occasional unreasonable rulings are tolerated, yet its acceptance leads to widespread whimsical judicial actions. These in turn create political pressures which force the adjudicative practice to become so upright that legal realism is no longer the best theoretical characterization of the adjudicative practice of the system.)

It should at least be noted in passing that Waluchow's position presupposes the possibility of taking a morally unengaged, objective, neutral attitude towards law, and representing the findings of one's investigation in morally objective, neutral language.

Philosophers of science such as Kuhn, Lakatos, and Laudan have disputed whether neutral language is possible even in the physical sciences. Related problems are the radical underdetermination of theory by data, and "non-scientific" influences on theory selection. It may be that these limitations can be dismissed simply as limits to be striven against in the pursuit of a noble ideal. But they may also indicate that the moral concerns about law isolated above into prospective legal theorizing infect even retrospective detached legal theorizing. To show this would require an exposition of the moral presuppositions underlying what purport to be morally neutral statements about normative and moral practices, in much the same manner that other types of evaluative judgements have been shown to be built into the language that describes physical reality. A preliminary observation that might guide such an investigation is that the choice of features around which the vocabulary is constructed may require assumptions that involve some measure of commitment to a particular type of morality.

### **Introducing Normative Concerns**

If one insists that theory claims only retrospective accuracy, then it would be consistent to insist that the choice of the best theory be determined solely by descriptive accuracy. Two prices must be paid to adopt this stance: one adopts theories which are not ahistorically accurate, and one's 'theories' should not be taken as the sole determinants of how the practice should develop. Indeed, such a theory on its own, even a detached normative theory, cannot claim to be making any recommendation about how the practice should evolve. Such an admission points to the need for an exploration and evaluation of the possibilities of law. While detached theories of the open type described above could take care of the exploration, the need for evaluation means that engaged theories will turn out to be preferable. We need to engage in argumentation about the point of law in order to have an adequate engaged comprehensive theory of law. This new theory need not

attempt to be any more ahistorically accurate, but it should help us see and plot our way forward.

Because a description of a social practice can change that practice, one should not limit one's horizon to a simply descriptive social theory. To strengthen whatever is described regardless of any considerations about its moral worth, as "Charter Challenges" can be construed as inadvertently proposing, is like walking in whatever directions we have faced in the past, oblivious to whether they lead to a garden or a desert. Indeed, one who accepted this approach to social theorizing would have us walk into a desert even if she knew a garden was just off to the right. The role of a legal theorist, as I see it and as I think Waluchow and Hart might see it, is not simply to whisper compass directions already chosen or which could be chosen in our ear, but to scout the surrounding territory and recommend the best direction amongst those already chosen or which could be chosen. Who else but a legal theorist can or should construct legal theories which point out desirable directions for the evolution of the law? Is the legal theorist *qua* scribe to be followed by a legal theorist *qua* visionary? Is such a sharp distinction between the two really possible, or desirable? I believe conclusive the argument I have put forth for the claim that morality can be relevant to legal theorizing. I take answers to the question of whether it should be relevant in the choice of accepting or advocating a legal theory to be as controvertible as answers to the general question, 'Why be moral?'

Waluchow, as a Hartian, wants to maintain we should do all we can to eliminate moral considerations from coming into play when evaluating theories about what is the case (even about what is the case about what people think should be the case). Only in this way can engaged normative deliberations be made in an informed manner. Yet a further argument can be developed to show there may be cases in which an engaged



comprehensive theory may have to choose a less preferred description of law (or of adjudication or compliance) if the prospective theory is to have any chance of success in gaining acceptance. A more subtly modulated version of this position is that we may have only slightly more confidence in one descriptive theory over another, yet if the second is true it may lead to or be compatible with greatly superior prospects for society. We would maximize society's prospects by acting as though the descriptive theory we judge best in terms of description were not the best description. A simple (and simplistic<sup>37</sup>) illustration in game theoretic terms should help make this possibility clear.

Table 1: Scenario 1 Outcomes

	Theory A True	Theory B True
Accept Theory A	10	0
Accept Theory B	0	20

Suppose we have equal confidence in the accuracy of each of the outcomes in Table 1. The table says that we would prefer to accept Theory B if it is true twice as much as we would prefer to accept Theory A if it is true, while it is equally bad to mistakenly accept either theory. This preference could be in terms of morality, or a more comprehensive normative theory. If we judge the probability that Theory A is true as .6 and Theory B as .4, then we would do better to accept Theory B ( $.4 \times 20 = 8$ ) than to accept Theory A ( $.6 \times 10 = 6$ ). This argument can be made either for an individual judging what to act on, or for a social group in the same circumstances.

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<sup>37</sup> Amongst the concerns which could be raised are whether we can exhaustively identify the possible theories, whether the stronger than ordinal ranking of outcomes presumed by this example is possible in every case, and whether the probability of the truth of the theory can be specified in stronger than ordinal terms.

The alternative I am arguing against is one which strictly separates the normative question of what to do in the future from the analytical or descriptive question about what is the case, and which assumes that only after being given the best answer to the second question can work on the first begin. It urges us to disregard any knowledge we may have about other less plausible alternative descriptions when deciding what to do.

Suppose Table 1 indicated the outcomes if accepted by a group. An individual arguing for the acceptance of an engaged comprehensive legal theory would also have to consider the likelihood that a theory would be accepted by the group in determining her best action. An illuminating illustration here is one in which the two most preferable theories have the same outcomes if accepted, but which have different likelihoods of being accepted. Usually it would be better to advocate the one most likely to gain acceptance.<sup>38</sup>

It may be possible, though I think it doubtful, that an engaged normative theory can be attached to every description of a social practice in such a way that the same action is recommended by all of these comprehensive theories. The weaker claim that several comprehensive theories might equally prescribe the same consequences is definitely true. Thus, to take the "Charter Challenges" example, acceptance of Exclusive Legal Positivism combined with a fairly activist normative theory of adjudication (in terms of going beyond the present law and specifying new law) could lead to exactly the same judicial actions as acceptance by a judge of Inclusive Legal Positivism and a more restrained normative theory of adjudication. One of Waluchow's insights is that certain normative attitudes of judges are fairly resistant to change, specifically, how comfortable they are in the role of law-

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<sup>38</sup> Exceptions to this may occur. For example, if the most preferred theories have very little chance of being accepted even when advocated, yet advocating the one with the lower likelihood of acceptance made the acceptance of other theories with desirable outcomes much more probable, and advocating the other made the acceptance of the least desirable theories more probable.

givers. Thus judges are unlikely to adopt the first account of their actions instead of the second, or even to adopt the actions if only the first account is available. This occurrent causal factor means that the choice of a retrospective, analytical theory can sometimes amount to the choice of appropriate actions. The choices we make are bundled: choosing a descriptive theory when its acceptance has foreseeable moral consequences is a choice for those consequences rather than others. These consequences may be irrelevant to the primary reason for choosing the bundle, but because they are part of the bundle, they may provide reasons for or against choosing the bundle. To insist that moral consequences should not be considered in the choice of a descriptive theory is to insist that we act as though we lived in a world which did not present bundled alternatives, at least when choosing descriptive theories.

The converse of the previous example is that the choice of appropriate actions can sometimes affect the choice of a retrospective, analytical theory. A slightly more complex scenario should make this point clearer. Take a situation in which two theories, A and B, are widely debated but a third, C, is unknown. Of the first two theories, B leads to an outcome twice as preferable as A, while C is just as preferable as B (Table 2).

Table 2: Scenario 2 Outcomes

	Th. A True	Th. B True	Th. C True
Accept Theory A	10	0	0
Accept Theory B	0	20	0
Accept Theory C	0	0	20

Now imagine a capable and well-respected person with influence in the group. As a single individual she has only a limited effect on the debate: if she advocates one of the three theories this increases the probability it will be accepted by 5 percent (Table 3).

Table 3: Scenario 2 Advocacy Effectiveness

		Theory Accepted by Group		
		Theory A	Theory B	Theory C
Theory advocated	No Theory	.55	.45	0
	Theory A	.6	.4	0
	Theory B	.5	.5	0
	Theory C	.53	.42	.05

If the likelihood of the truth of the different theories is ignored for the moment (or assumed to be equal for all three theories) then the difference between advocating two theories which lead to the same outcome if accepted can be appreciated. This difference is entirely due to variation in the likelihood of acceptance of the different theories according to which theory is advocated (Table 4).

Table 4: Scenario 2 Outcomes of Advocacy

		Calculation	Outcome
Theory advocated	No Th.	$.55 \times 10 + .45 \times 20 + 0 \times 20$	14.5
	Th. A	$.6 \times 10 + .4 \times 20 + 0 \times 20$	14
	Th. B	$.5 \times 10 + .5 \times 20 + 0 \times 20$	15
	Th. C	$.53 \times 10 + .42 \times 20 + .05 \times 20$	14.7

So theory B is preferable to theory C because of occurrent causal factors though both have the same outcome if accepted and both are equally likely to be true.

### Objections

In real life, of course, various courses of action do not come neatly labelled with the probability they will succeed. Theory acceptance need not be unanimous, which in some cases is worse than unanimous acceptance of any theory. What I hope the preceding discussion established was the theoretical possibility that a person should, on consequentialist grounds, whether moral or otherwise, advocate a comprehensive theory which contained parts they believed were less plausible than alternatives. Of the many possible objections to this claim, I would like to respond to three: we cannot predict effects well enough for these calculations to ever be meaningful; this argument presupposes rather than refutes a priority of descriptive truth over normative choices; and speaking the truth is an overriding intellectual virtue.

Evaluation, moral or otherwise, of the consequences of actions does not require complete prescience on the part of agents. We can choose amongst alternatives in the face of uncertainty, and our actions can be evaluated with the benefit of hindsight. Cases of utter uncertainty, though theoretically possible, are not our everyday experience. Indeed we would not be able to cope in a world in which our actions generally did not have predictable effects. On the other hand, it is necessary to admit the effects of our actions on diffuse social practices and widespread beliefs are much harder to gauge than whether a light switch works. But this does not prevent us from discerning real impediments to certain courses of action, such as the barrier that the general intransigence of judges towards assuming the role of law-giver presents to some activist theories of adjudication, nor the

relative acceptability of other theories such as Inclusive Legal Positivism which circumvent these barriers.

It might be thought the argument above uses the very priority of descriptive theory over normative debate it attempts to argue against. In a sense this is true. In order to choose which theory to advocate above, prior determinations of the likely truth of each theory were presupposed. But whereas earlier in the chapter we showed that the articulation of a social theory could affect that theory's truth, we are now attempting to show that the truth of a social theory need not be the sole determining factor in decisions to accept it or to advocate its public acceptance or rejection, in light of the consequences which follow from both of these decisions. This conflict between what is believed to be the case and what one should advocate is the case can be very difficult. Lest this should be thought to result solely from the extension of the moral into non-moral realms, it should be noted one can set aside all questions of moral propriety without removing this difficulty. It is sometimes impossible for some people to speak truly about social phenomena.

A finance minister commenting on the health of a financial institution is one situation where this truth is dramatically revealed. Let us say that the institution has a 40 percent chance of failure, were the minister not to comment on its health. As fate would have it, however, committee hearings the minister is obliged to attend are soon scheduled in which questions about its health are in order. If the minister says the institution had a 40 percent chance of failure, this would cause a run on deposits increasing the chance to 70 or 80 percent. Saying there was less than a 1 percent chance of failure might inspire confidence, leading to an improvement in the situation to perhaps 10 percent. Nevertheless a gross exaggeration might be counterproductive, as confidence in the minister as well as the institution would be eroded if she says there was absolutely no chance it would fail.

Similarly, if the minister refuses to comment this might lead to damaging speculation with its concomitant run on deposits. It may be that nothing the minister is able to say is true if spoken. Not only may forthright disclosure of what one believes to be the case conflict with (possibly moral) normative standards, it can prove to be impossible in principle to state.<sup>39</sup>

One complication ignored in the argument above was the possibility, in the face of feedback from theorizing, of attempting to articulate a second or higher order theory. These types of theories would aim to take account of the effects of their own articulation. Perhaps, to modify the previous example slightly, although there is currently a 40 percent chance of failure, if the minister were to say there is 20 percent chance then there would indeed be a 20 percent chance of failure. His utterance would have a performative aspect that made what he was saying true. If he were concerned solely with speaking the truth, he would say this, even though it would lead to a much higher chance of quite regrettable consequences. If speaking the truth were the only relevant virtue, that is, acceptable reason for action, then the minister would be right to make this statement. If the minister is also obliged to act in the economic best interests of her country, then a conflict between ends arises.

Perhaps openly speaking the complete truth is an intellectual virtue that should never be compromised in legal philosophy. If cases like the initial finance minister example were to arise in the philosophy of law, only then would other virtues come into play. But then they would not be limiting the first virtue, which had turned against itself, but would be supplementing it in cases where it did not determine what was most appropriate. This is

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<sup>39</sup> The argument could be phrased in terms of acceptance rather than 'advocacy' (or speaking the truth) by replacing the minister's statements with actions which she is obliged by circumstances to undertake.

a coherent position consistent with the motivation of informed normative choices which underlies Waluchow's position. A different ranking of the virtues which allowed candid confessions of belief to be curbed occasionally by competing concerns such as morally preferable outcomes offers a reasonable alternative. Like many debates over ends, this one has scope for reasonable disagreement. Is goodness always subservient to truth, or does it sometimes compete with it? Must oration always serve truth, or should it divide its loyalty between truth and goodness? Occasions of state coercion of citizens, both mild and severe, affected by adjudicative practices are legion. Does the intellectual virtue of a relatively small number of legal philosophers and judges matter more than the just treatment of so many of its citizens?

One way the position I have been advocating could be responded to is with the claim that the best consequences will result from always frankly advocating the best descriptive theory of law and one's preferred engaged comprehensive theory of law. This is a sound contender which may work out to be the best policy in practice. It amounts to rule consequentialism. My own belief is that there may be exceptional circumstances which occasionally warrant an act consequentialist approach. The threshold at which it is acceptable to break the rule(s) is not whenever one believes it would be best, all things considered, which amounts to act consequentialism as a practical guide to moral action, but at some higher, more stringent level. But even if this rule-consequentialist rejoinder were successful, its victory would be pyrrhic. For it is a moral argument which would now underpin the detached approach, making it an engaged approach at bottom. I nevertheless believe this modification of Waluchow's position presents the strongest challenge to the position I am advocating.

### **Application**



If the past is understood in one way rather than another, this affects how we approach the future. The question of which description of law is better is not a question of easily resolved differences over matters of detail, as the long disputes between legal positivism, natural law, and critical legal studies show. It seems theoretically possible that even if all the particular facts were agreed upon, such as which legal decisions were right and wrong, there would still be space for disagreements about which theory provided the best account. Particular judgements about how well a theory meets given criteria are open to dispute. Meta-theoretical disagreements may also arise about which criteria to use and how to weight them.<sup>40</sup>

In natural science, one tries to devise an experiment that shows which of two theories is correct, or even which of two methodologies is better. This enterprise is not guaranteed to succeed, as the wave/particle debate on the nature of light showed. In broad social theorizing, however, we do not have the opportunity to run controlled experiments. We have to choose one option as the basis for our actions, without always having the opportunity to retrace one's steps into the past to correct wrong steps. Events and practices may develop an irresistible momentum. The battle for what to do in the future is often fought over what went wrong and right in the past. When the 'fact' of the matter here is open to reasonable dispute then the 'best' answer to this dispute can and sometimes should be subordinated to the answer about what to do in the future in the ways outlined above.

Causal factors sometimes prevent the acceptance of such an interpretation if presented in the former light. This may be particularly true in the case of theories of law,

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<sup>40</sup> Raz, for example, criticizes Kelsen for adopting a principle for the individuation of laws which satisfies the aim of making them "relatively self-contained and self-explanatory" at the expense of ignoring the aim of making them "small and manageable units of law" "easily identifiable" in legal material. Kelsen, it might be argued, would have disagreed with the importance of this second aim. *The Concept of a Legal System*, p. 115.

for law prizes conservatism as one of its noblest virtues in the form of the doctrine of precedent and in its processes. To describe law one way in descriptive analytic jurisprudence, then to prescribe a very different practice in engaged normative jurisprudence is a naïve strategy. If two descriptions were equally plausible, but one more suited for prescriptive purposes, it would be foolish to use the other. To advocate these policies may seem regrettable, yet it is only intended to admit to pragmatic truths. I would prefer if virtues never collided, but do not believe that is our lot in life.

Philosophy is argumentative. One cannot slip poor reasoning past one's peers, so the place for oration is therefore limited. One decides which account of law is better by considering the various positions put forth on all sides of the debate. No claim is immune from criticism. In unclear cases of descriptive accuracy one could go against one's own intuitions on the matter, but would not get very far if the position adopted was implausible. However, if we admit the fallibility of human reasoning, and our occasional conscious awareness of the lack of closure on an issue (which is frequent in the case of complex social theories), then it is a legitimate philosophical move to make an engaged appeal to normative concerns to decide which of several detached accounts should be included in an engaged comprehensive theory of law.

Clearly, amongst the possible normative elements to be considered are moral ones. Legal systems inevitably include coercive measures, and the use of coercion is always a fit subject for moral approbation or disapprobation. Since theories of law can have an effect on the use of coercion, they can thus be evaluated from a moral perspective. I have argued that a theory of law should be framed with an awareness of its impact. Since part of that impact is a set of morally relevant consequences, the moral evaluation of a legal theory is the evaluation not simply of what would happen to follow that theory's

acceptance, but also of the probable impact of advocating acceptance of one theory over another. Like any other action of an agent, the explicit choice for these consequences by a theorist is open to moral evaluation. While sound understanding may be an aim in itself, as humans we also have other aims. It may be the virtue of enunciating truth outweighs all other virtues. My point is that it may not, and I hope I have shown a few reasons why it does not. If morally significant consequences in the practice of law arise from theorizing about law then legal theorists are engaged participants in this practice whether they wish to be or not. This does not mean they are judges or litigants or lawyers, or must assume the exact perspective or concerns of these other participants. It does mean they should accept responsibility for their participation regardless of whether this participation has been witting or unwitting, and notwithstanding their desire to avoid the responsibility. If a person went for a walk in a river valley to enjoy contemplating nature, she would be responsible for saving a drowning person if she could, notwithstanding the fact she didn't want to and regardless of whether she realized she had this responsibility. Indeed, a more analogous case would be if the person taking a walk caused the other to fall into the water.

A few observations on how academic legal theorists can and I believe do affect legal practice are in order. The obvious route is through educating future lawyers and judges, affecting their attitudes either through teaching, textbooks or scholarly publications used in advanced studies. Indirectly, an academic may affect students of other professors through her writings or through the effect her students have on other future lawyers and judges. But their influence does not stop there. Many academic lawyers also practice in their specialities and have the privilege, due to their reputation and skill, of representing clients in precedent setting cases. Their arguments on how the law should be decided are

sometimes accepted by judges, and become part of the law. Finally, Canadian judgements, perhaps in contrast to British judicial practice,<sup>41</sup> do refer to academic studies.<sup>42</sup>

### Conclusion

In concluding, I would like to return to the relation between analytic and normative jurisprudence. It was conceded above that in order to have an engaged comprehensive theory of law upon which one can act a detached understanding of what is the case is required. This does not amount to an absolute priority of detached over engaged normative jurisprudence in the construction of an engaged comprehensive theory of law. Neither does it mean a theorist must have settled the various descriptive or analytic theories before considering prospective, normative questions. For engaged normative jurisprudence might motivate the construction of a suitable retrospective account if a new vision for law was thought superior to all others, but was 'inaccessible' from existing accounts. If such a retrospective account could not be constructed, this legal utopia might remain a mere chimera, with no route to it from here. Or a radical restructuring of our legal system could be advocated politically, since the legal community could not or would not change so radically on its own.

This chapter was not meant to resolve issues within the theory of law itself. I have tried, rather, to show that in a legal positivist position such as Waluchow's, elements

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<sup>41</sup> "English judges tend to pay little attention to the work of academic lawyers." Raz, *The Authority of Law*, p. 180.

<sup>42</sup> For example, "Prof. Hogg, who teaches law at Osgoode Hall, is the author of several important constitutional texts and is probably the most widely recognized constitutional lawyer in the country. 'He has been cited in judgments by the Supreme Court of Canada more than all the other constitutional scholars in Canada combined,' said . . . James McPherson, dean of York University's Osgoode Hall Law School." Kirk Makin, "Six experts thrown into breach: Professors, advisers sign opinion on distinct society clause", *The Globe and Mail*, Tuesday, June 12, 1990, p. A8, col. 4-6.

can be identified which point the way towards a morally engaged attitude towards theorizing about law. I have concentrated the main portion of this chapter on showing how a detached analytical approach can and should be subsumed under an engaged approach. It was noted above that positivists such as Hart and MacCormick have argued on moral grounds for a separation of law and morality,<sup>43</sup> and Austin and Bentham also took this stand on utilitarian grounds. Whether or not one agrees with their moral arguments or finds them simplistic, one can point to these exemplars of the legal positivist tradition to illustrate the preferable stance of an engaged moral attitude to legal theorizing.

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<sup>43</sup> A private communication from Hart to Waluchow suggests he has recanted on this question, but the possibility of making this sort of argument still remains.

## CHAPTER 2: MORALITY AND HART'S LEGAL POSITIVISM

In "Legal Positivism and the Separation of Law and Morals" and again in *The Concept of Law*, Hart argued that for both intellectual and moral reasons,<sup>1</sup> neither legal theorists nor judges should confuse law as it is with law as it ought to be. He was particularly perturbed by the conversion to a form of natural law of the German judiciary and of the former legal positivist Gustav Radbruch after the downfall of the Nazi regime. He found the "unqualified satisfaction with" "the overthrow of positivism" "to be hysteria."<sup>2</sup> The exemplary case he cites involves a court of appeal declaring invalid in 1949 a statute that had been duly established and observed by the courts for over a decade on the grounds that this statute "was contrary to the sound conscience and sense of justice of all decent human beings."<sup>3</sup> I hope to show in this chapter why, if one accepts Hart's own concept of law, this could have been the correct decision for these courts on intellectual and moral as well as legal grounds.

The dispute is not over whether the actual statute in question was immoral, nor over whether the judiciary and other legal officials realized it was immoral, nor even whether the population found it morally offensive. The question is rather what bearing

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<sup>1</sup> Hart, "Legal Positivism and the Separation of Law and Morals", p. 81, *The Concept of Law*, pp. 203-7.

<sup>2</sup> Hart, "Legal Positivism and the Separation of Law and Morals", p. 80.

<sup>3</sup> Judgement of July 27, 1949, Oberlandesgericht, Bamberg, 5 *Süddeutsche Juristen-Zeitung* 207 (Germany, 1950), as quoted in Hart, "Legal Positivism and the Separation of Law and Morals", p. 80.

morality should have and does have on the legal validity of the statute. In what follows I will find it convenient to vary somewhat the force of the opprobrium associated with applying the statute, but these variations in the particularities of the social morality in the situation do not affect the issue under consideration.

Before outlining Hart's thought and showing how the requisite conceptual connection between law and morals can be shown to exist in it, notwithstanding Hart's contrary intentions, two passages should help to make clear the contrast between opposing views of what constitutes valid law. The first is an excerpt from Radbruch's *Rechtsphilosophie*, which stated a view of legal philosophy widely accepted in Germany before and during the rise of Nazism.

It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just. To be sure, the question may be raised whether this very duty of the judge, this *sacrificium intellectus*, this devotion in the blank of one's own personality to a legal order the future changes of which one cannot even anticipate, is morally possible. But . . . the judge . . . nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he still remains the servant of legal certainty.<sup>4</sup>

The second is Hart's characterization of Radbruch's later views which Hart attempts to refute.

Radbruch . . . concluded from the ease with which the Nazi regime had exploited subservience to mere law . . . and from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law, that "positivism" (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to the horrors. His considered reflections led him to the doctrine . . . that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality.<sup>5</sup>

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<sup>4</sup> Gustav Radbruch, "Legal Philosophy", in *The Legal Philosophies of Lask, Radbruch, and Dabin*, trans. Kurt Wilk, ed. Edwin W. Patterson (Cambridge: Harvard, 1950), p. 119.

<sup>5</sup> Hart, "Positivism and The Separation of Law and Morals", p. 79.

Social morality, also known as positive or conventional morality, is the morality generally in force in a group of people: it is the morality most people in the group actually accept and upon which they act. It may differ significantly from true or real morality, sometimes considered, following Thomas Aquinas, to be a set of principles of human conduct "discoverable by human reason without the aid of revelation even though they have a divine origin."<sup>6</sup> There have been many other purported versions of "true morality," and it is still an open question what it will turn out to be. While Radbruch's later legal philosophy attempted to show the limits true morality places on the content of valid positive law, I hope to show that Hart's concept of a social rule, which he uses to explain social morality and the existence of a legal system, provides the basis for the claim that social morality necessarily constrains positive law.

### Hartian Legal Positivism

*The Concept of Law*, which Hart published four years after "Legal Positivism and the Separation of Law and Morals" appeared, criticizes Austin's command theory of law<sup>7</sup> in order to indicate the need for a new account based on the idea of law as a complex social practice. The central element in this account is the concept of a social rule. A rule is distinguished from a habit by the fact that it has an internal aspect. This means that the fact of its existence is taken by some as a reason for doing what the rule calls for, and a reason for criticizing those who transgress the rule. While most English people may go to the cinema most Saturday nights, this is only a habit, since those who do not go are not criticized for this. In contrast, it is a rule that men take their hats off in churches because they face social pressure to comply.

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<sup>6</sup> Hart, *The Concept of Law*, p. 152.

<sup>7</sup> And Kelsen's elaborations of it.



For a rule to exist, some at least must accept the rule and use it (1) for the evaluation of action and (2) as a guide to action. This involves viewing the rule from the inside, seeing its internal aspect. An objective observer of a set of regular movements and sounds in a population and a set of characteristic movements and sounds from other individuals in cases where the first set were not present could only conclude a habit existed amongst the population. If the external observer could also understand the language and/or actions of the rule-followers to the extent that these characteristic movements and sounds were seen to be behaviour requesting or demanding compliance (rather than, say, praising supererogatory actions) then the observer would be able to make the further claim that the group followed a rule. She could make this external statement even if she did not accept the rule. Likewise, those who accept a rule 'One should do X' and display this by making internal statements admonishing others to 'Do X!' can also take the external point of view towards their practice presupposed in the statement 'There is a rule in my group that one should do X.'

Consider (2) above. If no one acted in conformity with the rule when they had occasion to it would not be a social rule but perhaps merely a topic of speculation. Note that rules can exist which only require actions from a subgroup or an office holder of the group: the secretary of a club should take minutes of the meetings, but no one else is required to.<sup>8</sup>

While threats of violence or other ills on the part of an individual or a sovereign can create a situation in which a person is *obliged* to act or to forebear from acting in some manner, only social rules and their internal aspect can account for the

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<sup>8</sup> Hart, *The Concept of Law*, p. 85.

existence of *obligations*. These latter arise when the pressure to follow a rule is both insistent and great. Serious pressure to comply meets actual or threatened breaches. These rules are "naturally" those whose continued observance is "believed to be necessary to maintenance of social life or some highly prized feature of it" and often they may require a person to sacrifice their own interests in order to benefit others.<sup>9</sup>

Usually when one is obliged there is no rule requiring the action in question, but all rules considered or believed to be sufficiently important create obligations.<sup>10</sup> Thus, though a person may be obliged to give a gunman her purse, this is insufficient to show she has an obligation. A person may have been obliged to do something she never actually did, but this is not normally said of someone who has been obliged to do something. On the other hand, it is unnecessary for parents to be obliged to care for their children in order for them to have an obligation to do so. In contrast to being obliged, and the predictive account of punishment which might be built upon this experience to explain obligations, a person may have an obligation in a situation "even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience."<sup>11</sup> For those who accept a rule generating obligations the failure of a person to fulfil that obligation "is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility."<sup>12</sup>

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<sup>9</sup> Ibid., p. 85.

<sup>10</sup> These obligations are obligations of social morality. To what extent these differ from 'true' obligations of 'true' morality is a question I will not attempt to answer.

<sup>11</sup> Hart, *The Concept of Law*, p. 81.

<sup>12</sup> Ibid., p. 88.

Rules such as these are primary rules of obligation. They are present even in primitive, pre-legal societies. What Hart sees as marking the shift from a pre-legal to a legal society is the introduction of secondary rules of recognition, change and adjudication.

A rule of recognition specifies

some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.<sup>13</sup>

It helps to overcome the uncertainty about obligations in a pre-legal society. A means of changing certain rules through some legislative mechanism is another mark of a legal society. Finally, a secondary rule of adjudication overcomes the inefficient arbitration of disputes about whether a rule has or has not been broken. In most legal systems the right to determine which sanctions to apply has also been reserved to a judiciary. The union of these three secondary rules with the primary rules of obligation which they recognize is the gist of Hart's concept of law--it provides what he, following Austin, calls "the key to the science of jurisprudence." Those rules which are identified according to the rule of adjudication as "a rule of the group to be supported by the social pressure it exerts"<sup>14</sup> are valid laws according to the rule of recognition. In a legal as opposed to pre-legal society, valid laws need not be social rules, nor must all social rules be valid laws. Whatever is not deemed worthy of such enforcement is not a valid law.

One complication to this summary is worthy of note. The rule of adjudication is complex enough in modern legal systems to allow variations in the criteria of valid law that are applied by different levels of courts.<sup>15</sup> Yet there is still generally a large central core of laws accepted as valid throughout a legal system at any one time, even if Dworkin

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<sup>13</sup> Ibid., p. 92.

<sup>14</sup> Ibid., p. 92.

<sup>15</sup> Cf. Waluchow, "The 'Forces' of Law", *passim*.

is right in his claim that every currently valid law is potentially invalid. The internal complexity, which allows one to say that the rule of recognition is not just what some particular judge in some particular court recognizes and believes should be recognized as valid law in her court, should not be misconstrued as showing that the rule of recognition can be taken as something other than a social fact about the attitudes and actions of the officials. Notwithstanding the intricacies of formulating a rule of recognition which recognizes conflicting tests for validity accepted by almost all officials as appropriate for the different courts, this rule is still constituted solely by the social fact of the beliefs and behaviour of the officials.

In the rest of this chapter I will be ignoring the subtleties of phrasing required to accommodate those laws which should be recognized by some but not all levels of the judiciary according to the accepted rule of recognition. I will also ignore the possibility that there is a penumbra in which the validity of the laws is subject to the discretion of the courts. My argument will be phrased in such a way that it deals with the central core of laws identified above, although it should be possible to extend it to the more complex and controversial cases according to the way in which these cases are treated in the theoretical enunciation of the rule of recognition.

This hasty and necessarily simplified synopsis provides the foundation for our discussions about the relation between morals and law in Hart's system. While Hart does identify a minimum content of natural law which is necessary given survival as a human aim, I believe he overstates his case when he writes that in the face of wicked law

both the theorist and the unfortunate official or private citizen who was called on to apply or obey them, could only be confused by an invitation to refuse

the title of 'law' or 'valid' to them. . . . we should say, 'This is law; but it is too iniquitous to be applied or obeyed.'<sup>16</sup>

Examining the relation between official and non-official classes and the attitudes they can have to the law will uncover this problem.

In the chapter entitled "The Foundations of a Legal System" Hart identifies two conditions for the existence of a legal system: the population as a whole must generally obey the rules recognized by officials as valid law; and the officials must have a shared or unified rule of recognition which they accept.<sup>17</sup> I propose to examine the connections between law and morals presupposed by three conditions:

- (1) the general obedience to the law by the population;
- (2) the acceptance of a rule of recognition by officials who also accept other rules, specifically rules of social morality; and
- (3) the acceptance of a rule of recognition by officials in the face of acceptance by the rest of the population of an opposed rule of social morality.

One point about Hart's analysis of social rules in the above discussion which I will further elucidate below is especially important to my project. This point is that it is necessary for the existence of a social rule, and still more an obligation imposing social rule, for the actions it enjoins to be generally carried out by the appropriate group members. If there is not general compliance with an obligation-imposing rule, then no rule of social morality exists, even though lip-service be paid to it.<sup>18</sup> Social morality, as I am using the term in this chapter, consists solely of Hartian social rules which impose obligations.

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<sup>16</sup> Hart, *The Concept of Law*, p. 203.

<sup>17</sup> *Ibid.*, p. 111.

<sup>18</sup> *Ibid.*, p. 54.

### General Compliance to the Law

Hart initially claims that for a legal system to exist, the mass of the population must generally comply with the dictates of valid law but need not accept any rules from the internal point of view. But because mutual benefits accrue when rules respecting persons, property and promises are observed, "what reason demands is *voluntary* co-operation in a *coercive* system"<sup>19</sup> since these rules would only be observed in societies which are not small and closely-knit if there are mechanisms to punish malefactors. It is thus part of Hart's minimum content of natural law that "there must be a sufficient number who accept it [the system of rules] voluntarily" to create authority.<sup>20</sup>

It has been a subject of much debate whether law has the authority it claims, whether it indeed possesses the authority of which Hart speaks.<sup>21</sup> Although the language Hart uses in the section on the minimum moral content of law<sup>22</sup> to indicate that *some* must accept the system seems to suggest 'some of the non-official class,' he never explicitly makes this claim. I will follow a stricter interpretation which does not require acceptance of the rules of the legal system by any of the non-official population because it eases exposition and the points I wish to make hold for both interpretations. Also, Hart explicitly

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<sup>19</sup> Ibid., p. 193.

<sup>20</sup> Ibid., p. 196.

<sup>21</sup> Cf., e.g., Leslie Green, "Authority and Convention", *The Philosophical Quarterly*, Vol. 35, No. 41, pp. 329-46; Joseph Raz, *The Authority of Law*.

<sup>22</sup> Hart, *The Concept of Law*, pp. 193, 196, 198.

adopts this stricter position earlier in the book<sup>23</sup> and it has been followed by some later positivists.<sup>24</sup> It does seem most consistent with the positivist orientation to hold that a regime ruling a passive population constitutes a legal system even if none of the population believe it is right or proper for them to do this. Some colonial governments may have taken this form, although this would not be so if the wider interpretation were correct.

I doubt Hart would dispute the connection between law and morals I am identifying in this section. It is closely related to the connection he accepts under the heading of "The influence of morality on law."<sup>25</sup> Whereas he emphasizes the influence of morals on the creation and interpretation of laws as a matter of contingent fact, I would like to indicate a type of morals which place necessary limits on laws. The existence of morals of this type I treat as a contingent fact, but where they exist, laws cannot contravene them. If purported laws do contravene them in manners I will outline, then they are not laws because the rule of law has broken down. This is a conceptual connection between social morality and Hart's concept of law.

If the rule of recognition accepted by officials recognizes primary rules of obligations which offend social rules of morality which have been accepted by the population *in a serious enough fashion* then the population will cease to comply with the law. Such compliance with the law is inconsistent with the existence of a social rule proscribing law-abiding behaviour. When the two conflict, either the rule breaks down because it is no longer followed, or the law is not conformed to. In Hart's words,

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<sup>23</sup> Ibid., pp. 111-4.

<sup>24</sup> E.g., Wayne Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon, 1987), p. 65.

<sup>25</sup> Hart, *The Concept of Law*, pp. 199-200.

very often, the law loses such battles with ingrained morality, and the moral rule continues in full vigour side by side with laws which forbid what it enjoins.<sup>26</sup>

The type of social moral rules to which I want to draw attention is that in which the social rule continues to exist even in the face of a law which forbids it. Civil disobedience greets these laws. A legal system is still efficacious if it contains a small number of unobeyed laws, but if there are enough then the rule of law has broken down. While a few laws contravening *still existing* social morality can be valid but unobeyed laws, if too many are contravened then the legal system has broken down.

There need not be a number of laws outlawing many different aspects of communal life prized by the population. Sumner<sup>27</sup> makes a detailed analysis of the idea that a right can have a core and a periphery, which he notes Hart and others have also accepted.<sup>28</sup> If a right exists this generally requires that it be protected in such a way that it can be exercised.<sup>29</sup> My right to delivery of a computer from a computer store requires that the store has a duty to deliver it, and may be further protected, for example, by a partial or complete immunity from the store exercising a power to extinguish its duty. In the case of a particularly valued feature of social life, social morality may impose strong protective duties around it. A regime which obstinately tried to outlaw the dominant religion of the governed society might face a non-official population which by and large saw it as their duty to overthrow the government even if they all died in the attempt. Perhaps in the

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<sup>26</sup> Ibid., p. 172.

<sup>27</sup> Sumner, *The Moral Foundation of Rights*, pp. 35-49, especially p. 48.

<sup>28</sup> H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982), pp. 171-3 citing Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh, 1838-43) vol. III, pp. 218, 159-60; also Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), ch. 7, who provides additional citations, p. 166.

<sup>29</sup> In the case of a liberty-right or demanded in the case of claim-right.



United States today this sort of fervour would confront any attempt to replace its mixed economy with a centrally planned and fully state-owned system. The point is that the legal system cannot remain efficacious if it recognizes laws which conflict with the social morality of the population to such an extent that the population ends up rebelling or otherwise disregarding the law.

I am not trying to make the empirical claim that rebellions would occur in these particular circumstances. These particular social rules might yield to the coercive force of the state. I am trying to claim that the continued existence of social rules such as these in the face of edicts outlawing them constitutes a rebellion where the rule of law and that particular legal system have ceased to exist.

The vague threshold at which disobedience becomes common enough to indicate the breakdown of a legal system can be crossed in a number of ways. Not only may sets of social moral rules which can be proscribed individually lead to a breakdown of law when proscribed concurrently, an intricate, unarticulated social moral rule may be infringed on in many ways, and the pace of legislation and various other non-moral factors may affect whether the threshold has been crossed. The existence of these other factors does not impugn my contention that the legal system ceases to exist in a more or less abrupt fashion principally because it conflicts with elements of social morality.

More provocatively, any law which contravenes the social morality of the governed population *strongly enough* is not a valid law. It is invalid because it cannot be included in an efficacious legal system. Its authoritative certification as valid by the courts will not be treated as authoritative, revealing the false presupposition in any claim that it is valid. The morals which would lead to widespread disobedience if the actions they

prescribe<sup>30</sup> or allow were outlawed form the first and least contentious constraint on the moral content of Hartian law.

### Official Acceptance of the Law

While primary rules of obligation are valid or invalid depending on whether they are recognized by the rule of recognition or not, the concept of validity is inappropriately applied to Hart's secondary rules of recognition, change and adjudication: they simply exist if they are accepted. Their existence is a social fact which can be ascertained by examining and understanding the actions of legal officials. The previous section established that although it may normally be correct to say "Though this law is immoral and should not be obeyed, it is nevertheless valid law," at some imprecisely identifiable point it is more correct to say "This is so immoral it cannot be law." The present section is devoted to showing how it may normally be possible for officials to correctly say "Though this law is immoral and should not be applied, it is nevertheless valid law," even though at a certain point they can correctly say, "This is so immoral it is not law."

It is necessary for the existence of a legal system "that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity."<sup>31</sup> If each judge used a different rule, it would not be a single unified system. It would be closer to a pre-legal society in which a chieftess or chieftain made authoritative pronouncements. For the shared rule to exist there needs to be general compliance on the part of officials and serious criticism in the rare cases where the rule is not upheld.<sup>32</sup> Nothing in this requires the rule of recognition be non-moral. Indeed, I hope

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<sup>30</sup> Proscriptive rules have equivalent prescriptive formulations.

<sup>31</sup> Hart, *The Concept of Law*, p. 111.

<sup>32</sup> Cf. *ibid.*, p. 142.

to show there is class of moral rules which constrain the law by imposing obligations on officials stronger than the institutional obligations they assume.

Although the rule of recognition must be generally accepted by all types of officials,<sup>33</sup> it is convenient to consider just the actions of judges (the same account can be extended to other officials). Judges, like everyone, may often rightly believe that they are under competing obligations. The obligation to attend his father's funeral or stay home to care for his sick child may conflict with his obligation to bring an over-lengthy trial to a speedy conclusion. As Ronald Dworkin is fond of pointing out, the many principles of the law often compete with one another.<sup>34</sup> When precedents are overturned it is arguable that obligations to respect other legal principles have successfully competed against the obligation to respect the principle *nulla poena sine lege*, which literally means 'no punishment without law'. Hart renders this as "the state should punish only those who . . . did what the state at the time forbade."<sup>35</sup>

In addition to the use of a rule as standard of evaluation of conduct for others and oneself, Hart's conception of a social rule requires general compliance with the rule before it is said to exist or impose obligations. It is possible to say "I shouldn't do X but I'm going to anyway," both when there is and when there is not a rule against doing X. In the first case one may be making a statement about critical or personal instead of existing social morality, or perhaps admitting to a moral lapse.<sup>36</sup> A social rule imposing moral

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<sup>33</sup> If police never arrested people for a certain type of crime, they would never be tried; if jailers stopped imprisoning people, the efficacy of the system would be in endangered.

<sup>34</sup> Cf. Dworkin, *Taking Rights Seriously* and *Law's Empire*.

<sup>35</sup> Hart, *The Concept of Law*, p. 207.

<sup>36</sup> Of course there are other possible normative standards which could be intended.

obligations against doing X exists only if most people in the group do not generally do X. If people generally said "I shouldn't do X" but went ahead and did X anyway then no Hartian rule against doing X would exist. Nonetheless, a rule can be (regularly) overridden by more important rules when conflicts arise without the weaker rule ceasing to impose obligations. Thus, if a crazed person wants to know where someone is so he can kill her, the rule against lying is overridden by a rule to prevent murders: "I shouldn't lie but I'm going to anyway." If social morality were considered as a single complex rule, these two rules could be combined into one against lying except when lying would prevent a murder.

The rule of recognition is a fact about what is recognized as valid law, which in advanced legal societies includes but is not limited to the text of statutes as well as the detailed interpretations of it provided by judicial decisions. It is constituted by the actions and attitudes of officials in a legal society. These officials decide what is valid law, employing a vast number of considerations ranging from the doctrine of precedent to an understanding of customary trade practices to the meaning of 'undue'. Many simpler rules are part of what we care to call this single complex rule. Some of the simple rules of recognition are always more important than others, in the same way that the simple social rule to prevent murders always has priority over the rule against lying in the previous paragraph. In other cases, the particular circumstances might dictate which of two simple rules has priority. The single complex rule of recognition encompasses both the simple rules and the simple rules of arbitration between them.

It is logically possible that none of the simpler rules encompassed by the rule of recognition are ever moral rules. Rules about how to decide what is valid law may not be felt to be so important as to give rise to moral obligations. But it is also possible they may. When one considers that moral obligations are considered particularly important

because they are necessary to maintain social life or some highly prized aspect of it<sup>37</sup> then it is clear there is strong reason to believe that moral obligations occasionally will outweigh other considerations about what makes a law valid. Because the rule of recognition and all the simpler rules which constitute it are social rules whose existence is defined by their acceptance, if another social rule of morality is held to be more important than one of these rules, this very fact means that it *is* more important. If some rule of social morality is accepted by officials as constraining the rule of recognition, this moral rule *does* constrain valid law.

While officials might generally castigate themselves for applying laws they do not think they "should" apply, whenever there is an overriding moral obligation not to apply a law arising from some social moral rule they accept, such a purported law is necessarily not a valid law. For in order for the overriding or more important social moral obligation to exist it must be a social fact that such a law is not applied and any attempt to apply such a law would meet with serious disapproval. But these are exactly the same social conditions which show that the purported law is not valid according to the rule of recognition: the social moral rule must be part of the rule of recognition. It is conceptually impossible for a law to be valid according to the rule of recognition at the same time that its acceptance as valid is proscribed by a social moral rule accepted by officials. More succinctly, any law whose recognition contravenes the social morality of the governing officials is not a valid law. It is invalid because it cannot be recognized by the rule of recognition.

That the recognition of purported law cannot contravene the social morality of officials does not mean that the content of the laws they recognize cannot be be immoral

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<sup>37</sup> Cf. Hart, *The Concept of Law*, p. 85.

according to the official's social morality. The officials can and in all modern states do believe that they have institutional duties which override their sense of social morality to some extent. I have nonetheless shown that officials refusing to recognize a law as valid solely because of its moral content need not be theoretically "confused".<sup>38</sup> It remains to be seen whether they must be morally confused.

Hart argues that judges should treat a purported law as valid when it meets formal tests of validity even if it is profoundly immoral. The test case he is most concerned to argue involves the post World War II German conversion to an adjudicative practice which recognizes moral limits on legislative competence from one which did not. The judiciary then had to confront the issue of whether they would recognize as valid those laws that were recognized by the former adjudicative practice which placed no moral limits on the actions of the legislature but that would not be recognized as valid given the new adjudicative practice. His blanket answer was that they should. If the principle *nulla poena sine lege* is to be violated, it should be the legislature which does this, since only in this way is it done openly.<sup>39</sup>

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<sup>38</sup> I take Hart to be saying this theoretical or intellectual confusion is a more fundamental mistake of law by the post World War II German courts than more ordinary mistakes such as neglecting a precedent or misunderstanding an obviously relevant precedent.

<sup>39</sup> Hart advocates retrospective legislation to deal with the problem in three separate places in "Positivism and the Separation of Law and Morals", p. 80. Hart writes in *The Concept of Law*, p. 98, that "In our system," and others I might add, "custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status of law by statute." I do not think he should be interpreted in the first article as proposing judicial legislation to strike down a statute. He would most likely have referred to the sacrifice of this principle that courts not overrule statutes in the absence of any constitutional power of this nature if he intended this judicial legislation interpretation. While the following arguments are directed against this interpretation of Hart, they could also be used to support a role for judicial as opposed to solely legislative legislation, if Hart is interpreted as supporting legislation of either or both kinds.

While this central principle of law has great moral weight, we have already seen in the last chapter that it can and sometimes should be overridden by other principles of law, as the High Court stated in its 1966 Practice Direction. Of the formerly recognized laws which would not pass the current moral tests if they were now legislated, in general some will still be valid when due consideration is given to the fact that *nulla poena sine lege* must be violated if they are to be overruled. However, some laws may be more wicked, so that even though they have been applied it may still be better to treat them as invalid. Just as precedents may need to be overturned, even though this offends some principles of justice in the case in which it is applied, so adjudicative practices may need to be overturned, even though this may offend principles of justice even more in the cases in which it is applied. If the problem with a former practice was that it did not recognize minimal moral standards, then the revised practice should not shirk from overturning decisions which contravene these minimal moral standards when due consideration has been given to the regrettable moral consequences of this overturning. To do so would be to inconsistently perpetuate the former adjudicative practice.

When Hart claims that retroactive legislation is the morally preferable corrective, one of his arguments is that if it is the judiciary who implement this retroactive punishment<sup>40</sup> it will "look like an ordinary case of punishment for an act illegal at the time."<sup>41</sup> This need not be so. The fact that the law had been recognized can be given some weight as a mitigating factor in sentencing, although other sentencing considerations such as the need to set an example may intervene. A differential treatment of cases according to whether they occurred before or after a purported law was declared invalid on

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<sup>40</sup> I am assuming, still, that Hart means for the legislation to be enacted by the legislature. Without this device, the only way the courts can inflict retroactive punishment is to declare the laws to have been invalid.

<sup>41</sup> Hart, *The Concept of Law*, p. 207.

moral grounds is possible. In many non-marginal cases, however, the existence of a countervailing reason to obey the law (such as the threat of official sanctions) is insufficient reason to excuse the infraction. In the marginal cases, absolute discharges can mark the technical culpability, or the coercion can be recognized as an excuse in law.

There is strong reason to hold that the judiciary as well as the legislature should implement retroactive punishment, that the former need not and occasionally should not wait for legislative action before proceeding in the most serious instances. While it is sometimes right to enforce or obey unjust laws, if the state is justified in criminalizing and convicting actions *after the fact*, and if this requires overturning laws the state had previously proclaimed and enforced, then it may have been wrong to proclaim, to enforce and to obey certain former laws. Unless one accepts a hard-nosed and full-blooded natural law view which grants no deference to the legislature by the judiciary on whether proposed laws are moral and which takes any contravention of morality as grounds for the invalidity of positive law, then while it may have been wrong for the state as a whole to enforce such laws, in only a subset of these would it have been wrong for the law-applying arm of the state to have applied the iniquitous laws it received from the (more responsible and culpable) law-giving arm.

While the courts in Nazi Germany did not believe themselves competent to pass any judgement on the moral content of laws, they can still have been wrong about this judgement and culpable for it. People can have obligations even if they do not know of or disagree with the obligation imposing rule. Rule-followers can impose their rules even on those who do not accept them. In this case, current officials upbraid their own previous actions (or the actions of previous officials) and those who cooperated with them in doing wrongs.



The basis for applying retrospective legislation is that the actions it prohibits were already morally wrong. But the judiciary as well as the legislature should be competent to act on those grounds. Although it might be put forth on other grounds, to argue against any judicial invalidation or non-recognition of formerly accepted laws in favour of always using legislative instruments is to argue in a way that it was only wrong to proclaim and to obey these laws. To say the evil of enforcing terribly evil laws can and should only be rectified by passing legislation to criminalize former judicial (or more broadly, official) activities is only to extend this case for the passivity and neutrality of the judiciary (or law-applying officials). It again presupposes the judiciary is incompetent or should not on moral grounds make this determination. But there is an inconsistency here, since the judiciary would have been right to act as mere instruments of the legislature if we still insist the current judiciary is wrong to act in any other way. Admittedly the role of the judiciary in any but the boldest natural law sense described above prevents it from prosecuting its moral beliefs to their fullest; it is held back by competing concerns which do not encumber a legislature so heavily. This only shows that the legitimate scope of legislative activity in this area is much larger than that of judicial activity--hardly a surprising result, and one which indicates a possible need for retroactive legislation over and above the redresses performed by the judiciary. But if the rule of recognition now accepted by officials acknowledges moral limits to the law, it is both theoretically consistent and morally justifiable that some previously recognized laws should now be declared to have been invalid. Of course, it still must be shown in particular instances that this is the case.

Two considerations can be put forth for why officials should accept moral rules which constrain the rule of recognition. The first is that they have some personal responsibility for what they do and are never completely alienated from their humanity.

Just as a prison guard is culpable for carrying out formally valid orders to cremate thousands of Jews, and a soldier for carrying out orders to seize their goods and send them to certain death, so is a judge personally implicated in the decisions he or she renders. The second is that with power comes responsibility. The power society invests in state officials to carry out the will of the legislative or executive arms of government should increase the deference of their own personal views to their masters', whether they be legislators in the case of the judiciary or government executives in the case of prison guards and army personnel. This power should also increase their sense of the importance of what is stake. They should not wield their power solely according to their own will, but neither should they be unaware they still have a will. When they realize the enormity of havoc they can wreak, they should become sensitive to how the moral defences provided by the fact of their deference can be scaled. In more political terms, law-applying officials have at least some of the obligations of ordinary citizens to act against a wicked regime, and these obligations can impinge on how they carry out their official functions. If the judiciary is united in rejecting moral abominations as valid laws, then these purported laws are not valid laws, and the most abject moral depravities will not be carried out in the name of the law of the state. If the coercive force of the state resists being wielded in abominable ways, it is less likely a morally wicked regime will arise and endure.

### **Non-official Rejection of Official Law**

The previous section showed the morality of officials can constrain valid law on Hart's account, and argued that if officials do accept moral rules which are stronger than the purely functional rules of their offices then in certain cases it would be wrong for them not to treat some morally repugnant but previously accepted laws as having been invalid. The worth of such a moral attitude was also pleaded. This section will consider the more

difficult case in which the population believes officials are mistaken in the moral rules they have accepted.

A separate moral argument Hart advances for the separation of law and morals is that if the certification of something as legally valid carries no moral imprimatur then people will be less likely to blindly obey immoral law. If either of two doctrines is accepted this will be avoided: if they count whatever the courts recognize as law to be valid law, but reserve the moral right to question whether they should obey valid law; or if they preserve the moral right to determine that what the courts recognize as law is not always co-extensive with valid law then they can accept that valid law requires obedience. Either works. The first treats the law with more contempt, preserving a higher place for morality. The second treats human institutions with more contempt, preserving a higher place for law which is not foully debased. Given that Hart has analyzed the concept of law in such a way that it depends only on what officials actually accept (so that he can say that wicked systems of law do exist), he cannot accept the second of these two characterizations. One could, however, if one modified his account somewhat to allow broader social rules of morality to have a veto over what is law, that is, to recognise that officials may be confused about their obligations or may as a class break them with impunity in the case of a wicked regime. This captures the idea that officials are wrong to use the coercive forces of the state in this wicked manner.

While such a move departs from Hart's view of official law as authoritative, it does stay closer than this view to his own account of rules. A closely-knit band of robbers in a pre-legal society may accept a rule that living off the plunder of others is better than working for an honest living. They may punish members who try to break away and apply severe pressure to ensure the way of life of the band is preserved. Yet Hart maintains that

these bandits are under an obligation of social morality not to steal due to the existence of a broader social rule:

that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others.<sup>42</sup>

Band members may feel the obligation to their party is stronger, but they are wrong. The obligation does not, however, arise from the prospect of a superior force being applied to them if they pursue their dissolute ways than if they forsake them. After all, criminals can be counted on to be prepared to escalate violence beyond the bounds established by society, whether these be the bounds of Quaker pacifism or the bounds at which punishment becomes cruel and unusual. Hart holds that an obligation cannot arise from a social rule if "*only* threats of physical punishment or unpleasant consequences were used in argument to dissuade"<sup>43</sup> actual or potential violators from their ways. While a primary rule of obligation recognized in a legal society might have this form, a socially accepted rule of obligation must rely on "appeals to the respect for the rules." Indeed,

emphatic reminders of what the rules demand, appeals to conscience, and reliance on the operation of guilt and remorse, are the characteristic and most prominent forms of pressure used for the support of social morality.<sup>44</sup>

That "hardened offenders"<sup>45</sup> are unaffected by such appeals says nothing against the existence or importance of the rule. Obligations imposed by social rules can extend even to those who accept an opposing social rule and have superior threats of force at their command.

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<sup>42</sup> Ibid., p. 55.

<sup>43</sup> Ibid., p. 175.

<sup>44</sup> Ibid., pp. 175-6.

<sup>45</sup> Ibid., p. 55.

What does this show about a legal as opposed to a pre-legal society? Consider Augustine's observation, "What are states without justice but robber-bands enlarged?"<sup>46</sup> If the rule officials use to identify valid laws is socially constituted, then although it can be criticized from the perspective of a critical or perhaps true morality, it cannot be justly claimed that it is not an actual and in that sense proper rule of social morality. Now a rule that requires a club secretary to keep proper meeting minutes does not become a rule to keep improper meeting minutes if the current secretary feels justified in this action and acts on this feeling in the face of opposing pressure. In a loosely analogous fashion, Hart argues that a single judge does not change the rule of adjudication even if they do not follow it.<sup>47</sup> The problem comes when these three cases are brought together: when the robber-band is acting in an official function as law-recognizers and law-appliers. Should we say that the rule is what the corrupted officials or the population believe it is and require that it be?

Hart unequivocally states it is whatever the officials accept, however immoral that may be from the point of view of the population. Whereas we showed above that this was not strictly true, that too flagrant a violation of popular morality by the laws recognized as valid led to a breakdown in law, I now want to probe the case where the population is attempting to use remorse and guilt on officials to make them mend their ways rather than erupting in disobedience and violence. It will be characteristic of this situation that the population will treat the offending actions of the officials as errors, and attempt to convince them of this by "emphatic reminders of the rules."<sup>48</sup> But this is just to refuse to treat

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<sup>46</sup> Augustine, *Confessions*, iv. Cited by Hart, *The Concept of Law*, p. 152.

<sup>47</sup> Hart, *The Concept of Law*, pp. 112, 142.

<sup>48</sup> *Ibid.*, pp. 175-6.

offending laws as valid laws, to remind officials that a moral rule imposing obligations on them forbids them to acknowledge abhorrent purported laws as laws.

It is true that if the club with the wayward secretary continued to accept her behaviour indefinitely, the rule being followed would be different. Perhaps the continued failure to observe the rule as a guide to action would mean the rule had evolved into one requiring only that the secretary be nagged. But this would misdescribe a situation in which other rules of the club of equal or greater importance prevented her from being replaced. If the secretary served at the pleasure of the president, and great efforts were being made to replace her because of the secretary's faults, then it still makes sense to say a rule exists that the secretary should take proper minutes. Similarly, a rule requiring certain moral standards on the part of officials might exist even if it were abused over a protracted period.

So even on Hart's account there can be reasons for the population to consider official pronouncements of law wrong. His account of rules explains how non-officials might believe that valid laws require obedience even though the laws recognized by officials may not. But this means that his second moral argument in favour of the strict separation of law and morals fails at the theoretical level. Certification by the courts of something as valid law need not carry a moral claim that it should be obeyed. People can believe that it was morally wrong for the courts to act as they did, which they take as showing it is not really valid law. From this they may conclude it does not deserve to be obeyed.

The two contrasting approaches may be more or less appropriate as means of hindering the rise of immoral regimes depending on the culture. Hart inadvertently concedes this when he notes that the words "*ius, recht, diritto, droit* . . . are laden with the

theory of Natural Law." If a group has a deep tendency to link the ideas of 'valid law' and 'deserving obedience,' then a natural law doctrine stating that 'Some things are too immoral to be law' may be easier to understand and therefore more effective. If, on the other hand, a group sees little connection between these two ideas, this doctrine may seem confusing and speculative at best. Where there is a strong tradition of and respect for dissidence the positivist doctrine 'This is law but too immoral to be obeyed' will be more comprehensible and effective. The first group in turn might find this positivist doctrine verging on the contradictory. Hart admonishes people to speak plainly about important matters,<sup>49</sup> but this does not lead to the conclusion one should speak in positivist terms. To speak plainly is to be sensitive to the views and the meanings of words and expressions accepted by one's audience. Which doctrine will keep alive the sense

that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience,<sup>50</sup>

and, I might add, officials' problems of application, is a question with an answer which varies by individual and by culture.

The two doctrines are not antithetical even in practice. A weak natural law theory may place some minimal moral standards on laws which still leaves room for laws immoral enough to require disobedience. A political and moral theory may require of the judiciary only that they not recognize crimes against humanity as law but respect the will of the legislature in every other matter. Above this minimum they only need to engage in moral deliberation as called on by the legislature in its laws, rather than in opposition to it. This would help prevent the regime from becoming morally abhorrent while still allowing it to be wicked. Citizens and rulers would be left the task and the opportunity to make it

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<sup>49</sup> Hart, "Legal Positivism and the Separation of Law and Morals", p. 80.

<sup>50</sup> Hart, *The Concept of Law*, p. 206.

good, with all the controversial moral and political decisions this requires, and which are best left out of the hands of the judiciary. Wicked laws might then require disobedience on moral grounds which the courts should punish.

### Conclusion

Theoretical connections between law and morality were shown to exist for each of Hart's two existence conditions of an efficacious legal system. It was shown that someone who accepted the 'natural law' claim that some things are too immoral to be law could still treat sensitively the complex moral issues surrounding immoral state dictates. Moral views supporting a judicial activism requiring a minimal moral content to laws were presented. Hart's concept of a social rule was used to show how non-officials who accepted a connection between law and morals could resist an immoral regime. I claimed that the effectiveness of a natural law or positivist attitude to law in allowing and encouraging resistance to immoral regimes by non-officials depended more on the individual and culture than the theory. Both attitudes could be effective or ineffective depending on the preconceived ideas about the relation between law and morals with which it was matched.

The arguments of this chapter have focused on the relation between social or conventional morality and positive law. The type of restrictions they provide are effective against tyrants who attempt to radically oppose the morality of the majority of the population or law-applying officials. They provide no protection against the persecution of groups who do not accept these moralities. They may even encourage it.

I am convinced many Nazis firmly believed they had both the right and the duty to carry out what we consider atrocities. If law-applying officials are unified in



accepting a morality equally deficient in what Hart terms rationality and generality,<sup>51</sup> a wicked regime will arise. If German society had generally accepted what we see as the pernicious ideology of the brown-shirts, the arguments in the section on the rejection of official law by non-officials are beside the point. Perhaps the broader horizons of the human race could then be appealed to in support of a court's claim that a statute is "contrary to the sound conscience and sense of justice of all decent human beings."<sup>52</sup>

This brings us to the border separating social morality from a 'true' or perhaps only 'critical' morality. Whether most people are decent, in the world or a society, is an important question for any theory relating law to social morality. But it seems that the social moralities of even very large groups disagree about the application of even their most fundamental and important precepts. Constitutions placing moral limits on laws may tend to have practical benefits, but raise the same theoretical issues at one further remove. The problem of creating a human legal system which would not transgress a 'true' morality may be insoluble. This chapter has not attempted to answer these fundamental and enduring questions, but merely to show how Hart's concept of law links law and social morals in ways he did not envision.

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<sup>51</sup> Ibid., p. 179.

<sup>52</sup> Judgement of July 27, 1949, Oberlandesgericht, Bamberg, 5 *Süddeutsche Juristen-Zeitung* 207 (Germany, 1950), as quoted in Hart, "Legal Positivism and the Separation of Law and Morals", p. 80.

### CHAPTER 3: INTERPRETIVE PERSPECTIVES

In the first two chapters I argued for the claims that morality should be considered at least to some extent in the process of legal theorizing, and has at least a small place both in the substance of legal theory (or at least in the theory of one principle opponent to this claim) and in a theory of adjudication, where this is conceived as different from a theory of law. In this chapter I will argue against the extreme opposite positions of excluding whatever is not morally relevant from legal theorizing, and portraying law as an enterprise exclusively concerned with finding the best answer in political morality. Once again I develop my own position by attempting to establish it in the face of an opposing theory, namely, Ronald Dworkin's law as integrity.

In *Taking Rights Seriously* Dworkin proposed a perfectionist theory of adjudication. According to Raz, the theory of adjudication presented in that book expresses a

total faith in . . . a total analogy--to all the existing statutory and common law rules. Such a total analogy is necessary to yield the best theory of political morality which best justifies all existing statutory and common law rules and which entails a legally binding correct solution to all hard cases. . . . They [judges] must rely only on analogical arguments which perpetuate and extend the existing legal ideology.<sup>1</sup>

Raz takes this as showing Dworkin has opted for the most conservative role for judges, inasmuch as they are not entitled to reform the law. In his more recent book, *Law's Empire*, Dworkin concedes "We cannot bring all the various statutory and common-law

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<sup>1</sup> Raz, *The Authority of Law*, pp. 205n-6n.

rules our judges enforce under a single coherent scheme of principle."<sup>2</sup> Yet he still clings to the ideal of judges working the law pure, holding that judges do and should act in as perfect a manner as possible in terms of an all-things-considered political morality, even though this requires them to make controversial decisions. Since a theory of adjudication is a theory of law for Dworkin, his endeavour to show that practice in its best light, and thereby encourage participants in the practice to make it as good as they can, is a theory of law thoroughly ingrained with political morality and aimed at improving as much as possible that practice in terms of its political morality.

I hope to show that despite the self-understanding of judges who adopt the theory of adjudication portrayed in *Law's Empire*, that this theory does not necessarily or even likely lead to the most justified system of law in political morality. Rather, insofar as it can be implemented in practice, this theory would result in diverging reforms based on the ideologies of the judges who must interpret the ideology of all relevant legal material. If a judge were to accept a theory of adjudication which did not require the constant search for the best judgement; in short, if she did not aim at the perfect judgement in the political morality of the legal material, she would more surely advance the goal of a more consistent and principled body of legal material.

The second theme of this chapter is that there are other concerns independent of morality which should be addressed in a theory of law. In terms of Dworkin's fit and honour, that a theory should fit well is a criterion not prized solely so that the theory better honours the practice, or so that the practice becomes more honourable. A better understanding of the practice of law is not valued just because of its instrumental worth in improving the practice or showing it in its best light--this understanding is also an end in

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<sup>2</sup> Dworkin, *Law's Empire*, p. 184.

itself. While points which exemplify this concern with understanding appear throughout, a distinct discussion of this topic is reserved to the end of the chapter.

### Interpretation

Interpretation is the fundamental notion in Ronald Dworkin's most recent book, *Law's Empire*. This chapter uses the attendant notion of interpreter's perspective or point of view to expose difficulties in his accounts of law and adjudication. The body of the chapter begins with a review of the meaning and role of interpretation in the book, advances a series of widening criticisms, and proceeds to a concentrated attack on the rationales which Dworkin provides for choosing as the point of departure for his theory a judge's point of view. I argue that he does not achieve the stated goals of his project because he confines his attention so much to the activities of single judges: he would advance his own aims of giving the most insightful account of law and of making the law the best it can be by broadening the focus of his study.

In its latest incarnation in *Law's Empire*, Dworkin's theory of law claims that law is an interpretive concept, and his interpretation of it is that it is an interpretive practice. A concept is interpretive when there is theoretical disagreement over its use. The theoretical disagreement over the meaning and use of an interpretive concept is similar to the disagreement over the point and behavioural requirements of an interpretive practice. In a social practice constituted only by theoretical concerns, the two would presumably merge.

According to Dworkin, interpretation is part of a social practice such as law when participants in the practice disagree in the following special way. The participants must have adopted an attitude toward the practice which assumes 1) the social practice has

some value or point and 2) the behaviour or judgements the social practice calls for are not

exclusively what they have always been but are instead sensitive to its point, so that the strict rules [of the practice] must be understood or applied or extended or modified or qualified or limited by that point.<sup>3</sup>

When participants have this attitude towards a practice and disagree either about the point of the practice or what that point requires, then a practice is interpretive.

This kind of interpretation is called constructive interpretation, and is distinguished from other types such as conversational or scientific. Constructive interpretation involves the imposition, by the interpreter, of a purpose onto the object(s) of interpretation. Dworkin draws on the work of Gadamer to distinguish three stages of this interpretation: preinterpretive, interpretive and postinterpretive. The first identifies those objects which are to be included (or excluded) from interpretation. The interpretive stage *per se* is understood as showing these objects in their best light, as the preeminent example of their genre. The postinterpretive stage uses this interpretation to mark certain parts of what was selected in the preinterpretive stage as weaknesses or strengths, as aspects that should be discouraged or encouraged, eliminated if possible or expanded. Constructive interpretations are judged both on their descriptive accuracy and by their value as recommendation. A good interpretation is one which balances fidelity to its objects with a penetrating account of their strengths and foibles.

But *Law's Empire* does not stop with the interpretation of law as an interpretive practice. The greater part of the work is devoted to the exposition of particular interpretations of the practice at several levels. Dworkin *qua* philosopher states that "any

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<sup>3</sup> Ibid., p. 47.

adequate account of interpretation must hold true of itself,"<sup>4</sup> and argues for his interpretation of interpretation. Dworkin *qua* philosopher of law selects the perspective of the judge as being most important in the practice of law, and argues that his interpretation of law centred on adjudication shows the law in its best light. Dworkin *qua* philosopher of adjudication argues for his interpretation of adjudication as an interpretive practice, one centrally concerned with theoretical disagreements, before going on to argue for a particular interpretation of adjudicative practice, an interpretation he names "law as integrity." Law as integrity selects as the most important features of adjudication a) that respect is paid to the virtues of justice, fairness and procedural due process,<sup>5</sup> b) that fairness and procedural due process place constraints on the ability of justice to produce a coherency in the principles "that flow through and unite different departments of law",<sup>6</sup> and c) that concerns of justice occasionally overrule concerns of fairness and procedural due process. Law as integrity interprets adjudicative practice as best seen as actions on behalf of a community of principle, and recommends that judgements of substance sometimes be allowed to overrule convictions about fit. Dworkin *qua* Herculean judge of law as integrity interprets justice as demanding a particular conception of equality which he identifies in the common law of accident.<sup>7</sup>

The various levels of interpretation in the previous paragraph are not kept separate by Dworkin, and indeed, the strength of his interpretation at one level often presupposes or depends of the strength of his interpretation at another level. Thus although I am most interested in this chapter in examining the claim that a judicial interpretive

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<sup>4</sup> Ibid., p. 49.

<sup>5</sup> Cf. *ibid.*, p. 404.

<sup>6</sup> *Ibid.*, p. 406.

<sup>7</sup> *Ibid.*, pp. 238ff.

perspective is the best starting point for a theory of law, I shall consider several layers of Dworkin's interpretations, often simultaneously.

Dworkin tries to justify his choice of the judge's perspective as central to any sound understanding of our legal practice by claiming it has four virtues: 1) it is an internal point of view of the practice; 2) law is argumentative, and "the structure of judicial argument is typically more explicit"<sup>8</sup> than that of other perspectives, judicial argument thus serving as "a useful paradigm for exploring the central, propositional aspect of legal practice;"<sup>9</sup> 3) the issues of soundness and truth are in the forefront in this perspective;<sup>10</sup> and 4) "judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal".<sup>11</sup> These claims, which will be confronted in detail at the end of the chapter, should be kept in mind through the next several sections.

While Dworkin claims that law is best characterized by noting that judges do and should decide cases by choosing the interpretation of law that best fits and justifies existing practice, I shall argue against this in the next five sections on several grounds. First, if the intent is to make the law more principled and justifiable, this theory of adjudication may be counterproductive. Second, the theory as it stands cannot cope with certain situations that can arise in adjudication when a panel of judges rather than a single judge is deciding a case. Third, the theory increases the effect on the law of the political

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<sup>8</sup> Ibid., p. 15.

<sup>9</sup> Ibid., p. 14.

<sup>10</sup> Dworkin may not have meant this, but I am trying to be charitable to his position and to the text on p. 14 of *Law's Empire*, which states that "This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face."

<sup>11</sup> Dworkin, *Law's Empire*, p. 14.

and ideological beliefs of judges, especially those on the highest courts of appeal. Thus the system of appointment of these judges practically determines much of the content of law, and a theory of law adequate to that aspect of law as a social practice is required, rather than a judge-centred one. Fourth, the perspective of lawyers is used to show a) that law as integrity overstates the role of the judge in our legal practice and b) that an external point of view to the process of adjudication is useful and illuminating as to the nature of our law. Fifth, the validity of interpreting a social practice from a point of view different from a Dworkinian participant is examined in light of the possibility of different perspectives towards that practice.

### Principled Law

*Prima facie*, one would expect that a theory of adjudication that says judges do and should base their decisions on the interpretation of legal practice which provides the best justification in political morality for the law while duly respecting fit with existing legal practice would end up producing a law that was fully justified, a law that had worked itself pure. It would purify the law of inconsistencies, since inconsistencies in law offend the principle of justice that like cases be treated alike. And it would cause the law to converge on justified political morality, although a limited fidelity to existing law would attenuate the speed of convergence.

Two adjudicative criteria can be identified in this account. The first is a progressive criterion of justifiability in political morality, which in isolation would lead to a radical version of legal pragmatism, which is one form of judicial activism as discussed in chapter 1. The second conservative criterion of respect for fit with the existing law tempers the first. If the second criterion were unhindered by the first, a rigid conventionalism (i.e.,



a radical form of judicial restraint) would result. But a theory of adjudication which accepts both criteria should approach and eventually settle on the most justified version of the law, regardless of the confusion and unjustifiability of the initial state of the law.

So goes a naïve account of Dworkin's theory. Dworkin himself grants that three major wrinkles distort this picture. The first is that what constitutes a fully justified political morality is not settled--different judges subscribe to different political theories as justifications for existing legal practices. Even if all were aiming at the best interpretation of the principles upon which the community personified is acting, disagreement should be expected between them. Some interpretations may nevertheless be rejected as incompetent and wholly without merit: the fact that more than one interpretation may be plausible does not require that any proposed interpretation be accepted as plausible. Dworkin cites three plausible accounts of the principles of justice which underlie Anglo-American law: his own, utilitarianism and communitarianism. Marxism and fascism are examples of implausible readings.<sup>12</sup>

The second difficulty concerns the relative weighting of the two criteria in choosing a best interpretation. Although some interpretations of the best relative weighting would be unacceptable to any competent judge (e.g., one which denied any force to precedents in common law), the range of plausible weightings believed to be the best by different judges would nevertheless sometimes result in disagreement over which side should win a legal dispute.

The third area of concern is that interpretations of the meaning or import of precedents is open to dispute. Judges who agree about the extent to which a proposition or

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<sup>12</sup> Ibid., p. 408.

distinction of law is justified by political morality and who agree on the fealty owed to existing law may yet disagree about whether or not that proposition or distinction is evident in or supported by a set of precedents.

Once we admit these three wrinkles, however, the claim that law as integrity will eventually produce an optimal law is much less plausible. Law as integrity, which encourages decisions in the law to sometimes ignore demands of fairness and procedural due process in the pursuit of "improvements" to the law in terms of the extent to which it matches controversial principles of justice, might, if it were actually practised by all judges, lead to a less worthy law, due to more numerous offences against all three of law's virtues.

Once it is accepted that accounts of the principles that underpin the law will vary significantly from judge to judge, it is clear that decisions based on these divergent accounts could quite possibly diverge. If there is a consensus about the principles underlying existing law, but the weighting of the criteria allows an opposed decision based on other principles which are themselves controversial, then the law will tend to become less coherent and more unprincipled. And if it is admitted that the less coherent existing law is, the more a judge must rely on her personal conceptions of the principles of political morality which would justify law as whole, and that if existing law is incoherent then more accounts of the principles underlying the law become plausible candidates for her belief, then it becomes clear that Dworkin's theory of adjudication could quite possibly make the law less principled and less justifiable even though it encourages judges to each individually attempt to make the law more principled and justified.

John Mackie has pointed out<sup>13</sup> a similar fallacy of composition in Dworkin's earlier book, *Taking Rights Seriously*. In that case the fallacy was that a theory of adjudication which held that "there is on every issue a determinate and, in principle, discoverable . . . law"<sup>14</sup> made the law determinate when judges used the theory to discover the answer to hard cases. Not only was this claim false, but the indeterminacy which resulted from Dworkin's theory was actually worse than that which resulted from the version of legal positivism which he was attacking.<sup>15</sup>

Dworkin does recognize several factors which promote convergence in the interpretations judges make of the law: that some propositions of law are universally accepted; that precedent exerts an influence which cannot be totally ignored; that the wider intellectual environment and "the common language that reflects and promotes that environment" limit conceptual horizons and discourage idiosyncrasies; that formal legal education is by nature conservative; and that "the process of selecting lawyers for judicial and administrative office, adds further centripetal pressure."<sup>16</sup> But Dworkin seems to accept the argument of this section when he writes, immediately after listing these converging factors, that his theory allows the law to better reflect the tensions of political morality present in the profession and society at large.<sup>17</sup> While he views this result as a credit to his theory, a more sober view of the matter would take more heed of its danger. We turn to the law for definitive answers; part of its point is to help us resolve disagreements

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<sup>13</sup> John Mackie, "The Third Theory of Law", *Ronald Dworkin and Contemporary Jurisprudence* (Totowa:Rowman, 1984), pp. 161-70.

<sup>14</sup> *Ibid.*, p. 169.

<sup>15</sup> *Ibid.*, p. 169.

<sup>16</sup> Dworkin, *Law's Empire*, p. 88.

<sup>17</sup> *Ibid.*, p. 88.

consistently on an issue for one side or the other. If disagreements between judges are increased by a theory of adjudication, this soon becomes a matter of regret. In mild cases it leads to an increase in pernicious practices such as judge shopping. In severe cases it results in the breakdown of a legal system, in which there is no single Hartian rule of recognition. In Gerald Postema's terminology, this would mean that no convention existed to solve the level 3 coordination problems amongst law-applying officials, which is inconceivable since "coordination is fundamental to law."<sup>18</sup> The next section will examine one aspect of this point in more detail.

But before moving on I would like to consider some possible responses Dworkin could make to the argument of this section. He sees two dimensions on which to judge interpretations: fit and honour. To my criticism that his theory leads to increases in the differences of principles in the law, making it less principled overall, he could respond that law as integrity both fits and honours our practice. It would be unacceptably inaccurate to claim no competing principles were present in our laws and judicial practices. Law as integrity shows how they arise. Law as integrity also honours our practice in two ways: the controversies to which I object are a way in which participants in the practice demonstrate and live their engaged protestant attitude to the practice by trying to make it the best it can be. This committed attitude towards the community and its institutions is valuable in itself. Secondly, for the practice to evolve into a purer, more just form, or even into one which is simply adequate to the changing challenges of the day requires the introduction of new principles. It is unreasonable to expect that the introduction of every new principle will be greeted with universal applause. Some of these principles will not be good ones, and will need to be weeded out. Differences of opinion on their merit are a

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<sup>18</sup> Gerald J. Postema, "Coordination and Convention at the Foundations of Law", *J. of Legal St.*, vol. XI (January 1982), pp. 165-203, at p. 194. See also pp. 183, 193.

sign that the debate over which are worth incorporating is proceeding. So the controversies are a natural prelude or concomitant to the improvement and preservation from decay of our law.

None of these rejoinders speaks directly to my point that a more restrained adjudicative practice would be a better interpretation. My proposal also explains why there are some conflicting principles in law; the interpretive attitude can be just as strong if it is adopted; and it allows the law both to be pruned and to grow in a slow and healthy manner. If radical surgery is required, it also allows this, but presents more resistance to all suggestions for change in the form of stronger burden of proof that an worthwhile improvement would result.

On the same criteria of fit and honour my moderate suggestion fares well in comparison with law as integrity. Law as integrity proposes a utopian scheme in which judges optimize every decision. Yet just as act-consequentialism is unworkable as a practical decision making theory in morals because of the difficulty, nay, impossibility of making all the requisite predictions and calculations in every situation in time to act, so too would Dworkin's theory of adjudication be unworkable in practice, as he admits. My modified rule-based approach more accurately fits the actions of judges who are forced to rely on maxims and rules of thumb to guide their conduct. Circumstances nevertheless arise in which the merit of these rules is called into question, and considered reflection may lead to an exception to the rule or to a change or even rejection of the rule. While a rule-based or strictly conventional approach would either have to have had a more precise rule already articulated or advise that the rule be followed even when it leads to severely regrettable effects, my proposal allows flexibility. Where law as integrity enjoins Hercules to set aside the rule whenever that is better, all-things-considered, my more moderate judge

would have a bias in favour of applying the existing rule. The advantage in morals of this type of bias is that it helps to discount the natural psychological tendency to consider more heavily the effects on oneself and those close to one. In adjudication, it serves to discount the human tendency to be more aware of the benefits of an improvement one is contemplating and to overlook or to underestimate the likelihood and severity of potential pitfalls. It also expresses a prudent caution on the part of the judiciary to prefer the preservation and protection of existing known practices over efforts to establish better ones which entail some risk of failure. As a practical theory of adjudication it therefore leads to the best results in the long run, which honours the practice more than law as integrity. Law as integrity, which aims directly at the best results, even the short run, ends up missing the mark.

It might be replied that my moderate rule of adjudication is just one conception of law as integrity, since what I am proposing is just a variation from what Dworkin says Hercules would do. Since Dworkin freely admits to the differences between Hercules and real-world judges which is the starting point of the objection, it does not seem unreasonable to suppose he would accept the rest. Even if he did not, the difference is a matter of relative detail.

While there is merit in saying the theory of adjudication I am proposing is related to Dworkin's, there are also fundamental differences. For Dworkin, the law is the decisions which follow from the interpretation that, "all things considered, makes the community's legal record the best it can be from the point of view of political morality."<sup>19</sup> The major point of coincidence between the theories derives from my claim that a modified rule-based approach will lead to better results in the long run than attempts to implement a

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<sup>19</sup> Ibid., p. 411.

fully act-based approach. If I am right, then Dworkin's methodology of choosing the preferred option, all things considered, in every act would result in adopting my approach if the correct calculations could be completely carried out. The difference is that I insist that these calculations cannot, are not, and should not usually be carried out completely. Attempts to do so are doomed to failure and will lead to poor decisions.

I was somewhat imprecise in the last paragraph. 'If the correct calculations could be completely carried out' presupposes that time and accuracy constraints are removed in order for the calculation to proceed. If this presupposition is used in the calculations, that is, if a person assumes she has Herculean powers when determining what she should do, then Dworkin's law as integrity results. The correct result is obtained by removing the constraints *on* the calculating, but retaining them *in* the calculations: this reflects the hypothetical results that would be achieved, taking into account that the person cannot actually calculate the results.

My proposed adjudicative method can be expected to achieve results worse in terms of the coherence of principles of political morality in the law in the long run than Hercules' but better than a human judge attempting to emulate Hercules. What it would identify as law is different from both.

A theory of law is a theory of adjudication for Dworkin. He contrasts his conception of law as integrity with conventionalism and pragmatism. Law as integrity, as practiced by Hercules, falls in the middle between these two theories of law in terms of how and what it identifies as law. The theory I am proposing would likewise fall in the middle between conventionalism and law as integrity.

### Judgements of Panels of Judges

Proceedings in appellate courts are normally heard by a panel composed of more than one judge. The highest courts in the Canadian, British and American systems all sit in panels. Dworkin claims that he is "concerned with the issue of law, not with the reasons judges may have for tempering their statements of what it is."<sup>20</sup> His point seems to be that it is best when constructing a theory of law to ignore the group dynamics of these pivotal panels of judges, and concentrate on the "pure" method of a single judge, even though his archetypal judge is constructed by studying the practice of judges mainly in appellate courts. Granting for the moment that judges are the only participants in legal practice whose perspective it is necessary to consider when constructing a theory of law, is it wise for Dworkin to disregard the structure of our court system which forces onto these judges (who are the final arbiters of what the law is) a perspective which includes the fact that other judges will be deciding the same case? Is it wise for him, when describing the methods of the superjudge Hercules, to not consider the fact that judges, as well as assessing and weighing arguments for both sides of a case, must also argue for their preferred lines of reasoning with other judges? Argument, when it is intended to convince, and especially when aimed at finding common ground, must take into account the beliefs and opinions of the audience as well as the speaker's own message.

Cases may exist in which it is logically necessary for compromises of principle to occur amongst the judges deciding a case. Dworkin's theory, structured on the paradigm of a single judge deciding a case, does not deal with this eventuality. While Dworkin himself cites cases of judicial compromise,<sup>21</sup> his "law as integrity" theory, as developed using the device of a superhuman Hercules, does not explicitly allocate a place for

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<sup>20</sup> Dworkin, *Law's Empire*, p. 12.

<sup>21</sup> E.g., *ibid.*, pp. 29-30.



compromises of principle amongst judges on panels. Dworkin thereby ignores an important feature of adjudication, since "The spirit of integrity . . . would be outraged if Hercules were to make his decision in any way other than by choosing the interpretation that he believes best from the standpoint of political morality as a whole,"<sup>22</sup> yet the method Dworkin describes for developing this interpretation does not take into consideration the interpretations of fellow judges hearing the case. This lapse is especially important because Dworkin admits Hercules does not have superhuman insight, but simply the time and energy to answer questions comprehensively which human judges can only answer partially. "His judgments of fit and political morality are made on the same material and have the same character as" human judges'.<sup>23</sup> Before examining this point though, it is useful to consider some ways in which panels of judges mitigate the undesirable effects of Dworkin's theory of adjudication outlined in the previous section.

Novel interpretations of the law by a judge would not immediately result in a decision of law unless they were so convincing as to sway a number of other justices of the court; they would only appear as dissenting opinions. The law is thus shielded from eccentric interpretations, while still allowing original interpretations of merit to be introduced and gradually adopted (e.g., several of Judge Holmes' minority opinions for the United States Supreme Court<sup>24</sup> have since become majority opinions in similar cases which followed in that court). Although dissenting and minority opinions are part of the law, their 'weight' is 'lighter' than majority and particularly unanimous opinions. The divergent or

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<sup>22</sup> Ibid., p. 263.

<sup>23</sup> Ibid., p. 265.

<sup>24</sup> His dissent in *Abrams v. United States* "is at the root of modern First Amendment protections." Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston: Little, Brown, 1989), p. 473n.

dispersionary effect of Dworkin's version of law as integrity is thus reduced, producing a more cohesive, and other things being equal, more justifiable law.

But this observation would be of little import if judges disregarded one another and wrote their own idiosyncratic opinions, with cases normally being decided by a mere numerical preponderance of judges rather than a consensus of opinion. Consider two aspects of their interaction: first, the possibility that discussions amongst these fallible humans may allow them to gain a new or better understanding of views which they had rejected, accepted or which had not occurred to them; and second, the possibility that judges modify their opinions in light of the opinions of the other judges *due to the value they place on agreement amongst themselves*. The first point illustrates one danger of hubris for a human judge adopting a theory of adjudication designed for a superhuman Hercules; the second, a part of judicial practice consciously disregarded by Dworkin but important to a good account of that practice as a whole.

Any judgement by a panel of judges on a case with sufficient complexity could be used to make the following point. To illustrate the importance of the problem, consider a final appeal court which must decide a case where, because of constitutionally enshrined rights, the issue is one on which the legislature is not competent to pass laws<sup>25</sup> yet which nevertheless has great social importance and the potential for divisiveness. Suppose that key terms or concepts in the case have not yet been interpreted or have been interpreted in

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<sup>25</sup> On some issues the courts may single out certain options as unavailable to the legislature while allowing the legislature to choose from amongst a number of others. E.g., in *Regina v. Morgentaler, Smoling and Scott (1986)*, 52 O.R. (2d) 253 (C.A.) at pp. 261-2, the court wrote that "The issue is only whether a pregnant woman has a right to terminate her pregnancy which is broader in scope than that given by s. 251 of the Code, and whether s. 251 deprives her of this right otherwise than in accordance with the principles of fundamental justice." Any legislation which did not impinge her right otherwise than in accordance with the principles of fundamental justice would thus be constitutional (in the face of challenges of this type).

conflicting ways. Let the issue be one which is complex enough to allow of many plausible answers, e.g. the circumstances under which an abortion should be legal, or the actions necessary to ensure racial or sexual equality. It is conceivable in such circumstances that each judge could come up with a competent and plausible interpretation of the law, but that no two of the interpretations would be alike in detail and impact because of the divergent principles upon which they are constructed. It may be that although certain of the justices believe that theirs is the best interpretation, they also believe that the interpretations offered by some of the other judges are almost as good. Now the question is this--is there anything in a situation such as this which would justify or require a judge to set aside their best interpretation of the law, either by accepting one of the other good interpretations (from their perspective) or by fashioning or accepting some compromise amongst different interpretations?

Questions of law which allow of more than two exclusive answers in a single case might require consensus building in order to obtain a simple plurality of votes. If a nine member court were split into three camps of three, each camp could be overruled by the other two.<sup>26</sup> The following example is meant to illustrate such a conflict of principles underlying three interpretations; nothing hangs on the interpretations themselves, or whether these interpretations are indeed plausible.

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<sup>26</sup> The following theoretical argument, which shows it to be logically possible for there to be conditions under which a compromise of principles is required for a plurality to emerge, would seem to require an actual instance of such a conflict of interpretations in order to avoid the charge that our law, as a matter of contingent fact, escapes this quandary, ie. it never is the case that there are plausible interpretations that conflict in just this way. While a wider knowledge of law than I possess might be able to locate such a disagreement in the judgements of cases with dissenting opinions for the majority or for the minority, I must trust the reader's judgement that this is indeed a live option.

Suppose that a court must decide a hypothetical case in which a Sikh has been fired for refusing to wear a hard hat in a work situation which was potentially dangerous to himself (but not to others) if he did not wear it. His reason was that wearing the hardhat would offend his religious duty to wear a turban as his only headdress. He has brought an action to court alleging wrongful dismissal under a new Charter of Rights which guarantees a right to freedom of religion. He notes in his suit that the company could, with a small expenditure, have made his working environment safe for him to work in without a hardhat.

If the following three positions are granted for the purposes of argument to be plausible interpretations of the law and are each held by three judges, the logical necessity of a compromise becomes clear.

Position 1: A company has a duty to prevent its employees from working in unsafe conditions. But as the right to freedom of religion does not extend to special treatment in the workforce and is simply the right not to be discriminated against on grounds irrelevant to one's work performance, the state has no right to force the company to make the workplace safe for the plaintiff to work in without a hardhat. The company was therefore entitled to fire the Sikh for refusing to work in a safe manner.

Position 2: As freedom of religion is a fundamental right, and rights are only rights insofar as they can be exercised, the right to freedom of religion should not be abridged by the necessity of earning one's livelihood, where this does not impose an undue burden on society or particular individuals within it. Since the company has a duty to ensure safe working conditions, and this can be fulfilled either by requiring workers to wear hardhats or by an investment in modifications to the workplace or by making some adjustment in the duties of the plaintiff, neither of which would constitute an undue burden,

the company violated the right to freedom of religion of the plaintiff, and must rehire him and make such changes as are necessary to ensure the workplace is safe.

Position 3: Freedom of religion is centrally concerned with the right of individuals to adhere to the faith of their choice, including the right to observe its customs and rituals. While this right demands toleration, it should not be construed so broadly as to include a requirement that members of society perform acts prejudicial to their interests in order to accommodate the variety of religious faiths in our society. Thus, while companies have a duty to promote a safe working environment for their employees, this does not require or allow them to fire an employee who objects to a work practice on bona fide religious grounds when this poses no additional risks to other persons or the company. The plaintiff must be rehired, but the company is not required to modify his workplace or relieve the plaintiff of duties dangerous if performed without hardhats. Furthermore, the company is absolved of liability for any injury the plaintiff may suffer as a result of not complying with normal company regulations concerning the use of hardhats.

If each block of judges wrote their own judgement without considering the other two positions, the decision would be inconsistent, and insofar as it set a precedent for similar cases, the law would also be inconsistent. Consider that a) a majority of the judges requires the company to rehire the plaintiff (positions 2 and 3), b) a majority is against the company allowing the plaintiff to work in an unsafe environment (positions 1 and 2), and c) a majority is against the company being required to modify the workplace to make it safe to work in without hardhats (positions 1 and 3) or otherwise accommodate the needs of the plaintiff. Some compromise is necessary here. Dworkin's theory of adjudication is thus either incomplete or leads to inconsistency in the law.

The inconsistency can be avoided or resolved if judges place some value on developing common fronts amongst themselves. While the example just given presents a case of an overriding need to make compromises of principle, other situations may exist where there is some lesser value to be achieved through compromises of principle, but this value is still large enough to swing the opinion of a judge between two closely balanced interpretations, or for two groups of judges to decide to forge a compromise interpretation.

An extension of law as integrity to include consideration of the benefits to society and the cause of justice derived from increased unity in judgements is thus required to repair Dworkin's theory. But this repair signals the introduction into the theory of a qualitatively new element: what the law is depends not just on the best interpretation of legal practice as it is and should be, which a single judge can construct, but also on the interpretations that other judges consider best.<sup>27</sup> While Dworkin believes that "the compromises actual judges think necessary . . . [in order to gain the votes of other justices are] compromises with the law,"<sup>28</sup> sometimes they are actually a necessary part of the law. Such an expanded theory holds that what the law is depends on several perspectives, although these are still only judicial perspectives.<sup>29</sup>

Postema has argued for the general claim that a fundamental part of law is the way it solves strategic coordination problems at three levels: (1) between non-officials, (2)

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<sup>27</sup> Cf. Dworkin, *Law's Empire*, p. 12.

<sup>28</sup> *Ibid.*, p. 381.

<sup>29</sup> Novick, *Honorable Justice*, pp. 342-6, 350, describes in more practical terms the problems of dissent and the need for judicial agreement on the U.S. Supreme Court in the period leading up to the appointment of William Howard Taft as Chief Justice in 1921. The fact of these changes in opinion is noted casually in several places in the book, including, e.g., p. 346: "Taft presided as if over a seminar, carefully eliciting everyone's views of every case, and Van Devanter, . . . served as Taft's deputy, mediating among the justices and negotiating changes in opinions to secure agreements."

between officials and non-officials and (3) between officials. The argument above illustrates a very sharp and pressing third level coordination problem which Dworkin cannot accommodate in his view of law as whatever is part of a Herculean judge's best (political) theory of law.

Is the required repair of law as integrity very substantial? The clear choice is to have Hercules factor into his own theory of law not only the institutional constraints required by fairness<sup>30</sup> and procedural due process, but also the contingent facts about the opinions of the other justices, and his knowledge of their susceptibilities to various types of arguments, their stubbornness and other personality factors, the patterns of deference and antagonism he expects amongst them in the court's conference, perhaps even their health and mood on the particular day. Everything which is relevant to deciding how the other justices will decide the case at hand, and how much and how they can be convinced to change their minds is gathered up. Given this data, Hercules then proceeds to develop his best interpretation, considering how his own opinion or vote in the decision of the court will make the law the best it can be.

Once again, I would recommend that a human judge should filter most of this out most of the time. Questions of manipulation are out of place amongst equals who respect each other, as justices on a supreme court should. Sometimes the benefits of a unanimous decision or a compromise on a matter of principle will be worth troubling about, but often they will not. Often, as Dworkin emphasizes, the law is better off if it embodies a dispute.

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<sup>30</sup> A passage on p. 249 of *Law's Empire* suggests Dworkin might classify my present concern as a matter of fairness. The point I am interested in arguing here is that law as integrity must address the additional factors involved in adjudicating on a panel of judges: I am not trying to suggest that he needs to name a different virtue.

Hercules, however, in his ever vigilant readiness to improve the law, will constantly be on the lookout for opportunities to finagle changes from the other members of his court. He will have all the time in the world to plot strategies and come up with careful misstatements his own preferred position that will attract the assent of other members of the court. In the same way that existing law is law as (inclusive) integrity, which balances the three virtues of justice, fairness and procedural due process, not just pure integrity, which considers only justice by abstracting away all of the latter two virtues, just so will the law be what Hercules says it is, not what he would prefer to say it was if he were not shackled with the constraints imposed by other judges on a panel.

The problem with this portrait is that foreign pigments seem to have tainted the colours of the dignity and honour in which Dworkin is rendering the law. If law is whatever a judge properly considers when deciding a case, then aspects of other judges on a panel which are important to working with them are part of law. This strikes us as odd. When the over-achiever, Hercules, is set to work on it, it becomes ludicrous. I do not believe Dworkin casually disregarded these aspects of adjudication in law as integrity. They are embarrassments to the claim that a theory of law is the same as a theory of adjudication. By showing it is necessary for a theory of adjudication to incorporate some of these phenomena rather than simply label them all as matters of regret, I have adduced some evidence for the claim that a theory of law, that is, of what law is, should be distinct from a theory of adjudication, that is, of how judges do (and should) decide what laws should be enforced.

### **Appointing Judges**



If it is the case that judges do and should decide cases based upon their own best theory of political morality, then the political and ideological beliefs of judges will have a significant effect on the content of the law, on what the law is. A theory of law which makes law depend so centrally on the particular individuals who are judges should interest itself in the manner of appointment of these judges, for the political makeup of the highest appellate court will significantly determine what the law is. The same is true to a lesser extent of judges on lower court benches, insofar as they have and use power to advance or evolve the law, and determine its application in particular cases. If the theory ignores this process, it risks being unable to make law justifiable to the community ruled by that law.

To see why this is so, consider the case of a court populated by judges who subscribe to a narrow and unrepresentative band of the political spectrum of their society, perhaps the self-interested perspective of a dominant class. Even if the statutes they must interpret issue from a representative legislature and are politically justifiable on some interpretations, it is likely that the justifiability of the law would be lessened if not made impossible by the definitive interpretations of a biased court.

So in order to justify the law and explain its claim to being authoritative, which is surely part of the point of Dworkin's theory of law, his narrow theory of adjudication would need to be supplemented by a theory of judge selection. Dworkin might claim it is wrong to demand this of him, since he is allowed to frame his project as he wishes. He could point out that a great number of things must be true of a political system in order for its law to be justified, and his theory of law should not be required to spell them all out. He notes at the beginning of his book several ways in which what it presents

is less than a complete theory of law,<sup>31</sup> and this objection could simply be added to that list. But his project "aims . . . to construct and defend a particular theory about the proper grounds of law,"<sup>32</sup> and I contend that, given his characterization of the grounds of law in the best interpretations of the justifiability of the law by individual judges, he must account for the selection of these judges in order to defend his theory. If law as integrity is to speak to every member of the community, the principles the judges weave into the fabric of its political morality must reflect the dreams of more than just the official classes. Whether or not a "theory of judge selection" should be named as part of his theory of law, if Dworkin's theory of adjudication is accepted then it is required in order to understand how and why our law has come to be what it is, what the essential and determining features of our current legal practices are, and what their ideal forms in a true political morality would be, so that we can strive toward realizing them in the future. Just as Dworkin deals with political integrity in legislation, so should he deal with judge selection.

While I will not attempt to construct such a theory, I would like to note that in countries such as Canada and the United States where judges are appointed, a theory of judge selection in the spirit of Dworkin's law as integrity would have to recognize the judge-selector's perspective as essential to determining what the law is in an abstract and overarching way, while the judge's perspective would be essential to determining what the law is at the level of detail found in concrete cases. Indeed, as became evident in the recent struggle between the U.S. Congress and President Reagan over the President's attempt to appoint a Supreme Court justice who shared many of his political beliefs, the judge-selector's perspective includes a knowledge of and responsibility for future concrete judgements of a justice.

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<sup>31</sup> Dworkin, *Law's Empire*, pp. 11-2.

<sup>32</sup> *Ibid.*, p. 11.

This criticism of Dworkin's position cannot be refuted just by Dworkin's arguments regarding the primacy of the internal point of view. It is not just that we misunderstand the practice of law if we ignore this facet of our law (this is where an Dworkin's version of an external critique would end). In addition, our law would not reflect the principles of political morality accepted by our community personified if judges systematically interpreted laws using an ideology which did not reflect the ideology of the community at large. This central ideal of law as integrity would be perverted. A participant in the practice of law who wanted to make the law the best it could be would also attend to this aspect of our legal practice.

### **Lawyers and the Law**

Is the lawyer's point of view parasitic on the judge's, or vice-versa, or are the two perspectives symbiotic? To pretend that judges have a responsibility in our judicial system to determine all the possible cases that can be made for each of the litigants' causes, and to determine their merit is a perversion of actual practice. Our judges, our Canadian, British and American judges, are arbiters and adjudicators, not investigative agents. Just as it is the right and responsibility of the defence and prosecution to call witnesses to make their respective cases, yet this right is not held by the judge, so it is the right and responsibility of each party to summon arguments on behalf on their cause. Yet this responsibility does not burden our judges. Although judges may if they wish develop new lines of legal argument instead of simply evaluating those which are presented to them, this activity is supererogatory, not incumbent on them. Judges are meant to rely, and do rely, on the arguments put forward by the parties to disputes at law. Law as integrity ignores this limit to their duty. Because it attempts to account for all of law from the single

perspective of a judge, it does injury to that perspective by forcing it to embrace and include concerns which are properly the concern of lawyers at bar.

Lawyers, when they represent a litigant in a lawsuit, attempt to win the case for the side they represent, and, failing that, try to minimize the damage to their party by reducing the sentence or redress required. Their interest is to best represent the interests of their client, whether the "client" be the state, a private individual or a corporation. Their interest in the law is not finally to make the law more justified, or any other such lofty goal. It is partisan: to show how the law is what their side wants it to be, and how it is not what the opposing party wants it to be. Their attitude towards the law is instrumental: how can they use it to advance their party's ends? While counsel for the Crown or the executive arm of government might be thought to represent an agent whose only goal would be the advancement of the cause of justice, the need for an judiciary independent of the other branches of government belies this claim. A lawyer's perspective on what the law is would emphasize the disputatious aspect of it, which, though central to our practice, is scarcely acknowledged by the judge's perspective from above the fray.

Lawyers do not only argue in court. They also counsel their clients as to what is legal and illegal. And sometimes they will need to give advice on unsettled law. Law as integrity is woefully inadequate for this. Even if it is true as a theory of adjudication, a lawyer advising a client should not try to decide what the law is using law as integrity. Clearly, what is at stake is not what the lawyer would decide if she were a judge, but what the actual judges will decide, in the actual courts of the day. While the ruling theory of adjudication will enter the predictive theory at some point, the two are distinct. Thus a predictive theory of law external to the judge's point of view is required for lawyers when

they act in this capacity. Thus a predictive theory of law is still useful from an internal, participant's point of view.<sup>33</sup>

What law is will often not be determinate from this perspective. If law as integrity is accepted as a theory of adjudication, the lawyer will need to attend to the principles of political morality that the current judges use to decide cases. And the lawyer will recognize that what the law is on an issue may change simply because of a new appointment to the Supreme Court, even though no change in the statute or case law or principles underlying the law has changed.

### **Multiple Interpretive Perspectives**

Besides judges, judge-selectors and lawyers, there are a number of other points of view towards the law, many of which require a theory of what the law is which is different from judges' law as integrity in order either for persons with these perspectives to pursue their proper activities or for their role in shaping law to be recognized. What the law is changes practically if the Solicitor-General decides not to investigate or prosecute certain types of cases. Changes of certain types in the customs and conventional morality of citizens mean changes in what the common law is. Different theories of law are required both for a social critic advocating changes in the method of appointing judges and for a sociologist attempting to describe the role of law in shaping the actions and attitudes of citizens in a society.

In the previous section, the need for a predictive theory of law was illustrated by the case of a lawyer advising a client on an area of unsettled law. Is this a case of the

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<sup>33</sup> Cf. *ibid.*, p. 13.

lawyer *joining* in the practice of adjudication? Is it, as Dworkin maintains,<sup>34</sup> really impossible to understand a social practice such as law without joining in that practice? A more plausible view is that one can often understand practices in several ways. Some of these ways would entail that one had joined the practice, in the normal sense of join, while others would not. Normally to have joined a practice is taken to mean to have become a participating member of a practice. But there may be different categories of membership. To adopt the attitude of a judge in Canada evaluating what is and should be the law in Canada is not to be or become a Canadian judge. It does not even mean that Canadian judges will pay any heed to one's pronouncements.

Dworkin himself, for all of his rhetoric about the necessity of an internal point of view, is not a judge. He has his own perspective as a philosopher that does not perfectly mimic the practical, applied perspective of a real life judge. He is much more concerned than they are to tease into conscious view the reasoning processes many of them use instinctively. He is also more oriented towards identifying and justifying the grounds of law than his more practical brethren, who merely want to use those grounds, much as he would have us suppose that he is merely giving an account of law from their perspective. Indeed, his perspective as a legal philosopher might arguably be leading Dworkin to choose as the grounds of law different things than are used by actual judges, and would be chosen by actual judges as what should be the grounds of law. An interpreter's perspective on a social practice can be even more pointedly at cross-purposes to the participants' viewpoint and needs than this difference between Dworkin's and judges' perspective reveals.

Often, as in the case of a lawyer advising her client, the difference in perspective between the interpreter and another agent of a social practice makes it difficult

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<sup>34</sup> Ibid., p. 64.

if not impossible for the former to adopt the latter's interpretive perspective to the practice. While this difference can perhaps be seen as a theoretical disagreement about the best interpretation of the practice like any other, noting that the disagreement springs from the perspective and needs of the particular role played by the interpreter in the practice is useful. It allows a distinction to be made between disagreement based on the point of the practice, or what it requires, and disagreement based on the perspective of analysis of the practice.

When a social practice is complex enough to have several roles, none of which completely dominate or characterize the practice, it is time to question whether a particular participant's perspective is the best point of view from which to analyze and interpret the practice. This does not necessarily mean adopting a view from nowhere towards the practice. It may be possible to develop a rich and complex account which allows several perspectives and their (sometimes) separate concerns to coexist, rather than subjugating all to one.

### Conclusion

It is now time to return to Dworkin's claim that the judge's perspective is the one which should be adopted in order to understand law. He presents four supporting arguments. The first is that it is a virtue that this was an "internal" point of view of the practice. If this is taken to mean that it is the perspective of *one* particular role in the practice, we now have reason to question whether this is to be applauded. If, on the other hand, Dworkin insists that it is impossible to give an interpretation except from somewhere, we can identify in the practice a role for a legal philosopher, or even for a descriptive sociological legal philosopher (although we have argued in chapter 1 on moral grounds that no legal philosopher, or other person for that matter, should take such an alienated and

detached view). Legal philosophers are indeed part of the social practice of law widely construed. And if one role must be chosen as presenting the best overall picture of law, it makes sense that it would be a role which is dedicated to constructing that picture by integrating all of the roles and interactions between roles. (In the usual case, participants in one role are only concerned about those other participants in roles with whom they directly interact, even though this may not account for all participants.)

As noted above, Dworkin himself, *qua* interpretive legal philosopher, has a role and perspective which is not that of a judge. The device of Herculean judge serves to obscure this divorce, but it is nevertheless real. Dworkin is not Hercules, and Hercules is not a real judge in our practice of law. Any attack on an account of law because it is an "external" point of view is a two-edged sword which can be used to cut against Dworkin's law as integrity.

The second argument was that judicial reasoning is typically more explicit in a characteristically argumentative practice. While a central feature of law is that it is argumentative, law as integrity reduces argumentative to deliberative. Hercules argues only indirectly with other judges about what the law is in cases which come before him, not joining in a real dialogue which would allow compromises to enter his judgements. And being an arbiter, rather than a party to disputes before the law, he does not dispute and argue claims of law, but only makes, weighs and chooses arguments in the privacy of his own mind.

That the structure of judicial argument is more explicit than lawyers' arguments and summations before court is questionable. We have seen above that the adversarial nature of our judicial system induces lawyers to put forth arguments on their own side of a



case and attempt to refute those of the other side. They do not enjoy the luxury of constructive vagueness, which is the hallmark of joint statements covering underlying differences of opinion. We have seen that judges, like diplomats and politicians, are obligated occasionally to take stands on common ground, forsaking their preferred territory in order to serve a shared and higher end. The literary style of judicial opinions also varies by judge and era. The "cryptic phrase"<sup>35</sup> of Justice Holmes' style, while later widely respected, was criticized by contemporary justices. It has been said that his

opinions had always been easy to read but difficult to understand. They flowed on in a conversational way, but distinct points were difficult to isolate and questions were presented in a kind of mosaic that one took in as a whole.<sup>36</sup>

Hardly the explicit argumentation of Dworkin's Justice Hercules, but still a shining exemplar from the practice he purports to interpret.

It would be unreasonable to claim that judicial argument is the best paradigm for exploring all of the propositional aspects of the law. For, as we have seen, propositions of what the law is in cases that are unsettled are not amenable to a purely judicial perspective. So the usefulness of the paradigm is circumscribed in at least this one way (which is not to deny that much can be learned about law from judges' arguments).

Thirdly, while the issues of soundness and truth are in the forefront in a judge's perspective on the law, law as integrity would mitigate this virtue by encouraging, even requiring, judges to be more personal and subjective in their evaluations.

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<sup>35</sup> E. Sergeant, "Oliver Wendell Holmes", 49 *New Republic* 59 (1926), as cited in Novick, *Honorable Justice*, p. 355.

<sup>36</sup> Novick, *Honorable Justice*, p. 256.

Finally, Dworkin's claim that "judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal,"<sup>37</sup> can be accepted only if "reciprocal" is taken as meaning equal, or of the same kind. The reasoning of judge selectors is ultimately more determinative of the law than that of judges, and the reasoning of other participants, such as citizens and lawyers also influence judges' reasoning.

Dworkin's theory of law is based on interpreting law from a judge's perspective. The last several sections exposed difficulties in this account by focusing on the perspective involved in interpretation. The possibility was opened for a theory of law which accounted for the varied perspectives of participants and the desirability of such a theory was suggested. No attempt was made at a full articulation of it, however, and thus the positive aspects of Dworkin's theory which might be used in such a theory were ignored. That judges are central to our legal practice, perhaps even playing the most important role in it, was not denied. Rather, I argued that all of law cannot be seen by looking only through their eyeglasses.

If a better understanding of the social practice of law results from considering other perspectives than judges', which amounts to separating a theory of law from a theory of adjudication, then this counts in favour of such a theory. The benefits of law as integrity from Dworkin's perspective seem to amount to the improvements in adjudication which would result, and the value of the fraternal

protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances.<sup>38</sup>

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<sup>37</sup> Dworkin, *Law's Empire*, p. 14.

<sup>38</sup> *Ibid.*, p. 413.

Theories of law such as Hart's can be wedded to various theories of adjudication. A theory of law providing an improved understanding of law would be preferable to law as integrity if it could accommodate a better theory of adjudication as well as offering equal or greater inspiration to its community. Even if these latter two considerations were balanced between two theories, the scales would be tipped if an improved understanding resulted from one.

While different purposes could be served by accepting different theories for different ends, our purposes are often clustered and require a single or at least compatible theory, as was noted in the discussion in Chapter 1 about the attractiveness of a normative theory being affected by the accuracy of the descriptive theory to which it was joined. Improved understanding, or more specifically accurate descriptive analysis, is an end which is strong enough, it appears to me, to sometimes outweigh the demands of morality. Not only does an inaccurate description undercut the (moral) effectiveness of a theory by making it implausible, the benefit of a superb analysis can be more important than the morally regrettable consequences which accompany it. Dworkin also considers this 'accuracy of fit' to be an independent political virtue. Even after a minimal threshold of fit has been passed, questions of fit play a competing role with questions of justice, fairness and procedural due process in selecting the best interpretation.<sup>39</sup>

It may be that Hart's concept of law, suitably modified to include an orientation towards a good legal system as well as an analysis of all legal systems, could successfully contend with law as integrity as the best interpretation of our legal practice. Little if anything in what Dworkin has to say about how adjudication should proceed conflicts with Hart's concept of law. Hart's work easily deals with the foregoing concerns about perspectives in law as integrity.

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<sup>39</sup> Ibid., p. 256.

But the matter should not be prejudged. It is a striking feature of Dworkin's law as integrity that every element of the theory strains to make law the best it can be, just as striking as the equanimity between good and evil in Hart's articulation of law as a combination of primary and secondary rules. While I have shown how more 'good' slipped into Hart's work than he cared to recognize, there may be other aspects or elements of law that strive towards order or goodness which are not clearly articulated in Hart's legal positivism and which cannot easily be added to it.<sup>40</sup> Adding a theory of adjudication as a normative addendum to Hart's concept of law may not honour or fit them. Whether a more full-blooded natural law theory provides a better interpretation of legal practice than a modified Hartian account is, however, a question to be answered in another work.

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<sup>40</sup> Kenneth I. Winston has suggested, for instance, that the idea of "a 'functioning order' implicates a standard of goodness" on p. 335 of "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law", *Oxford Journal of Legal Studies*, Vol. 8, No. 3, pp. 329-49.

## CONCLUSION

Two propositions can be abstracted from the previous discussions: that the best way to approach some ends is not to try to optimize their realization directly, and that the ends we strive for sometimes compete with each other. I believe these propositions are true not just in law or in theorizing about law but also in other aspects of our lives.

In this thesis I had hoped to clarify my ideas about the relationship between values, empirical facts and knowledge. In addressing the particular question of the relationship between law and morals I was able to come to some weak conclusions about the more general problem. If the existence of law can depend on its moral content, then facts and values can be intimately related in at least this way. If accepting a theory of law can change what the theory is about then knowledge and value and fact are intertwined in at least some domains.

While a more general set of arguments for the positions adopted would have been desirable, by operating within the bounds set by other theorists I at least reduced the chances that I would end up talking past them because I was addressing a different question, a frequent charge in the controversy between legal positivists and natural law theorists. By engaging in debate with particular existing positions I hoped both to introduce myself to the issues at stake and to gain some small measure of surer success. I nevertheless risk being open to arguments which challenge aspects of the positions of Waluchow, Hart or Dworkin that I need for my own purposes. Thus my work in this

thesis presupposes, e.g., that Waluchow is right in his claim that legal theorists sometimes do affect judicial practice, that Hart is right in his analysis of social morality where he states that one existence condition of a social rule is behaviour that generally conforms to the rule, and that Dworkin is right about judges often deciding cases on the basis of the political morality that would justify the relevant legal materials.

I began this thesis with the observation that "One facet of the dispute over the nature of law and legal systems that developed between Dworkin and Hart and other legal positivists was the relationship of a theorist of a social practice to the community under study." In Chapter 3 I examined whether Dworkin's conflation of the roles of legal theorist and judge is warranted. I concluded it amounts to little more than imaginative role-playing without even being able to fully play the disguise. I claimed there that as a legal theorist he imports concerns to his task that judges in the practice would often be loath to consider. I also questioned whether his theory allows him to object with propriety that disagreement between judges over matters of principle is a mark of a flourishing interpretive community.

But before taking this close look at Dworkin's own work I first looked at two other issues which he has addressed. In Chapter 1 I examined another aspect of the question of whether a legal theorist must be a participant of the practice in order to give a proper account of it. My question was somewhat related to Dworkin's *modus operandi* of taking the practice as the best it can be in order to make it the best it can be, and intentionally blurring the distinction between these two activities. That chapter investigated the interrelations amongst describing/analyzing a social practice, changing that practice, and being responsible for the practice changing in one way rather than another. Although my arguments are different from Dworkin's, they do go part way to establishing some of his conclusions.

In contrast to Dworkin, Waluchow (as well as Hart) believes it is important to understand a practice as it is, and to keep this question separate from how the practice ought to be (or "the best it could be", in Dworkin's words). For him a distinction is possible and desirable between analytic jurisprudence, which involves analyzing legal practice by giving, amongst other things, an insightful theoretical description of the concepts used in it; and normative jurisprudence, which recommends the best evolution of the practice.<sup>1</sup> One way to characterize this approach would be to say that analytic jurisprudence provides an understanding of law necessary (but insufficient) in order to make informed choices in normative jurisprudence. A slightly different way is to say normative jurisprudence takes up where analytic jurisprudence leaves off, using the clear-headed conception of the practice the latter provides to limit and help assess in pragmatic terms the range of alternatives considered in the former endeavour.

My position differs with regard to the relationship between normative and analytical jurisprudence, and this difference is predicated on the fact that legal theorists are participants in the social practice of law. Their actions of articulating and advocating theories of law can affect the development of the practice of law, which in turn affects the accuracy and plausibility of their theories. Since some of these effects will undoubtedly be morally significant, moral considerations should play a part in the choice of the best theory of law. Normative and descriptive elements of a comprehensive theory of law are thus not strictly separable, in that normative concerns can and should play a role in choosing the descriptive elements of the best overall theory.

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<sup>1</sup> Cf. H.L.A. Hart, "Positivism and the Separation of Law and Morals" in J. Feinberg and H. Gross (eds.), *Philosophy of Law*, 2nd ed. (Belmont, CA: Wadsworth, 1980), pp. 69-71, 85. In that work he defends Austin's and Bentham's thesis that the morally best or preferable law can be distinguished from actual existing law, although he does not use the phrase normative jurisprudence to indicate the study of the former.

While Chapter 1 addressed these issues, Chapter 2 examined some of Hart's normative and analytic claims for the separation of law and morals in light of his analyses of social morality and the concept of law. If Hart's accounts of social morality as important social rules and legal systems as combinations of secondary and primary rules are right, then there are conceptual links between law and morality. Whether social morality actually acts to constrain valid law in a particular system is a question of how strong the obligations of that society's social morality are. I also argued, once again using Hart's own analysis of social morality, that the evil consequences he thought would follow from accepting that law is conceptually linked to morality need not occur. Not only is law linked to morality, if people believe they are linked this will lead to morally preferable results in the case of some people and cultures. These arguments justify at least a moderate 'natural law' theory incorporating some connections between law and morals but allowing for the possibility of unjust laws and wicked legal systems.

The arguments presented in this thesis have been against particular opposing positions. Although they do not amount to a systematic articulation of the relation between law and morals, a common thread runs throughout. Moral concerns can and sometimes should supervene on activities such as legal theorizing and adjudication which are often or normally considered separable from morals. While these unexpected moral factors may occasionally affect how we can and should think and act in these domains, trying to approach every problem in these areas with the goal of optimizing the moral outcome is counterproductive. It would be best if these practices normally disregarded moral considerations, but accepted that moral factors can and should be decisive in exceptional cases.



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