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THE ROLE OF MORALS IN THE
JUSTIFICATION OF
JUDICIAL DECISIONS

by

CHRISTOPHER BIRCH

A thesis submitted for the degree of
Doctor of Philosophy
at the
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PREFACE

This work was by its nature not based upon empirical research but formed instead from a set of arguments each of which is concerned with or related to the question of how judges ought to decide decisions. Except where in the text it is specifically acknowledged, the arguments have been developed by the author. However, each bears clear signs of its ancestry. This is an area of philosophy in which the general positions that might be adopted have all been stated many times before and it is not suggested that this thesis says something of the sort that has never previously been uttered, rather, it is hoped that the combination of arguments is sufficiently novel that new light has been shed on old problems. A prototype of the argument in Chapter 7 was read as a paper at a session of the conference on 'Reason in Law' at the University of Bologna, December, 1984. Early versions of Chapters 4 and 5 have been read as papers at seminars given at the Department of Jurisprudence at the University of Sydney.

None of the material in this work has been previously presented for the purposes of obtaining any other degree.

Christopher Birch
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Chapter 13: Conclusion
This work seeks to accomplish three things:

1. To show that the best methodological approach to problems in jurisprudence concerned with legal reasoning is simply to ask 'how ought judges to decide cases'?

2. To demonstrate that in deciding a case a legal agent ought simply to inquire as to where lies his moral duty.

3. To show that legal agents can make decisions in accordance with what they believe is their moral duty without the need to abandon a concept of a legal system as a set of rules existing objectively.

The argument of the thesis commences with the methodological point and does so by examining the classical positivist theories of law and reconstructing the questions to which their theories of law are answers.

It is argued that classical positivism has provided two sorts of explanation. The first has attempted to explain law by way of a physicalist reduction. The analogy with the theory of physicalism in the philosophy of mind is intentional. A similar analogy exists with physicalism in the philosophy of language.
It is argued that physicalism as a project in law fails and that it is partly this evident failure which explains the development of the second strand of classical positivist jurisprudence referred to in the thesis as the 'idealistic' theory of law.

The idealist project is best represented by Kelsen and seeks to explain law as a set of norms describable by imperatival statements and which possess certain quasi-logical relationships described in a theory of validity.

The idealist theory necessarily implies a certain theory of legal reasoning and it is crucial to that theory that legal decisions represent the conclusions to arguments constructed purely from norms chosen from a closed set of possible norms. This theory of legal reasoning was convincingly attacked by the American realists. Further arguments against it flow from what are referred to in the thesis as 'the constitutional paradoxes'.

The rejection of the idealist theory of legal reasoning leads to a general consideration of what is required for a theory of legal justification and a definition of what is referred to as 'strong justification'.

The notion of strong justification is shown to be necessary because law, unlike the physical sciences, cannot
appeal to something external to itself against which the soundness of legal reasoning can be tested.

Having shown the necessity for strong justification in legal reasoning the next step is to examine the relationship between legal rules and decisions and moral purposes. This might be referred to as the justification for the justification. In arguing that legal rules can only be defended by moral reasons it is shown at least indirectly that the furtherance of moral purposes must be the aim of legal reasoning. This would of itself establish that judges should reason in the fashion in which private moral agents ought to reason.

From the consideration of the categories of possible reasons for laws the argument proceeds to consider the nature of the judicial task. It is argued that judging is an action and is itself a possible object of moral appraisal. It follows from this that a judge on any occasion of judicial decision-making can ask 'how ought I to decide this case, morally speaking?'

Ironically, it can be further demonstrated that a judicial decision is a moral act by considering the nature of judicial justification from the point of view of positivism. Positivism deploys a theory of validity whereby the justification for applying law lies in higher laws forming part of a hierarchy supported by some form of constitutional
foundation. The justification and support for the constitutional foundation can only lie in a moral or political choice by the judge. The significance of a moral choice cannot be restricted to just this first premise and the realm thereafter claimed for pure law.

It might be objected that if judges simply decide cases by asking what ought they to do morally, it is not possible to provide an organised rule system for the maintenance of social order.

The first reply to this objection is that any moral or political system placing value upon social order would dictate a judicial duty that in turn valued recognition and consistency with other judicial pronouncements and legislation.

A judicial duty to respect social order might be thought to revive the whole panoply of precedent and statute in a fashion barely different from that described by positivism. This is not its effect. Legal pragmatism radically alters the logic of judicial justification. This in turn subtly alters the judicial decisions produced. Judicial practice is altered by a judge's understanding of its logical foundations.

It follows from the view of legal reasoning expounded here that, contrary to the views of the writers mentioned in
the text, there is no special method of legal reasoning or any set of meta-legal rules governing the application of legal rules.

The categories of argument dealt with thus far suggest two alternative theories to the one proposed here. The first might accept that moral rules or principles are the basis for laws and legal reasoning but it might be said that a judge cannot just apply his own private moral beliefs, but must look for moral principles that have some general support in society. The second alternative proposes that judges can rely upon a fully self-sufficient class of legal imperatives. Judicial activity on this view is considered akin to the manipulation of the rules of a game albeit a socially useful game.

The first alternative is supported by theories like that of the early Dworkin essays with their theory of institutional support for principles. Devlin's view outlined in The Enforcement of Morals also provides a version of the first alternative although quite different from Dworkin's.

The suggestion that judges should bow to the moral demands of society has difficulties quite apart from those of ascertaining society's moral viewpoint. The very nature of moral demands makes their application depend upon the
commitment of the agent. It cannot be a reason for applying a moral rule that it is accepted by other agents unless their acceptance creates a further moral reason for the first agent to apply the rule.

It is suggested that the only resolution of this dilemma is to accept that judges should act in accordance with their moral duty and that judicial moral independence can itself be a social and moral good.

The second major alternative to the principal argument is the view that judges can reason about laws without any reference to the moral or political purposes of laws. In Hart's theory, the idealist strand of positivism is revamped. It is argued that Hart's theory of rules and the internal point of view do not provide a self-sufficient basis for legal reasoning. The analogy with the rules of a game is fatally misleading when applied to law because of the external social or moral purposes served by law but not by games.

From the rejection of both Hartian style positivism and the argument from the organic nature of society two views need to be considered that are very close to the principal argument. These are Dworkin's theory of legal interpretation and the view that moral reasons provide 'material' that can be used by judges when deciding cases.
Dworkin's theory of interpretation as disclosed in his most recent work argues that judges do indeed consider the moral purposes of laws when reasoning about them. But this reasoning takes place as an attempt to ascertain the objectively existing purposes of laws and because the correct interpretation has an objective existence one can speak of citizens having a right to a result, the result being 'the one right answer'.

Dworkin argues that judges should reason as he suggests because citizens' rights must be respected and judges ought therefore morally to do what is necessary to respect those rights. Dworkin's theory is thus not a logical theory about legal reasoning but a moral reason and exhorts judges to recognise objective legal rights only because Dworkin is a moral objectivist. Dworkin's attack on legal pragmatists is therefore misguided. He differs from a judge acting as a utilitarian not because they have different logical theories about how judges reason but simply because they hold different first order moral views.

Those theorists that speak of moral reasons as being materials that judges can advert to (eg Summers) fail to explain the nature of the judicial task. When that is seen to be a moral act like any other morally relevant conduct, moral reasons are no longer just materials which judges may on occasion apply if legal rules do not appear to be sufficiently precise. They are in the last instance the only reasons a
judge has.

Conclusion

Our concept of moral appraisal does not allow us to exempt judicial conduct, but even if we appear to concede to judges the power to exercise an unfettered moral conscience this would not lead to the dissolution of the legal system as we presently know it.
"... this drama of immutable rules lay at the heart of the tremendous power that law held over the English imagination. The judge simply surrendered to the imperative of the statutes, a course of action that absolved him of judicial murder, and that caused him to weep. His tears humbled him not before the men in the dock, which would have been unthinkable, but before the idea of Law itself. When the royal mercy intervened as it commonly did, transmuting the death penalty into exile on the other side of the world, the accused and their relatives could bless the intervening power of patronage while leaving the superior operation of Law unquestioned. The law was a disembodied entity, beyond class interest: the God in the codex. The judge was invested with its numen, as a priest was touched by sacerdotal power. But he could no more change the law than a clergyman could rewrite the Bible."

Robert Hughes

The Fatal Shore

Pan, London, 1988, page 30
INTRODUCTION

1.1 The Philosophical Problem

This thesis will argue that any judge holding the views described in the quotation from Robert Hughes' The Fatal Shore set out on the previous page would have committed a serious logical error. Those views are so extreme that one might doubt whether there exist judges in the present time with similar beliefs. Yet there are no doubt many modern liberal minded judges of our own age who would still believe that there is an important distinction between whatever moral duties they may have as private citizens and their judicial duty. It will also be argued that the views of such modern judges are as false as the extreme views of the 18th Century.

This thesis will examine the nature of legal argument and the nature of judicial activity. It will seek to answer the question, 'How ought judges to decide judicial decisions?'. This question is posed in an attempt to discover what is philosophically interesting and difficult about law.

The word 'difficult' in the last paragraph was used in a sense that might be contrasted with 'obvious', or 'banal'. It is of course philosophical old-hat to suggest that the
classical philosophical question 'What is law?'\(^1\) is really only an invitation to provide a definition of the word 'law'. But if we eschew questions such as 'what is law?', it is not at all obvious what we should ask in its stead. Initially, it does not seem that law creates the same philosophical difficulties as subjects such as science or morals. The philosophy of science has always to battle with the fundamental problem of justifying scientific induction. Moral philosophy must deal with our overwhelmingly strong intuitions that certain things are wrong and the great difficulty in then justifying those intuitions in some rational fashion. What then is philosophically difficult or interesting about law?

Legal systems have frequently been a subject for sociology and anthropology but rarely have theorists in these fields suggested that law is conceptually irreducible. Whether one turns to Marxist analysis with the emphasis upon the determinate role of the mode of economic production\(^2\), or more modern functionalist analysis describing law as a means of social control\(^3\), legal institutions appear as simply one

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3. (a) see Shklar; J N, Legalism, Harvard University Press, Cambridge, 1964 as representatives of this view and;
(b) Benn; S I, and Peter; R S, Social Principles
social form alongside custom, ideology, educational systems and manners and law is in no sense conceptually unique. Shklar uses the metaphor of a continuum of social forms with different poles reflecting the different emphases of the mechanism, some relying on force, others on controlling thoughts and attitudes. Each social form or institution merges gradually into the next.

If law is simply one of a host of social institutions, in no sense analytically unique, then it would not form a conceptual category worthy of special philosophical treatment. Law would not be analogous to morals, or language but to some other less fundamental social institution like a municipal council, or a standing army. Yet there is an academic industry in writing about the philosophy of law without any equivalent level of interest in such institutions as councils, or standing armies.

The philosophical interest of law lies it is suggested in its paradigmatic quality. Law stands to ethics in somewhat the same position as science stands to epistemology. However unlike scientific induction which is a site of philosophical difficulty, this thesis will argue that legal systems do not pose any special philosophical difficulties not already present in the moral concepts upon

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(c) Roberts; S, Order and Dispute, Penguin Books, Harmondsworth, 1979, pp.15, 17-29 (an anthropological example).
which law is founded.

This thesis will argue that there is nothing philosophically unique about law and one should abandon the thought that the terms 'legal reason' or 'legal reasoning' refer to some special form of ratiocination. But this does not lead to the conclusion that law is philosophically uninteresting. It provides the sharpest example of some critical issues in modern moral philosophy. It might also be suggested, albeit with a tinge of philosophical vanity, that the practice is improved by self-conscious reflection upon its philosophical nature.

1.2 Methodological pragmatism as an approach to legal philosophy

In order to extract the maximum philosophical value from the investigation of law, a pragmatic methodology will be adopted. Methodological pragmatism provides a theory for selecting those problems that deserve further investigation. The possible answers to any suggested problems should tell us something about some part of the universe. If our concern is law, those answers should tell us something about the political, moral or social structures that we loosely describe as law. By contrast, were language our subject of study, interesting things could no doubt be said, but what is doubted is whether legal language poses any greater philosophic or linguistic interest than any other part of the language.
In using the term 'pragmatic methodology' to test the philosophical problems presented for investigation, the connotation of the word in the American or Jamesian sense is deliberate, although Pierce rather than James would be the more direct intellectual ancestor. Pragmatic methodology in its modern guise has borrowed from the American tradition but abandoned the radical empiricism of the early American pragmatists.

Modern methodological pragmatism views theories as attempts to solve problems⁴. A problem is presented by any question about how we might act upon some part of the world. Modern methodological pragmatism does not view the world as simply consisting of physical objects, it also contains language, theories, moral dilemmas and so on. A scientific theory might predict where in the sky to find a star, how to construct an atomic bomb. A scientific methodology might tell us which is the most fruitful scientific theory upon which to continue research. A judicial decision might involve the need to determine whether or not to punish some person, a legal theory should explain how such a decision is made.

It is not suggested that the vast bulk of major theories of legal philosophy have not addressed problems in the sense just described. It is simply that they have not always expressed their aims in such terms. Nevertheless the significant strains of positivist legal philosophy can be reconstructed as answers to certain practical questions. Such a reconstruction will be offered in the early part of this work.

1.3 Judicial decision making as a site for philosophical work

One central argument of this work will attempt to show that a fruitful way of approaching legal theory is to ask how ought a judge to decide judicial decisions. Looked at from the judges' position, the problem will be characterised as a practical problem about how to act, not a theoretical problem about how to ascertain the law.

In seeking to provide a prescriptive theory of judicial justification that remains neutral between moral and political principles, a further difficulty arises. If the theory of justification is not itself a moral or political theory why is it prescriptive? This difficulty can perhaps be met by dealing with theories of legal reasoning as theories of legal argumentation. Ultimately the 'ought' here is the logical 'ought' rather than the moral.
1.4 The historical path to the problem: positivism, idealism and legal realism

This work will seek to establish the methodological points just made by examining the positivist theories of Bentham, Ross and Kelsen. These theories have been chosen as representative of three of the most significant strands of positivist jurisprudence. It will be argued that these theories must be taken to answer one particular question, namely, how does law exist? Both historical and theoretical reasons can be offered for the concern of early positivism with this question.

Two sorts of answer to this question have been provided by the theories just mentioned. Both answers attempt to provide a total description by one general schema of the existence of legal phenomena. Both answers imply by this general schema a particular theory of legal reasoning.

The theories of both Bentham and Ross seek to provide descriptions of legal phenomena that reduce law to physical or behaviouristic phenomena. It will be suggested that this physicalist reduction is unsuccessful.

If the physicalist reduction cannot succeed, an alternative approach is to view law as a system of ideas, a theoretical structure composed of norms that possess deductive relations. The system is organised into a hierarchy, like the chain of theorems derivable from a set
of axioms. This is a slightly caricatured form of Kelsen's pure theory of the law.

The pure theory seeks to solve one of the other great problems posed by the existence of law, namely, how law can be reasoned about deductively. Judges appear to ascertain what legal rules are relevant to a case without the need to conduct any sociological or psychological investigation. When law is described in a purely sociological form, then the ability of judges to ascertain information about the law by simply reasoning about legal statements is left unexplained.

Kelsen's pure theory of law also illustrates the close connection between problems surrounding the existence of law and the explanation of legal reasoning. The two problems are often answered by the one theory. Kelsen's pure theory of law provides an explanation of what law is. It will be argued that this implies a theory of legal reasoning. If it is possible to reverse this schema we could seek a better theory of how law exists by developing a theory of legal reasoning. We can thus start to investigate the nature of law by asking 'how do judges reason?'

If the positivist theories mentioned so far have viewed law in either behaviouristic or theoretical terms, there is one school of thought that has concentrated on viewing law in terms of the practical activity of judges; this is the American Realist school of jurisprudence. The American
Realists provided theories serving two distinct purposes. On the one hand they offered a critique of many traditional theories of legal reasoning. In particular, writers such as Frank and Llwyelyn argued that the doctrine of precedent in no way seriously determined the result judges reached.

This lack of determinacy arises because legal rules are open to interpretation and the scope of their meaning is not closed. Law can never be like mathematics and legal rules can always be manipulated to provide justifying arguments for any position a judge desires to adopt.

The skepticism of the Realists attacked the claim of many of the traditional theories of legal reasoning to give an account of judging as a rational activity. In doing this it made many of the idealistic theories about what law is and how it exists vulnerable. If theories of precedent are shown to be without any logical foundation, and without any constraining effect upon the legal conclusions reached by judges, then this will dissolve much of the supposed structure of the legal system. The skepticism of the legal Realists can be read not simply as a critique of the traditional doctrines of precedent, to which they were explicitly addressed, but as a critique of the idealist theory of law and all theories asserting law to consist of rules or norms.

In addition to providing a skeptical attack upon certain theories of law the Realist school also provided an
alternative account of law. Central to the Realist account was the position of the judge who is no longer viewed simply as a technician who applies the rules, but is seen to perform an active role in judging and settling the disputes brought before him. 'Law', said the Realists, 'is what the judge says it is'. The positivist critics of legal realism made the obvious point that a judge looking for legal standards to assist him will get no guidance from being told law is what he says it is; the slogan will merely lead him into circular reasoning.

The refutation of the slogan might be taken by some positivists to deal satisfactorily with Realism. This is too trite a reply. The Realist critique leads back to a theory of judicial activity. The Realists allow the question of how law exists to be replaced by the question, 'how does the judicial process actually settle a dispute?'

The Realist theory of law has been criticised for not offering any guidance to a judge. Indeed the skeptical critique of traditional theories may have generated an 'anything goes' approach when expanded to produce a theory of how judges ought to act. Rather than abandon this as a reduction of the theory it will be argued that it provides a useful starting point from which one can ask, 'what limits should be placed upon the discretion of the judge when settling a dispute?'
1.5 Judicial justification and the general theory of reasoning

If we decide that questions such as 'how does law exist?' do not lead to illuminating answers we can consider asking instead 'how do judges reason, and decide cases?' In posing this question it becomes necessary to clarify whether it is a prescriptive or descriptive answer that is sought.

Law and legal philosophy have often pointed to certain procedures for legal reasoning as important to law. A legal conclusion or the verdict of a case ought to be justified only by certain types of permissible reasons. This view speaks of legal reasoning not simply as the means of discovering the correct verdict to a legal dispute, but as the proper procedural way of justifying the result.

This theory of legal reasoning is clearly exemplified in the essay on judicial technique by Dixon, J.⁵ He argued that the conclusions reached by Denning, L.J. in the line of cases commencing with the High Trees House case⁶ (without mentioning Denning L.J. or the High Trees case by name) were correct in their result. These cases reformed the traditional concepts of contract law, by allowing a party in certain circumstances to raise as a defence gratuitous


promises made by his opponent. Despite agreeing with the conclusions reached by Denning, Dixon suggested Denning had used bad reasoning to reach those conclusions. However, this criticism did not accuse Denning of invalid argumentation, inconsistency, or some other error of logic. The point of Dixon's criticism was that Denning had relied upon an unfortunate choice of doctrinal justifications and should have justified his result by development of traditional concepts of 'waiver', rather than inventing a new species of equitable estoppel.

It will be argued at length in the central part of this work that the criticism levelled at Denning by Dixon is mistaken in a fundamental way. It is based upon a very narrow view of the relationship between the justification and the decision. It will be argued that law is no different from other moral areas, and the only purpose of legal reasoning is to discover what the judge ought to do.

If we were to conclude that judges had moral duties about the way to decide cases and we had certain beliefs about the content of those duties, we could specify precisely how judges ought to decide particular cases. Our beliefs about what would be the right decision in particular cases would take precedence over any procedure of justification that could be offered by a judge. Once judicial reasoning is viewed merely as a means of discovering the right decision, then, to the extent that we can specify what that decision is, a judge's reasoning will
have no independent significance. Thus given a judge who achieves the correct result by faulty reasoning correctness of the result is in no way impugned.

This view of legal reasoning is in contrast with the procedural concern of many theories of legal reasoning. It assimilates reasoning about law to the traditional notions of moral reasoning. Moral reasoning is usually thought to be concerned with actions and establishing which are the right actions to perform. To the extent that morals are concerned with psychological matters, they have been concerned with intentions and beliefs. One would not usually inspect moral reasoning for any quality apart from its soundness. The virtue of moral reasoning would appear to lie simply in whether or not it directed performance of the right actions.

The point just made will be taken to infer that there is no such thing as legal reasoning, if by that term is meant some special method of reasoning analogous to the theories of scientific induction. Yet without claiming to describe a method of legal reasoning, it will be shown that the role of the judge creates special problems when one investigates his moral duty. Without selecting any particular set of first order moral principles, one can still investigate possible valid forms of argument regarding the duty of the judge.
The interest in the position of the judge lies in the fact that many theories of a judge's duty are concerned with the effect on his duty of the existence of records of prior decisions, or the expressions of will or intention of political bodies, such as legislators. To the extent that these matters generate special dilemmas, law provides the commonest examples of them.

Legal reasoning thus provides the archetypal form of the dilemma of an individual asked to apply rules and commit actions that the agent believes wrong. This is analogous to the problems generated in political philosophy by theories about the citizen's duty to obey unjust laws, although these two sets of problems must still in some respects be distinguished. Theories of legal reasoning provide a significant body of thought upon one of the major problems in the theory of moral obligation.

1.6 A theory of judicial justification as moral reasoning

The central part of this work will outline a theory of legal argumentation. It will be suggested that all legal reasoning must be based upon the moral obligation of the judge. All judicial justifications of legal verdicts are therefore moral arguments. This in turn provides an opportunity for explaining the possible ways that statutes and past decisions are relevant to legal reasoning and this is by the way they affect the moral duty of the judge.
A theory of legal argumentation can easily criticise the reasoning of judges who have propounded arguments invalid in form. A more complex task is to establish how one might, while remaining morally agnostic, specify types or categories of reasons which could justify a judicial decision.

It will be apparent that resolution of many problems traditionally considered jurisprudential will, on the theory outlined here, frequently trail off into areas of pure moral or political philosophy. The description and definition of a moral reason, and the existence of a duty to obey the law, are just two such issues of importance to this work. They are problems of pure moral and political philosophy respectively. This work seeks, where possible, to remain neutral between the competing moral answers to these questions. At other points, provisional solutions are offered.

Ultimately the theory offered is incomplete. It will not explain the problems of legal philosophy fully, but rather it displaces those problems by linking them to the central problems of moral and political philosophy. This is useful in two ways, firstly it clarifies the nature of law, and secondly it provides new perspectives on old problems in moral and political philosophy.
1.7 The relationship between moral reasons and Law: Three possible answers

After outlining the theory of this work, it is contrasted with the major alternative modern theories in the field. The position outlined by this work is not novel in its conclusions - substantially similar views were expressed by Felix Cohen in the 1930's. In very recent times the work of Detmold clearly maintains that legal reasons are built upon moral reasons. These authors are, however, in the minority. The majority of modern jurists either insist upon the separation of law and morals, or restrict the sorts of moral reasons a judge may use, thus denying that the judge should approach the task of judging as a normal moral agent.

The major modern theories of legal reasoning will be put into three categories to assist analysis. The first such category is the modern positivist view of law best exemplified in Hart's classic work The Concept of Law. This work will be examined concentrating upon Hart's attempt to describe a concept of legal obligation conceptually distinct from moral obligation. Hart develops this theory from the view that law should be seen as one of the many rule systems within society. The primary concept is that of rule following behaviour. Rule following is viewed by Hart in the light of those analyses of language generated by the Analytical school that followed the work of Wittgenstein and J L Austin.
The second category is the non-positivist theory of law that asserts there is a special manner of legal reasoning and that this reveals the legal answer to any particular problem. This is a characteristic of the views of Dworkin. It is possibly misleading to suggest Dworkin's theory has any substantial similarity with traditional natural law theories. Nevertheless his theory has some relationship to those declaratory theories of law that were significant in English jurisprudence prior to the rise of positivism in the nineteenth century. These declaratory theories could themselves be seen as a branch of the natural law body of thought.

Although Dworkin's theory returns jurisprudence to the notion of a judicial obligation that is moral in character, the judge's obligations are determined on very narrow grounds which do not permit recourse to the full range of moral reasons that might touch a particular matter. Dworkin's views are also confusing because while he appears to be arguing only about the methods by which a judge reasons, his position is not neutral as between possible first order moral theories. Dworkin's theory is, ultimately, the application to law of a first order moral theory. If one wishes to challenge Dworkin's rights thesis it then becomes necessary to examine his methodology and see what Dworkinian legal reasoning would be like if one had a moral theory that did not recognise rights.
The final category of current legal theories can be seen as the next step after Dworkin's, those that place no restraint on the type of moral reasons to which a judge may have recourse in justifying his decision. Some of these views are similar in purport to those of the American Realists of forty years ago. These modern theories represent a revised and more sophisticated version of legal realism.

This summary of contemporary theories of legal reasoning has arranged them in the order in which they grant increasing recognition to the importance of moral reasons in judicial decision-making. This ordering of the theories also provides a spectrum of answers to the question 'how does law exist?', the question dealt with in the second chapter of this work. That spectrum leads from the positivist reply, that law is a system of rules, to the realist or pragmatic reply that speaks largely of courts and views them as institutions for dispute settling.

At this realist end of the spectrum the anthropologist's and sociologist's conception of a social rule must be abandoned when one seeks to investigate the process of judicial justification. The argument outlined in the central part of this work will help show that one cannot use the same concept to describe both the patterns of mass

behaviour observed in society and the reasons and conclusions of judges engaged in the process of dispute settling. One can therefore proceed to an analysis of what happens in the judicial process freed from any necessity to provide concepts that will also explain all the other social phenomena loosely described as legal.
2. POSITIVISM AND THE QUESTION OF HOW LAWS EXIST

2.1 Reasons for an historical detour

If it be methodological pragmatism's injunction to develop theories that solve problems, then it will be part of the process of enquiry to uncover the problem. Problems are not manifest. They are created by our theoretical framework. A committed theist may see a problem in linking the concept of political legitimacy with the will of God. For an atheist, such a problem cannot even be coherently stated.

The argument of this thesis will commence by examining the positivist theories of the late 19th and early 20th centuries in order to uncover the problem or problems to which they were addressed. The purpose of this analysis will be not simply to criticise the answers that those theories provided, but to reconsider the theoretical usefulness of the questions they posed. It will be argued that those theories were chiefly concerned with the question, 'how do laws exist?' The difficulties encountered in answering this question suggest the most successful strategy is that adopted in Chapter 4, namely, to substitute as the central question, 'how ought judges to decide cases?'
2.2 Positivism as a polemical response to natural law theories

To appreciate positivism's answers to the question, 'how do laws exist?', it is the first necessary to understand why the question was posed. For one of legal positivism's early theoreticians, Jeremy Bentham, the issue arose in the course of the debates about the reform of English law in the mid-19th century. Bentham identified his intellectual enemy as those natural law theorists who saw the positive law in force in England not simply as a social institution, but as a corporeal reflection of a moral and logical structure which any law properly so called must reflect.

Bentham's stalking horse was Blackstone and his famous Commentaries on the Laws of England. Blackstone's Commentaries were intended for practitioners rather than philosophers and Blackstone's views reflected the profession's own philosophy of law rather than an attempt at a rigorous analysis of legal foundations. Blackstone borrowed his philosophical views fairly freely from Grotius, Pufendorf, Burlamaqui and Montesquieu. Blackstone may have bowdlerised some of the classics of 17th and 18th century continental natural law theory and this may have provided

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2. Blackstone; op cit, p.XXXVII.
Bentham with too easy a target. It is doubtful whether anything in the nature of natural law theory makes it a more suitable vehicle for conservatism than radicalism, but at the time of Bentham's campaigns for legal reform the jurisprudence espoused by writers like Blackstone provided conservatism's defence.

Blackstone saw English law not simply as an historical and cultural artefact but as an excellent system that reflected the natural law and in Blackstone's mind natural law was laid down by God.

Bentham saw opposition to his proposals for reform as deriving in part from the fallacy that conflated what law is with what law ought to be. Bentham saw natural law theory as leading to the belief that existing legal rules exist because they are in some sense right. Thus, for Bentham, the legal reformer, the distinction between what law is and what it ought to be was of crucial polemical importance. Natural law theories can easily be employed to support arguments of the following form: since this is law, it must be just. When something is established law, the onus of rebutting this presumption will fall upon those wishing to argue that it is


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unjust. Bentham wished to argue that much of the common law was inefficient, or unjust. For this purpose it was necessary to demonstrate that law was itself merely a social fact, as liable to moral criticism for being unjust or inefficient as any other social institution.

By criticising natural law theory for confusing the is/ought distinction, positivism posed for itself the task of making it good. The positivists had to produce a theory that explained how law existed as a social fact. The difficulties that such a theory faced were caused by what Alf Ross referred to as the 'dual nature' of law. On the one hand law is a field of statements possessing logical relations with each other. On the other hand law is a social phenomenon which manifests itself in the physical world in which people act. This latter aspect of law is important in establishing how any particular law might be said to exist. It is in this regard that the positivists were seeking a theory that would dispose of the natural law contention that the moral quality of rules is relevant in determining whether or not they are law.

2.3 The behaviourist-imperitival theory of law

Nineteenth century positivism is characterised by what will be described as behaviourist-imperatival theories of

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law. This rather awkward title describes in those two words the two crucial aspects of those theories and the means by which they sought to answer the question concerning the nature of legal existence.

The two crucial characteristics of positivism captured by the slogan 'behaviourist-imperatival theories' are the description of laws as commands or imperative utterances and the analysis of their existence in terms of effective delivery of a sanction when a law is disobeyed. That the early positivists like Bentham chose such analytical devices to explain law is partly the result of their broader program, namely, the attempt to clearly distinguish law from morals and this in turn arises for Bentham from his desire to attack the jurisprudence of Blackstone and those like him advocating doctrines of Natural Law.

Nature, according to Bentham, "has placed man under the empire of pleasure and of pain. We owe to them all our ideas; we refer to them all our judgments, and determination of our life". Such a starting point establishes immediately the path by which Bentham will seek to explain the nature of law by finding a factual, or empirical base. Clearly Bentham believed that pleasure and pain were physical

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quantities that were measurable, in some way analogous to physical quantities like mass or velocity. This 'physicalist' thesis would therefore allow law to be explained in terms of psychological facts which could in turn be ultimately explained in basic physical properties.

The psychologism behind the principle of utility provided not only a foundation for a moral system but a principal guide for the legislator. Law is seen as the key instrument for altering social conditions to produce greater happiness for a greater number. The reason that law is chosen for this function (as opposed to education, revolution, etc.) lies with the other necessary hypothesis about social man, namely that he acts from rational self-interest. This behavioural psychology combined with the principle of rational self-interest makes law the natural choice for a social regulator. Even so, what is principally meant by law in this case is legislation. This is the archetype of law. For Bentham customary law and common law are seen as less developed legal forms.

Law provides the link between the social goal of maximising utility or happiness and the fact that people are supposed to act from rational self-interest. People are thus commanded to act in the most socially useful fashion.

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Obedience can only be ensured by social arrangements that make obedience in each individual's rational self-interest. Thus each command must be backed by a sanction that provides that disobedience will result in greater pain for the law breaker than obedience.

This simple model combines a theory of psychology with a theory about the moral purpose of law. It has certain clear implications about what laws should be like. Firstly, laws are forward looking in that punishment of past wrongs is only to maintain the deterrent efficacy of the law in the future. Law is a set of commands to produce certain types of behaviour.\textsuperscript{10} It therefore follows that commands can be altered whenever a more efficient means of producing the desired social goal is found. However because law is a set of commands addressed to citizens, an awareness of those commands and the ability to conform are important. The principle of rational self-interest can only operate if people are sufficiently apprised of the facts to be able to calculate their rational self-interest.

From Bentham's polemic with the natural lawyers emerged a theory of law that gradually became accepted as a judicial philosophy, replacing the natural law theories to which Bentham had been opposed. As the doctrine of precedent became less flexible in legal culture, courts declined

invitations to alter accepted legal rules on the basis that they only applied positive rules of law and did not have law-making functions.\footnote{Cross; R, \textit{Precedent in English Law}, Clarendon Press, Oxford, 1977, p.2 ff.}

The Benthamite view was not without its problems. The view that all laws were the commands of the Sovereign was hard to fit into many of the obvious facts of legal life. To solve these problems new versions of positivism were created. Most of these theories retained much of the basic structure of Bentham's theory. More importantly they examined the elements of Bentham's theory with greater theoretical self-consciousness.

One task that any theory must perform that seeks to explain by an analytical framework certain social phenomena is to identify which social phenomena are conceptually relevant. The areas of human life that are governed by law are not activities without any other significance. Marriage, crime or commercial agreements can all be described in legal terms, but can also be simultaneously described without any reference to law.

Although many social activities can only exist because of social rules, social rules need not necessarily be legal. One can imagine a society that had no legal rules about marriage but where marriage still existed as a social institution. Where one is seeking to explain how law exists
it is not sufficient to point to the fact that people get married. That is to confuse the existence of the social institution with its legal aspect. It is to assume that if law did not exist people could not be described as married.

Bentham makes a clear choice about which social phenomena reflect the legal structure of society. Bentham's application of behavioural psychology to the explanation of law has already been mentioned. In choosing the legal sanction, or the threat of inflicting pain, linked with the notion of the Sovereign, Bentham identifies legal phenomena as the expressed will of the Sovereign together with the mental states of obedience or disobedience in the citizenry.

Although Bentham describes clearly what he believes to be the concept of law, he does not appear to be clearly conscious that he is propounding a theory of legal existence. While Bentham was probably aware that his theory of law was based upon his theory of psychology, in his most elaborate work on legal theory, _Of Laws in General_, Bentham simply takes his theory of psychology for granted and builds his legal theory upon it.

Austin in turn developed his positivist theory of law by taking over much of the conceptual groundwork of Bentham. It was European legal philosophy that examined the foundations of positivism critically. In particular the Scandinavian Realists provided the most detailed analysis of the interaction between the analytical theory of law and the
psychological or sociological assumptions behind that analysis.

2.4 Scandinavian Realism: Law as Fact

The Scandinavian Realists expressly sought to develop a theory of how law exists. Olivecrona says at the beginning of the second edition of his work *Law as Fact* that his aim is to explain how one fits "the complex phenomena covered by the word law into the spatio-temporal world."\(^{12}\) Alf Ross adopts the verificationist principle from general positivist philosophy and applies it to legal propositions:-

"A proposition about reality must imply that by following a certain mode of procedure, under certain conditions certain experience will result."\(^ {13}\)

One would not now seek to defend verificationism as a theory of meaning, but what the Scandinavian Realists highlight is the fact that a statement about something being a valid law is making certain empirical claims. It is an assertion that a certain state of affairs exists. This however presents further problems. It appears that a statement that 'x is a valid law' or 'x is a law in Australia' is an assertion about human behaviour, namely a statement about patterns of obedience, or the expected future


\(^{13}\) Ross; A, op cit, p.30.
conduct of citizens and legal officials in certain circumstances. It is thus referring to mental states and dispositions and physical actions. Such a statement appears similar to an assertion such as 'a game of cricket is being played over on that field'.

If we wish to confirm the truth of an assertion such as 'a game of cricket is being played over there', we would usually have to make some observations and investigate what people at that place were actually doing. On the other hand, statements about the existence of particular laws, as distinct from statements about human actions, are often made without any direct reference to observations of human behaviour.

Law appears to have a logical or ideal structure (here I use Ross' phraseology) which allows one to formulate legal statements simply as deductions from a field of legal statements. This quality leads Ross to speak of 'the dual aspect of law'. Law, he says, "is at the same time something factual in the world of reality and something valid in the world of ideas". The problem for legal philosophy is to describe the existence conditions for social rules like law, while simultaneously explaining the logical structure of a legal system.

\[14\] Ross; A, op cit, p.38.
Ross' analysis provides a useful key for explaining the form of many systems of legal philosophy. Bentham's theory clearly shows the fashion in which law is connected with the physical world. Its logical structure consists simply in describing the set of statements that represent the commands of the Sovereign. Austin and Kelsen concentrate greater attention than Bentham on developing an explanation of this logical structure. They and the later positivists develop a complex theory of legal validity. For these later positivists the validity of a particular law flows from its deductive relationship to a higher norm. The system is nailed to the physical world, so to speak, at the apex of the logical hierarchy, by the figure of a Sovereign or Kelsen's Grundnorm. This law-giving figure no longer depends upon being derived from higher rules but is established by sociological fact, namely, acceptance and obedience by its subjects.

To verify the existence of law on the basis of the theories just described one would firstly ascertain by sociological enquiry what Sovereign or Grundnorm enjoyed regular obedience or acceptance in the society. Once that has been done sociological enquiry ends and it becomes a matter of purely logical or doctrinal enquiry to discover which are the primary rules dictating permissible or impermissible behaviour.

For such an analysis as that just described the doctrine of desuetude would be a peculiar exception. Anglo-Australian
law does not generally accept the doctrine that a law might lapse after a lengthy period of non-enforcement.

Returning to the explanation of the duality of law, Ross' theory preserves the notion that laws can have logical relations, while simultaneously explaining each law as having its own sociological existence conditions. Ross describes laws as norms. A norm "is a directive which stands in a relation of correspondence to social facts".\textsuperscript{15} By a directive Ross means an imperatival or ought-type statement. As to the relationship of correspondence with social facts Ross is somewhat more obscure. He considers that the formal structure of law is that of an instruction by law-giving bodies to officials about the use of force. The existence of laws is tested by finding whether or not the rule has the allegiance of officials. The allegiance of officials and its display through the application of force in accordance with those rules are no doubt the social facts to which Ross refers.

Ross rejects an attempt to reduce law entirely to statements about observable behaviour on the ground that such descriptions could never be sufficiently complete accurately to predict future behaviour. Nevertheless, Ross insists that law can only be understood by positing directive type rules which provide the officials with instructions about the use of force. By his insistence upon the rule structure of law

and his criticism of the behaviouristic reductionism of the American Realists Ross is not far from the position of Hart. However, he differs from Hart in his insistence, along with Kelsen, that laws are addressed to judges and concern the deployment of organised force in society.

By dealing with the question of legal validity one law at a time, Ross seems to offer a very simple solution to the question of explaining how a law exists. One simply examines each law to see whether it carries the allegiance of officials. The officials are those who conduct the organised deployment of force in society.

2.5 Positivist theories of legal existence and physical reductionism

Ross' theory, and Bentham's before it, have been dealt with as theories that seek to explain how law exists. The central project of positivism sought to criticise natural law theories for failing to distinguish between law as it is and as it ought to be. To do this positivism therefore needed a theory of legal existence.

Positivist theories that seek to explain how laws exist intend by the term existence what might be called existence in the strong sense, or physical existence. Law manifests itself in many observable ways as forms of human conduct whether in the actions of legal officials or social behaviour
of citizens.

It might therefore seem at least prima facie possible to reduce a description of law entirely to brain states and observable human behaviour. Such a theory would explain positive law as a physical phenomena in keeping with the general philosophical theory of physicalism. Olivecrona made the point explicitly when he referred to fitting 'the complex phenomena covered by the word law into the spatio-temporal world'.

This attempt to explain law as part of the spatio-temporal world arose from the need to combat what Bentham termed 'the natural law fallacies' and it was thought that these could be exposed by sharpening the is/or distinction. However, law is intimately linked to language. Legal rules are only capable of representation as statements in a language. These representations have usually taken the form of some kind of imperative utterance. Thus, the initial positivist attempt at explanation sought to describe laws as the commands of a sovereign, this being an analogy to the usual concept of a command as an imperative utterance.

Most theorists would accept that a command, like any imperative statement, is not capable of being true or false. Nevertheless, commands may be expressed in a fashion that depends on other statements being true or false. Thus, the basic command:

"Shut the door"
cannot be true or false. However the statement:

"Shut the blue door in the house at 5 Smith Street"

is less clear cut. The statement appears to contain, in addition to a command, the assertion that there is a blue door at 5 Smith Street, which no doubt is capable of being true or false.

The point of the examples just given is to show that even if we seek to explain law as a set of commands, any user of the legal system will need to be able to manipulate the whole of the language in which that system is cast and be familiar, at least intuitively, with the basic semantic notions of reference, denotation and truth.

Any physicalist reduction of a social rule system like law must therefore depend upon there being a means of explaining the operation of language including the basic semantic notions, in physical terms. Therefore, before we can fit the phenomena of law into the spatio-temporal world, one must ask whether the fields of linguistics or semantics can provide the sort of reduction required.

It has in fact been argued by Field\textsuperscript{16} that no such reduction of the sort just described has been successful. Field argues that one of the key aims of Tarski's explication of truth was an attempt to reduce basic semantic notions such as truth to non-semantic physical facts. This was in keeping

with the overall philosophical enterprise of physicalism. Field argues that Tarski's theory fails in this respect and that no adequate physicalist reduction of basic semantic notions has been achieved\textsuperscript{17}.

If Field is right about the failure of Tarski's physical reduction, then quite apart from the enormous practical difficulties still faced by modern science in seeking to effect a complete physicalist reduction of language, it appears from the present state of the debate that it is arguably not even theoretically possible. Aside from this not inconsiderable difficulty, any purely physical explanation of legal phenomena would probably be uninteresting, rather like a description of a chess game which was restricted to the spatio-temporal movements of the chess pieces and the musculo-skeletal movements of the players, coupled with a description of the neural activities occurring in their brains.

Any useful description of a rule governed activity like law will depend upon the use of terms which will involve metaphysical or epistemological notions such as value, or truth. If we eliminate those terms from our descriptions we eliminate those aspects of the activity which attracted our

\textsuperscript{17}. See also Haack; S, Philosophy of Logics, Cambridge University Press, Cambridge, 1978, p.\textit{111}.\n
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attention in the first place\(^8\).

2.6 **Can there be a correspondence between legal rules and social practices?**

It remains to be seen whether anything more can be made of the claim that law is a matter of fact. If it were suggested that the physicalist test is too severe, perhaps a theory of law as fact can be produced that without being physicalist in the strong sense gives some meaning to the claim.

A weaker theory of legal existence might be built upon Ross' correspondence theory. Ross assumes that laws as rules operate very much like commands, or the rules of a game. In archetypal form they might be described along the lines 'If Y's do X they shall be punished'. To this rule Ross says there must be a corresponding social practice.

The difficulty with this simple correspondence theory is that in even a relatively simple legal judgment there will be not just one but many laws applied. Every verdict is the cumulative result of a myriad of decisions on evidence,

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\(^8\) This is presumably the point Weinberger is attempting to make except that he appears to conflate the problem of truth functionality with physical reductionism. See Weinberger, O., "Facts and Fact Descriptions", in *An Institutional Theory of Law*, ed. MacCormack & Weinberger, Reidel, Dordrecht, 1986, p.77.
procedure, substantive rules and their exceptions. To use an analogy with chess, the rules might be the same in every game but there are millions of possible games. However, unlike law, we might observe a chess game proceed move by move and see in each individual move the instantiation of a particular rule. With the law the only link between the verdict and the array of possible applicable rules is the judge's reasoning. If the reasoning is false or undisclosed we lose all contact between the rules and the social practice.

Any theory of 'Law as fact' will have difficulty dealing with the numerous legal decisions that are novel, or derived from old or little used laws that many thought had fallen into desuetude.

Systems of legal rules always contain, packed within the logical relations between those rules, possible legal consequences which may, until they are included in a new judgment, remain unrecognised by society. Certainly no social practice could be said to correspond to such novel legal rules.

If we cannot speak of a correspondence between social practice and each particular legal rule, can we still claim there is a relationship between the more general principles of a legal system and social practices that correspond? This last assertion may well be true, but will not explain the ontological nature of a specific legal rule. By the time the
correspondence theory has been watered down to give it some verisimilitude it will have lost its explanatory power and will not tell us anything useful about the nature of the latest novel legal rule propounded by the House of Lords or the High Court of Australia.

Because of the theoretical aspect of law, reductionist theories of legal phenomena always experience difficulties of the sort just discussed. The same problems are experienced by reductionist theories of science or mathematics. There is an important respect in which law just does not fit into the spatio-temporal world unless we leave parts out. It is therefore appropriate that in the next chapter we examine theories of law that have approached legal phenomena by examining legal reasoning. From attempts to develop physicalist or reductionist theories of law we will turn to the attempts to develop theoretical or idealist theories of law.
3. LEGAL IDEALISM

3.1 Law as a set of statements

The previous chapter examined some of the traditional positivist theories of law, and sought interpretations of those theories, as answers to the question, 'how does law exist?' One advantage of the question being posed in that form, is that the risk of the discussion being sidetracked into a quibble about the definition of the word "law" is avoided. Asking the question "What is law?" is always risky. On a literal reading, this latter question would be simply a request for a definition of the word law, akin to what might be found in a dictionary.

Many enquiries have commenced with the classic question, "what is law?" but have then frequently led off into discussions concerned with matters such as whether social customs are laws, and if not, why not? These questions, which at the fringe may concern, for example, the problem about when and whether primitive custom amounts to a legal system may have some interest for legal anthropology or sociology, but as it is hoped to show in this work, answering these questions does no philosophical work.

The last chapter sought to show, that at heart, the legal positivism of the 19th and early 20th centuries was
concerned with the project of physical reductionism. In its most extreme form, it sought to reduce legal phenomena to part of the spatio-temporal world. It was argued that this project was impossible to fulfill.

It has also been previously suggested that a central theme of the legal positivist body of thought is the description of law free from any reference to moral value, or moral judgment, and one method of achieving this was the physicalist reduction. However, if law is not reducible to purely physical phenomena, there still remains the possibility that a complete description may be given that uses the concept of an imperatival statement such as a rule or norm, but in such a fashion that the describer remains amoral, or non-judgmental.

This alternative positivist view of law will be generically described as legal idealism following the usage of Ross. The laws of any particular legal system can, according to legal idealists, be described as a set of rules or norms ordered by their logical relations to other rules or norms in the system. The archetypal version of this legal theory is Kelsen's pure theory of law.

Before turning to any detailed consideration of Kelsen's pure theory, it is worthwhile laying out the whole of the argument in advance. If legal idealism is adopted by positivism to avoid the difficulties inherent in attempting the physicalist reduction, a new point of vulnerability
appears when one investigates its ability to provide a set of rules or norms that can be used for legal decision making without constant need to resort to further materials.

The last point is a different way of saying that the set of rules or norms must be complete. The notion of 'completeness' as used here is clearly borrowed from the philosophy of mathematics but is not used to do other than describe the relationship between a legal verdict and the reasons that support it. In a legal system that is complete in this sense the verdict will be derivable from the legal reasons offered in support of it, and the legal system in question will permit only one answer to each legal problem.

This may seem an unduly severe test to impose upon a legal system, but it will be argued later that there is no scope to water it down. If the answer to a legal problem cannot be obtained by pure deduction from within the set of legal rules or norms then the legal idealist project must fail.

The last step brings the argument to the point at which a discussion about theories of legal existence intersects with theories of legal reasoning. Theories of legal reasoning are often dealt with as if legal reasoning can be analysed separately from central theories about legal phenomena. It will be argued that legal reasoning, and theories of legal existence, are but different ways of
viewing the same legal material.\textsuperscript{1}

The positivist theories of writers such as Bentham, Austin and Kelsen imply theories of legal reasoning. These theories of legal reasoning are implied by the descriptions of legal phenomena. These descriptions dictate the sorts of logical relations that can hold between laws; this in turn produces their theories of legal reasoning.

The last point can be best explained by an example. One might adopt a positivist theory that describes laws as the commands of a sovereign. These commands are in the form of general imperative utterances describing categories of behaviour. Such a theory implies that a judge would have good legal reasons for a decision by finding that the correct description of the particular case either could or could not be subsumed under some general imperative utterance that is valid.

The example just offered obviously compresses the process of judicial justification. Most judicial decisions cannot be justified in one step, from general rule to particular instance. Most positivists view the process of justification as involving a chain of reasons, from the most general rules to the particular rule in the case, and then

judgment upon the particular facts. The steps in the reasoning are guided by the rules of natural deduction.

From this analysis of the relationship between law and legal reasoning, it can be seen that any theory of law can be tested by asking whether or not it provides an adequate theory of legal reasoning. An adequate theory is one that lays down rational canons for the making and justification of judicial decisions. This concept will be examined in greater depth in the next chapter. At this stage of the argument it is sufficient to investigate the theory of legal reasoning that flows from legal idealism.

At a later stage the skeptical rebuttal of the theory of legal reasoning generated by legal idealism will be dealt with. It will be suggested that the skepticism of the American realists provides, to a large degree, an unanswerable criticism of some theories of legal reasoning. It will be suggested that those are the theories of legal reasoning generated by legal idealism. Therefore, to avoid the pitfalls of reductionism and idealism, it will be suggested that a new methodological approach is necessary. The description of that approach will be dealt with when the argument resumes in the fourth chapter.

3.2 Theories of Law and Theories of Legal Reasoning

However much theories of law may appeal to sociology or anthropology in explaining what law is, a judge rarely has
need to refer to information from these subjects when determining how to apply legal rules. Lawyers and judges reason about legal rules as if they describe the concepts of an abstract system, and not as if they are descriptions of sociological fact. It is this aspect of law, its ability to be manipulated as an abstract axiological system, that Ross referred to as the 'ideal' aspect of law.²

Many positivist theories of law, including that of Ross, depend at many points in their explanation of the nature of law upon such concepts as the recognition or acceptance by a class of officials or of the citizens generally of those instructions or commands promulgated by particular bodies. In the last instance, positivism always appeals to sociological fact, and yet despite the importance of sociological fact in this theory of law one never expects judges to engage in any sociological inquiry.

All theories of law assume, almost as of course, that when judicial officers need to ascertain what legal rules or norms they should apply, they will engage in an almost purely theoretical inquiry delving into statutes and law reports and clarifying their concepts with legal argument. It is this very aspect of law that provides the constant temptation to lawyers to draw the conclusion that law itself is something akin to mathematics, and that the legal solution to a legal problem can be obtained by the adept manipulation of

formulae.

The ideal aspect of law in positivist theories of legal reasoning is generally treated by a description of the form of a legal argument which views a legal judgment as a conclusion derivable by the application of the principles of natural deduction to general legal rules. A typical example of a judicial argument that accords with this theory would be as follows:

1. If a person kills another person, (and certain defences do not apply, eg. self-defence, insanity) then he ought to be sentenced to life imprisonment.

2. X killed Y (and no relevant defence applies).

3. Therefore X ought to be sentenced to life imprisonment.

The major step in formulating an argument like the one above clearly lies in determining what will be the general premise from which the conclusion is derived. In keeping with the Benthamite theory that laws are the commands of a sovereign, that first premise has been expressed as a general statement. The conclusion is then derived by an application of the rule of inference known as modus ponens.

As many theories of legal reasoning are principally concerned with the method of discovering the initial general
premise, the deductive schema may be thought to be of little explanatory value. Its significance lies in the assertion that the process of legal reasoning ultimately depends upon the application of general rules. This might perhaps be the commonest view; it might be the only view that is logically supportable; nevertheless, some writers seem to hold alternative views.

It is often suggested that legal arguments that rely upon the authority of past decisions are in the form of arguments from analogy\(^3\). Golding presents a schema for such argument forms as follows:

1. x has characteristics F, G ...
2. y has characteristics F, G ...
3. x also has characteristic H.
4. F, G ... are H - relevant characteristics
5. Therefore, unless there are countervailing considerations, y has characteristic H.\(^4\)

While there is a certain vagueness about premise (4), and the conditional in the conclusion, it is still arguable that if there really are arguments of the form illustrated by

\(^3\) (a) Cross; R, op.cit, p.24.


Golding's schema, then they do not involve the use of any premise in the form of a general rule.

Despite the procedure illustrated by Golding's schema in application to several examples of legal reasoning Golding suggests that the argument by analogy is applied to derive a general rule. No doubt this general rule could be applied in the form of an argument from modus ponens.\(^5\) It is doubtful in this instance whether what is finally produced by Golding is truly an argument by analogy. A true argument by analogy should not involve the application of a general rule which would end up bearing the weight of the argument.

It might be suggested that the argument by analogy is only used to derive the general rule, from there the reasoning process proceeds according to more usual principles. This cannot be accepted; to suggest that an argument by analogy can have as its conclusion a general rule, is to misconceive the nature of such an argument. If a general rule were derived from a number of specific instances this would be by the use of inductive and causal investigation of those examples.

The use of a genuine argument by analogy would not turn upon the use of any general rule as a necessary step in the argument. The deductive schema illustrated above would not apply. The Benthamite theory of law based upon rules as

\(^5\) Ibid., p 117.
commands is clearly incompatible with the schema for arguments by analogy. Thus one could not hold both principles to be true descriptions of the nature of law.

The argument by analogy thus provides an example by which it can be shown that certain theories of legal reasoning are not reconcilable with all general theories of law. Arguments by analogy have no logical force and it could well be doubted whether they play any significant part in legal reasoning. This still leaves some of the more central theories of legal reasoning, and the question of how these theories can be fitted to the general theories of law. These issues will be dealt with initially by an examination of Kelsen's theory of law.

3.3 Kelsen's Pure Theory as an illustration of Legal Idealism

Kelsen's Pure Theory of Law, especially his theory of legal validity, provides a perfect example of a description of law as a system of imperatival statements related to each other in a fashion that is simultaneously a matter of sociological fact and logical truth⁶.

Kelsen's Pure Theory of Law is a theory of law that explains law as a theory of legal norms. The test by which

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one ascertains whether a norm is a law is by ascertaining whether it is authorised by a higher norm. This is dealt with by Kelsen's Theory of Legal Validity. This theory of validity is in turn described as the means by which one can discover whether a particular norm belongs to a legal order.7

The point just made appears to suggest that having picked some legal norm one might then pose to oneself the question, to what legal order does this norm belong? While a possible question, it obviously does not represent the usual practice of legal reasoning. Only in rare cases involving constitutional challenge to a specific law do lawyers ask questions such as does this law truly belong to this legal order?

It is of course not itself a criticism that the questions posed are unusual. In searching for a higher norm from which the particular norm can be derived one is ascertaining whether or not the norm is valid. To be valid, there must exist a higher norm that authorises the creation of the particular norm.

The notion of a higher norm authorising the creation of another norm lower in the hierarchy will have different implications depending upon whether one is a legislator or judge. The legislator needs to advert to certain

constitutional norms in order that any new norm that that legislator purports to create will be valid, ie, will be created in the manner required by the constitutional norms. For the legislator, the constitutional norms will read as a series of "ought statements" with which that legislator must comply if he is to create a new valid norm.

For a judge seeking to apply legal norms to a case there will be a subtle shift of meaning in the constitutional norms. The judge is concerned to ascertain whether apparently existing legal norms can be subsumed within the constitutional norms. This process involves two steps, the first is to ascertain what norms as a question of fact the legislator has purported to create. The second step is to investigate whether or not these norms are authorised by those higher norms which in turn have their warrant, in the last instance, from the basic norm.

In determining whether a norm purportedly made by a legislator was authorised to be made by a higher norm, the judge will need to apply the higher norm as the premise of a syllogism. A finding that the lower norm is valid, will be the conclusion to such a syllogism. For example, the validity of a council by-law regarding the disposal of rubbish might be established in the following fashion:

1. Municipal councils may in accordance with X procedure promulgate rules in regard to the disposal of rubbish within their boundaries (the higher norm).
2. Council A after engaging in procedure X promulgated rule 1A regarding the disposal of rubbish. (Factual statement regarding conduct of legislator.)

3. Rule 1A is a valid norm regarding the disposal of rubbish (the lower norm).

The example just given is of course greatly simplified, no attempt has been made to set out all of the necessary norms that would govern determination of whether the legislator is a bona fide council, and whether it has properly complied with the required procedure.

The point of the example just given was to demonstrate that the notion of a higher norm authorising a lower norm will, when considered by a judge determining which valid norms to apply, become a process of deduction in which the norms forming the chain will be steps in an argument.

Despite this emphasis on the deductive relationship between norms as one ascends through the system (Raz refers to it as the 'chain of validity'), this alone is not sufficient to establish the validity of a norm. There will always be an infinite number of norms that can be postulated from which the relevant particular norm could be derived. As in the example above, in seeking the appropriate valid norms

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one looks to norms that have been brought into existence as a fact.

This factual inquiry that we need to make at each level of the chain of validity in order to discover which of all the possible norms that have been authorised to be made, have actually been enacted, is a purely historical enquiry about the past conduct of legislators. Usually, this sort of enquiry is conducted by purchasing from a government printer copies of acts or bills. Nevertheless, the possibility always remains that one can go behind these records of legislative conduct, and contest whether as a matter of fact they correctly record the past conduct of legislators. This possibility must always remain, no matter what norms may have been created attaching prima facie, or conclusive significance to certain records of legislative conduct.

Legal idealism can thus never fully escape the need for factual enquiry. Yet despite this empirical necessity, the chain of validity is fundamentally a chain of deductive argument in which may be found logical relationships not intended or expected by legislators.

If the norms of the system have been identified, then the chains of validity can be followed back to the point where one must postulate a basic norm, the creation of which was not authorised by any higher norm. There are difficulties in explaining the role of this basic norm in identifying the legal system, and determining membership of
the system of the lower norms. These issues have been touched upon by Raz\(^9\) but do not directly concern this enquiry. The other function served by the basic norm that is relevant to this enquiry, is providing to a legal system a source for the validity of all the other norms that constitute that system.

The purpose of the Kelsenian theory of norms was the production of the "pure theory of law". This would provide a scientific theory of law in which any legal system could be described in purely factual statements stating things about the existence of law. The description of law would thus become entirely separated from judgments of political or moral value. This description need not be a physicalist reduction as discussed in the previous chapter, but the theory of law would still be descriptive and capable of expression in purely propositional statements.

It must be a necessary concomitant of this pure theory of law that the system of norms provides the complete material that a judge requires to decide a case. If, however, judges do appear to rely on more than just existing norms to decide cases then several manoeuvres would still be available to a Kelsenian in defence of the theory. It might first be argued that the Pure Theory is a theory of how judges ought to act, but should they advert to extraneous reasons, that simply shows that they are bad judges, not that

\(^9\) Raz; J, op cit, p 104.
the theory is disproven.

It could be said in answer to this first manoeuvre that Kelsen\(^{10}\) claimed that his theory was a theory of how legal systems actually operated, not a mere recommendation. It would be difficult to imagine how Kelsen could have sought to characterise his theory as scientific if it was intended to be more than descriptive of law.

The second point that might be made in reply to this first manoeuvre is to point out that Kelsen never presents any arguments to show why his system ought to be followed. If his system were to be construed as a recommendation, it would require moral or political argument to establish why judges should restrict themselves to deciding cases in accordance with established norms.

If it is accepted that the Pure Theory is a description of how the legal system actually operates, a Kelsenian might reply that many of the obvious principles of political or moral value that a judge might apply in interpreting or explaining norms, are actually part of the basic norm. Kelsen certainly sought to pack a great deal into the basic norm. He asserted that it contained the principles of non-contradiction of norms and the principles that ensured the overall coherence of the norm system.\(^{11}\) Nevertheless there

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\(^{10}\) Kelsen; H, *op cit*, section 11.

\(^{11}\) Raz; J, *op cit*, p.96.
are certain difficulties in extending it to include all the moral and political values which judges might use. Assuming we are still asserting that the theory is descriptive, it will have difficulty dealing with judges who apply values in conflict with other judges or the values of past decisions. There will be difficulties explaining how these principles within the basic norm could change.

It must be concluded that it is not really possible to defend the Pure Theory unless it can be shown that the process of judicial decision does in fact depend entirely upon the application of existing norms. In proceeding from this point to consider whether the Pure Theory is indeed adequate, it ought not to be thought that the criticisms that will be suggested are addressed purely to the work of Kelsen. Whatever be the logical structure of any theory about the legal system, all theorists who suggest that the necessary and sufficient elements in the description are norms or rules will confront virtually the same problems when it is demanded of their theories that they provide an adequate account of legal reasoning.

3.4 Legal Skepticism

American realism as a jurisprudential movement amongst United States jurists was influential from the late 19th century to well into the middle part of the 20th century. Several of its leading proponents were themselves judges and its doctrines have been traditionally encapsulated in the
slogan 'the law is what judges say it is'.

This work shall attempt neither a history, nor a deliberate defence of the views of the American realists. However, their views taken as a theory of judicial activity, provide a methodological counterpoint to those of the positivist mainstream and it is for that purpose they are considered here.

The views of Frank are usually taken as mapping the outer limit of the American Realists skepticism, and are therefore possibly the clearest statement of the position. Frank's views are frequently described as a skeptical attack upon the existence of legal rules, and many of these commentaries are written with the apparent assumption that Frank's views are discredited, or were never intended to be taken seriously.

Frank's skeptical attack produces no alternative normative theory of judicial decision making. His views are in effect an ad hominem argument against those believing that legal rules determine judgments. Frank's insight lay in the recognition that if the legal rules are not being deployed in a strictly deductive fashion, then their application necessarily depends upon the choice of the judge. If this be the case then the rules exercise no limiting influence upon the decision reached by the judge. Frank's demonstration of this principle will not be dealt with here, the next chapter deals at length with arguments which seek to establish the
impossibility of existing legal materials; namely, precedents and statutes deductively determining the appropriate judgment in any particular case.

Frank demonstrates that if there is not a necessary logical connection between the existing legal materials and the judgment, then there is no room to argue that the existing legal materials have nevertheless determined the result (albeit their connection with the judgment was based on a less stringent relationship than logical deductivity).

Critics\textsuperscript{12} expound Frank's theories in such fashion as to suggest the assertion that legal rules cannot in any way determine legal judgments is so extreme and improbable a theory that no more disproof is required. However such commentators rarely offer in reply any explanation of how rules can determine judgments by any lesser relationship than strict deductivity. If one tries to imagine alternatives, the difficulty becomes immediately apparent. For example a probabilistic relationship would be nonsensical if one was seeking to develop a theory of justification.

It might be argued that legal materials provide reasons for a judgment although not totally determinative reasons. Of course, this theory is as vulnerable to the skeptical attack as any view of the sort that legal rules strictly determine a judgment. Frank sought to demonstrate that legal

\textsuperscript{12}. For an example, see Harris; J W, \textit{Legal Philosophies}, Butterworths, London, 1980, p.97.
rules are what judges make from the legal materials through the process of interpreting and qualifying statements from past cases or Statutes. This very process of interpreting, qualifying and choosing would apply were any judge seeking to ascertain whether some past statement was a reason in support of a judgment let alone a determinative reason.

Frank's own explanation of the process of judicial decision making was a casual theory wherein judgments were explained as the consequence of judicial motives, both conscious and sub-conscious which had in turn led the judge in his selection of reasons and justifications.Such a casual theory obviously suffers from its inability to provide justificatory reasons to a judge seeking to ascertain what judgment he should make.

Later chapters in this work will show that a rational theory of justification is possible but that it flows from recognising that judicial decision making operates by seeking the appropriate end or purpose which the judgment should reflect. The danger of deductivism is that it leads to a model of judicial decision-making in which one imagines the judge applying rules or reasons to the facts of the case in order to see what result will be produced. No rational process of judicial decision making could operate unless judges have an eye on the end result. Any present day positivists that recognise this fact still seek to evade its import by a modified form of deductivism. Their views are considered in the next chapter.
Frank's skepticism provided a strong criticism of deductivism as a theory of legal reasoning. Frank's work also extended its skepticism to the fact finding processes in judicial decision making but his theory is important to the argument of this work in highlighting the need to make clear the nature of the relationship between the judgment and legal rules if we are not to delude ourselves about the nature of judicial decision making. Where the relationship between the judicial decision and the reasons for that decision is wholly determinative of the decision, then it will be described in this work as a strong justification. The nature of that relationship and the notion of strong justification is the topic to which this thesis now turns.
4. RATIONALITY AND JUSTIFICATION

4.1 Having reasons and reaching verdicts

The last chapter ended with the conclusion that any adequate theory of legal reasoning must be one that strongly justifies any legal verdict. In one sense this might appear trite, the demand is only a demand that the legal reasons to which one has appealed are so arranged that they can only justify the actual verdict reached and do not leave open the possibility of several 'correct' but contradictory verdicts. While this demand may initially appear trite, it is not easy to satisfy. The thrust of the sceptics' attack was generated by the ease with which legal materials can be so arranged that they justify whichever verdict the court may for other reasons desire.

Before embarking on the task of trying to develop a theory of legal reasoning that strongly justifies legal conclusions or verdicts, it is worth further investigating the function of legal reasoning within a legal system. This investigation might be described as the formulation of answers to the questions: 'why is it necessary, and what is required, to be rational within the province of law?'

There is nothing intrinsic to the meaning of the word 'law' that requires the verdict or practical result of any
legal proceeding to be the conclusion of an argument reducible to syllogistic form, the judgment being a logically valid inference from the premises. Law is frequently categorised as society's dispute settling mechanism. It can be viewed as a piece of apparatus to which parties in dispute submit their claims so that a final and definitive result may be obtained. Close to this view are those theories as well as judicial pronouncements, and even legal rules, that emphasise the importance of the legal system in keeping the peace and preventing private feuding and resorts to self help.

The law's role as peace-keeper is emphasised whenever appeal is made to the law to provide a final answer and help avert anarchy by imposing solutions on citizens and avoiding the possibly excessive violence that might occur if people sought their own solutions. Law seen in this light does not need a complex set of rules, but rather a procedure that produces a recognised and definitive result. In the Anglo-Saxon legal systems of present times the last vestigial remnant of this form of legal process is the use of a jury in a criminal or civil trial.

While juries are informed of the law and the facts, they produce a legal conclusion or verdict that is simply a statement of guilt or acquittal or an award of damages, without any supporting reasons. The inscrutability of the jury's verdict is increased by the legal rules preventing inquiry by higher courts or officials into the jury's
deliberations. Within a system such as that of the jury there is no scope for a theory of legal reasons. Nevertheless, although the verdict of a jury is unsupported by published reasons, this form of legal process is still stringently rule-governed. The selection of the jury and the preparation of the jury for the task of forming a verdict are processes covered by elaborate rules.

The rules that govern the deployment of juries thus produce a verdict without in any way justifying the correctness of the jury's decision. The only form of inquiry or argument about a jury verdict allowable within the legal system is an inquiry into whether all the pre-conditions have been satisfied necessary to produce a valid verdict.

Although a jury is exhorted to apply the legal rules explained by the trial judge, and supposed to rely entirely upon the facts as established by the evidence led during the trial, Anglo-Saxon legal systems provide no mechanism to ascertain whether the jury fell into error when considering their verdict. Given the difficulties of properly applying legal rules even for lawyers, it is clearly a pious hope to assume that most juries reach their conclusions in a manner that could be vigorously defended on legal grounds. It is clearly not a crucial value in the conduct of trials by juries that the conclusions they reach are necessarily the conclusions dictated by a strict application of law. That this is so might be defended on the ground that use of the jury system satisfies other values, such as permitting
participation by the general community in the administration of justice.

The advantages or disadvantages of the jury system are not a topic of this work, rather the jury system provides an example of one extreme, namely the minimal reliance upon reasoned justification of the result. One can thus ask "what more do we need and how does it assist?" If in answer to this question we reply that public reasons and justifications are required so that we can satisfy ourselves of the absence of error, an important assumption would have been left unargued.

Although a jury's verdict is not subject to further examination or inquiry, and is issued without reasons, it does not naturally follow that the jurors themselves have no reasons for their verdict. What is initially sought in addition to a verdict is the assurance that the verdict was in accordance with the legal rules and principles applicable. This last statement involves further assumptions about the existence of legally correct answers.

The interest of litigants in receiving the legally correct solution to the dispute must be distinguished from the provision of published reasons that justify the result. Thus, if juries infallibly produced the correct verdict albeit for the wrong reasons then litigants could have no grounds for complaint. A litigant's primary interest must be in having the case decided correctly. If the correct
decision is reached, then, even if judges, officials, or jurors hold incorrect beliefs about the proceedings, there has been no prejudice to the litigant.

The primary purpose of published reasons must be to assist in the administration of justice by permitting parties to understand how the result was achieved and to facilitate the detection of error. Leaving aside for the moment such pragmatic issues as the assistance published reasons may offer to future litigants, the raison d'être of a legal proceeding is the verdict, not the reasons that justify the verdict. The reasons assist one in checking that the verdict is correct, but that purpose is dependent upon the existence of a verdict.

Before proceeding further the phrase 'a correct verdict' should be examined. Legal systems are clearly concerned with the maintenance of order in society. They are not the only means of maintaining order, custom or force alone might succeed. It is also the case that legal systems are usually expected to serve more purposes than simply the maintenance of order, but if legal systems are to achieve more than merely the settlement of disputes (if their purpose is more than solely the keeping of the peace regardless of the result), then the result must matter, there must be right and wrong results.

If one views the laws of a legal system as rules, then those rules should for any set of facts dictate permissible
and impermissible results. If the rules are insufficiently precise to exclude some possible verdicts, and dictate others, then the rules are in pragmatic terms of little effect. By failing to determine the result, the system administered in accordance with such rules is little different from a system which does not purport to apply rules but simply pronounces verdicts in order to settle disputes.

The notion of a 'correct verdict' is therefore no more or less than the result determined by the appropriate set of rules. What, therefore, is meant by a set of rules determining a result? Where the rules are capable of post hoc formulation to create arguments that bear the actual verdict as the conclusion, they can be said to weakly justify the result in the sense used in the last chapter. To what was said in the last chapter about justification in the strong sense the following comments can be added. Strong justification could be formulated in advance of any judicial pronouncement by somebody knowing all the facts and all the law, and such a person, possessed of a strong justification, could say that any judge not agreeing with the verdict implied by his strong justification was in error. In such a case the set of rules determines the result.¹

¹ In the examples just given the terms 'rules' and 'reasons' are being used interchangeably. No consequences flow in this instance from the differences in meaning between the two terms.
4.2 The impossibility of an internal logical test for judicial justification: the scientific analogy

A set of rules that weakly justify or under-determine a result is ultimately compatible with conflicting verdicts. This is equivalent to saying that in any broad field of statements and theories, the interconnections will be so complex that in regard to any single statement it is possible within the system to provide a justification for the statement or its contradiction. By adjustments within the totality of the system any single point can be altered, or for any single verdict an opposite verdict could be substituted, and, by the addition of new arguments, the internal consistency of the system preserved.

The last paragraph applied to rule systems like law the characteristic of scientific theories frequently discussed in criticisms of empiricism. The principle is clearly enunciated by Quine in his essay, "Two Dogmas of Empiricism":

"Total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field . . . re-evaluation of some statements entails re-evaluation of others, because of their logical interconnections . . . But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience."\(^2\)

\(^2\) Quine; W V O, "Two Dogmas of Empiricism", in From a Logical Point of View, Harper, New York, 1963 p.42.
Law is rather like the field of science, and particular verdicts rather like individual sensory experiences. In science no theory is irrefutably confirmed or falsified by individual observation statements. A theory or hypothesis can always be retained by sufficient adjustment elsewhere in the theoretical structure\(^3\). In law a desired verdict can always be justified if sufficient adjustment is made in the myriad of legal rules and principles brought to bear in a particular case. The judgments that artificially distinguish a clearly pertinent precedent are simply the most clumsy examples of this process at work. The judge, like the experimental scientist, can also work on the choice of relevant facts.

There is not space in this work to fully argue for the thesis just propounded. It has already been done several times most notably by Frank. Opponents of the sceptic attack rarely seek to deny that one can by deft manipulation of legal rules justify any desired verdict. It appears that this point is often conceded without any thought that it is a significant concession. However, it will be argued that once this concession is made, and it is hard not to make it, then the task of formulating rational canons for the process of judicial decision-making becomes extremely difficult.

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It is worth persisting for some little distance further with the analogy with science. The principle of the irrefutability of any particular theory or hypothesis mentioned above has been referred to as the "Duhem-Quine thesis". Pierre Duhem reached a similar conclusion to Quine's, approaching the matter historically rather than by investigations in epistemology.\(^4\) Versions of the Duhem-Quine thesis have provided one of the central problems for modern theories of scientific methodology. However, there are solutions open to the theory of science not available to solve analogous problems in the philosophy of law.

It was emphasised at the beginning of this chapter that the primary purpose of a legal proceeding was the production of a result or verdict. It was further emphasised that the difference between a system that produced justified results and one that simply provided a result without adverting to any principle or test for correctness was that it pre-eminently mattered for the first type that the rules or reasons determined which verdict was obtained, rather than simply providing reasons in support of the verdict. If the system of rules or reasons which assist in determining the verdict so radically under-determine the result as to leave open which verdict will be selected, then that system is not significantly different from the procedural system which does not justify its verdicts.

I will describe as rational justification a system where the reasons or rules relied upon fully determine or strongly justify the result. This is not to suggest that reasons offered in instances of weak justification are irrational or without point. Weakly justifying reasons may help reconcile disaffected litigants to the result. Such reasons may help preserve public confidence in the system of justice by successfully persuading many people that judicial decisions are not the product of personal bias, favours to friends or the great and powerful, or otherwise motivated by improper purposes.

The sorts of purposes served by weakly justifying reasons are unrelated to demonstrating the validity of the verdict. These are purposes external to the process of rational justification. They need not therefore be branded irrational, for they may serve those purposes successfully, if looked at externally from an ends/means viewpoint.

While weakly justifying reasons can serve rational ends, the aim of the argument to this point has been to demonstrate that if legal reasoning is to be internally rational, then legal reasons must strongly justify legal verdicts. At this point the divergence from the scientific analogy that has been used above can be explained.

At any particular time a scientific theory may suffer from having a number of areas of internal inconsistency; it may not be able to explain certain experimental results and
may have made predictions that have not been fulfilled. This need not require our rejection of that particular scientific theory. Any pragmatic scientific methodology would exhort us to retain the best available scientific theory despite such anomalies.\footnote{Rescher; N, \textbf{Methodological Pragmatism}, Blackwell, Oxford, 1977.}

The exhortations of methodological pragmatism can make sense because there is the possibility of external criteria for the assessment of scientific success. The best scientific theory allows more accurate prediction of physical phenomena, the building of better space ships and so on. These external criteria provide public methods for assessing the success of scientific theories. In crude common sense terms, a scientific theory is supposed to describe the physical world. The better the description the better the theory. Most people would consider that the aim of scientific investigation is to maximise the truth content of scientific theories and would be realists in the philosophical sense about the concept of truth even if not familiar with the label.

In this process of maximising the truth content of the theory, or, in purely pragmatic terms, producing solutions to problems about the physical world, a certain degree of inconsistency and unresolved conflict with experimental data will be tolerated. If a particular scientific theory is a better explanatory instrument than any other it is not a
fatal criticism that it does not explain everything.

By contrast with a scientific theory a body of legal rules does not have the same connection with the physical world, or any other external means for testing either the efficacy of particular legal doctrines or rules, or the ability of particular judges. There are some external constraints. Certain laws might prove unenforceable or be so utterly detested that they simply provoke mass disobedience. However, historical experience suggests that societies can tolerate legal systems that perpetrate quite extreme injustices, oppression or inefficiency without the society being destabilised or the legal system collapsing.

It must be conceded that law is limited by the need to comply with certain formal requirements in order that legal rules can have meaning and be capable of being complied with. Laws commanding the impossible or involving logical inconsistency clearly fail, just as would any incomprehensible or meaningless scientific theory.

The external limitations upon permissible legal rules or permissible verdicts are slight when compared with the degree to which scientific theories are tested by the physical world. True it is as the Duhem-Quine thesis suggests that no single recalcitrant experience can disprove a theory. Ad hoc adjustment can always allow the phenomena to be 'saved'. But ad hoc adjustment cannot increase explanatory power or help generate new and powerful predictions about the world.
In the field of law the limitations and tests are almost entirely internal. An appellate court reviewing the decision of a lower tribunal and checking for error is largely seeking to find out whether the decision under review is consistent or reconcilable with established doctrine and statute law. Schools of thought advocating economic analysis of law, or law reformers suggesting economic or social goals for laws, are indeed judging law by external criteria, but their tasks are very different from that of a court theorising about what the law actually is.

If one assumes that the true interpretation of legal verdicts is that they are imperatival statements, being commands to parties or officials to perform certain acts, then of course they cannot have truth values in the same fashion as the predictions of scientific theories.

There is thus not the possibility of founding the justification of a verdict (as opposed to a jurisprudential theory) upon a pragmatic methodology similar to one of those that has recently been expounded for science. The test for whether or not a verdict is justified is to ask whether it is a proper inference from a valid system of rules and principles. There is simply no external test for the correctness of an imperatival conclusion other than its justification by other imperatival premises. This much is

(b) Lakatos; I, op cit.
philosophical dogma at least for the purposes of this work.

It might be argued that legal statements could be checked against moral statements and that this is a form of external check on the success of a legal doctrine. As moral statements are themselves imperatival there can be no logical objection to this notion. In one sense this theory is acceptable. Indeed it will be argued later in this work that legal statements are simply a sub-set of moral statements. What is misleading in this suggestion is the idea that judges might have moral intuitions about the correct verdict, which they will then justify by the construction of legal arguments of the weakly justifying sort.7

The difficulty with the position just mentioned is that where the legal reasons only weakly justify the verdict, alternative arguments justifying conflicting verdicts could be constructed from the same set of legal rules and principles. Thus it is not the legal materials which are not determining the verdict, but rather the moral rules to which the judge has first resort. These moral rules are thus not 'checking' the process of legal reasoning; they are the hidden determinants of the legal conclusion.

If our legal system provides strongly justifying reasons

7 (a) Golding; M P, Legal Reasoning, Knopf, New York, 1984, pp.2-6.
then it is no longer arguable that moral intuitions provide hidden determinants of verdicts, but on this assumption moral reasons will be of minor significance, and it would be as likely that judges could find their way to the correct verdict by depending upon legal technique.

Despite the dangers described above in using intuition or judicial hunch as a legitimate method of approaching a verdict writers still seek to defend the process of justifying post hoc judicial intuitions and to do this with analogies with science.

Wasserstrom and Golding\(^8\) claim that the sceptic attack can be defeated and borrow from scientific analogy for their argument. As in science so in law they allege that a distinction must be drawn between a 'process of discovery' and a 'process of justification'. The concept is explained by using as a classic illustration the example of a scientist who hits upon a breakthrough by some non-rational process, for example, he dreams of the right equation or sees it in a flash of insight. The scientist may later construct a justification by using rational argument to demonstrate that his discovery is scientifically useful.\(^9\)

As has already been suggested, the reason a scientific

\(^8\) Ibid.

\(^9\) Cross provides a similar defence of the judicial hunch without the scientific analogy: see Cross; R, op cit, p.51.
theory is justified is not because chains of argument can establish its consistency with existing knowledge; that, as the Duhem-Quine thesis points out, is available to any statement, but rather because the theory can be shown to have greater explanatory power, or properly predicts more novel phenomena than any of its competitors.

A judge may have a hunch about how to decide a case before constructing his justifying reasons, but to then suggest his construction of justifying reasons is analogous to the process of justification in science is to entirely miss the distinction created by the external test upon scientific theories and the entire lack of such a test in law.

It may be argued that in the process of constructing a justification a judge finds that his hunch just will not work, and is thus forced to abandon the idea. If this ever actually happens then it would be some evidence that post hoc justifications are of significance in determining an actual verdict.

The fault in this reply is that it wrongly identifies the reasons why a judge might abandon his hunch after trying to construct a justification for it. It would be unlikely that a judge could not construct a deductively valid argument that reached the desired conclusion. In the process of so doing, however, the judge may reflect upon and change his hunch or intuition. A judge may feel that the construction
of a justification for his initial hunch involves the use of artificial distinctions. Artificiality is not itself a logical concept. In science the notion of artificial or ad hoc adjustments to theories is deprecated because such adjustments are not thought to increase the theory's ability to make new empirical predictions. These limitations have no corollary in law.

Criticism of legal reasoning for artificiality is more likely to be based upon the view that the distinctions or points argued for have no moral or political justification. If law ignored this criticism it would be reduced to a word game, divorced from any social or political purpose, but the point of such criticism is that it returns to an external viewpoint that sees law against a background of moral principle. So, once again, it is not the set of legal rules that rejects the judge's initial hunch; rather the judge may be led, in examining those rules, to reflect upon his own moral intuitions and reach a revised moral position inconsistent with his hunch.

There are numerous other possible forms of conflict between a judge's private moral intuitions and the content of publicly acknowledged legal rules. These will be examined in greater detail later. The suggestion made above should be taken as an example rather than an exhaustive description of ways that judges may be led to abandon an initial hunch. The purpose of the argument at this stage was to demonstrate that simply because justifications may be devised to rationally
support discoveries in science, it will not follow that post hoc justifications devised by judges to support a judicial hunch serve to make law internally rational.

4.3 Strong justification as the foundation of a theory of adjudicative reasoning

The process of judicial decision making can only be internally rational if the reasons given by judges to support decisions really count. Unless the reasons actually determine the decisions, then whatever social or ideological purposes might be served by such reasons they are not part of an internally rational process.

It might be objected that the test for rational judicial conduct has been set too high and without necessity. Provided people can usually predict the type of response that a court will make the system is workable and no more can be asked of it. The objection might be alternatively formulated to the effect that since experienced lawyers frequently provide quite accurate advice about the future decisions of courts, often assisted by reading law reports or statutory materials, the process must therefore have an internally rational structure.

Two possible inferences might be drawn from the grounds of the objection first stated. Firstly, it could be suggested that the fact of successful prediction of judicial decisions establishes that legal materials do have a rational
structure, even if they are not capable of satisfying the test of strong justification. Secondly, it might be said that even if the internal structure does not satisfy any of our tests for rationality, provided one can predict in most cases what a court will do next, that is enough, and the demand for internal rigour is silly and unnecessary.

The first point just mentioned takes its force from the fact of successful prediction. One possible explanation would be the existence of an internally rational structure in legal materials that is apprehended by a lawyer and allows him to draw rational inferences that result in successful predictions about future judicial conduct.

This argument assumes that successful predictions could not be made unless there was a rational internal structure, but as readers of poems or novels would be aware, they may gain insights into the works of authors that permit them to make accurate predictions about future works from the same authors. A psychiatrist reading the incoherent scribble of a lunatic may be able to make accurate predictions about the future behaviour of that individual. This of course does not imply that such writings are internally rational in the sense in which that phrase has been used in this work.

Lawyers go through a lengthy process of education and training. The aim being to produce a 'legal mind', the process of training leads to an ability to see the 'legal side of things' and to a considerable extent this will
involve adopting values and mental techniques generally used by lawyers. Skill in mastering these concepts may lead to a lawyer possessing greater than usual power to predict a court's decision, or to persuade it to adopt a view.

Part of this legal skill will involve the ability to formulate reasons justifying particular decisions. Lawyers writing such reasons and others reading them will feel confident of their ability to understand and control the legal process.

All that has just been said may well be true and yet the legal decision-making process may not be internally rational in the manner described above. Those that speak of the practice of law as a craft, and this includes both practitioners and judges\textsuperscript{10}, capture well the notion of a practice perhaps capable of being carried to high levels of skill and technique yet guided by principles that are not discursive but only mastered by practise and understood intuitively. This would put law on the 'knowing how' side of the knowing how/knowing why distinction suggested by Ryle.\textsuperscript{11}

Returning to the original objection, that regular successful prediction of judicial outcomes should be sufficient, the reply can now be made that successful

\textsuperscript{10} Dixon; O, \textit{op cit}.

prediction does not imply that the outcomes were produced by judges acting rationally, in the sense that legal rules and principles determined the result. Most judicial decisions are probably rational in that the judges have good reasons for deciding in the fashion that they do. If judges proceed by forming some general idea of the merits and then seek to construct justifying reasons, then whatever purpose those reasons might serve, the general view of the merits clearly provides a reason for giving the verdict to one party rather than the other. A judge who decides a case in a certain way because he has received a massive bribe is behaving rationally as an individual, although one might condemn his action as a judge.

The faults with the sorts of reasons just mentioned fall into several categories. Judges who accept bribes or favour friends we condemn because they favour a party that may not deserve to win the case. We can say this viewing the matter in simple moral terms without considering the effects of legal rules. A judge who decides the case purely upon his intuitive view of the merits and who, consciously or subconsciously, constructs reasons to publish as a matter of form, we can only criticise on more subtle grounds.

The judge in the last example cannot be attacked for favouring an undeserving party, at least not if we assume for a moment that his intuitive view of the merits is frequently a reliable guide to the morally deserving party. There is however something which offends us about the fact that his
published reasons are not what they seem. At a different level, although deciding a case purely upon a hunch about the merits may not incur the moral opprobrium of a decision dictated by bribery, we justly feel that the decision may well have given insufficient weight to legal rules and principles, and the victor although perhaps morally deserving in one sense did not deserve to win at law. The judge in this example is condemned because ultimately he could be charged with ignoring the constraints upon his position as judge, and thus acting against the constitutional and political culture of which he is a part.

In the comments just made it is important to always keep in mind the distinction between the reasons for the judgment and the reasons offered in justification. The criticisms just made of a judge who acts on private unstated reasons are criticisms of those reasons because of the danger that they will produce the wrong result. It is an additional criticism that the reasons for the judgment are different from the reasons offered in justification. This can lead to a further charge that the process is deceptive and misleading, but if the private reasons for a decision of a particular judge were always in accord with what valid legal materials would dictate, then the initial criticism, namely of producing the wrong result, would not apply.

Although the word justification has been used frequently throughout this chapter it should now be clear that legal reasoning is not envisaged as the 'justification' of a result
independently ascertained or discovered. The word carries unfortunate connotations of explanation offered after the event. By contrast the theory of law offered by this work claims that correct legal decisions can only be described as the correct inference from valid legal materials. Legal reasoning is thus the producer not the justifier of legal decisions. Of course at this stage the notion of a correct legal decision and valid legal material must be left largely unargued, but suffice it to say that the idea of a correct legal decision simply refers to the point made at the beginning of this chapter, that it is the verdict of the case that matters, not the justification. The concept of valid legal material refers to the class of reasons by which it is permissible for a judge to reach a verdict. Statutes in force might be within the class, acceptance of bribes is clearly outside the class.

The purpose behind much of the discussion in the last few paragraphs has been aimed at showing that the question with which we are concerned is not that of establishing that legal reasoning is rational human conduct in the general sense. Judges may act in a rational manner; but we might consider their reasons utterly improper. Rather, one is firstly concerned with the types of reasons that judges ought to use when determining a judicial decision. It is clear that the types of reasons relied upon must be capable of being deployed in such a fashion that they strongly justify each particular verdict.
The next few chapters will seek to provide a theory of the sorts of reasons upon which one ought to rely when acting as the adjudicator in a dispute. For the purpose of this theory it is not necessary that the theory antecedently define the area of law. The theory is a general theory of the adjudicative process and would apply to many instances not considered legal in the usual sense of the word. The prime elements necessary for the application of the theory are the existence of parties making irreconcilable or conflicting claims and the existence of a person called upon to act and settle the dispute, who relies not upon his own sheer power or force to impose his solution, but relies instead upon an acceptance of his role by the parties or generalised support from social structures.

A legal dispute offers the classic paradigm of the adjudicative process, but law is still just an instance of a genre, it does not generate any unique logical or methodological problems.

The general theory of adjudicative reasons can be broken into two parts. The first part makes the quasi meta-ethical claim that the sorts of reasons a judge or adjudicator ought to use are those generated by viewing the process of judging as one requiring the judge to act as a moral agent.

The second part of the theory investigates the impact it would have upon judicial practice if judges consistently and universally acted as original moral agents in judicial
decision making. This second part of the investigation is important in demonstrating that a logically consistent theory of judicial conduct is not a social or practical impossibility.

The theory is developed by investigating legal reasoning from the standpoint of the individual judge. This second part of the investigation shows that when the perspective is shifted to test the theory against social needs it is also capable of functioning.
5. MORALS AND THE REASONS FOR HAVING A LAW

5.1 Introduction

This chapter will begin the process of outlining a theory of adjudicative decision-making. The theory does not claim to be an analysis of the actual practice of judicial decision-making as it has been conducted in the Anglo-American common law tradition. However, while the theory to be propounded is prescriptive, past and existing judicial practices are not to be ignored. Their role is investigated at the beginning of this chapter by way of an introduction to the main theme.

The central argument of this chapter, and first step in the outline of the proposed theory of adjudicative reasoning, is to establish that any law can only be rationally supported by appeal to a moral reason about the behaviour that forms the subject of the law. It will be further suggested that it flows as a corollary from this first argument that the only rational form of legal reasoning would be an argument that appeals to the moral reason that justifies the law in dispute.

5.2 The Place of Past Judicial Practice in the Theory of Legal Reasoning

While the warning has already been clearly issued that the theory to be propounded is a prescriptive theory, and is
not therefore to be judged by its degree of veracity as a
description of existing judicial practices, the study of
judicial conduct and case law cannot simply be put aside.

A prescriptive theory of legal reasoning can never
become totally detached from the institution for which it has
been invented. It is, in essence, a proposal for the reform
of a particular activity, in this instance, by increasing the
rationality with which the activity is conducted.

It is of the essence of jurisprudence that it must work
by using concepts such as rationality without fully arguing
for the definition of the term which will be relied upon. If
one waited before investigating law until one had rendered
all those concepts one wished to use unproblematic, then the
study of jurisprudence would never commence. Legal
philosophy lies in a zone where problems in logic,
epistemology and the philosophy of morals all overlap. It is
usually only possible to investigate one strand at a time.

While the philosophical investigation of law might
commence with the apparently unphilosophical ploy of simply
adopting some common sense versions of fundamental concepts
like rationality, and morals, these assumptions are not made
dogmatically but provisionally. In the course of argument,
our initial assumptions may be altered, even radically, or
totally abandoned. Making such assumptions allows the
activity of jurisprudence to get under way, and once that is
achieved, no particular concept should necessarily be
indispensable.

5.3 Private and public reasons

The preceding chapter explored the problems generated by the demand that judicial decision-making be rational. That discussion referred to the possibility of judges acting rationally but for the purposes of expediency publishing reasons other than those they acted upon. A form of thorough-going pragmatism might ultimately endorse the action of judges publishing reasons for public consumption, while privately acting in a fashion they believe desirable to further the greater good. Dworkin uses this example of a judge telling a noble lie as part of his own characterisation of the legal pragmatist.¹

Judges telling noble lies would clearly disrupt any attempt to establish principles of judicial reasoning where publicly announced judicial reasons strongly justified the verdict reached. Does this mean the project of using pragmatism to develop a theory of rational judicial activity is doomed from the outset?

Dworkin's assumption that to adopt pragmatism is to invite noble lie type judgments, and perhaps abandon the internal rationality of the published reasons of judges, arises from conflating the pragmatic judge or legal official

of the famous moral dilemmas deployed in university courses on moral philosophy with pragmatism as a methodological principle and as a theory of rationality.

Methodology in the sense used in this work is concerned with developing theories about how judges ought to reason and adjudicate. But the concern is not with the private mental processes of judges but with the reasons that might be deployed to persuade or convince a hypothetical or actual audience. Making this distinction allows one to deal with the apparent paradox of a theory for judges about the rational justification of their decisions which may in some circumstances dictate that the reasons they would publish not be the reasons which in fact led them to their conclusions.

Implicit in the creation of the paradox is the assumption that the best moral reasons for justifying what should be done cannot be published because members of the public would react to such reasons in undesirable ways. It follows from this assumption that members of the public who would so react do not have the belief of the judge in the correctness of his moral reasons.

The paradox assumes that the judge's reasoning is correct (if it is not there is no need to defend it). It follows that in differing from the judge's beliefs the members of the public who differ are holding false beliefs or have reasoned badly. It follows that if the public is assumed to be as rational in belief and impeccable in
reasoning as the judge no occasion would arise when a judge's publicly pronounced reasons need differ from his private reasons.

Once the source of the noble lie dilemma is uncovered its irrelevance to the theory propounded in this thesis can be demonstrated. The theory propounded here is a prescriptive model for legal reasoning. At the first level it can be viewed as a description of what legal reasoning would be like in a world which satisfied all the needs for legal reasoning to be as rational as possible. One such need would be a public who act as rationally as the judiciary.

At the second level the theory can be viewed as a theory about the type and structure of legal reasons. It is argued that judicial reasons are moral reasons. That alone does not give a judge reason in some cases to publish reasons he did not accept in order to promote the social good. To have reason to do that a judge would also have to hold particular first order moral beliefs, such as 'act utilitarian' beliefs. The theory of judicial decision-making propounded here does not require that all judges be act-utilitarians.

The dilemma that might be faced by an act-utilitarian judge does not alter the nature of legal reasoning although it might undermine the integrity of the published reasons of such a judge. The dilemma has no effect at all upon the conclusions of this work viewed as a model for a hypothetically rational community.
5.4 The notion of rational reconstruction

Having disposed of the threatened paradox, some broader methodological considerations can now be dealt with. The first of these is the role to be played by existing case law and judicial conduct in the development of prescriptive theories of legal reasoning. The notion of adjudication where a decision is justified by reasons that make use of legal rules has provided the problem, namely, the creation of a rational canon for the justification of decisions. Past judicial conduct has by its very nature staked a claim to have been rational. Case law invites investigation with a view to formulating the logical principles upon which it was constructed.

Implicit in an inquiry of the sort just described lies the risk that no one single set of logical principles will adequately explain the whole of past judicial conduct. There will be an inevitable degree of incoherence, inconsistency, and possibly even bald logical error. It is not the task of legal philosophy to keep constantly tinkering with doctrines of precedent in order to try and achieve the best possible fit with past judicial conduct. It is not even necessary to seek out that theory that best explains the largest portion of decided case law. The actual conduct of judges is no measure of a theory devised to serve as a model of judicial rationality. Past practice does not determine what is rational.
Yet, despite this apparent irrelevance of past decided cases, the actual practice of judges in creating this case law is the activity the theory is seeking to make more rational. For this reason the theory cannot ignore the conduct of judges and must be capable of re-constructing past judicial conduct in accordance with its new canons of judicial rationality.

This process whereby an activity is first assumed, then reflected upon, and then rationally re-constructed, is reminiscent of the methodology of Rawls with his notion of a 'reflective equilibrium' between our moral intuitions, and the theories of morals we devise to further explain these intuitions, but which may lead us to amend or abandon our original intuitive notions. A closer analogy than Rawls reflective equilibrium is the notion of a 'rational re-construction' suggested by Lakatos in his work on scientific methodology.

5.5 The Relationship between Law and Morals

The relationship between law and morals has already received significant attention in this work. It will dominate much of the remainder of the work. In commencing to

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outline the prescriptive theory, the first examination of the relationship between law and morals will assume that the common sense notion of law is not too problematic. The man in the street no doubt would agree that laws are social rules publicly recognised and promulgated and enforced by social institutions. If the same man in the street were asked about morals, he might well describe the notion of conscience as a private sense, and moral rules, although public in one sense, as rules about which individuals may have to make their own choices, and in regard to which they can be led into conflict with their legal obligations.

Law and morals are clearly different concepts, and if someone were to use the words synonymously we would consider that they did not properly understand the meaning of the words or were using them in a different fashion from that of normal English speakers. Legal systems usually contain rules which appear to duplicate much of the content of most first order moral systems. On the other hand, legal systems appear to contain large numbers of rules which usually have no correlate in the moral beliefs of most people. Likewise, most people have moral views on matters such as the way one should properly conduct oneself towards one's friends and family that are not usually the subject of a law.

These layman's notions of the province of law and morals are clearly reflected in many works of more academic flavour on the topic. One commonly finds authors suggesting that law
and morals overlap. Thus Antony Allot⁴ not only speaks of the overlap between law and morals but illustrates it with a venn diagram to show the area of overlap and to separate areas of the subject matter which remain uniquely legal or moral as the case may be.

Hart in his "concept of law" says:

"In all communities there is a partial overlap in content between legal and moral obligation; though the requirements of legal rules are more specific and are hedged around with more detailed exceptions than their moral counterparts."⁵

At the present time, books are frequently published with titles such as 'The Law and Morals', the subject matter of which are discussions upon issues such as abortion, homosexuality, pornography and euthanasia. One would never expect to find in these sort of works an essay on whether or not courts should enforce gratuitous promises. What the titles of these works illustrate is the assumption that those issues, upon which the community is presently deeply divided and where in argument reference is frequently made to the role of private conscience, are matters upon which morals bear more directly upon the law than upon issues such as the passing of the risk in a contract for the sale of goods.


Lying behind this notion that law and morals overlap is no doubt the belief that law in some areas is simply the enforcement of certain archetypal moral rules. Legal prescriptions against murder, theft and violence against a person are the obvious examples of this. By contrast, at least in the minds of some, laws on such matters as parking or public holidays are not seen as being connected with moral principles. It is clear in regard to examples of the sort just given that a connection with moral principle can be easily demonstrated. It may not be morally desirable that one drive on one side of the road rather than the other, however it is morally desirable that traffic is orderly so as to avoid collisions, and for this purpose a convention must be decreed. Once a choice is made by convention, conformity is a moral duty, and disobedience can cause significant harm.

By taking examples such as traffic laws, one can usually formulate some moral principle that the law appears to reflect, but leaving aside this anecdotal evidence, the question must be asked whether a law could be sensibly proposed the reason for which was not moral. This question is of course close to but not identical with that discussed by Hart concerning the difference between the legal and moral 'ought'. The difference is, of course, that one is concerned not with the nature of a statement of legal obligation, but with the reasons that could be adduced in support of the imposition of such an obligation.

For a natural person, the reasons with which he
justifies his conduct can be quite other than moral; they might be prudential or aesthetic reasons. I may choose to read a certain book because I enjoy the works of that author and believe that I have no moral duty in regard to the matter. Can a society make laws that could be justified upon purely aesthetic grounds, or by reasons that are for society as a whole, what prudential reasons are for an individual? In dealing with this question, it is important to recognise that laws are not simply promulgated as desirable social goals, but that intrinsic to our notion of a social rule being law is that it is backed by the coercive apparatus of the State. To pass a law is, in the last instance, to commit the State apparatus to the punishment of any individual who fails to conform.

This issue has been discussed in an article called "How to Preach" by Michael McDermott. McDermott states the principle shortly:

"The punishments wielded by the legal system are forms of harm which are regarded as morally wrong to inflict without a reason. A moral reason is therefore needed to justify punishment."  

Turning aside briefly from the justification of punishment, it might at this stage be objected that it is wrong to characterise all laws as being about the delivery of punishment. Many laws do not fit the pattern of criminal law with its straightforward prohibitions and prescribed

punishments. Hart referred to many of these non-criminal laws as "power-conferring" laws.\(^7\)

The law governing wills is, Hart suggests, about conferring power on individuals to arrange the devolution of property without the need for governments or courts to exercise power. While this is incontrovertible in one sense, it is the possibility of disappointed beneficiaries calling in aid the full sanction-backed resources of the State to implement their claim that marks a valid legal will from the merely pious hope of a testator. Any power-conferring law can lead ultimately to litigation in which a party calls in aid the organised forces of the State to enforce its claim under the rules. Mr Pickwick discovered this fact the hard way when the power-conferring rules governing proposals for marriage were used to place him in debtor's prison after losing an action for breach of promise to marry.

Some of those functions performed by power-conferring laws are also performed by other power-conferring social rules. What distinguishes the power-conferring rules that govern conduct of the local tennis club from those governing the formation of a commercial contract is the direct and immediate access to the State's coercive apparatus for the victim of a breach of contract.

The distinction between those rules most clearly seen as

sanction-backed obligations, such as criminal statutes on the one hand, and power-conferring rules on the other hand, does not undermine the argument that all law, power conferring or otherwise, ultimately appeals for its effect to the possibility of enforcement by punishment and to demand a rule be made law is to demand that non-conformists be punished.

If we are advocating that someone should be punished, what sort of reasons can we offer in support of the action? McDermott's argument reverses the premise and conclusion but argues that the link is purely analytical. McDermott's argument can be summarised thus:

If I believe that doing X is wrong, then I want doing X to be punished by society.

Wanting the doing of X to be punished is, McDermott suggests, what is meant by believing that the doing of X is wrong. Wanting X punished therefore flows analytically from believing X is wrong in the same fashion that being an unmarried man flows from being a bachelor.

The position being argued for in this thesis reverses McDermott's formula and asks if wanting doers of X punished by society can only be advocated because of the belief that doing X is morally wrong. One might question whether the connection is purely analytic, but the best argument in favour of the inference appears to be the strangeness of refusing to draw it.
Plainly, one could want the doing of X punished by society for purely manipulative reasons such as the gratification of a personal desire for revenge upon a particular class in society, or because a certain law would make one rich. The advocacy of laws for purely self-interested motives can be excluded by the principle that such self-interested motives, while they could be a rational reason for the advocate, could never provide a rational reason for the other members of society to adopt the law.

The argument that the self-interested reasons of an individual cannot be rationally adopted by all members of a society is simply a variation on the 'original position' argument used by Rawls to support his principles of justice. If we imagined someone placed in the hypothetical position, referred to by Rawls as the 'original position', such a person would not know what particular acts would gratify any actual desires or interests they may or may not have. The person in the original position, behind the veil of ignorance, could not then rationally advocate reasons for punishment that depended upon some individual obtaining a special advantage or pleasure.

In the original position, the only grounds for punishing offenders that could be rationally advocated would be those reasons that would appeal to someone without unique forms of self-interest. They would therefore be reasons based upon general principles. However, the Rawlsian argument is not used in this instance, as it is by Rawls, to prescribe a
particular set of first-order moral values. The argument is used in this instance to exclude a particular category of reasons from the reasons that might be rationally advocated in support of a law.

The argument deployed here has perhaps a slightly different emphasis from Rawls in that even without the veil of ignorance, and all the conditions of the original position, the self-interested motives of a particular individual for the introduction of a law will always run into the logical difficulty that those are not reasons that other members of society can have to advocate a particular law.

The position has been reached where we can reject the self-interested views of particular individuals as reasons for a law, but this still leaves the possibility of general non-moral principles. If for example someone believed that wearing tasteless clothes should be punishable because it infringes a general principle about human attire can any formal criticism be levelled at this view?

One approach to this issue would be to argue that demands that people infringing a rule be punished (where punishment refers to legal sanctions such as imprisonment or seizure of goods) are moral demands, and thus the statement that only moral reasons can support laws is analytic. This is, as suggested above, McDermott's principle in reverse.

There may be some force to this position. Part of what
distinguishes an aesthetic principle from a moral principle is our view that an aesthetic principle is a matter of taste, by which we usually mean a matter of choice for each individual. This need not imply that we would not recognise objective aesthetic standards, but if one wanted those aesthetic standards imposed upon the population at large, then it might well be considered that one had converted an aesthetic principle into a moral principle.

Such a conversion does not affect the content of our original aesthetic principle but arises from the reasons for its enforcement. To provide an example, it might be suggested, in order to produce more pleasing streetscapes, that people should be regulated in the manner in which they design or build the facades of their houses. The goal of any such regulation is clearly the satisfaction of an aesthetic principle, the creation of pleasing streetscapes. Does this mean that the justification of such a regulation is an appeal to the aesthetic principle it reflects?

In answering no to the question just asked it is important to distinguish between the grounds for wanting building facades to possess a certain look, namely the satisfaction of an aesthetic principle, and the reason for enforcing that look with the legal apparatus of the state.

Were one a utilitarian an argument for justifying the proposed regulation might rely upon the permanence of building facades and their public nature. A pleasing
streetscape would give great pleasure to large numbers of people over a long period of time. An owner who was allowed to ignore the principle would please only himself for the period of his tenure. Such a justification appealing as it does to maximising happiness we recognise as a moral argument.8

One clearly cannot proceed to anecdotally consider every possible legal rule and attempt in each case to construct a justification for the rule from a general non-moral principle in order to satisfy ourselves that such a thing is not possible. How then can one establish that no such justification might exist? Part of the reason why this task is so difficult is no doubt because the concept of morality is as difficult to define as the concept of law. When Hart sought to characterise moral rules he did so by specifying four cardinal features, being "importance", "immunity from deliberate change", "voluntary character of moral offences", and "forms of moral pressure". This sort of definition is in stark contrast to the care with which Hart elucidates the concept of law, although Hart concedes this himself.9 This sort of definition does not assist in a search for a non-moral reason with which to support a law.


McDermott's analytical argument proceeded by assertions about the meaning of certain words. After reflecting upon the way we use the words 'moral' and 'punishment' and testing our intuitions by examples we may accept the assertions about what we really mean when we use those words. This is however the end of the argument. There is nothing more that can be said to persuade someone that all unmarried men are bachelors than to assert that that is what most people mean when they use those two words.

If all our attempts to suggest aesthetic or prudential reasons for possible laws evolve by the analytic argument about the meaning of 'moral' and 'punishment' into moral claims, we must conclude that the only possible general principles that commit us to advocating the punishment of infringers of those principles are moral principles. If this conclusion follows analytically from what is meant by the demand that a person be punished, it must follow that if we believe that the characteristic quality that a principle or claim be enshrined in a law is that infringers will be punished it follows that it is not possible on logical grounds to demand that infringers be dealt with by the legal apparatus in regard to any sort of claim other than a moral one.

It needs only to be added to complete this argument that the term 'punishment' is used to describe enforcement by socially organised means. This excludes the instance where someone advocates a moral rule the infringers of which he
believe should be punished, but punished by their consciences or the loss of esteem or good repute, not by a socially organised system. The existence of such moral principles that one would usually want legally enforced is in keeping with our intuitions about morals. It follows therefore that although the only justification of a legal rule would be a moral principle not every moral principle would call for the enactment and enforcement of a law.

Although the analytical argument for moral reasons as the exclusive ground for the support of law might seem something of a linguistic trick the excursion was a necessary reminder that every legal rule from the central pillars of the criminal law to the most esoteric municipal building regulation is in the last analysis only capable of being rationally supported if a moral argument can justify its enforcement. If the city fathers decide that everyone should build their homes from brick rather than wood in order to promote the general welfare, this is as much a matter of morality as whether or not they will permit people to engage in consenting homosexual acts in private. All law is about morals, and there is therefore something very misleading in the phrase "morals and law overlap".
6. THE STATUS OF LEGAL AGENTS

6.1 The distinction between legal rules and the acts of legal agents

The last chapter sought to show that all laws are about moral values or moral principles. This was intended in the sense that if one were to ask of any legal rule or principle why ought this to be the law, the only satisfactory argument in support would be a moral argument.

It might be said of the argument to this point that it has continued to speak about legal rules as if they exist in the fashion described by the early positivists or legal idealists and has done this despite the criticism of those views expressed in earlier chapters. In defence it can be said that up to this stage nothing turns upon any assumptions that might be made regarding the nature of laws. The only commitment necessary for the argument is that society contains some rule governed behaviour.

The discussion is still at the stage where the pronouncements of legislatures and Courts can be taken at face value and treated as pronouncements making authoritative claims about how people ought to behave. Of course, not even this characterisation will be utterly uncontroversial, but the alternative is to take radical scepticism as one's
starting point and as explained in the last chapter, this work is not based on a Cartesian methodology.

Still working with the basic assumptions about the nature of laws used in the last chapter, and equipped with the conclusion that those assumptions logically commit one to law's relationship with morals for which this work has so far argued, the inquiry now turns to the moral status of legal agents. The point can be explained in this fashion: the last chapter looked at the arguments that could be adduced by a hypothetical supporter of a particular law. The arguments of this chapter seek to examine the reasons that can be adduced by a legal agent when acting as such. Simply put, what sort of reasons are used by a judge or sheriff to justify their conduct when acting as legal agents?

The examination in the last chapter of the sorts of reasons we may have to support a law remained agnostic as regards any particular set of first order moral principles or values. Likewise for the present inquiry the purpose of the investigation is to examine the category or type of reasons an agent may have to justify conduct, not to specify any particular set from that category as the correct or appropriate reasons.

6.2 Theoretical Reasoning and Practical Reasoning

One important characteristic of the actions of legal officials lies in just this fact, that they are acts and
therefore of a practical nature. In making this assertion one is immediately choosing sides in one of the significant debates in the philosophy of legal reason. Logicians are familiar with the distinction between classical logic dealing with the relationship between propositions, and practical logic dealing with the relationships between imperative statements.\(^1\) Classical logic, frequently represented in the present day by the propositional or predicate calculus, is concerned with propositions, namely, statements of fact, capable of being true or false. Classical logic is truth functional, and a valid argument in classical logic necessarily preserves truth in the conclusion where the premises are true.

Practical reason is concerned with imperative statements. To give a legal example -

"X ought to compensate Y"

Such statements cannot be true or false and until the development of deviant logics in recent decades, imperative statements would not have been thought capable of producing the conclusion to a valid argument form. Few would now deny some legitimacy to the practical syllogism, although imperative logic still remains controversial; providing


again a legal example -

"All tortfeasors ought to compensate their victims. X is a tortfeasor. Y is a victim of X. X ought to compensate Y."

When one directs these issues to the question of legal methodology, two radically different approaches are produced. One approach would see the tasks performed by a judge as the investigation of statements about what the law is. The reasoning processes of such a judge are an exercise in classical or propositional logic. These will be referred to hereafter as theoretical reason.

Legal rules are themselves imperative statements, but this does not prevent statements about those rules being propositional. Thus a legal argument consisting entirely of propositional statements could be constructed in the following manner:

1. It is the case that there is a legal rule requiring consideration to move from the promisee where a party seeks to enforce a contract.

2. It is the case that there is an exception to the rule in 1 where the promisee has acted to his detriment in reliance upon the promise within the promisor's knowledge of such action.

3. In the present instance within the knowledge of the promisor the promisee acted on the promise to his detriment.

4. The facts in this case are within the scope of the rule in statement 2.

Although the argument above would not satisfy the
strictures of the propositional calculus, it bears some resemblance to the sort of arguments one might well hear in a Court. It is also the case that each of the statements in the argument purports only to state a matter of fact, and is capable of being true or false (statements of fact are here taken to include statements about the meaning of words or propositions). It is however important to note that the argument could not reach a conclusion in terms of a command or an order without the insertion of some imperative premise.

The scheme which is described above displays the process of legal reasoning as one of discovering legal truth. The schema has been considerably shortened and in practice the significant argument would be concerned with arriving at the statements that are statements 1 and 2. But this process of discovery can proceed through all stages by way of statements of fact about the past decisions of courts and the existence and meaning of statutes. The process of ascertaining the legal truth in no way points to the investigator, and is the same process whether conducted by the reasoning processes of a judge, a counsel for a party, or a disinterested observer.

If one takes the step of viewing the process of judicial reasoning as an exercise in practical reason as opposed to theoretical reason, there still remains the controversy surrounding issues such as whether the imperative statements are commands to legal officials, or whether laws are general imperative statements from which judges draw practical conclusions; or imperative statements directed at the
parties; or exist in some other form altogether. Whichever view is taken, to view legal reasoning as practical reasoning produces subtle changes in the logical analysis of the process of judging. The statements adduced in argument may be addressed to particular individuals or parties and therefore have different significances, depending upon whether we are looking at a judge reasoning to his judgment, a lawyer advising a client, or a commentator studying the law.

When we view law in terms of theoretical reason, the statements that form part of a legal argument are identical in meaning whether uttered by a judge, a lawyer or a layman. They are statements asserting whether or not particular rules exist and whether or not certain rules do or do not apply to particular sets of facts. When we characterise legal reasoning as an exercise in practical reasoning the utterances by legal personnel are statements about duty and vary in meaning depending upon the individual's role.

A party's legal representative addressing a judge is stating what in that representative's submission is the judge's duty in regard to the case in point. A judge in giving judgment is stating what he has concluded his duty to be. A litigant or an observer who criticises a judge's decision is asserting that the judge is mistaken about what his duty required of him in regard to the case.

The distinctions between theoretical and practical
reason just discussed reflect other differences in approach to the philosophy of legal reasoning of a methodological nature. The approach of theoretical reason is reflected in those schools of jurisprudence that see the investigation and discovery of laws as the central problem of legal reasoning. The approach of practical reason reflects the different methodology that views judging as a human activity and legal reasoning as something concerned with governing that activity.

If judging or making a decision is a practical act, then it cannot merely be part of a process of deductive theoretical reasoning and decision-making cannot therefore be determined by the rules of theoretical reason. If it were the case that judging were a pure exercise in theoretical reasoning, then a judgment in the strict sense would not be necessary for the judgment would itself follow a priori from whatever legal premises a judge might discover within his law reports and statute books. However, the second school of juristic thought views legal reasoning not as an attempt to ascertain fixed rules or principles of law, but as an attempt to find ways of rationally supporting the process of judicial decision-making. This is however merely the application to the legal process of the general principles of practical reason, not the development of any special form of 'legal reasoning'.

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In this instance, one can again discover a useful methodological analogy with problems in the philosophy of science. For some philosophers of science, scientific methodology is concerned with the discovery of scientific theories that are true or possess higher truth content than other scientific theories. These matters are determined by the objective logical relationships between theories and observations. Representative of these views is the work of Karl Popper.³ By contrast are those philosophers of science for whom the methodological issue is not about the logical relationships between theories and observation statements, but about the normative decisions that must be made by scientists in choosing which theories to deploy in expectation of the greatest cognitive or scientific success. Thomas Kuhn's work is perhaps the most famous example of this view.⁴ A less extreme but more subtle version of this view in regard to science is that expounded by Ravetz.⁵ Ravetz suggests that the methodological decisions of scientists in regard to theory choice, far from being exercises in inductive logic, are akin to the methods of artisans and craftsmen dependent upon "the inherited craft experience" of the workers in the field. This point in relation to legal


reasoning was touched upon in the last chapter.

The greatest strength of using practical rather than theoretical reason in the analysis of judicial decision-making is that ultimately all Court cases result in some form of command or imperative utterance. A judge can devote any amount of energy to the study of law reports and statute books and the formulation of statements about the existence of legal rules, but this can never result of its own accord in the pronouncement of a judgment. Theoretical reason cannot produce or imply an imperative.

It ought not to be thought that the argument depends at this stage upon showing that the so called psychological verbs, such as 'believing' or 'judging' are themselves verbs of action, such that decision-making becomes a matter of conduct by virtue of the 'mental conduct' of the judge in 'deciding' or 'judging'. Edgley has already dealt at length with the arguments for treating the psychological verbs as action verbs, and found those arguments wanting.6

The decision a judge reaches is not for his private intellectual satisfaction. It is significant only as a public command in turn requiring action on the part of others; in this regard judging is an action. To judge a matter cannot therefore be a pure exercise in theoretical reason, and if the final act of promulgating a judgment is to

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be rationally justified, it must look to the categories of practical reason for that justification.

6.3 Felix Cohen and Judicial Reasoning as Practical Reasoning

The point just made is far from new and in slightly different form constituted the central argument of Felix Cohen's work Ethical Systems and Legal Ideals, first published in the 1930s. The argument as presented in that work still provides today one of the clearest statements of one of the most persuasive views regarding legal reasoning.

Cohen describes the judicial process as being about the activity of judging. For Cohen, judging is an action like punishing or fighting or making a bargain:

"A judicial decision is a command, not an assertion. Even if any sense could be found in the characterisation of a decision as true or false (or, in the non-ethical sense of the term, right or wrong, correct or erroneous), such truth or falsity could not determine what decision, in any case, ought to be given. That is a question of conduct and only the categories of ethics can apply to it."

Cohen proceeds to use this principle to demolish what he describes as the fallacies of crypto-idealism. The essence of these 'fallacies' is to substitute for the principle of

8 Ibid, page 33.
moral goodness a more specific value that is offered as the central value of law. The crypto-idealist then argues that legal decisions should be made so as to maximise the realisation of this value.

Cohen's objection to crypto-idealism is simple yet powerful. Why sacrifice moral goodness to internal coherence, integrity, logic, the harmonisation of social interests, or whatever, if the need to maximise those values can only be justified in the last instance by the need to maximise moral goodness? It could be suggested that Cohen has simply attacked crypto-idealists for being bad rule utilitarians, but because they have chosen a rule that cannot be justified by the utilitarian calculus, does it follow that no other more suitable legal value could be chosen as the appropriate rule for judicial decision-making? (Unless of course Cohen can demolish rule utilitarianism entirely.) This criticism of Cohen would have more point if the sorts of writers that he characterises as crypto-idealists claimed to be rule utilitarians and put that forward as a defence of their theory. This is usually not the case.

Without wanting to characterise MacCormick's views as crypto-idealist fallacies, his writings can be used to illustrate the counterpoint to Cohen's argument quite neatly. In MacCormick's work Legal Reasoning and Legal Theory, MacCormick argues that a legal system should be rational. This appears not to be meant in the strong sense of a rational system where each judicial decision is strongly
justified by those reasons produced to support it. Rather, rational describes, instead of the actions of judges in making decisions, a quality of the legal system as a whole. It should exhibit certain internal properties of coherence and consistency. On coherence MacCormick said in *Legal Reasoning and Legal Theory*:

"Coherence goes beyond . . . seeking merely to avoid flat contradictions or inconsistencies, but indeed to find a way of making sense of the system as a whole ... In arguing from coherence, we are arguing for ways of making the legal system as nearly as possible a rationally structured whole which does not oblige us to pursue mutually inconsistent general objectives."9

Nor does MacCormick seek to justify the pursuit of coherence as the means to some other end. He insists that rationality characterised in this fashion is itself a moral good:

"I can really only express my revulsion from the prospect of a life without reasoned discourse."10

In more recent writing MacCormick sets out a similar view albeit more subtly defended.11 After considering the nature of practical reason and its relationship with morals

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10 Ibid, p.268.

MacCormick concludes "that rationality must itself be one among the goods - the abstract values or virtues".\textsuperscript{12} Its unusual quality is conceded in its description as a 'technical' or 'formal' virtue. Conceding this conclusion for the purposes of the present discussion\textsuperscript{13} the next step in MacCormick's argument is to seek to elevate rationality to the position of a pre-eminent good.

Rationality, MacCormick suggests, is the first or fundamental virtue as the realisation of all other virtues depends upon the capacity to rationally appraise possible conduct. It is true that the intentional realisation of other 'goods' depends upon the faculty of rational appraisal, but having conceded that, is anything added by labelling it 'first' or 'fundamental'? The exercise of rational appraisal cannot commence until other 'goods' or 'virtues' are assumed. The pre-eminence is itself merely technical. Our existence is a pre-condition of the possession of a virtue but that no more makes our existence a virtue than it makes it a first or fundamental one.

The final step in the argument in "Limits" possesses an ambivalence not present in "Legal Reasoning". The early work clearly suggested that rationality was a particular virtue of legal systems and to be promoted by judges not just as part

\textsuperscript{12} Ibid, p.197.

\textsuperscript{13} For a discussion of whether being rational is a means or an end see Parfit; D, Reasons and Persons, Clarendon Press, Oxford, 1984, p.45 ff.
of the promotion of the greatest possible amount of good. In "Limits" MacCormick has already suggested that rationality is the pre-eminent virtue of all thought and action.\textsuperscript{14} It is possible that what is suggested for the application of the principles of practical reason to law is no different from the application of such principles to any other sphere of human conduct. MacCormick comes close to asserting this himself. This conclusion would amount to a rejection of any claim that rationality is a special virtue of legal conduct as opposed to other categories of human conduct. It might therefore follow that one judges simply by asking 'what ought one to do' and applying general principles of practical reason. Such a position comes close to that argued for in this work.

The ambivalence appears in the argument in "Limits" from comments by MacCormick suggesting that legal reasoning ought to promote certain values or virtues rather than simply promoting the good. When judges produce reasons for their decisions their primary concern, says MacCormick:

"...is with logical consequences, consequences in implications, rather than with behavioural consequences of decisions or other longer run probable outcomes".\textsuperscript{15}

What judges must do, says MacCormick, is to propound reasons that can be fitted with the reasons given in past

\textsuperscript{14} Ibid, p.198.

\textsuperscript{15} Ibid, p.204.
cases and which may need to be foreseeably given in the future. This fitting of reasons is a logical process. What is being appealed to here is simply the principle of coherence as described although differently, in "Legal Reasoning".

This view about the importance of coherence in legal reasoning would be stigmatised by Cohen as a form of crypto-idealism. Cohen deals with views akin to MacCormick's under the heading, "The Aesthetic Valuation of Law". Cohen criticises those who argue that when deciding a dispute one should have regard to reasoning in a way that preserves harmony with the rest of the system of law. The internal properties of the legal system are only important to the extent that they assist in allowing it to fulfil its function. The function of law is to further the good. MacCormick cannot seriously intend that judges hand down decisions that are unjust, anachronistic, or likely to increase civil disorder, rather than stem it, simply to preserve coherence. Possibly, MacCormick thinks judges should also pursue the good but ensure they justify it in ways that are coherent. If this is the case, then coherence is not itself a reason for a decision, but simply one of post hoc justification. Such a principle could never assist a judge in determining how a decision should be made.

MacCormick may wish to argue that making the law rational in his sense will further the good. The more coherent a system the easier it is to understand, and the
simpler it is to administer, but such reasoning would make coherence merely a factor to be taken into account and the final determination must depend upon more fundamental principles.

MacCormick may argue that unless a legal system is rational in his sense, it would be necessarily unworkable, or necessarily immoral. To examine this matter, it is necessary to begin a closer examination of the concept of rationality. MacCormick clearly intends the concept to have a wider meaning than simply not issuing inconsistent commands. If on Monday Judge Smith grants relief to X, but on Tuesday he refuses Y relief on identical facts, MacCormick might brand this irrational, but Judge Smith has not of course done anything inconsistent in a logical sense. What such a decision really offends is our sense of justice, for we do not normally consider the day of the week a relevant consideration in settling disputes. This in turn is not due to any principle of coherence or pure rationality, but is decided by our moral views in the substantive sense. If we believed Mondays to be sacred, or knew the law had changed on Tuesday morning, we might not consider Judge Smith's actions unjust.

If we could think of no good reason for Smith to have given the two decisions that he did, then we could label his conduct as unjust, but we might reserve the word irrational to describe his reasoning in one of those two decisions.
Traditional analyses of rationality have defined rational behaviour as the use of the means appropriate to the ends one desires. If I believe that poison will kill me, and I desire to live a long time, then I would be behaving irrationally if I knowingly drank poison. The notion of irrationality in this instance depends upon a principle of inconsistency in some strong or logical sense. If a person tells us he wants to live a long time and then knowingly drinks poison, we would be inclined to think he must be lying, for the knowledge about the drink and the express desire seem to involve inconsistent beliefs.

Applying the above principles to Judge Smith, it is possible that he acted irrationally, in that he really held inconsistent beliefs, but it is equally possible that he acted from caprice, or bias or prejudice none of which would have involved him in holding inconsistent beliefs. If a judge gives a perverse verdict because he has been bribed, we would consider that scandalous, but not irrational.

It is, to mix our concepts, good to be rational. But it is doubtful if rationality is a term we can use to describe the law of some jurisdiction, if by that, we mean the totality of decided cases and statutes. True it is that particular statements plucked from the whole set might be consistent or inconsistent when placed alongside each other, but that is a different matter. Rationality is a human trait and it is the conduct of judges in judging that we wish to be rational.
Different judges might quite rationally pursue general objectives that are in fact inconsistent. This might in some cases be bad, in other cases it might be tolerable, but in either case, this notion of consistency can provide little assistance to a judge attempting to decide the case before him.

It is often only possible in a pluralist society to reach a workable compromise in regard to the introduction of a new law or social reform by permitting to remain inconsistencies of principle which are not defensible on any other ground than that they constituted part of the political price that had to be paid by the group seeking change or reform. Judges might well consider that preserving such inconsistencies rather than smoothing them away is defensible as a keeping of the original bargain that saw the law enacted.\(^\text{16}\)

Returning to the beginning of Cohen's argument, it started from the assumption that a judicial decision is a command, and therefore being non-propositional, legal reasoning must be founded upon the principles that govern the appraisal of human conduct. It should not be thought that the value of Cohen's view is affected by the criticism Hart has levelled at Austin's theory of law as a command. For the word command in Cohen's argument, one could substitute any one of a host of different sorts of imperative statement that

\(^{16}\) A classic example of such a legislative compromise is the New South Wales Anti-Discrimination Act.
would fit virtually any available general theory of the nature of law.

Although Hart's criticism of Austin's attempt to characterise laws as the commands of a sovereign are telling, a judicial decision as opposed to a general law usually issues in commands in the literal sense. A party is ordered to pay damages, refrain from certain conduct or whatever. The object of legal reasoning is the production of this judicial decision which is in effect the pronouncement of such commands.

If judges are acting rationally, then when called upon to justify a judicial decision, and 'justify' is used in the strong sense described earlier, the justification must be an argument couched in the terms of practical reason having for its conclusion the orders or commands of that judgment and justifying the conduct of promulgating those commands.

The previous chapter argued that the only good arguments in favour of laws are moral arguments. This chapter has argued that legal reasoning is about justifying actions. The gap that remains is to examine whether it must be moral reasons, non-moral reasons, or a combination of the two that judges use in justifying their decisions. Positivists must argue that although laws are society's implementation of moral principles, judges must only have resort to special types of 'ought' statements produced from legal rules. American realists, legal pragmatists and natural lawyers
argue that judges must resort to moral reasons to justify their decisions.
7. THE JUDGE AS PRIVATE MORAL AGENT

7.1 Introduction

The last chapter sought to establish that the justification of a judicial decision is the justification by the judge of action that he has taken. We might contrast justification with explanation. An engineer might provide an explanation regarding the working of a piece of machinery, and do so by way of statements of fact regarding components and the physical forces at work. The last chapter argued that the judge cannot be placed in the same position as the engineer. The judge might make some statements about statutes he finds in the statute books, or the words used by previous judges as reported in the law reports, but these can never add up to a justification for his own action in issuing the judgment he finally produces.

What this chapter will seek to establish (and this is the central thesis of this work) is that the judge in producing his justification must be viewed as a private moral agent. If we ask how judges should reason, we really ask 'how ought they to decide the particular case before them?' The canons of natural reason or deductive logic are insufficient alone to dictate an answer and further criteria must be added. These criteria must dictate how a judge ought to decide a case. The weight of
the argument therefore falls upon the meaning of the word 'ought' in this context. I shall argue that the 'ought' means 'ought to act in accordance with the judge's moral duty'. What is meant by a 'judge's moral duty' will then be explained in greater detail.

The last paragraph used the phrase 'private moral agent' and this requires some further explanation. A moral agent is simply a focus of moral rights and obligations and would usually be thought to include simply any human being. Dworkin\(^1\) argues that collective groups of people such as corporations, or nations, can also be moral agents. In this work, it will be assumed that a moral agent is always a natural person.

The use of the word 'private' to qualify the judge's status as a moral agent is intended to indicate that the type of moral reasoning or justification in which a judge must engage in regard to his actions is no different from that which ought to be pursued by someone facing similar dilemmas but without the status of a judge. The similarity, however, is in the type of reasoning, not the reasons themselves. It will be argued later that the position of the judge may on occasion be reason for him to act differently from someone in the same position who was not a judge. This however does not signify any special logical peculiarity of legal reasoning. The fact of being

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a judge is simply at times a relevant matter, along with all the other facts and circumstances surrounding a decision which may bear upon a person's duty.

It is useful at this stage to compare the view being outlined with the two most important and persuasive alternative theories. Hart's modified positivism would argue that the ought type arguments needed by a judge to justify his decisions are not moral imperatives, but simply legal imperatives. Hart argues that the law supplies a sufficient but closed set of statements no further justification of which is necessary. On the other hand, Dworkin argues that moral reasons underpin judicial justifications, but a judge is not a private moral agent, and his status as judge creates special principles governing the justification of legal decisions.

7.2 Can the chain of judicial justification commence with a non-moral premise?

Returning to the central argument, the task is to investigate the type of reasons for action that could justify a judicial decision. The task is analogous to that carried out in the fifth chapter which examined whether one could advocate the imposition of a legal rule for other than moral reasons. This chapter will investigate the possibility of a judge being able to rely upon non-moral reasons in the justification of a judicial decision.
In keeping with the policy of refining and improving the definitional and conceptual armoury as the argument progresses it is at this point appropriate to examine more closely the contrast between a legal imperative and a moral imperative. In a simple fashion, the contrast is neatly illustrated in a statement such as:

"One ought to obey the legal rule which proscribes travelling through red traffic lights."

The legal rule can be expounded as an ought type statement, 'one ought not to go through red lights'. The statement about one's duty in regard to obedience would in some contexts be understood as describing a moral duty in regard to the law.

If, as lawyers, we inquire into the nature or source of the obligation in the legal rule, as opposed to the statement of moral duty, one common legal reply would look to the theory of legal validity and say that the traffic rule is a valid enactment made by the proper body in turn authorised by other rules to make traffic laws. This explanation is only in an extended sense a definition of the meaning of the legal ought. It is not an account of the meaning of the term in the sense sought by Hart. Nevertheless, it is an explanation of the sort that a judge might proffer a litigant who demands to know why that particular legal rule would be applied to his conduct.

The theory of legal validity in positivist legal
theory is concerned with describing the criteria whereby the authoritative legal rules for any legal system are identified. The very notion of legal validity bears positivist connotations. The concept is made essential by the way that positivism sets up the problem.

If one, in the style of Kelsen, pursues the chain of legal explanation backwards and asks why the pronouncements of the particular body in question ought to be recognised in regard to traffic laws, then one rapidly reaches the constitutional foundations of the legal system. This exercise, whereby the chain of validity is traced back to the constitutional foundations, is not merely a philosophical model, but a close representation of the sort of argument frequently deployed in courts called upon to review the constitutionality of some particular law. Kelsen asks,

"If law as a normative order is conceived as a system of norms that regulates the behaviour of men, the question arises: ... why does a certain norm belong to a certain order?"2

Here we are being asked to view legal sources as containing a host of rules from which the judge must pick the rules that belong to the system he treats as authoritative.

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Hart suggests that a legal system only exists

"... where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation ... Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation."\(^3\)

While Hart differs widely from Kelsen on many issues, especially the analysis of the primary rules of obligation, both theorists have remarkably similar views on the issue of the theory of legal validity.

The concept of a rule of recognition or grundnorm is necessary to positivist accounts of law, but possesses, at least in positivist terms, a very equivocal nature. Positivists assert that whether or not a rule is a law of a certain community is a question of sociological fact. Theorists like Hart are fond of saying that the rule of recognition is the rule actually used by courts to identify valid legal rules. Nevertheless, as Hart also insists, when a judge says that a rule is valid he is not making a prediction about official behaviour. In such a case the rule of recognition is a reason for his behaviour.

What Hart refuses to answer clearly, at least as a topic within the subject of legal reasoning, is the question, 'why does a judge apply a rule of legal

\(^3\) Hart; H L A, op cit, 1961, p.97.
validity'? Both Hart and Kelsen do address the problem, but this is essentially to argue that the question ought not to be asked. For Kelsen, a legal system is likened to an axiomatic system where the grundnorm is the axiom and the subsidiary norms are theorems of the system. Kelsen appears to believe that an assertion that the grundnorm is simply the norm from which other norms are derived is sufficient to block any investigation into why a judge should apply the grundnorm.

Hart pursues a similar tack with his reply to any hypothetical questions about the rule of recognition. We may ask, he says, whether as a sociological fact this particular rule of recognition exists, or whether it is morally good, or whether we could devise a better rule, but if we do ask these latter questions "we have moved from a statement of legal validity to a statement of value."

It is instructive to examine one further example. Bryce poses the question of ultimate validity by assuming a hypothetical rate collector is questioned about the source of his powers. Having traced his power back to the Queen in Parliament, what, says Bryce, if his questioner then asks 'what right has Parliament to confer these powers'? Bryce suggests that the rate collector can only

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reply that everybody knows that in England Parliament makes the law and that by the law no other authority can override or in any way interfere with any expression of the will of Parliament. This answer is of course a non sequitur, but the interesting point is the eagerness of positivists to avoid this question. Despite the failure to answer the question, Bryce gives no reason as to why the question should not be answered or why it is badly formulated, if this is so. The question asked by the curious citizen is easily answerable, but of course the answer will be quite blatantly a political theory of obligation. In this of course lies the explanation of the positivist reluctance to answer.

If we ask why a judge applies a particular rule of recognition or basic norm the question allows of two different sorts of answer. It is upon this ambiguity that positivists are wont to play. We could clearly provide a causal answer that sought to explain the judge's actions in behavioural terms. His legal education and cultural and social affinities may well incline him to apply the principle recognising rules made by the Queen in Parliament rather than rules produced by religious revelation, or suggested by a private mentor. Such an explanation may satisfy certain types of sociological enquiry, but if a judge wishes to act as a rational agent it will not provide reasons with which he could justify his decision to apply a particular rule of recognition.
If the positivists are to block an appeal to political theory as a justification of the rule of recognition, then the only possible reply they could give is that a judge does not, and should not, seek to justify the application of a particular rule of recognition. Such an immunity from discussion and argument seems hard to sustain, but the position can be rejected upon quite simple grounds. An immunity from any call for justification can really only be sustained if the rule of recognition itself remains above the controversy of litigation. A quick glance at the law reports or texts on constitutional law quickly shows that the rule of recognition can be litigated like any other rule. How then do the courts justify decisions about the rule of recognition?

If one considers a written constitution such as the Constitution of Australia the rule of recognition may not be identified with the entire constitution, but perhaps merely with the significant sections creating and empowering the Parliament. Nevertheless where the entire constitution enjoys an immunity from amendment or repeal by the Parliament except with endorsement by referendum, it might be considered that the entire constitution forms a complex rule of recognition. Alternatively the rule of recognition may not be identified with the constitution at all. It might be suggested that the rule of recognition could be 'that all rules passed by the constitutional convention ought to be applied'. Kelsen suggests the
historical origins of the constitution must be traced.

If one has traced back the chain of validity to the constitutional foundations of the legal system one can then ask whether this is a self-sufficient answer to such a question as whether or not I should drive through red lights, or must there always be at least some further premise by which the judge assumes he has a duty to respect the political structure of the society, a premise which could in no common or layman's sense be classified as a rule of law? It will be argued that a further non-legal premise is indeed required.

The inadequacy of an appeal to the constitutional foundations as sufficient justification for any legal conclusion can be illustrated in several ways of which one of the most straight-forward is to examine the conduct of judges when confronted with what might be termed constitutional paradoxes.

It is part of the judicial doctrine of constitutional validity in Australia that the original source of validity was the enactment by the British Parliament of the Commonwealth of Australia Constitution Act, of which the Australian Constitution itself was section 9. The British Act was passed after a plebiscite had been conducted in each of the Australian colonies that were in turn to form the states of the Commonwealth.
The classic question that has been posed and discussed countless times asks what an Australian Court would do were the British Parliament to purport to amend, or repeal, the Australian Constitution.\(^6\)

The confidence of present legal commentators that any such purported amendment or repeal by the British Parliament would be ignored by present-day Australian Courts does nothing to detract from the philosophical significance of the question. Australian Courts immediately prior to the commencement of the Australian Constitution looked to and enforced legal rules made by the British Parliament. Judicial doctrines at that time attributed the Constitution's validity to its promulgation by the British Parliament. Without needing to worry overly about historical accuracy an educated guess would suggest that immediately after the commencement of Federation, the Constitution's basis as an enactment of the British Parliament was then of significance to judges.

An attempt to provide a completely internal legal solution to the problem by pointing to those enactments of the British Parliament by which it purported to relinquish

\(^6\) For an example see Coper; M, *Encounter with the Australian Constitution*, CCH Australia, Sydney, 1987, p.87.
any power to amend the Constitution of Australia fails if one adopts the judicial doctrine of validity regarding the British Parliament, namely that it cannot by any enactment fetter its future power.

Taking all of the assumptions contained in the last few paragraphs, there was no method consistent with the judicial doctrines of validity accepted by judges in Australia and England in 1901 that could produce an Australian Constitution immune from the possibility of future amendment or repeal by the British Parliament. The passing of the Australia Acts in 1986 intended to "repatriate" the Australian Constitution do not affect the argument just presented. Indeed, the fact that the Australia Acts were passed with the co-operation and assistance of the English legislature reinforces the point made.

In the highly unlikely event that the British legislature attempted to repeal or amend the Australian Constitution, and the High Court of Australia did not recognise the change, it would be apparent that the judges in such an instance would be not simply applying the law, but making a primary and fundamental political decision about which law to apply. In other words, the judges would need to formulate for themselves a rule in some such form as:

"I will abide by those legal rules created in accordance with those political institutions founded in Australia in 1901."
This statement of course overlooks many of the pre-twentieth century sources of English law, but that point can be ignored for the present moment.

An initial premise of the sort just propounded cannot be characterised in any fashion as a formal legal rule internal to the legal system and not requiring any initial moral or political choice by the judge. This point would be immediately evident if there were a popular uprising and a new body proclaimed laws inconsistent with those passed under the old constitution. Where this actually happens, as it did in Fiji in 1987, there can be no doubt that for the judges faced with the choice, it is a private and agonising decision.

It might well be protested that although final Courts of Appeal considering difficult constitutional cases may well be forced to make original moral or political decisions, these are rare and exceptional cases and do not assist in understanding the daily fare of judicial work. This objection fails to meet the point made at the beginning of this argument that a judge might trace his way back to the constitutional foundations in seeking justification for his decision whenever challenged over his reasons for enforcing any particular legal rule. The fact that such a challenge is rarely issued in the normal course of litigation in no way affects the logical status of any argument that might be mobilised in defence of a judicial decision. Most judicial decisions, far from
setting out exhaustively the reasons for judgment from the most primary assumption to the final conclusion, usually leave most of the initial stages of the argument unstated.

The impossibility of the closed set of legal reasons within a legal system providing the justification of judicial action can be equally demonstrated simply by appealing to the need for judges to have chosen the legal system from the infinite set of competing rule systems. Why does a judge not apply the rules of Roman law? Why not those rules of common law propounded by those legal commentators who did not accept parliamentary sovereignty, and its consequent repeal of much of the common law.

In case it be said that judges look to that set of rules, or ruling power, receiving regular obedience from the citizens, the reply can be made that that only assists a judge who has in turn decided to adopt for himself the rule that he will enforce those laws made by the body receiving regular obedience. It is doubtful, however whether the concept of a body receiving regular obedience is of any real assistance in solving the present jurisprudential problems.

Even if it is accepted that every judicial decision couched in the traditional terms of appeal to legal rules must of necessity assume for its initial premise a moral principle of the form that the judge will apply those laws made in accordance with the constitution, can it not be
said that once this principle is assumed and one is across the threshold then from that point on, the judge no longer needs to refer to his private moral beliefs, but can base his judgment upon existing legal materials? If one leaves aside for the present moment the sceptic objections to the problem of ascertaining the existing legal materials the other difficulty is that the characterisation just suggested whereby the moral step takes one over the threshold into the purely legal realm would misrepresent the significance and importance of the initial moral premise. If one applies the law, because one has the view that it is one's moral duty to apply the law, then that application will in each and every instance be justified only to the extent that one's principles justify the application of the particular law in question. Some first order moral theories might suggest that in a parliamentary democracy such as Australia, there is an absolute moral obligation to obey all and every law promulgated by the law-making institutions of that society. A judge that held such a moral view would clearly suffer few dilemmas in his life on the Bench. Other first order moral views prescribe much weaker duties of obedience even in a parliamentary democracy. The issue at the present time lacks topicality, but the campaigns of civil disobedience in the 60's and early 70's in relation to the Vietnam war were conducted by people who believed certain laws were so unjust that no matter what democratic endorsement they obtained, obedience to them could never be a moral duty.
The example discussed in the last paragraph would create grave dilemmas for some judges. These issues will be discussed in a later chapter; they are referred to at this point in answer to any objection that might suggest that the judge need make only one primary moral choice, namely, that he will apply the law, and that he can then put morals aside.

7.3 The constitutional paradoxes establish the impossibility of a non-moral premise 'ad hominem'.

It is at this point in the argument that the concept of a legal rule can be subjected to closer scrutiny. So far, the terms 'legal rule', 'legal system' and 'the law', have been used in such fashion as to suggest that we can ascertain a definite set of legal rules and that these are rules about conduct that judges can use when making judicial decisions.

The argument to date has also made frequent use of the concept of legal validity. Broadly, this notion has been taken to mean that legal systems contain procedural or constitutional, rules with which one can ascertain whether some other rule is or is not part of the legal system.

The argument that demonstrated the moral foundation of legal reasoning from what has been described as the constitutional paradoxes used the notion of validity and the concept of a legal rule and a legal system in a
fashion not unlike that of present day positivists such as Hart or Raz. The use of these concepts to demonstrate the moral foundation of legal reasoning should in this instance be viewed as an ad hominem argument. It should not therefore be assumed that the best theory of legal reasoning would be described by a model in which a judge applies an initial moral premise to ascertain the appropriate set of legal rules, and then deploys a theory of validity to discover which rules are applicable to the instant case. Rather, it has been argued that any model deploying the conventional positivist machinery of legal rules and a theory of validity will inevitably be driven to admit the necessity of the initial moral premise. Once this admission is made, it can no longer be argued that legal rules provide a sufficient justification for judicial decisions and that the 'ought' in the judicial command is not a moral imperative.

The ad hominem argument demonstrates that we cannot have a closed set of non-moral imperatives that will be capable of providing a judge with justification for the action of producing any particular judgment. The positivist can only stop the regress to a moral premise by arbitrarily insisting that the chain of argument terminate at the point where the system of rules in use can provide no further premises. This, it has been shown, is not only arbitrary, but cannot explain how a judge comes to be using any particular set of rules in the first instance.
If the ad hominem argument eliminates the possibility of judicial justification by appeal to statements produced by a set of non-moral rules, then, as suggested at the beginning of this chapter, one is left with the judge as a moral agent, and the justification of his decision will simply be a description of his moral duty.  

7.4 The Relationship Between a Judge's Duty and the Existence of Social Rules

It has been already explained that in this chapter the terms 'legal rule', 'legal system', and 'legal validity' have been used to demonstrate an insufficiency in positivist theories of law. The position now reached where the entire weight of judicial justification appears to rest upon the individual moral duty of the judge no doubt appears to have gone to the other extreme and suddenly made legal rules and legal validity utterly irrelevant. Their relevance will be re-invented in the succeeding chapters, but at this stage, a significant distinction must be drawn. To this point, the words 'legal rules' and 'legal reasons' have at times been used interchangeably. This is a practice that would be encouraged by any positivistic theory of law. If we believe that judges can justify their decisions by appeal

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to legal rules in the positivist sense, then the statement of legal rules will stand in for reasons in such judicial justifications.

The positivist schema might be viewed by seeing it as providing a judge with a set of ready manufactured rules which like building blocks the judge can use to construct his judicial decision. The alternative view, emphasising a judge's moral duty, sees that duty as a source from which the judge must generate reasons to justify his decision. For the positivist judge, laws virtually appear as ready-made reasons. The judge as moral agent must discover his own reasons.

Viewing a judge as an individual moral agent does not mean denying the existence of rule-governed behaviour in society. It does mean denying that the justification of a judicial decision can consist simply of the statement and application to particular facts of rules. Even for the positivist, there is clearly a significant distinction between the statement of a legal rule and the existence as sociological fact of rule-governed behaviour.

The social existence of rule-governed behaviour is clearly of great importance to the judicial decision-maker. Nevertheless, its existence does not of itself dictate an answer to the question, 'How ought I to decide this case?''
Further confusion can arise from running the positivist concept of a legal rule or norm into the justificationist concept of a reason. Detmold in his recent work on the role of morals in the justification of judicial decisions clearly views the judge as an individual moral agent. Detmold asks if we can make the following statement without being self-contradictory:

(A) The prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang.

... The first part of (A) states the legal norm which is constituted by the combined operation of the rule of recognition and the capital statute.\(^8\)

This method of posing the dilemma creates perplexity. Detmold translates the legal 'ought' as meaning -

"Legal norms have only a prima facie force."\(^9\)

Thus the legal 'ought' means that prima facie one must do X. Detmold suggests that this manoeuvre demonstrates the inadequacy of positivism as the legal 'ought' can therefore only provide a proper justification if it possess covert moral force, otherwise it will be no justification at all.

To say that a legal norm has "prima facie force" is not really an explanation. If there exists a capital


\(^9\) Ibid., p 23.
statute that prescribes the death penalty for certain conduct, the judge's dilemma is much less confusingly stated by asserting that he lives in a society with a certain political system that has propounded a rule saying that people who engage in a certain sort of conduct should be hanged and although the man in the dock appears to have engaged in such conduct, the judge believes that it would be wrong to hang this individual. To say that legal norms have merely "prima facie force" is simply another method of stating that one is dealing with a capital statute; its existence is nothing more than a record of the fact that certain political organs in the society have prescribed a certain rule. This cannot without the other assumptions already explained answer for the judge the question, 'Ought I to command this man to be hanged?'

7.5 The Judge's Moral Duty and Legally Relevant Materials

Many traditional theories of legal reasoning have been primarily concerned with determining how judges should extract an appropriate rule from existing legal materials. It is not considered in these theories that the judge is free to chose his own rule, so the concern is with ascertaining a rule that might be viewed as existing within the relevant legal materials, and which the judge must discover.

If the argument of this work is accepted the judge will ultimately formulate his own rule, but in doing so he will need to consider if the rule he should formulate will
be affected by existing legal materials in the form of past decisions, statutes and the like.

He must therefore still examine the legally relevant materials but with a radically shifted emphasis. The concern is not to uncover the correct rule buried in the materials, but to discover if the materials that exist affect the judge's duty as a moral agent.

This difference in approach to existing legal materials alters the manner in which these materials are read and the method of dealing with inconsistency, ambiguity or other difficulty in their interpretation.

We can best imagine the differing nature of the possible difficulties of judging by starting with an example where they are almost entirely absent. We should imagine a set of rules that possess no definitional problems, and which apply to actions in such a fashion that it can always be said that a rule either does or does not apply. We will further assume that the rules themselves are a completely consistent set.

The above example has been so arranged that a judge should only have to select the relevant rules then examine the actions and can then tell immediately from the meaning of the rule whether the actions being considered are illegal or constitute a civil wrong or whatever. This further assumes that a judge works with the assumption
that when he discovers an infringement of a legal rule he will automatically pronounce the verdict that mechanical application of the relevant rules to the actions would dictate. Needless to say, it is one of the central arguments of other chapters of this work that such an assumption must itself be justified.

The only difficulty for a judge placed in the position just described is the problem posed by a conflict between the applicable legal rules and his felt sense of moral duty if that should differ from those legal rules. Such a problem is widely recognised by positivist legal philosophies. Indeed the very stress such theorists place upon the separation of law and morals helps generate the problem. For positivists this problem is a private legal dilemma for the judge. For the positivist, not only does the law itself offer no internal guidance that might assist a judge facing such a dilemma, but legal theory also offers no assistance. It appears to the legal positivist that this problem stands outside of the limits of legal theory.

From the model just described, the next level of difficulty that we might consider arises if the rules themselves are not sufficiently clearly defined. For example, we may not be able to say with certainty whether or not they apply to a given set of facts. This situation is viewed by Hart as the arch problem of the positivist judge. If a judge faces this difficulty he will clearly
be forced to do some reasoning about the legal rules before he can apply them.

For the positivist, the problem of establishing usable legal rules is clearly seen as a problem within the province of law. With such a complex body of rules as is presented by a legal system, there are always problems of internal consistency, ambiguity or uncertainty in the application of rules, and questions of determining the weight of conflicting rules. All these problems present threshold problems that must be solved before it could be said of any particular actions that they were illegal, or civil wrongs.

The problems just mentioned in the previous paragraph clearly present matters classically dealt with by theories of legal reasoning. All of those issues are the foci of controversies within legal theory. Those controversies are largely by-passed by the argument of this work which seeks to entirely shift the focus of discussions about legal reasoning away from traditional debates about the doctrine of precedent or statutory interpretation and related problems concerning the interpretation of rules. Problems interpreting rules do not on the theory presented in this work need to depend upon solutions gained from some textual reading of the rule system. Ambiguity or inconsistency in the rules simply become further factors a judge feeds into the equation when deciding what impact a rule will have upon his moral obligation concerning a
decision in a case.

7.6 The Judge's Moral Duty and Legal Reasoning

It is now possible to explain the theory of legal reasoning that is being propounded in this work. If we assume that the verdict a judge should reach is dictated by his duty as a moral agent, then statutes and past decisions will be examined by a judge to ascertain whether they generate a moral duty on the part of a judge to reach any particular verdict.

To use an example, let it be assumed that when a dispute comes before a judge it is pointed out that previous courts have always solved it in a certain fashion. Let it be assumed that the dispute involves the attempt by one party to enforce a unilateral or gratuitous promise; in the terms of the law of contract, a promise unsupported by consideration.

In a case such as this, it might be suggested that prima facie there is a moral duty to honour promises. The existence of such a duty would generate in the judge a correlative duty to enforce the promise. However, the first point that must be made is that a moral duty owed by one litigant to the other does not automatically generate a correlative duty in the judge to enforce that duty. Using the example I have set out above, if the judge is to enforce the promise, this may lead to a party having to
pay a large sum of money. In default of compliance with the court's order, the defaulting party might face contempt proceedings, possibly involving imprisonment, or bankruptcy.

A judge in deciding to grant a verdict for a particular party is deciding by that verdict to place behind the successful party the enforcement apparatus of the state. It is possible to find that although one party to a dispute owes a moral duty to the other, this duty does not create a correlative duty in the judge to offer that party the assistance of the state's coercive apparatus.

This position is in conflict with McDermott's, mentioned in the previous chapter. As suggested above, there would appear to be instances of moral duty where acceptance of the moral principle should not commit the agent to supporting legal enforcement of that duty. McDermott appears not to have allowed for a moral duty, the essence of which is that obedience to the principle is only to be assured by appeal to the conscience of the agent. The classic instance would be acceptance of a moral duty to offer charity to the poor. It is intrinsic to the notion of charity that any moral obligation on the part of the giver creates no correlative right in the recipient to demand the gift.

A different concept of moral duty but one which is
also inconsistent with the idea of legal enforcement would be an agreement between parties understood to bind only in conscience, 'a gentleman's agreement'. It clearly becomes difficult when dealing with such rules of 'good form' to distinguish a moral rule from a rule of manners. There has always been a strong tradition among certain social elites to elevate 'good form' into a principle of life that would take precedence over all other social obligations.

While it would pose an interesting study to seek to unravel the logic behind the obligations imposed by notions of good form, it need not be investigated here. I would suggest that some examples of such obligations are examples of moral obligation. If this is so, then these are examples of moral obligations existing between parties that would not generate a correlative duty in the judge to enforce such obligations.

The examples just suggested might be classed as instances of moral obligation that intrinsically do not attract legal enforcement. A different case would be the examples of moral duties or obligations that a judge should prima facie enforce but which are not enforced for pragmatic reasons. If the judge is committed to a consequentialist moral position he may believe that the very process of legal enforcement may itself create evils of such magnitude as to outweigh the effects of leaving a breach of such an obligation unpunished.
Familiar examples of the above argument are suggestions that drug abuse or sexual deviancy are wrong, but attempts to legally restrict them only produce black markets, police corruption, and so on. Not all judges would accept arguments of this nature. Non-consequentialists may insist that certain conduct must be punished regardless of the consequences. It is not necessary for this work to chose between these two positions.

Returning to the example with which this section began; the demand that a judge enforce a gratuitous promise; it has been shown that the moral duty of a judge will not simply map the moral duty of the parties. His very position as a judge, and the fact that his decision lends to the successful party access to the enforcement apparatus of the state will affect his duty. The judge must turn to the impact upon his duty of the past decisions of judges and the pronouncements of legislatures. These latter two categories will clearly have a significant impact upon whatever a judge determines to be his duty. A detailed consideration of precedent and legislation will shortly follow but one fundamental objection should firstly be dealt with.

If a judge adopts fairly conservative views of his function, it could be suggested that even though he might adopt the theory propounded in this work, he would end up acting in a very similar way to a judge of rigidly
positivist outlook. The objection would thus run that although judges might have different fundamental justifications for their tasks, the theory carries no serious implications for actual practice. In a liberal democratic society judges will continue to believe that they ought to accept the pronouncements of legislatures and accord significant weight to the past decisions of courts. We may therefore have traded explanations, but the operation of the system remains unchanged.

The charge might then be levelled that the error that afflicts applications of radical scepticism is now apparent, the absence of any objective, non-moral criteria leads jurisprudence back to the imitation of existing practice and custom. One commences with a radical thesis that becomes in application mere conservatism, but not a self-conscious reasoned conservatism.

There are several answers to this charge. The first is of course to point out that this work seeks to investigate the logical foundations of judicial reasoning,

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10 The justification of this charge was accepted by the sceptics of Ancient Greece who saw conservatism as the consequence of their views; see Sextus Empiricus Outlines of Pyrrhonism, Heinemann, London 1933, p.17

"Adhering, then, to appearances we live in accordance with the normal rules of life, undogmatically, seeing that we cannot remain wholly inactive. And it would seem that this regulation of life is fourfold, and that one part lies in the guidance of Nature, another in the constraint of the passions, another in the tradition of laws and customs, another in the instruction of the arts."
and if they turn out to be unexpected or inconvenient that just cannot be helped. However, the most significant answer is to deny that the adoption by a judge of the view suggested in this work would have little impact on his judicial activity. Apart from the significance the view would have upon how a judge used legal precedents or statutory materials, it will also be argued that the best arguments from political philosophy in support of an obligation to obey the law, don't lead us to the conclusion that conformism will be the duty of the liberal democratic judge.

This latter answer will be explained further in the next chapter by a detailed consideration of the reasons for deploying a doctrine of precedent.
8. THE EFFECT ON A JUDGE'S MORAL DUTY OF THE PAST DECISIONS OF COURTS

8.1 Do legal precedents and statutes matter?

It was argued in the last chapter that the relevance of legal precedents and statutes lies in the effect that they might have upon the moral duty of a judge. The last chapter was still largely concerned with the methodological question regarding the nature of the reasons that might be relied upon by a judge when making a judicial decision. In concluding that these reasons will be exclusively moral reasons, and selected by the judge acting as a private moral agent, the methodological aspect of the enquiry is virtually complete. This chapter and the next two chapters step from the methodological or meta-ethical level to the level of normative ethics and examine some of the normative views a judge might hold on what his moral duty actually is when faced with past decided cases or statutes, and the demand that he act in conformity with them.

If all matters to be considered by a judge are now only relevant to the extent that they affect a judge's moral duty it might be suggested that little will any longer be gained by examining the role of precedents and statutes. They may be important, perhaps extremely important, but so might a deterioration in the balance of trade or an upsurge in domestic violence. If our methodology gives no theoretical significance to any one class of matters over another in
terms of the calculations of the judicial moral duty why bother with a special examination of legal precedents and statutes?

The first answer to the question just asked is that the normative ethical problem posed for a judge by past decisions and statutes is an unique problem not completely similar to any other faced by a private moral agent, and for that reason not solved by the answers generated for related fields. Part of the peculiarity of the problem is that past decisions and statutes are themselves imperatives with ethical content (unlike the balance of trade, or domestic violence). Their relevance involves consideration of the principles governing the political organisation of society, and the impact upon judges of any general duty to obey the law.

It will be argued that the nature of the adjudicative process does not permit one simply to extrapolate for the judge whatever duties or obligations might be attributed to the citizen in civil society. The ethical problem created by the demand to follow precedents has virtually no equivalent outside the sphere of judicial activity.

A second part of the answer to the question asked above is that one test of the methodological principle is to examine the sorts of results that judges would obtain when acting as private moral agents in regard to legal precedents and statutes.
If one accepts as prima facie desirable that there be some body of social rules not unlike criminal law, or commercial law as presently known, then it becomes a significant test to find whether the methodological principle advocated permits the reconstruction of something resembling such a body of doctrine or would result in their dissolution and the inauguration of a reign of judicial anarchy.

A theory such as the one propounded here has two tasks. The first is to establish that it would permit the continued existence of necessary bodies of social rules. The second task is created by success at the first. If the methodology propounded here will permit the continued existence of necessary bodies of social rules, then it is necessary to show the usefulness or importance of the suggested methodology in contrast to that of conventional views on judicial activity.

8.2 The doctrine of precedent as the application of the principle of formal justice

The doctrine of precedent occupies a shadowy area. It is viewed by judges as a part of the procedural law and, ironically, claimed to be established for that purpose partly by precedent. It is viewed by legal commentators as more akin to a methodological principle operating at a level different to that of the positive law which it helps to create.
In its barest form it can be simply stated as the rule that like cases should be decided alike. In its classic formulation by appellate courts, the doctrine is explained as the mechanism whereby the central and necessary reasoning by which a superior court reaches a decision upon a case (this intellectual kernel being the 'ratio decidendi' of the case) binds any other court in the hierarchy in any future case that is relevantly similar.¹

Much has been written about the proper application of this doctrine. The difficulty, particularly for legal formalists, in demonstrating how a ratio decidendi might be extracted from a case is perhaps one of the more outstanding aspects of the debate. Modern revisions of the doctrine, such as those propounded by Dworkin, alter it from the classic formulation practically beyond recognition.

While the difficulties for positivists or legal formalists in producing a defensible version of the doctrine of precedent will only be slightly touched upon here, however formulated, there is clearly an important moral principle behind the notion that like cases should be decided alike. This doctrine would seem as applicable to general conduct as to judicial conduct.

If there was a general moral principle accepted by most first order ethical systems to the effect that like cases

should be treated alike, might this not reintroduce through the methodology of the judge as moral agent a doctrine of precedent largely resembling the classical positivist doctrine? It will be argued that an examination of the principle does not lead to the rehabilitation of the doctrine of precedent as known in Anglo-American positive law.

Proceeding to ask what is the moral or ethical basis behind the principle it is useful to return again to the example of the gratuitous promise. Assume a judge has before him a dispute where he is asked by one party to enforce a gratuitous promise. Assume the tribunal to which this judge belongs decided a similar case fifty years ago and held against enforcing the promise. Let it be further assumed that if this case had been novel our current judge would have decided to enforce the promise.

It might be suggested that the modern judge should follow the earlier decision because it is a principle of justice that like cases be treated alike. I shall argue that a purely formal principle, that because principle x was applied in the past it should be applied now, does not provide a tenable principle of justice and does not therefore provide a reason for following past decisions.

The argument against a principle that one follows past decisions flows from the arguments of Perelman.² It might

first be stated that any intuitive sense that one should follow past decisions simpliciter is ambivalent. If I made an error of judgment in resolving a dispute between two people, it would not appeal strongly to later disputants that I make the same mistake simply in order to maintain my consistency.

Hobbes utterly rejected the notion that precedent generated any obligation and saw it as little more than an excuse for repeating mistakes:

"No man's error becomes his own Law; nor obliges him to persist in it. Neither (for the same reason) becomes it a law to other judges, though sworn to follow it."³

Perelman argues that the notion of justice, when abstracted from any particular concrete system of value, is no more than a principle of logic. Let one take as an example the following rule, 'if someone is injured through the fault of another, then the wrongdoer must pay compensation to the victim sufficient to repair the damage as well as money can'. If A and B are injured by wrongdoers X and Y respectively, justice requires that the rule be applied to both equally. If A is compensated fully then B must also be compensated.

If B is not fully compensated he may well point to the position of A and claim that an injustice has been done. But the strength of B's pointing to A is that A is pointed out as the correct instantiation of the rule. If the rule applied in A's case is correct, then it follows that there has been a failure to follow that rule in B's case if B has not received like treatment. Perelman states the principle thus:

"Equality of treatment in formal justice is nothing more nor less than the correct application of a rule of concrete justice which determines how all the members of each essential category ought to be treated." (Perelman, 1963, p.38).

It follows from the analysis of justice just presented that when we say like cases ought to be treated alike, the imperative nature is derived from the concrete rule we are directed to follow. If the rule is 'each according to their needs', then if two have equal needs, equal reward is simply the correct application of the rule. If we say that these two cases are alike and in that respect deserve equal treatment, it is then necessary to know in respect of which rule they are alike.

Without a rule to follow it is not even possible to know whether two cases are alike. Being alike merely means having certain properties, specified by some concrete rule that are alike. It has already been argued that any judicial decision must, if it is rationally justifiable, appeal to some moral reason. This moral reason is some first order moral reason about when it is appropriate to punish people, or to award
damages. The formal principle of justice cannot provide such a reason being empty of any content in this regard.

If a past case is appealed to on the basis that the case at bar is relevantly similar, then similar treatment will only be deserved if it is accepted that the rule should be followed that obliges one to treat these cases similarly. It is therefore not the case that because of the verdict handed down on the previous set of facts the result in any present case is determined. The question must always be, why should one follow the rule previously enunciated? Principles of formal justice will provide no assistance here because they merely instruct how to act when the rule is already known. Principles of justice do not assist in determining which rule one should adopt.

The theory of Perelman has two significant effects for the doctrine of precedent. It firstly provides an explanation of the appeal of the rule. However in providing that explanation and demonstrating its formal nature it deprives the doctrine of any basis for being deployed alone as a means of guiding judicial conduct. One cannot formulate an adequate and complete moral argument form, the sole major premise of which is that 'like cases must be decided alike'.

If the formal principle is not an adequate moral principle to support a general practice of following past decisions then one must abandon the view that there could be a general moral principle that could provide a surrogate for
the conventional doctrine of precedent. Are there other reasons for following past decisions?

8.3 An objection: Do not decided cases report the existence of a social rule rather than a moral principle?

A positivist might object that the difficulty referred to in the last section arises because past cases are being treated as reports of the application of a moral rule and this is what leads to the conclusion that deciding the next case alike is only a consequence of the correct application of that pre-determined moral rule. If past decided cases are treated as reports of the existence of a social rule then there would be a reason for following the decision if judges had a general duty (which a positivist would deny is moral in nature) to obey and follow all existing social rules.

A full consideration of this objection is left to the next chapter which deals with a general duty of obedience to existing social rules. At this stage it might be observed that the objection effectively assimilates the role of precedent to that of statutes or the pronouncements of legislatures.

Legislative pronouncements enjoy the privilege over judicial precedents that they have a warrant for their authority from the political process. To the extent that one has a political theory that provides reasons for a duty of obedience to the legislative pronouncements of the political
system the source of the duty to obey statutes is at least clearer than any general duty to apply the past decisions of judges.

Austin sought to complete this assimilation of case law to statute law with a theory that the precedents created by case law obtained their authority from the tacit consent of the legislature. The legislature has the power to effectively repeal any judge-made precedent and if the legislature withholds the exercise of that power this amounts to a tacit consent to the judge-made rule.

Whether or not such arguments succeed in providing a theory for the political authority of case law is not directly in point. To the extent that they do succeed in demonstrating that any duty to obey the law applies equally and for similar reasons to legislative pronouncements and case law they are dealt with in the next chapter. The argument of that chapter will seek to show that no duty of obedience to the law can be converted to a moral principle requiring a judge to apply all existing case law and statute law.

8.4 The pragmatic arguments for application of past decided cases

Returning to the central argument, we are seeking

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reasons for applying rules previously applied, other than the moral correctness of the rule itself. If we reject any general principle that says rules previously applied should always continue to be applied, one group of arguments we are left with is what shall be called pragmatic arguments. These are arguments of the form that some rule consistently followed is better than the best rule, if the judiciaries' conception of the best rule is going to change. These are arguments to the effect that society needs a rule system and that a degree of certainty and stability is a necessary requirement of that system.

Arguments appealing to the need for certainty and stability in the law could not elevate these virtues to a status where they could require courts to repeat gross errors or injustices for fear of upsetting the established order. It must also be the case that the need to follow past decisions would vary from instance to instance depending upon the nature of the social rules and their subject matter. Where no settled rule had developed albeit some past decisions existed no harm should result from further judicial experimentation. A past decision considered a pillar of some existing social practice could only be ignored at the expense of overturning long standing expectations.

The pragmatic criteria would also suggest that it is necessary to investigate those matters that tell whether a past decision is frequently relied upon or does in fact form part of the law frequently appealed to. If esoteric or
arcane learning is applied in the name of following precedent, and this produces a legal answer at variance with the expectations of practitioners and citizens, then following those precedents could not be easily justified by appeal to the pragmatic arguments.

It could be suggested that the thrust of the pragmatic argument directs a judge to follow not past decisions, but what most people believe are past decisions. The two need not naturally coincide.

It is now time to examine the effect of these arguments for applying past decisions on our central problem. We are examining the reasons a judge could have for choosing to apply the rule applied in a previous decision, other than a belief in the moral correctness of that rule. Any argument of the form of procedural justice has been rejected. It has been suggested that the only good arguments depend upon belief in certain values. Belief in the beneficial social effects of stable law, or the rule of law argument both involve belief in first order moral statements. If we wish to speak of the rule of precedent as a rule of law then any rational justification of that rule would depend upon arguments of the kind just presented. Such arguments would not necessarily support a continuous and strict application of precedent to all current cases. This less than strict application of precedent is the very position now being adopted by high appellate courts such as the High Court of Australia. The judges of these courts show an increasing
willingness to depart from rules applied in previous decisions in order to apply what they consider to be better rules.
9. **The Judges Moral Duty to Apply Rules Created by Legislatures**

9.1 **Introduction**

At the present stage this inquiry is concerned with examining the consequences that flow from the methodological principle adopted when applied to some of the important first order moral principles that could govern judicial conduct. As already mentioned this is partly a test to see whether the suggested methodology permits the reconstruction of a necessary and workable system of social rules and partly, turning to the other extreme, to see whether the results produced are significantly different from conventional positivist theories of judicial activity.

The last chapter pursued these points in relation to the doctrine of precedent as a basis for judicial conduct. This chapter continues the examination with reference to statutes or other expressions of legislative intention. While a justification for the application of precedents and statutes might be merged, as was suggested in the last chapter, they may also be seen as reflecting two different principles of great importance in the control of judicial activity. Precedent appeals to the notion of consistency as a necessary element that must be reflected in any system of legal rules. Statutes are created by legislatures and in any
morally justifiable political order the ultimate control of law-making processes is usually reposed in the legislature. This in turn is usually a consequence of according a paramountcy to democratic principles in the constitution of the legislature.

These considerations usually produce a chain of argument commencing with the democratic principle as the foundation of political legitimacy and leading to the conclusion that judges must therefore exercise only a very limited law-making power if any. This line of argument clearly has significance for the suggested methodological principle of this work, for if most first order moral systems would lead to the conclusion just described judicial conduct might be little affected as judges simply responded to a duty to enforce whatever the legislature had uttered. This chapter will therefore seek to explain how an individual moral right to decide cases could operate within a society in which certain moral duties are owed to society.

9.2 A Judge's duty and the social contract argument

Many have argued that the members of a society have a general duty to obey the law irrespective of whether those members believe of any particular law they are called upon to obey that it is good or bad. A variety of arguments have been put forward to justify this duty. It is not possible to examine all of those arguments here. What will be done is to examine the most important of those arguments and suggest
that whether or not it is successful in its own terms, it cannot be applied to the position of a judge. It will be further contended that the objections to this argument are illustrative of objections that could be taken to any attempt at establishing that a general duty to obey the law binding citizens also limits a judge in deciding cases.

The argument to which reference is made is the social contract theory of the state. This central argument of political theory has been deployed in various forms from the time of classical Greece to the present day. In its classic form, found in works such as Plato's *Crito*, or Hobbes' *Leviathan*, the contract is said to arise from an actual assent, albeit largely tacit, by each individual citizen. Societies' laws and law-making apparatus offer benefits to each individual making life under a state preferable to life where there would be no central protective organisation, no laws, and no law-making bodies. A citizen by living in society, and accepting those benefits is said to tacitly accept an obligation to be bound by each and every rule made by the state.

Different formulations of the argument might suggest different origins of the obligation to obey the law. Woolzley suggests that Plato's *Crito* contains four separate arguments as to why the law ought to be obeyed.¹ Some of those arguments rest clearly upon imputing to each citizen an

actual, albeit tacit, consent to obey. Other arguments
depend not only upon consent in the strong sense, but upon
the principle binding a citizen that assumes that having
accepted the benefits of living in society, the citizen
cannot throw off the burdens. I shall refer to both versions
as the social contract theory of the state.

Rawls' modern theory abandons the claim that an actual
historical covenant led to the formation of the state. The
social contract becomes a thought experiment where we are to
imagine that those who engage in social cooperation choose
together, in one joint act, the principles which are to
assign basic rights and duties. These principles:

"... are the principles that free and rational persons
concerned to further their own interests would accept
in an initial position of equality as defining the
fundamental terms of their association".2

For Rawls, the social contract is an hypothetical
device that allows us to determine what principles are just.
A society governed by such rules is a just society, and
should it promulgate an unjust law we would be bound to obey.
In Rawls' words:

"When the basic structure of society is reasonably
just, as estimated by what the current state of things
allows, we are to recognise unjust laws as binding
provided that they do not exceed certain limits of
injustice."3

2 Rawls; J, A Theory of Justice, Oxford University
3 Ibid, p.351.
The fine print in Rawls' social contract establishes the duty of obedience in this fashion; no person would consent to a constitutional structure that, although just, would allow people who did not accept laws for conscientious reasons to choose not to obey them. In Rawls' hypothetical original position, what we choose for everyone we must also choose for ourselves. We cannot therefore ask to be excused from obedience in cases of our own conscientious objection.

The arguments just described above are concerned to show that a citizen should always act so as not to break the law, even if this means doing something that, but for law, the citizen would consider wrong. It has already been argued that judging is itself an activity, and as such, susceptible of moral judgment in the same way as other human actions. It might therefore be asked whether, when a judge is judging a case to which some statutory rule applies, his position is any different from a citizen deciding whether to obey that same statutory rule. If there is a general duty of obedience binding all citizens, should not the judge consider himself under the same duty as the citizen and apply laws even though he conscientiously objects?

It might firstly be said that it is not accepted for the purposes of this paper that the best arguments do in fact establish that such a general duty of obedience exists. An alternative theory might hold that a citizen only has a duty to obey those laws that he considers just laws. Where a citizen did not believe the law to be just he would not have
a duty to obey. However, it would not follow that he necessarily has a duty to disobey. He ought to be able to argue at least if he is a consequentialist that he only has a duty to disobey if the consequences of his obeying are worse than the consequences of his disobeying. If he disobeys he may well be caught and punished, and this is an undesirable consequence that must be outweighed by the consequences of obedience before his duty to disobey will arise.

The competing arguments for these two positions will not be considered here. Rather, I shall argue that the social contract argument does not apply to a judge at all. This is significant, because if it did, and was accepted by a judge as the best theory, it might largely dictate how he ought to decide cases.

The first point to make is that there are major differences between the position of a citizen deciding how to act, and a judge deciding which rules to apply to a dispute. This is reflected in the way we correct infractions in each case. If a judge does not apply a legal rule that he ought to have applied, one would not usually say that the judge had disobeyed the law. Usually his decision would be described as erroneous, and might be reversed on appeal. The judge suffers from no sanction or punishment other than perhaps a loss of respect from the profession. Unless he should act corruptly or fraudulently, a judge is virtually immune from legal attack for the manner in which he decides a case, other than his liability to be reversed on appeal, and is immune
from civil suit even if he acts maliciously or without honest intent.\textsuperscript{4}

This difference in legal form and treatment points to a deeper difference between the position of judge and citizen. While the judge in judging is acting, his actions are not of course the actions to which the law was originally addressed (although this point might not be universally conceded, some, the Scandinavian Realists in particular, argued that laws are orders to judicial officers to apply penalties). However, even if one accepted the Scandinavian Realist position, it does not alter the fact that the judge's action in judging is not the same sort of action as the behaviour the law was intended to regulate.

The very function of a judge is to decide what rules to apply to a dispute. If a judge's decision was thought to involve disobedience to the law, then attempts to sanction the judge will ultimately be caught in an infinite regress of judges who judge judges. Clearly a determination that a judge's decision involves disobedience will have to be determined in turn by other judges. At the end of the line the decision of the last tribunal is uncorrectable. If anyone thought that this last tribunal had itself been disobedient, then for this disobedience there could be no legal sanction.

\textsuperscript{4} Rajski v Powell (1987) 11 NSWLR 522.
Courts cannot therefore be said to be subject to the law in the same fashion as a citizen. The court has the freedom to say what the law is, and until it does so, it is not legally bound to take any view of a particular dispute. The litigants will have to accept whichever rule is promulgated and do not have the power to affect the result other than through advocacy. Courts are, in this sense, above the law and not in the position of citizens. Courts stand on a second level where nobody can say that they have disobeyed the law.

A number of other points might be made to distinguish the moral significance of the judge's role from that of the citizen. A judge is usually assessing conduct after it has been performed. The question for a judge is not whether a citizen should or should not engage in the relevant conduct, but whether he should be punished or ordered to pay compensation for having in fact engaged in it. Once again the argument applies that although the citizen had a moral duty to obey the law, and the judge himself should also have obeyed in his or her position, this does not imply a moral duty to punish once that duty has been broken. The view of theorists like McDermott suggesting that a discretion not to punish does not exist has already been discussed and rejected.\(^5\)

It could be said that the last point does not carry one very far. Judges under any system usually have a discretion

\(^5\) See above, p. 96.
in determining the penalty to be imposed on those convicted of offences, but this is exercised after they have decided which rules apply and recorded a conviction if the matter is a criminal case. The argument can however be strengthened in the following fashion. When considering whether to obey a law a citizen should advert his mind to the question of whether it would be morally just to excuse his obedience because the law is wrong. The citizen might view the duty of obedience to unjust laws as a demand made upon him by society.

The position of a judge is again different from that of the citizen. A judge is not simply subject to a demand made upon him by society, but his role as an enforcer of law requires him to actively make that demand, on society's behalf, of the people who come before him. I suggest that the social contract argument in all the forms discussed above only establishes that I would have a duty to obey the law, even if I though it unjust, but does not establish that I have a further duty to force people to obey unjust laws. This is because the source of the duty to obey the law in the social contract argument lies in its being unjust that we should seek to be excused from compliance.

The last point can be further explained thus. If I have a duty that is generated by my relationship to a group, the existence of my obligation does not create a right, held by me, to enforce the similar obligation owed by each other member of that group. This is not to say that no person or
organisation is able to enforce compliance. What is suggested is that the right to enforce compliance is justified by very different considerations from those that create the primary duty.

Assume I belong to a group each member of which owes the group, considered as a separate entity, $100. We can assume that I have a duty to repay the group $100 and that I have a right to force each other member to repay his $100. The reason why I should repay my $100 is based upon my duty to keep my promises (presume the money was given to me upon my promise to repay it). The reason why the other members should repay is based upon their respective duties to repay. However, the reason I have a right to force the others to repay is not based upon my promise to the group. The justification for forcing others to comply would rest upon a principle of justice that if one person has to make good his promise, others in the same position should not be able to resile from theirs. In other words the justification of enforcement does not flow from the same source as my duty to obey, my original promise.

It should not be thought that the example just given provides an argument from justice without a concrete principle. Such a possibility would contradict the earlier argument against formal justice as an insufficient principle to justify conduct. The concrete rule in this case would be that where people equally give promises of the sort in this case, then each shall be compelled to make good what he
promised.

A duty to obey the law based upon the social contract might be classified in one of three versions of the theory. These three versions might be loosely described as the tacit consent argument, the acceptance of benefits argument, and Rawls' hypothetical contract argument. Upon any of these arguments the reasons that would justify our right to demand compliance from other citizens would be reasons of a different sort from those requiring our own obedience and would be based upon a concrete principle of justice.

The principle of justice deployed in each case might appear so heavily dependent upon the reasons why each agent has a duty to obey that some might argue that the two sets of reasons are not really distinct. One method for demonstrating the independence of the reasons is to show that one agent might have the right without the duty. Hence the reasons for the right cannot depend upon the agent satisfying the criteria that generate the duty. Thus a person not a member of the group and not owing $100 could justify forcing those owing $100 to repay that sum in order to avoid injustice to those who repaid their debt. Indeed a member who has repaid his $100 no longer has any obligation to repay anything to the group, yet retains his right to force defaulters to comply.

Since the principles of the rule of law are strongly held in most Anglo-Saxon legal cultures, enforcement
authorities are usually required to abide by the law while enforcing it. Certain exceptions are made. Police can break traffic laws when pursuing a suspected criminal. Illegally obtained evidence may be admitted into evidence in certain circumstances. These are small exceptions, but I suggest that the rule that enforcement authorities should themselves be bound by the law, while perhaps a good rule, does not follow inexorably from the principle of obedience derived from the social contract arguments.

To establish the last point, let us assume that our enforcement authorities are incorruptible, beneficent and capable of always correctly calculating whether the harm of law-breaking in enforcement would be out-weighed by the harm of leaving offences unpunished. If such circumstances existed, then it would be possible to hold both that citizens have a moral duty to obey the law and that enforcement authorities were exempted from this duty, although perhaps limited in certain ways. Thus we might not allow a purely utilitarian law enforcement agency to kill people in the process of law enforcement, but allow all property offences since these would be compensable by insurance so no particular citizen would suffer an unfair burden.

By the comments of the last few paragraphs I have attempted to show that a duty to obey the law does not imply a right to force others to comply. This is because the reasons that justify a duty of obedience are distinct from the reasons that justify enforcing compliance. An agent can
justify enforcing rules even though there is no corresponding duty to obey. When a judge is acting in his capacity as judge he is acting as an enforcer of legal rules and not as a subject of those rules. To determine what reasons would justify his applying any particular rule we must therefore look to the reasons for enforcement, not obedience; it is to those reasons I now turn.

9.3 The Judges' duty to enforce laws

It must firstly be conceded that this work cannot suggest that there are no plausible arguments to the effect that a judge has a duty to enforce all statutes passed by the legislature under a just constitution. It may be possible to construct an argument from the Rawlsian concept of a social contract to the effect that a separate duty rests upon judges to enforce the law where they accept the role of judges under a just constitution. However the strength of these arguments regarding the duty of judges to enforce the law probably owe their force to the conviction that democratic principles ought not be frustrated by independent and unelected judges. This conviction may in turn stem from a similar ground to that of a citizen's duty of obedience when one is operating within the Rawlsian framework of the social contract and its theory of the just constitution. The basis would however be very different when one looks to other justifications of a general duty of obedience that operate independently of general democratic principles.
If one divorces the enforcement of law by judges from a general duty of obedience then the position becomes analogous to that described in regard to the application of precedents without a general duty to follow past decisions. What are referred to as the "pragmatic arguments" will clearly have a significant role. To the need for consistently applied rules will be added the further consideration that so much modern legislation forms part of a complex process of government, often enacted only after expert consideration and recommendation. Rare would be the occasions upon which a judge could justly decline to apply part of this network because of a conscientious objection.

These considerations may suggest that our methodological principle produces little change in judicial activity in this field but this stems partly from the working assumption that the pronouncements of legislatures are clear and unequivocal. When uncertainty must be resolved the impact of the judge's private moral duty becomes more apparent.

A judge who believes that he ought to obey any pronouncement of a legislature may well be driven to a search for the intention of the legislature whether actual or hypothetical, in respect of which he can offer the required due obedience. However a judge who does not believe that his role carries an obligation of obedience akin to that of a citizen will not see the same necessity to seek out legislative intentions in uncertain pronouncements and while
taking account of those legislative intentions clearly expressed, would feel more free to fashion the best rule.

9.4 The political judge

The argument has now developed to the stage where conventional positivist theories can be tested against the methodological principle propounded here. Such a test can be conducted in regard to their ability to explain the nature of legal criticism. It will be argued that this is a problem for positivism but not for the theory advocated in this thesis. To draw the problem for analysis, that individual who stood in the shadows of the argument in the last chapter and the earlier part of this chapter can now be brought to the foreground; the political judge, the judge who ignores conventional arguments about legal validity.

The political judge is a problem for positivist theories, especially those like the theory expounded by Hart in his work The Concept of Law, because of the difficulty of criticising such judges from the positivist framework. Criticism is here meant not in the sense of deprecating the existence of such individuals, but in the sense of critically appraising their conduct. This is part of a larger problem for positivist theory of developing a basis for any doctrinal criticism within legal theory.6

In speaking of doctrinal criticism what is intended is legal criticism, or criticism within legal theory as opposed to political or moral criticism. Law journals and texts are full of statements that critically appraise the reasoning of a court upon some decision, and may recommend the reasoning or attack it. Can this activity be adequately dealt with by positivism? Finally, at the extreme, is the judge who appears to simply disregard historically recognised rules. What can be said of his conduct?

Hart has never denied that one can make moral or political assessments of the decisions of courts, but has insisted that such considerations are not part of legal theory. If this is the case it is difficult to see what function legal theory can serve. If we assume that our political judge has not failed to apply the historically recognised rules due to incompetence, or some corrupt motive, how then might he be criticised by the positivist? It is beside the point to accuse this judge of not applying previously recognised rules; that is freely admitted. Our political judge can claim to have a good rational justification for not applying previously recognised rules. Can this political judge be said to have made a mistake, in positivist terms?

The most probable criticism of the political judge a positivist might make would be the 'it's not cricket'

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criticism. This argument would seek to avoid any questions about the correctness either legally, or morally of the decision. The positivist would simply assert that since the judge has chosen to ignore the existing standards of legal validity, then he is outside of the legal 'game', whatever personal responsibilities he may have assumed and despite whatever respect he may be accorded by other people for his exercise of judgmental discretion.

This criticism lacks force on several grounds. A renegade legal official who starts to ignore usually accepted standards in pursuit of some private eccentric goal might be explained in this fashion, but a judge who retains the respect of professional colleagues and the obedience of citizens to his decisions could hardly be described as having stepped out of the legal system. Yet some quite major departures from the accepted legal standards could be made without our judge appearing to have assumed a new function.

The positivist could seek to concede all that has been said without admitting that it damages the legal theory of positivism in any way. If a judge departs from usually accepted standards is it not a key tenet of positivism that there is no legal criticism that can be made? It is simply a question of whether what the judge does is morally good or bad. Yet if we adopt this view, it makes the nature of the rule of recognition perplexing. We look to doctrinal discussion of the law to tell us more than simply whether a judge's conduct is inside or outside the 'game' of law. We
look to legal commentators to tell us whether a decision is good or bad, but this is an evaluation that may involve detailed consideration of those values that are of particular significance to legal decision making, reasoning and consistency that preserves the intelligibility of the system, and that properly reflects clearly expressed legislative intentions.

The methodology propounded here does not see the political judge as an anomaly that can only be dealt with by suggesting he has abandoned the 'game'. His attempts at a break with dominant views can be assessed and criticised as can any attempt at creating new rules and such criticism will be moral criticism.
The argument of this work has proceeded to the present stage by asking what ought a judge to do when asked to decide a case. This methodology considers the problems of legal reasoning as private moral dilemmas for the judge. Reasons have been given for adopting this approach. Nevertheless, the following objection might be raised, that if the viewpoint is altered, and one asks what might society demand of a judge, this might result in a different answer from that suggested by the present theory, and would be an objection to it.

The objection can also be put in this form. Unless we believe that a judge's moral duty is objectively ascertainable, to demand of all judges that they simply act in accordance with their own private moral beliefs leads to a toleration of different possible verdicts, depending solely upon the moral views of the judge. While an objective observer might seem to be commanding a judge to act in accordance with that judge's moral duty, the observer could not recommend the result that would be delivered unless he shared the judge's first order moral views.
If a judge was idiosyncratic and appeared to hold views in conflict with some moral position upon which there was a degree of consensus in society, is it not odd to suggest that the rights of litigants should be determined by the views held by the judge, rather than those of society at large?

It might initially appear that this problem is a variation on that posed by the claim of a general duty of obedience, and dealt with in the previous chapter. It is in fact quite a different problem that arises from the conflict between the objective quality of moral utterances and the dependence of at least some versions of the principles of practical reason on the subjective beliefs of moral agents.¹

Let it be assumed for the moment that the notion of society's demands is unproblematic, that society rationally demands one thing of a judge, the judge rationally argues that his moral duty requires him to act in another manner. If the judge and society both held the same first order moral views it would be difficult to imagine this situation arising. A policeman and a bystander may have different duties on the same occasion, but everybody sharing the same first order moral views should make the same demands upon the policeman.

If the judge and society held different first order moral principles, the possibility of a conflict is now easy to

¹. For a similar presentation of a related dilemma see, Greenwalt; K, Conflicts of Law & Morality, Oxford University Press, Oxford, 1987
comprehend; but if we retain the requirement that each party act rationally, then it is possible that our theory of rationality might tell the judge to act at variance with the demands that society, equally rationally, makes upon the judge. This still depends upon what we consider to be rational behaviour.

Initially we might suggest that each person must act consistently with their moral beliefs if they are to act rationally. This view of rationality looks to consistency in terms of the logic of practical reason between a person's beliefs and actions. Clearly if people have different moral beliefs they could both act consistently in this sense and yet claim to be obliged to act in ways that are in conflict.

The model of rationality just proposed might be objected to on the following basis. If I hold certain moral beliefs, then the important thing would be that I do what those moral principles dictate. Since these are moral principles, then I would also believe that everyone else should do what those moral principles demand. If someone holds alternative moral views that conflict with mine and acts consistently with their views, that person will still be acting in a manner that I consider wrong. If they say that they are nevertheless acting consistently with their beliefs, this will not provide a defence to our allegation that they are acting wrongly. If they acted in accordance with our moral principles, without changing their own moral beliefs, then albeit they are acting inconsistently with their beliefs, we
would be satisfied with their behaviour.

If we thought someone's moral beliefs were wrong, and yet asked them to act in accordance with our moral beliefs, without asking them to change their beliefs, or knowing that they would not change those beliefs, we would be asking them to act inconsistently with their moral beliefs. More simply, we would be asking them to do something that they believed to be wrong albeit something we believed to be right.

Some people might believe that consistency between one's beliefs and actions is itself a 'good'. MacCormick seems to suggest when defending his principles for rational decision-making, that they reflect the good of being rational.²

However most consequentialist moral philosophers would not consider consistency between moral beliefs and actions mattered if it were not related to the producing of better outcomes. Being consistent is merely a means, not a moral end.³

Each moral agent will claim that his moral beliefs justify his actions and he would be acting wrongly if he did not follow them. This claim needs closer scrutiny. If I claim that my moral beliefs justify those of my actions that are in accord with those beliefs, what is it about this

². See above p.115.
relationship between actions and beliefs that constitutes the justification?

A claim that someone's actions are justified would at its broadest be a claim that one can point to something that supports those actions. Most theorists would agree that such support would be reasons one might have that support that action. The complexities of the theory of practical reason can be avoided here, as the exact characterisation of the support one might claim for one's reasons is not necessary. Nevertheless the principle of justification can be stated in broad form. If I hold a belief about moral duty, the reason this justifies my action is because it is the right belief to hold. It is not my believing the principle but its rightness that justifies the action. Thus if I hold a belief about a moral principle that is wrong, then actions in accordance with that principle will not be justified.

To some degree the issue concerns use of the word 'justification'. On some occasions a person holding a belief sincerely may be said to have a justification for his actions even though the agent may now concede that the belief was false. Nevertheless, the use of the term 'justification' in this type of case is usually deployed to counter the claim that the person acted wickedly or badly. We might concede that the person acted innocently, but still assert that he or she did not do the right thing. The only exception to this principle would be someone who acted on a belief now recognised to be false, but which could be defended as the
belief he had most reason to have at the time.

If one can for a moment entertain the notion that society asks a judge to act contrary to his moral beliefs the judge's claim that he must act consistently with his moral beliefs cannot, from society's point of view, justify the judge in failing to obey. From the judge's point of view his duty may be affected by the demand of society, but then he will only be justified from his point of view if the fact that society has made the demand sufficiently alters his moral duty to make obeying society's demand his new moral duty. Put shortly, the judge cannot justify himself in the eyes of society by claiming a right to act consistently with his own moral beliefs, despite the fact that his beliefs provide a sufficient justification for a judge to act in accordance with them when viewed from the position of the judge.

10.2 Authoritative Power

This produces something of a dilemma. The judge is in a position where he may be asked or expected to act contrary to his moral beliefs while being apparently unable to offer a justification acceptable to the other party for refusing to meet his demand. One solution to this dilemma is to argue that the demand from an authoritative source can provide a sufficient reason to act and this will provide the judge with a justification for doing what would otherwise be wrong. Raz seeks to provide a theory of just such reasons by way of a
theory of 'authority'.

Raz starts from a discussion of reasons for action. Most non-authority reasons would be classified by Raz as first order reasons. Not exceeding the speed limit because it is dangerous would be an example. We might also believe the importance of not being late for a special appointment is reason for exceeding the speed limit. The command of a person in authority is according to Raz also a reason for acting. However an authority reason operates by being a reason for disregarding other reasons, as for example when an authority says that getting to appointments on time shall not be a reason for exceeding the speed limit. A fact (namely some order) that is both a reason for acting and an exclusionary reason for disregarding reasons against it Raz calls a protected reason for action.

Raz defines normative power as the ability to change protected reasons. Authority is the possession of normative power. Thus if a judge were to view the utterances of a legislature as authoritative, this implies that he accepts that they provide not merely reasons for acting, but for disregarding other reasons for acting. Does this mean that a judge, by looking to a legislature, need not therefore engage

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(b) Raz; J, The Morality of Freedom, Clarendon Press, Oxford, 1986, p.46. In this work he renames an authority reason a pre-emptive reason but the argument remains largely unchanged.
in the weighing and balancing of first order reasons for and against applying some statutory provision such as was discussed in the last chapter? Raz does seem to think that is the case. In criticism of Robert Paul Wolff's theory of moral autonomy, Raz says:

"It is true that accepting authority inevitably involves giving up one's right to act on one's judgment on the balance of reasons. It involves accepting an exclusionary reason."\(^5\)

Raz naturally concedes that his argument does not deny the possibility of anarchism. The anarchist will treat the commands of de facto authorities as merely further first order reasons to be weighed in the balance. But, says Raz, on the anarchist's part, his confusion is to seek to deny the possibility of second order reasons. It is not a necessary truth that what ought be done is what ought to be on the balance of first order reasons.

In one sense it is hardly necessary to disagree with Raz. If someone wished to treat the utterances of somebody as creating exclusionary reasons, then their reasons for acting might be characterised in the fashion described by Raz. Whether one wishes to differ from Raz over his claim that power to create exclusionary reasons for individuals is the essence of having authority might depend upon how important one considers the concept of authority. Raz says nothing that allows one to declare as irrational the position of the judge who adopts the anarchist's mode of reasoning. Raz

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\(^5\) Raz; J, op cit, p 26.
makes only one comment upon what determines whether somebody is recognised as authoritative. An exercise of normative power is so regarded, if it is desirable to enable people to change protected reasons.\textsuperscript{6}

It would appear that in the last instance whether one should recognise a body as authoritative itself depends upon the balance of reasons. Indeed it would appear that Raz also concedes that the exclusionary reasons can only be applied judgment by judgment. Presumably in each case a decision must be made about the desirability of recognising the relevant body as authoritative. It appears that the notion of authoritative reasons does not greatly assist the judge; there is no ground for believing that all the reasons which it was suggested in the last chapter will influence a judge in deciding whether to apply a law will not now reappear as reasons to be considered in deciding whether to recognise a body as authoritative.

10.3 The Judge: An island of freedom from society's demands

A claim by a legislature to be authoritative or a principle upon which there is a social consensus does not provide a solution to the dilemma caused by the possible conflict between a judge's moral beliefs and the demands of society. To solve this dilemma it is suggested a judge must

\textsuperscript{6}. Ibid, p 27.
be seen as an independent decision-maker. There are good reasons for society granting to judges an area where demands upon the judge are suspended and the decisions made by the judge are accorded the authority that political philosophy usually reserves for a legislature.

The suggestion just made proposes a very different view of the grounds of judicial authority from the traditional theory. Traditional theory would suggest that the authority of the judge is a legal authority derived from the laws that constitute the judicial institutions, and based upon the authority of those laws, an authority in turn grounded in the justification of the political institutions of the state.

The alternative view of the authority of judges also has its source in the traditional canons of juristic thought. It is developed from the doctrine of the separation of powers of which the most celebrated exposition is contained in Montesquieu's work, The Spirit of the Laws. Arguments of this nature come to the fore when legislative or executive government seeks to interfere with the conduct of the judicial process, or to limit its effect. Claims might then be made that there is a sphere of judicial independence that legislatures and executive governments can never be justified in breaching.

Latent in this claim for judicial independence is the suggestion that judges have an authority in relation to the application and interpretation of laws that does not merely
derive from the authority of State institutions. Whether one's preferred fundamental political philosophy is a social contract theory or other alternative, all these theories may be called upon to justify not only the legitimacy of the institutions of state, but also the existence of other institutions that in turn claim an immunity from interference by the state. Examples of such institutions, apart from courts, include universities that have always asserted a right to be self-governing and to pursue education and research free from the direction and control of the State. State owned and funded broadcasting and television stations, likewise, claim a right to an independent sphere of action and the right to attack government policies or socially popular issues.

The existence of these institutions claiming a right to a sphere of action free from government control or direction establishes bodies that assert a limited exemption from the control of the state. To this extent institutions might be compared with the position of citizens who claim rights to non-interference by the State in various spheres of their lives. It might be suggested that the claims by the institutions just mentioned, when properly analysed, are really disguised forms of rights of non-interference actually held by citizens. In rejecting the suggestion just made it is important to recognise that an organisation like a university is claiming not merely a right to non-interference, but an authority, and that this authority is not something merely delegated by the state. Thus a
university claims an authority over its students in the manner it teaches and examines them. What is asserted is therefore not merely a right to immunity from state action but an independent source of authority.

The fact that somebody might claim authority does not naturally conclude the issue, but the arguments that might be used to justify the legitimacy of the state might be varied to justify the authority of these independent bodies. Once again this is not to suggest that authority claimed by these bodies is derived from the authority of the State. Rather, such arguments would seek to show that it is desirable that society should have these bodies that are authoritative and independent of the State.

At this stage I wish to propose a further reason as to why it is desirable that judges should be free to act in accordance with their own moral beliefs. I suggest that in relation to the settlement of disputes involving particular individuals it is not possible to identify an authoritative claim by society. The notion that a judge should apply the moral views of society is thus questionable because we may find that no such one view can be found. If we cannot identify any moral view that can claim to be the authoritative view of society, then the best way to settle disputes is to accept the independent authority of professional dispute settlers who judge these disputes in accordance with their personal sense of moral duty.
10.4 Can society hold an authoritative moral view?

To support the view just mentioned, the first issue to consider in detail is whether a judge could ascertain an authoritative view of the moral principles of Society. This issue must not be confused with the status of the pronouncements of legislatures. As expressions of public opinion formulated through a just constitutional process they would usually be given great weight, but are clearly not decisive. Social views are often out of step with legislation. However the question asked here is whether one can speak of the moral view of society apart from its expression in statutes, and whether that should provide a judge with reasons for action.

Many writers speak of the judge ascertaining the views of society to assist him in his reasoning. Devlin asserts there is a public morality which represents the shared view of the society on politics, morals and ethics. These shared views are part of the social cement that makes possible the existence of a society:

"For society is not something that is kept together physically; it is held by the invisible bonds of common thought."7

How then does the judge ascertain the contents of these shared ideas? Devlin says of them:

"The moral judgments of society must be something about which twelve men and women drawn at random might after discussion be expected to be unanimous."\(^8\)

Even allowing for the partly rhetorical style of this explanation, difficulties are apparent. Devlin appeals in the last instance to the lawyer's notion of the reasonable man, the

"certain way of thinking on questions of morality which we expect to find in a reasonable civilised man or a reasonable Englishman, taken at random."\(^9\)

Devlin's theory might produce a few principles that would satisfy his test, largely in areas of serious criminal offences. Presumably nearly every citizen believes murder or armed robbery to be wrong. Beyond those issues Devlin's theory fails to deal with the existence of a pluralist society and the possibility of sharp division of public opinion upon important moral questions. Where, as is increasingly the case, there is no social consensus, the lawyer's reasonable man is likely to hold any number of different views depending upon his social position, class, educational background, religion and other significant social determinants.

Devlin's theory would appear unworkable, or only likely to produce any positive principles in a small range of clear

\(^8\) Ibid, p 15.

\(^9\) Ibid, p 15.
cases. What is needed if the idea of an authoritative public morality is to be useful is a means of choosing one view from the many possible positions and explaining why that view should be recognised as authoritative. Dworkin seeks to provide such a theory with what might be referred to as his doctrine of institutional morality.

Dworkin's position is considered at length in a later chapter but one aspect of his theory should be dealt with immediately. In Dworkin's essays, "The Model of Rules I" and "The Model of Rules II", Dworkin suggests that judges solve hard cases with the aid of principles. These principles are statements of great generality not applied in the mechanical manner of rules to all applicable cases. A single case may be governed by several principles that make conflicting demands. In such a case a judge would have to resolve these conflicts by ranking principles in an order.

If we ask which principles should be applied by judges and what weight should be attributed to them, Dworkin argues that only those possessing institutional support are relevant. The notion of institutional support does not allow of determination by some simple rule. Institutional support is exemplified by the principle having had prior recognition in reported cases, or having figured in the argument of those cases. Reflection in statutory enactments or preambles are further examples cited by Dworkin.10

Dworkin rewrote the positivist's question about the concept of law. It is thus truly not to the point to ask if Dworkin's principles are law in the positivist sense. For positivists, they appear to be in a twilight zone. One cannot formulate any conclusive test of validity to ascertain which principles should be applied. Yet despite not possessing the status of an authoritative statement uttered by a government elected under a just constitution, Dworkin clearly considers that these principles possess an authoritative claim on the attention of a judge.

Dworkin's theory of institutional support provides a means of selecting certain moral principles for the privileged function of justifying judicial decisions. Clearly Dworkin believes that by pointing to the institutional support for a principle the objection to judges exercising political power is satisfied. Indeed one of the functions of Dworkin's theory is to demonstrate that judges do not exercise any political power and only declare rights of parties discovered through legal reasoning.

Dworkin believes that his theory of institutional morality provides a set of moral principles that can assist judges in reasoning about hard cases and that are also authoritative. The possibility that a case might arise for which the set of legal principles is insufficient to provide an answer is unlikely. Aside from the sheer diversity and richness of the available legal principles, some are of great generality leaving no room for gaps in the institutional
morality.

Dworkin has provided a theory that might satisfy our first requirement, namely, a set of identifiable moral principles. The second requirement is that these principles have an authoritative status so that one could point to them as the authoritative demands of society. This second limb of Dworkin's argument will be examined here more closely.

10.5 The Independent judge and democratic principles

Dworkin's theory of the authoritative status of the principles of institutional morality is based upon a political theory that normative power (in Raz's sense) should only be exercised by democratically elected governments.\textsuperscript{11} If judges solve disputes by appealing to policies, they usurp the function of democratically elected governments and breach the democratic principle.

Dworkin defends his theory of the separation of powers by pointing out that judges are ill-equipped to reconcile competing social interests. They do not have the contact with lobbyists that keeps the politicians in touch with the interests of the various social groups. Judges should therefore eschew policy reasons.

One can only say that here Dworkin appears to be engaging

\textsuperscript{11} Dworkin; R, Taking Rights Seriously, Duckworth, London, 1977, p 84.
in some wilful naivety about the political process. If politicians are too susceptible to the lobbying process this is just as great a threat to democracy as the social isolation of the judge. People who vote for a politician expect him to follow a reasonably predictable course and not to be greatly influenced by particular lobby groups. Indeed the ability of lobby groups to influence politicians or distort the effects of public opinion upon the political process provides a good reason for divesting popularly elected assemblies of various segments of political power and conferring it upon the relatively more independent judicial sphere.

Behind the arguments of Dworkin and indeed behind those of most positivists is a conviction that representative democracy has a legitimacy that is lacking in the exercise of political power in any other form. The democrats hold that it is legitimate to compel citizens to obey a rule if that rule is promulgated by a government that is supported by the majority of the relevant population. It need only be a bare majority. Most democrats naturally place certain limits upon the extent of such majority rule necessary to stop persecution of minorities, or creation of other gross injustices.

It is at this point that the theory of legal reasoning enters the realm of pure political philosophy. It is difficult to reach any concluded position concerning the role of the judge without first settling these central
controversies of political philosophy. To provide such solutions would be beyond the scope of this work. I shall therefore offer as an alternative to the solution of these problems a suggested answer that provides a different reply to that of the democrat, but with certain practical advantages.

The suggested answer to these problems would avoid many of the practical difficulties facing a theory of adjudication that sought to rigidly apply democratic principles. Clearly modern sophisticated democracies can only have issues of the most major importance decided in truly democratic fashion. Matters of macro-economic importance, relations with foreign governments or major social reforms likely to affect large numbers of people are considered the province of governments. This clearly leaves large numbers of matters that affect few people, or don't involve major public spending. Such matters may be dealt with judicially or administratively. They cannot be dealt with by the legislature - the sheer volume of such matters makes this an impossibility.

If it is recognised that grave limits exist upon what democratically elected institutions can achieve, then the possibility of a law-making judge will be viewed as less of a breach of principle, and more as something socially necessary. The social necessity for law-making judges could only be avoided if all legally relevant human behaviour could be regulated by rules of such specificity that all future contingencies are foreseen, and mere mechanical application
of the rules is all that is necessary to provide solutions in all cases. This is far from being achieved by any existing legal system and, most theorists would agree, is impossible in principle.

It might be suggested that the last difficulty could be avoided by governments divesting themselves of power in favour of smaller community groups that could in turn consider a wider range of social problems. This will not eliminate the problem. If the problem of solving disputes is to be dealt with effectively then all parties to the dispute must be members of the same community in relation to the relevant rule-making body. If political power is decentralised to too great an extent then the democratic principle is subverted indirectly since the parties will often belong to different communities and whichever community assumes the power to solve a dispute between the parties acts undemocratically in relation to the party who belongs to some other community.

The points just made might appear trite but a more radical defence of independent judicial authority can be made out by examining the justification of democracy. Democratic governments are thought to have a right to exercise power or authority not possessed by other forms of government. If we challenge this claimed right of such governments successfully we leave the democratic institutions without any privileged claim.
If we are examining this issue in relation to the problem of authority, the central question concerns the supposed right of the state to claim obedience from a citizen who conscientiously believes the relevant law to be wrong. Clearly the citizen may have many reasons for obeying the law apart from a duty of obedience, not the least of which is a reasonable apprehension that any infractions will be punished. It is not possible in this work to exhaustively review the argument upon this topic, nor could one simply assume that there is no good grounding for the position that such a duty exists. What can be proposed here is a justification of democratic government consistent with the independent law-making authority proposed for judges.

Arguments for the right of the state to claim a duty of obedience from citizens have principally depended upon variations of the social contract argument. Utilitarian arguments do not naturally focus upon the question of rights. A utilitarian justification of the state will not produce any theories about duties of obedience or rights against authority. Nevertheless, utilitarian theories will provide reasons for having a state if the best social theories show the state to have a net beneficial effect upon the utilitarian calculus.

We could propose a utilitarian justification of democracy. This theory might describe democratic elections as the best means to deter governments from becoming corrupt, inefficient, and a threat to the people they are supposed to
protect. Such a justification does not see consent of the ruled as a crucial element in the right of the state to claim obedience. Indeed the notion of a right to claim obedience or the state's claim to legitimacy is transformed by utilitarian theory to concepts hardly recognisable to rights theorists. The actual form of the utilitarian answer will depend upon whether one adopts an act utilitarian or rule utilitarian theory. Act utilitarian theory would virtually dissolve any notion of a duty of obedience or a right to be obeyed.

The purpose of examining the utilitarian justification of democracy is to provide a pragmatic theory of the justification of the state. For such a theory the fact of a government's having been democratically elected is a merely contingent virtue. The best available social theory might establish that democratic governments would create less happiness for the greatest number than a monarchy. If that were the case then ceteris paribus the utilitarian should prefer a monarchy.

Utilitarians have generally been enthusiastic democrats. The presumption has been that democracy provides the best and most efficient form of government.12 It is not the concern of this work to challenge that presumption, but the utilitarian assumption leaves much more room for judicial

law-making than the rights based justification of the state. The assumption by a judge of law-making power is not a breach of democratic principle unless it produces a reduction in the total benefit to society.

Reviewing the position now reached, it has been suggested that the objection to judges exercising an independent moral choice is based upon the democratic principle that only democratic governments should be able to make or alter legal rules. Two objections have been raised to this. Firstly, it has been suggested that if the democratic objection is the basis for objecting to law-making judges, then the strength of the objection will depend upon the strength of the democratic position. I suggest that political philosophy has not yet provided a coherent account of the reasons a minority should have a duty to obey rules they believe wrong simply because these rules have the support of the majority of citizens in the community.

The last objection can of course cut two ways. If democratically elected governments cannot claim a privileged position in regard to the exercise of state power, this could be because no state has any legitimate authority.\textsuperscript{13} Alternatively, the state might be justifiable without needing to claim the imprimatur of democratic elections. In this event judicial law-making would not pose any special problem.

\textsuperscript{13} Wolff; E P, "In defence of Anarchism", Harper & Row, New York, 1970.
The second point made has shown that one theory of the justification of the modern democratic state is not inconsistent with a law-making role for judges. No independent argument has been put forward to support the utilitarian justification of the state, rather, it has been argued that the theory provides a justification of certain common practices. It is also suggested that certain democratic arguments would demand that society be governed in ways that are not practically possible. The attempt by Dworkin to provide a theory that satisfies a stringent democratic standard and a practical solution to the need for solving disputes will be examined in a later chapter.

The points argued above have sought to establish that there are no objections from the area of political philosophy to a claim that judges should provide an independent source of authority, rather than operate as a cipher for the authority of a legislature.

This chapter commenced by suggesting that if we ask the question, 'what might society demand of a judge?' then this appears to create a difficulty if we give an answer to that question that differs from the moral view of a particular judge. It was conceded that in the face of an authoritative demand by society, a judge could not justify to society his decision to resist that demand by insisting on a right to act consistently with his own moral beliefs.

In the face of the dilemma created by conflicting
possible demands upon a judge's choice of action the argument of this work has sought to show a way out of the dilemma by denying that the moral consensus of society should be accorded any authoritative status. This argument could be viewed in two lights. Firstly, it is argued that judges should be granted an independent authoritative status to which society should defer. Put shortly, it is suggested that society should not make demands upon judges of the sort originally suggested.

The second side of the argument in this chapter seeks to establish that the existence of a moral consensus in society or Dworkin's institutional morality should not be interpreted as an authoritative demand upon the judge to conform with that majority view. This part of the argument was supported by examining the basis for the claim that society's moral position is authoritative. If this claim is based simply upon the principle that only moral rules having democratic support can be applied to solve disputes, then the claim depends ultimately upon the extent to which democracy is justified. The argument concluded by suggesting that not all justifications of democracy require so extensive an application of the democratic principle as to oust all judicial law-making.

10.6 Golding's objection to legal pragmatism

The argument has now reached the point where it can provide an answer to a further possible objection. Professor
Golding has suggested that the theory of judicial decision-making advocated here cannot explain a common legal phenomenon. Judges in parallel jurisdictions called upon to decide cases that are nearly identical may hand down different decisions. Lawyers might speak of both cases as being correct or as deciding the law for two separate states without any sense of paradox.\(^\text{14}\)

It is suggested that these cases lead to the following objection. If the cases are relevantly identical then if we ask what a judge ought to do, we would conclude that each judge should act in the same way. In our hypothetical example the judges reach different decisions but these are both recognised by lawyers as correct decisions within each judge's particular jurisdiction.

The usual explanation for judges in parallel jurisdictions reaching different legal conclusions points to differences in the existing legal precedents, or statutory materials. The clear implication behind Golding's objection is that although the precedents and statutes might be different in the two cases the moral implications of the facts are identical. An ethical analysis of the decisions could not therefore justify the different conclusions, and they can not both be called correct. The fact that lawyers may refer to both decisions as correct demonstrates that the basis of legal reasoning must be other than contended for in

\(^{14}\) Golding; M, _Legal Reasoning_, Knopf, New York, 1984, p.60.
this thesis.

The reply to the objection should now be clear. Even though a judge ought to consult his moral duty rather than merely apply legal materials like some form of legal computer, past decisions and legislative enactments affect that moral duty. The assumption that in describing the facts of each case and finding them identical the moral duty of judges is identical ignores these other matters that affect the judge's moral duty.

With many instances of such judicial divergence the positivist claim that both decisions are 'correct' ignores the common practice of lawyers to engage in doctrinal criticism of decisions. Legal practice rarely results in such consistent acceptance of decisions as 'correct'. Without such a practice the objection does not even possess a viable basis.
11. THE THEORY OF HART: DO THE LEGAL 'OUGHT' AND THE MORAL 'OUGHT' HAVE THE SAME MEANING?

11.1 Introduction

It might be suggested that simply because the nature of judging is susceptible to analysis in terms of practical reason it is neither obvious nor necessary that the 'ought' of a legal judgment is a moral ought. The last few chapters have presented several arguments by which it has been sought to show the equivalence. This chapter returns to the task but from a slightly different angle.

The arguments to this point have proceeded from an investigation of the moral justification of laws to the conclusion that judging is itself a moral task. This chapter examines a theory; that of H L A Hart; which propounds a radical separation between whatever moral and political values might justify laws and the imperative of a judicial pronouncement. Hart would accept that judges and litigants speak in imperative not propositional terms. Laws are rules and members of the legal community view them as statements of duty not statements of fact.

Hart views judging as an exercise in practical reason, but denies that the legal ought is a moral ought. There is, according to Hart, a self-contained world of legal imperatives not logically dependent upon any moral premise,
and it is these imperatives that provide the justification of a judicial decision. This chapter will examine this part of Hart's work and seek to show that this attempt to present a self-contained theory of legal imperatives does not provide an adequate theory of legal justification.

11.2 Legal Normativity

Hart has stressed the positivist flavour of his theory by describing it as descriptive sociology. Despite this announcement, Hart has never really engaged in a description of law in the fashion of American jurimetrics. Hart sees the task of jurisprudence as an investigation of the normative aspect of law; he believes that investigation of this normative aspect of law is not an investigation of any part of Society's moral norms.

The product of this investigation becomes Hart's theory of legal normativity. Legal normativity is of the same logical nature as moral normativity, but their content exists in parallel. The notion of legal normativity can be explained thus: if someone says to another during a game of chess 'You must only move your pawns one square at a time, except upon their first move,' clearly normative language is being used. Prima facie, any obligations referred to are not moral obligations, but imply the obligations imposed by the rules of chess. The meaning of the 'must' is not the same as the meaning of the word in a moral context. The fact that the chess imperative and the moral imperative utilise an
almost identical grammar does not provide a warrant for confusing these two separate forms of obligation.

Accepting for the moment the analysis just described, it is obvious that there is an infinite number of parallel normative systems, and with them an infinite number of different meanings for 'ought'. It is worth briefly returning to examine one other important normative system for the purpose of comparison. Aesthetic normativity provides an apparently fully autonomous normative system. We might commend something as good in the aesthetic sense, or state that a design ought to be done this way rather than that, without thereby intending to make any moral comment upon the work.

It would be wrong to accept that this distinction between aesthetic normative criteria and moral normative criteria is universally accepted. Vladimir Nabokov in his literary criticism championed the distinction and condemned attempts to judge works of art by moral or political criteria. He insisted that artistic worth was utterly independent of the moral or political message of a work. This position is rejected by many, and in the present century, the artistic establishment of the Soviet Union, certain religious groups, and moral conservatives, have

1. See 5.5 Supra for earlier discussion.

sought to base aesthetic judgments about works of art upon moral and political criteria.

To the Soviet style socialist-realist, or to the moral puritan, the aesthetic positivist might reply that they are simply confused, that they may intend to politically condemn a work, but this must be a different issue from judging its artistic merit. Unfortunately, for the positivists, there seems no way of blocking their opponents from insisting that a work cannot be aesthetically good that does not incarnate certain moral values. If a person insists that a picture of moral virtue is beautiful and of moral evil ugly, then there appears to be no way of rationally persuading such a person to separate moral and aesthetic criteria.

It can be seen that the first strategy the positivist might adopt in this dispute is to insist that his opponent is mis-using language. Our socialist realist art critic is just stubbornly refusing to accept the conventions of language. But there is a further level to which the dispute can go. Someone might insist that moral criteria may describe a certain kind of phenomenon, and the aesthetic experience involves the very same phenomenon. If someone suggested that the basis of moral beliefs was a moral emotion, then it could be argued as a matter of psychological fact that the aesthetic emotion was not different in any significant sense, and it is only a convention to distinguish between them on the basis of their objects.
The positivist response to this tactic would no doubt cover the position from doubting the existence of such phenomena to the simple ploy of suggesting that empirically it seems just as probable that there are different phenomena for each normativity. However, realism about moral or aesthetic phenomena suffers from the problems of realism in logic or mathematics and Hart's reply would no doubt expound upon Wittgensteinien theories about mathematics and language.

The inadequacies of the realist position are highlighted by returning to the chess example. We use normative language to explain how to play chess because explaining how to follow particular rules is a different linguistic activity from describing an object. Normative language is the way we engage in rule-following practice. However, morally normative criteria can still be applied to these activities like chess playing. We might say to someone that he ought to make move x for moral reasons; because he ought to let the other person win, or give him a further chance, or for any number of possible reasons.

If we were to give moral advice to a chess player as in the previous example, it would be clear that although using normative language, we were advising not according to usual chess-playing norms but according to a different viewpoint; the moral point of view. Now this appears to be identical to Hart's position, namely, that the law is a set of rules with its own normative criteria, and while we might also apply moral criteria to these rules, that should never be confused
with the independent legal criteria.

Hart greatly confuses this discussion by persisting with the use of the word 'obligation' to describe the normative sense of legal statements. He then asks whether it is to explain the basis of legal obligation that people assume that it is founded in moral obligation. Legal obligation is, however, only a term to describe the normative character of legal discourse - namely, the fact that we can make legal 'ought' statements. This, of course, no more implies connection with morality than the fact that we might say in chess, 'Bishops must only move diagonally,' implies connection with morality.

The fact that society contains legal institutions distinguishable from the other manifestations of moral conduct provides a basis for insisting that legally normative statements are different from morally normative statements. But does the fact that society contains distinct social institutions and practices mean that there can be no connection at all between moral and legal reasoning? Hart argues that there can not. He appears to argue thus: if legal reasoning is dependent upon moral reasoning, then we must have assumed that legal and moral obligations are identical, but since by the legal ought we mean something different from the moral ought, we cannot combine them, and therefore legal reasoning cannot be dependent upon moral

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reasoning.\textsuperscript{4}

The un-argued jump in this line of reasoning is Hart's assumption that any dependence of legal reasoning on moral reasoning would imply that legal and moral obligations are identical. Certainly this work views legal reasoning as simply a branch of moral reasoning, but this does not prevent it from possessing a distinctive nature. The official position of the judge compels him to consider matters that do not have to be considered by the normal moral agent. The reasoning and the conclusions of the judge will therefore always bear the distinctive mark of his adjudicative capacity and in this lies its legal nature.

11.3 The internal/external distinction

In arguing that the basis of the legal ought lies in the special moral considerations that operate for a judge because of his adjudicative function, the nature of the legal ought is explained. The judge must exercise his faculty of practical judgment whenever he judges, so that his decision, although cognisant of legal culture, will be inscribed within the larger framework of his moral view of the world. For the judge, the legal and moral ought coincide. The judge simply judges, but what is for him a decision, based on his sense of practical judgment, is for everybody else describable in terms of 'the law' and by the use of legally normative language.

\textsuperscript{4} Hart; H L A, op cit, pp 149-153.
The error of the early positivists was to assume that the recipient of a legal command or order who behaves in accordance with it because of an immediate threat of punishment provided a suitable form for the phenomenological account of all legal activity. Hart correctly recognised (and in this lay the descriptive sociology) that there is much conduct in society that might loosely be termed legal in nature that does not fit the command/threat model.

In replacing the earlier forms of positivist reductionism with the more sophisticated concept of rule-following that had been developed by Wittgenstein, Hart emphasised the analogy between law and language. The speaker of a language follows the rules because of his facility and adeptness at so doing, not because of threatened punishment if he fails.

Wittgenstein's theory of language and rule-following undergoes a subtle change when translated by Hart to an account of law. One would not speak of a language user as having assented to the rules of the language. If one does not follow the rules of the language one simply will not be able to utter anything. Hart develops the notion of 'assent' as a critical part of his theory and a distinction between his theory and that of earlier positivists.

Hart correctly points out that the use of normative language does not establish that moral judgments are being made. One can speak about things as prohibited or obligatory
without intending to use moral language. By expanding this notion to create a theory of legal normativity we can according to Hart discuss legal rights and duties in a detached way. If the legal rule coincides with our moral judgment on the issue, it may be difficult to decide whether a statement is a detached statement of the legal ought, or a committed statement of moral belief. When a person (perhaps a sentencing judge) says, 'Armed robbery is an atrocious crime,' the same statement would appear to bear both such interpretations. This statement might be translated into 'Armed robbery, as viewed by our legal system, is heinous, and I agree with that view'.

Hart further develops this idea of detached and committed statements of legal rules in a fashion different from the simple example in the last paragraph. An anthropologist might make a detached statement about a legal rule when, say, asserting as a fact that a community has a certain rule, and that they accept its existence as a reason for acting. This, says Hart, is different from "the internal statement of a rule made by one who accepts it."5

This distinction of Hart's is hard to maintain. The anthropologist reporting on a rule may use normative language in just the same fashion as a member of the object community. Our anthropologist may restrict himself to purely factual assertions, for example, 'People who hit cows with sticks

are forced to give one rack of corn to the village chief.' If our anthropologist chooses instead to report this as a social rule, he will use normative language this way: 'People are prohibited from hitting cows; offenders will be fined one rack of corn.' It is difficult to see how the anthropologist's statement is the least bit different from the internal statement of a member of the community who accepts the rule, albeit he morally dissents, 'I do not hit cows because it is prohibited, but I think it is a silly law.'

Raz enthusiastically supports this theory of Hart's. He summarises the distinction in these terms:

"External statements about the law are statements about people's practices and actions, attitudes and beliefs according to law.

Internal statements are those applying the law, using it as a standard by which to evaluate, guide or criticise behaviour."  

Yet, despite the insistence of Raz that these two modes convey different meanings, both can be couched in exactly the same terms.

Raz provides an example which clearly illustrates the view he takes of the distinction. One could imagine an ill-informed Jew asking a Catholic friend, who is expert in rabbinical law, what he should do in a particular situation.

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The friend might naturally give a reply in accordance with rabbinical law, meaning not what he thinks the friend should really do but what he should do according to rabbinical law. What both Hart and Raz have clearly identified is that when uttering certain imperative statements I might have a number of different attitudes or beliefs about them, but this cannot affect the meaning of those statements. What Hart and Raz suggest is that the presence or absence of a private mental assent alters the normative meaning of the statements.

We can imagine a similar example where A does not know what is the mental state of B (the maker of the statement). On Hart and Raz's view, A would not know whether an internal or external statement is being made. This might well be the case, but it is also true that A still knows just as much about the rules being discussed as if he knew whether the statement was external or internal. All that A will learn when he discovers what B's attitude is, is certain facts about B's attitudes and beliefs.

We can therefore conclude that while the internal/external distinction is useful in reminding us that not all normative statements report the beliefs of the speaker, it tells us nothing further about the meaning or logic of normative statements.

Hart was right to criticise Bentham and Austin for seeking to reduce normative legal statements to statements of factual matters such as states of mind, or the application of
force, but once a speaker resorts to normative language, there is no further logical distinction to be made. The anthropologist reporting a quaint custom, and the native who believes deeply in its sacred importance, both mean by their reports exactly the same thing, namely, that there is a rule prohibiting cruelty to cows. The difference in attitudes lies only in their different moral or religious beliefs, the very things Hart was seeking to exclude from his definition of the internal legal point of view.

Two ways to discuss legal phenomena have been discussed. The first is the reductionist project which seeks only to report factual states of affairs. This methodology was dealt with in Chapter 2 and has been convincingly criticised by Hart. The other way is by descriptions of law as rule following processes. This second method draws support from the social phenomenon of rule-following practice. Nothing in this sociological observation however dictates to a judge that he must restrict himself to justificatory reasons that are solely drawn from past adjudications and the contents of statute books, and exclude from influence upon his decision any other sort of reason.

Hart might make further reply to this. It could be conceded that legal rules and the legal obligation upon a judge do not imply any supererogatory duty to decide a case in accordance with pure law. Nevertheless, as a game of chess is characterised by being played according to the rules of chess, so a legal system is characterised by being
administered in accordance with legal rules. A judge is someone who decides a case according to the legal point of view.

A reply like this, which makes language use the final court of appeal, can naturally do no more than provide us with a theory about the use of words. Hart might still accept this but make one last point: given that judges could abandon the legal point of view and act as original moral agents that would be a different state of affairs from what presently exists, and a judge need not chose to act as a private moral agent, because the legal point of view provides a self-contained and logically consistent method of justifying decisions. To this issue I now turn.

11.4 Can Hart's Theory of the logical sufficiency of the internal legal point of view provide a complete theory for the justification of legal decisions?

One counter argument to Hart's position was outlined in Chapter 7 when developing the theory of the judge as a private moral agent. That counter-argument was, for want of a better description, referred to as the 'argument from the constitutional paradoxes'. The argument outlined here looks at legal language generally, and the inadequacy of an 'internal' viewpoint for normative systems when deployed as justifications for conduct outside of games.
The reply to Hart relies essentially on the arguments developed by Dworkin. To explain their force, it is necessary to work out a clear difference between a rule system such as law and the rules of games. Choosing chess again as an example, one can say of the rules of chess that they are purely constitutive as opposed to regulative. This is a distinction that has been used by a number of writers and has been criticised by Raz\(^7\) and Warnock\(^8\) - critics who have used Searle's version of the distinction as representative of the theory.

Regulative rules regulate by ordering or prohibiting natural acts. Constitutive rules provide the definitions of new sorts of behaviour that are only brought into existence by the rules that govern the conduct. Thus chess as a game of skill is only brought into existence by the following of the rules of chess. By contrast, one can commit murders or robberies quite independently of the existence of a social rule prohibiting such conduct. Searle believed that certain legal acts were governed by constitutive rules; for example, the making of a will or contract is only possible because of the laws empowering people to do these things.

Raz criticises this distinction for being without any real difference. Searle bases his logical distinction on the


suggestion that behaviour governed by constitutive rules cannot be described without reference to the rule. But clearly even the moves of a chess match can be described without reference to the rules of a game (for example, moving a wooden piece around a chequered board). It might be objected that this description leaves out the rule following aspect of the behaviour. But if we insisted that our description capture that aspect of the behaviour, then all rule-following would collapse into the constitutive definition.

Warnock accepts this form of criticism of the distinction but accurately describes the residual insight which the distinction does capture. There is a distinction, says Warnock, although

"broad and rather woolly ... between two different 'objects' of rules, or reasons for having them. It is not the object, presumably, of the criminal law to create the possibility of committing criminal offences, though of course it incidentally does so; the object is to 'regulate' in certain respects the conduct of members of society. By contrast, while the rules of say, soccer do regulate the way in which balls are kicked about in fields, it is in this case the object of (some of) the rules to 'constitute' a certain exercise in physical skill ... to 'create' a particular game for people to play." \(^9\)

This passage has been quoted at length because it captures one of the most important aspects of the nature of law. The weight of the argument in Chapter 5 was addressed to showing that rules of law always have as their object the

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\(^9\) Warnock; G J, \textit{op cit}, p 38.
furtherance of a moral principle. This is so because the existence of law could not be rationally justified except by appeal to a moral principle. Warnock's treatment clearly captures this notion of the justification of a rule, law being a regulative, as opposed to constitutive, rule system par excellence.

Warnock's reference to the 'object' of the system is the critical link to the present argument. A later chapter deals with Dworkin's theories of legal reasoning and legal interpretation which emphasise the object of legal practice as the crucial element in resolving conflicts and uncertainties in the meaning of legal rules. Dworkin sought the object of legal practice in the moral and political values that underpin our constitutions and political system. These values according to Hart's theory of legal normativity are external to the set of rules that comprises the legal system.

If law is a regulative rather than a constitutive rule system, it would appear inevitable that its object would be located outside the zone of legal normativity. Can we have a theory of legal justification that does not require advertence to the objects or purposes of law? The arguments propounded to this point would obviously suggest the possibility is unlikely. If legal decisions are as little dictated by deductive reasoning as has been suggested, then judges must be continually making choices and evaluations about how to solve legal problems without being able to
deduce these solutions from legal rules. If the arguments of the sceptics are accepted, then a judge can never deduce a judgment from legal rules in the strong sense. Legal justification must therefore always proceed with an eye upon the moral and political ends that law must serve. If this were not done, then legal reasoning would assume an arbitrary quality, and legislatures would have to be constantly repealing impractical and anachronistic decisions.

Despite these objections can any sense be made of the claim that there is a legal point of view as opposed to a moral point of view? It has already been pointed out that a judge's official capacity may alter the things he believes to be morally relevant to his decision, but this does not imply that his point of view is not a moral or political one.

A purely legal point of view would in fact be rather peculiar. The oddness can be highlighted by examining a strange claim in a standard Australian text on constitutional law.

In his opus on the Australian Constitution\(^\text{10}\), P H Lane comments upon the extent of the Commonwealth of Australia's power to make laws about the family and marriage. Criticisms were often made by those involved in the practice of family law in Australia about problems that arise from the division of family law powers between Federal and State governments.

\(^{10}\) Lane; P H, Australian Federal System, Law Book Company, Sydney, 1979, p.214.
This division arose as a result of the terms in which the constitution conferred power upon the Federal Government to make laws with respect to marriage.

Against the background of these criticisms Lane says that from "a constitutionalist's point of view the grant of power to the Federal Government is a generous grant". Apart presumably from Lane, most people would find this statement paradoxical. If we assume the position of the family lawyer might be equated with that of someone concerned with the social and welfare problems surrounding families, then there appear to be no further evaluative criteria left. The notion of a constitutional point of view severed from the social and political purposes served by family law must represent a mistaken view about evaluation and legal justification.

If one sought to argue that a legal point of view provided a self-sufficient ground for the evaluation of conduct, a similar error to Lane's would be committed. One could assemble various judgments from purely legal sources, but they would not provide a basis for a judicial decision. Without having taken cognisance of the purposes of law, the judgments produced by the 'legal point of view' might be utterly lacking in any common sense or moral value. Unfortunately, courts do occasionally reason in this fashion.

In 1979, the High Court of Australia found that the convicted felon Darcy Dugan was unable to bring a civil action because he was serving a period of penal servitude for
a felony. This conclusion was based on reasoning that the law of New South Wales included the doctrine of attainder, which had been brought from England to Australia between 1788 and 1828\textsuperscript{11}. The reasoning of the court was notable on this occasion for its refined consideration of the implications of the eighteenth-century English common law doctrine of the attainting of the felon's blood! (See comments of Murphy J.) The result of this type of reasoning is that the legislature must immediately intervene to restore a match between rules propounded by courts and the social and political ends that such rules are supposed to serve (see \textit{Felons (Civil Proceedings) Act 1981 (NSW)}).

If there cannot be a workable internal 'object' or 'legal point of view' we must doubt whether there can ever be a theory of justification for judicial decisions that is founded upon 'pure legal normativity'. Law being a regulative rather than a constitutive rule system the process of legal justification must always point to the moral and political ends that law serves. The legal ought will thus never provide a sufficient justification for a judicial decision.

In an important article\textsuperscript{12} Beyleveld and Brownsword consider this issue and put forward an argument showing that

\begin{itemize}
  \item \textsuperscript{11} Dugan v. Mirror Newspapers, (1979) 142 CLR 583.
\end{itemize}
it is not possible to develop a coherent concept of non-moral obligation. The authors conclude that this leaves a choice between legal idealism being a theory of law based on moral obligation and legal realism which appears to be a causal theory of legal validity. They do not chose between these two theories leaving that decision for another day, but noting that:

"Our arguments in this paper do not even begin to address the question of whether practical reason presupposes moral reason, this being the question which lies at the centre of the theoretical debate." (p.512)

The point upon which the authors just mentioned see the debate turning is a little odd. Practical reason clearly does not presuppose moral reason in the sense that prudential imperative statements are not moral statements but are nevertheless nonpropositional and only capable of formulation within the canons of practical reason.¹³

The reason that legal imperatives are necessarily moral follows from the nature of law being conduct, the ends or purposes of which are purely moral.¹⁴ Not all practical reasoning presupposes moral reason, but all legal reasoning presupposes moral reason in the same fashion that for instance any reasoning about the justification of war would presuppose moral reason.


¹⁴. Infra, chapter 5.
11.5 What does 'legal' really mean?

If there is so little left of any distinction between the 'legal' and the 'moral' why is there still continual reference to 'the law' or 'legal rule' and to 'judges' and their 'official capacity'? Does this not show that we need some residual notion of law as a constitutive set of rules, and a legal point of view. The criticism might be strengthened by asking how, if judges are purely moral agents, can we identify a judge from some mere self-appointed adjudicator. If one appeals to patterns of socially existing rule governed behaviour to identify judges has one not reverted to Hart's descriptive sociology and abandoned the principles of legal pragmatism expounded in this work?

The difficulty just mentioned is a product of attempting to use one analytical tool for all purposes. The identification of social institutions and the justification of adjudicative decisions are quite different intellectual tasks. The identification of a social institution does not require that the institution define itself by an internally sufficient set of rules that simultaneously provide any practitioner with the only means by which he can speak about it. As was pointed out in an earlier chapter the fact that we have laws about marriage does not mean that without a legal system we cannot have marriage, or speak about marriages.
A more perfect analogy is institutions like the Catholic or Anglican Churches in which one would struggle to find any rules of recognition, and individual clerics (at the risk, perhaps, of excommunication) regularly re-appraise significant portions of dogma, so that at the present time one even reads of senior church figures being described as atheists. One does not, or cannot, apply some straightforward litmus test to ascertain who are, or are not members of a Church. Our continued use of the terms 'Catholic' or 'Anglican' does not by the fact of language use establish that there must exist some hard core, or cluster of internal norms, or rules such that should we seek to join the institution we necessarily commit ourselves to some or all of these rules.

The judicial order, if effective, has an institutional existence. People part with money or go to jail if they disobey, bailiffs seize property, or whatever. This institutional existence is not dependent upon the moral correctness of the decision, or for that matter even its legal correctness. This very real institutional existence well deserves the description of being legal. Legal officials thus make legal orders and enforce legal rules, but this does not mean that the reasons or justifications must conceptually be purely legal. I might build a bridge for moral reasons. There is nothing conceptually moral about a bridge, but this does not prevent my reasons for putting it there from being moral.
We need the term 'legal' to describe the judicial order. This describes the social and institutional significance of the judge's utterance. For the lawyer and his client, the judge's reasons may also be described as legal, for they may well not be the reasons that the lawyer or the client would have used. But for the judge, his reasons must simply be the best rational justification he can offer for his decision.

The conclusions of Hart's positivism point out the normative character of legal decisions, and their independence from the observer's moral viewpoint, but Hart's conclusions cannot provide the judge with any guidance in solving a legal dispute, and justifying that solution. One could apply the principles of descriptive sociology to the institutions of organised political life. One would easily isolate particular institutions, and norms and practices that characterise them. None of this would assist a minister faced with making a decision who must simply make what he believes is the best decision as measured by moral and political principles.
12. DWORKIN - LAW AS INTEGRITY, A RETURN TO CRYPTO-IDEALISM

12.1 Introduction

Dworkin's theories of legal reasoning provide the counterpoint to Hart's legal philosophy. Dworkin, more than any legal philosopher since the early American legal realists, returns to the process of judicial decision making as the fulcrum of jurisprudence. From Hart's own characterisation of his theory as 'descriptive sociology', Dworkin returns the debate to the question of how judges should decide cases. In the last twenty years Dworkin has propounded three different answers to this question. These answers might be read as refinements of each other, the latter answers not necessarily involving the rejection of all that was contained in the earlier.

Each of Dworkin's answers has grown from a defence of a doctrinal view of law. Dworkin does not view the analysis and discussion engaged in by judicial officers, and recorded in reports of decided cases, as so much 'dressing up' of a political or social prejudice, nor even the post hoc justification of a judicial hunch. Judicial argument is important for Dworkin because judges manipulate not just rules, but theories and doctrines, and the content of these theories and doctrines is often controversial.

Dworkin clearly identifies the process of judicial
decision-making as being consciously concerned with the purposes of law. Since these purposes are in Dworkin's view always moral and political aims, law is therefore always concerned with moral and political theories. Yet, despite the pervasive presence of politics in law, judges according to Dworkin are not partisan in the way that one expects of politicians to be.

Each of Dworkin's proposals for a method of judicial decision making require judges to reason about politics and morals, yet this reasoning is not done in the same fashion as a committed adherent would reason about his own moral or political views. Dworkin departs from the positivist views of philosophers like Hart in describing law as an activity concerned with politics and morals in a strong sense. Yet Dworkin, in keeping with the positivist tradition, maintains that judges preserve a degree of neutrality in that they do not simply apply their own moral views.

One of the concerns in Dworkin's writings, especially the earlier writings, is a criticism of Hart's theory; firstly in regard to the inadequacy of rules alone as a sufficient description of the nature of law, and secondly, a criticism of the view that judges in hard (difficult) cases exercise a discretion and in effect make a new rule. This chapter will not dwell upon Dworkin's criticisms of Hart; they are implicit in the alternative theories that Dworkin propounds. What this chapter will do is examine Dworkin's claim that law provides judges with a body of theories and
doctrines which they apply, albeit interpretively, or hermeneutically, and that they ought not to, and do not, simply decide cases in accordance with their own moral beliefs.

12.2 Dworkin's first theory, rules and principles

The first of Dworkin's theories is outlined in the two essays "The Model of Rules I" and "Model of Rules II". In these two essays Dworkin develops his first theory from his criticisms of positivism. The theory provides an antidote to what Dworkin views as the most glaring problem with Hart's positivism.

If law is a set of rules, and the rules have arisen from past social practices, the issue of how to govern modes of human conduct not covered by the existing rules will not be decidable simply by the application of those rules. Likewise, wherever the meaning of the rule is not sufficiently clear judges will need to resolve the ambit of the rule's application by original choices about how far the rule should be permitted to extend.

The difficulties for positivism just mentioned have arisen because positivism, according to Dworkin, seeks to give a complete description of law relying only upon the phenomena of social rules. Dworkin concedes that rules do

form part of a legal system. In using the term 'rule', Dworkin does not mean anything much different from conventional usage. Rules bind a judge in a strong sense. A rule cannot be ignored or not applied because the rule may be inconvenient. If the result of applying a rule would be inconvenient, then that can only be avoided by finding an exception to the rule or some means of legitimately distinguishing the circumstances of the case from those to which the rule should normally apply.

Dworkin departs from the theories of positivists like Hart in suggesting that legal systems also contain what he terms 'legal principles'. These legal principles differ from rules in not being absolutely binding upon a judge. Dworkin also distinguishes principles from policies. A principle, says Dworkin,

"is a principle of law [if] the principle is one which officials must take into account, if it is relevant or a consideration inclining in one direction or another"\textsuperscript{2}.

Principles are standards which should govern human conduct but not in the absolute fashion of rules. Dworkin makes the distinction clear with examples. The maxim 'no man may profit from his own wrong' is a legal principle and standing on its own, is not sufficient to determine the outcome of some concrete case. By contrast, the requirements

\textsuperscript{2.} Dworkin; \textit{R}, op cit, p.26.
for the execution of a valid Will are rules.\\n
Principles are clearly distinguishable from policies in that policies are concerned with social goals. The minimisation of poverty, promoting the construction and supply of low-cost housing; these are policies in that they represent social goals capable of being realised in a host of different ways. If we believe in democratic principles and believe that it is the function of judges to apply laws, not to legislate, then judges ought not to decide cases by choosing the result which would promote social goals or policies. In a society governed by the rule of law, it is the function of judges to apply existing legal standards. Litigants have a right to that result dictated by the correct application of existing legal standards.\\n
The legal system does not therefore contain policies. It is the function of the legislature to concern itself with the promotion of social goals, and in a society governed by the rule of law, it would do this through legislation. The legal system contains rules and principles. Rules are applied in concert with principles, principles providing amongst other things the guidance in hard cases that permits a judge to discover the legal answer. The best explanation is again achieved by an example. Dworkin's own example uses

\[\text{Dworkin; R, op cit, pp 26 and 27.}\]

\[\text{Dworkin; R, op cit p.44}\]
the decision in Riggs' case in which a New York court decided to limit the right of an heir named in a Will, albeit that the Will was validly executed in accordance with the statutory requirements. The heir had murdered the testator. No existing rule disqualified the heir from his inheritance. Nevertheless, the court, appealing to the maxim that no-one should profit from his own wrong, decided that the rules would not be given literal force so as to permit inheritance.

As Dworkin correctly points out, the law reports are filled with references to principles, maxims and standards, and judges frequently rely upon them in reasoning their own way to a conclusion. The judges in Riggs' case could find numerous past instances of reliance by judges upon some such principle as 'no-one should profit from his own wrong' The principle had 'institutional support'.

The controversies about Dworkin's distinction between principles and rules will be by-passed in this work. Although Dworkin has since modified his views to produce what might be called the interpretative theory of law, it is worth pausing to enquire whether the notion of principles as just outlined provides a model for judicial decision making which avoids the more radical aspects of the pragmatic theory outlined in this work.

Dworkin's principles are clearly moral statements.

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However, they differ significantly from moral beliefs. A judge's decision to apply a Dworkinian principle is determined by the principle's applicability to the facts, and its degree of institutional support. The judge applies the principle not because he believes that it is morally right, but because principles of legal validity select that principle as the one appropriate to that case.

By divorcing the judge's decision to apply the principle from the judge's belief about whether the decision obtained by applying the principle is morally right or wrong, the difficulties in basing legal reasoning upon the positivist concept of rule following reappear in regard to principles. Returning to the argument form deployed against rules in Chapter 7 we can now inquire of Dworkin from where comes this obligation to apply a principle because it is found to have institutional support. Presumably the answer would be that judges must have a theory about their function and role and that this theory tells them that they ought to follow a particular a principle. This theory could be none other than a moral theory.

Legal pragmatism dictates that a judge's action in making a particular judicial decision can only be justified by reference to moral reasons. Speaking in positivist terms, our moral theory determines which rules we should apply. If we add 'principles' to our juristic armoury little changes. A judge should apply principles because his moral theory selects those particular principles as the correct ones to
There is perhaps a certain oddness about speaking of a judge's moral beliefs choosing a principle to apply to a case. The very nature of most Dworkinian principles so closely mirrors a moral statement that in most cases of judicial justification, it would seem artificial to distinguish between the judge's moral beliefs and the application of principles. Choosing as an example the principle that a person ought not to be permitted to profit from his own wrong, this is itself merely a moral precept. Although judges may look to past instances of the use of such a principle as a warrant for its use in the instant case, its justificatory function surely follows as much from the fact that judges relying upon this principle believe that a person ought not to profit from his own wrong, as from the fact that past judges have deployed the principle in analogous circumstances.

Dworkin's theory thus appears to straddle two opposing views of legal reasoning. On the one hand, principles appear to suggest that judges justify their decisions by, in many cases, an appeal to moral statements. On the other hand, the requirement for these principles to have some institutional support suggests that a theory of legal validity still lurks in the background and that the positivist framework has been maintained, albeit principles have now been added to the armoury of concepts along side rules. This ambiguity subsists in Dworkin's second theory.
12.3 Dworkin's second theory of legal reasoning

The second theory is first outlined by Dworkin in the essay "Hard Cases". Where the first theory arose at least pedagogically, in the course of a criticism of positivism's reliance on social rules as an explanation of the nature of law, "Hard Cases" begins and ends with a theory about judicial justification. The focus of Dworkin's work has now been entirely shifted from any interest in positivist questions about what is law, to the problem of judicial decision-making as a focus of jurisprudence.

Dworkin expounds his second theory by using the device of a hypothetical judge, Hercules, and asking how Hercules would decide hard cases. This literary device serves to make clear the fact that Dworkin is proposing a prescriptive theory about how judges ought to decide cases, although he clearly also believes that it accurately reflects a significant portion of the very best of past judicial practice.

Dworkin's notion of a hard case, as has been already explained in his earlier writings, includes not merely instances where some legal rule is chronically vague or uncertain, but also instances where, for example, there may be a clear and explicit rule applicable, but it appears to lead to a result that seems unjust or unconscientious.

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6. Dworkin; R, op cit, p.81.
It is also worth observing when one examines Dworkin's later works that there is a significant retreat from references to rules and, ultimately, even principles, in their place the raw materials of judicial decision making are now the institutional sources of law, statutes, and reports of past cases.

Dworkin outlines his second theory by way of examples and deals with them in categories, representing the three legal sources, constitutions, statutes, and past judicial decisions. Commencing the exegesis with constitutional cases, a judge dealing with a hard constitutional case, says Dworkin, approaches it by developing a theory about the constitution.

The process, as Dworkin explains, is akin to that of an umpire asked to deal with a difficult question involving a rule of the game of chess. A chess umpire would interpret the rule of the game having regard to which interpretation would best further the game. To do this the umpire would need to reflect upon the nature of the game, whether it was one of skill, chance, will power, and so on. In interpreting a rule, the chess umpire develops a theory about the whole of the game.

The judge dealing with a hard constitutional case engages in a similar process. The constitution "sets out a general political scheme that is sufficient just to be taken
as settled for reasons of fairness". Hercules must develop a full political theory that justifies the rule contained in the constitution. Hercules will seek the theory that provides the smoothest fit with the constitutional scheme as a whole. The final result will be a theory of the "constitution in the shape of a complex set of principles and policies that justify the scheme of government".

This total theory of the constitution developed by Hercules will allow resolution of any question about the meaning and interpretation of any provision of the constitution. The theory will provide a rational justification for the particular resolution adopted and one that is consistent with the rest of the constitutional background.

To the notion of a constitutional theory is added a similar notion for dealing with statutes. Here the question of construction and interpretation of statutes will commence with the rational justification of the legislative power to make law. The judge will therefore look for the theory "that justifies this statute in the light of the legislature's more general responsibilities, better than any alternative theory".

7. Dworkin; R, op cit, p.106.

8. Dworkin; R, op cit, p.106.

9. Ibid, p.108
For the second proposal of Dworkin to succeed, it is necessary for a judge to have a conceptual background in regard to the constitutional provision or statutory section sufficiently rich to enable him to develop a theory about the legislation that can usefully deal with quite fine points of construction or interpretation. Likewise, a similar conceptual background is necessary to provide a base for any theory that will allow the interpretation or application of common law doctrine derived simply from the reports of past judicial decisions.

Judges might respond that Dworkin's theory merely states what is already the law and practice of constitutional and statutory interpretation. The law of statutory interpretation is filled with maxims and rules to the effect that one looks to the mischief a statute was intended to correct when interpreting vague or uncertain provisions. It is significant cause for criticism of any judicial interpretation of a statute that it fails to pay attention to the manifest purposes and intentions of the act.

It is not criticism of Dworkin's theory that it is already partly mirrored by judicial practice but Dworkin's theory is far broader in its import than the maxims of statutory interpretation. The maxims and principles have frequently been inadequate to the task, and are often quite explicitly inconsistent. For instance, the principle that statutes will be interpreted in such fashion as not to deprive citizens of common law rights unless an intention so
to deprive them is clearly expressed in the statute frequently collides with the principle that statutes will be read in such a fashion as to promote the social policy that the legislature intended the Act to further. Indeed, it is these fundamental antinomies for which Dworkin has proposed his second theory. However, according to Dworkin, these conflicts are not resolved simply by an appeal to moral rightness simpliciter, but in the case of constitutional and statutory interpretation by an appeal to "general democratic theory".\(^{10}\)

Turning from constitutional and statutory materials to the fundamental basis for any judicial theory about past decisions and their interpretation and application by judicial officers, Dworkin again appeals not to moral rightness generally, but to a specific value and in the case of judicial precedents it is the principle of fairness, of treating like cases alike\(^{11}\). Some theorists, like Rawls, have defended democratic principles on the grounds that they are chosen by the principle of fairness as the most appropriate way to govern a society. For those philosophers, Dworkin's two justifications are one and that is the principle of fairness.

\(^{10}\) Dworkin; R, op cit, p.110.

\(^{11}\) Dworkin; R, op cit, p.113.
12.4 Dworkin's second theory and the connection between law and moral values

The task that must be undertaken by Hercules, the Dworkinian judge, in developing a theory of the constitution, or some piece of legislation or judicial precedent, appears clearly to found legal reasoning upon political and moral values. Hercules will apply a statute because the acceptance of the theory of the democratic state would dictate that one obey the formal pronouncements of the legislature in all but extreme cases. In interpreting and applying the pronouncements of the legislature, Hercules would take account of the legislative responsibilities of the law-making bodies and the proper ambit of their power given the social programme they have been elected to enact. Likewise, in dealing with judicial precedents, Hercules recognises that he will not satisfy the principle of fairness if he ignores the pronouncements of previous judicial officers, and the fact that many citizens will have organised their affairs in the expectation of consistency in the way disputes are settled by judges. These principles that would be applied by Hercules are strikingly similar to the proposals for legal reasoning outlined in chapters 8 and 9 of this work and it might reasonably be asked in what fashion the views expressed here depart from those already expressed by Dworkin, or whether Dworkin himself is a legal pragmatist.

It is important when considering what Dworkin says about
the moral and political values that should be applied by judges not to view these comments in isolation from his more general moral views. Dworkin has argued persuasively against utilitarianism and general consequentialist moral theories. His own theory of rights with the powerful metaphor of a rights claim as a trump card in the moral debate provides the background to his theory of judicial activity.

Dworkin makes it abundantly clear in the explication of his second theory about legal reasoning that judges elaborating a theory about the legislation or precedent they are seeking to apply are not merely constructing their own theory in such a fashion that each judge is free to make what sense he chooses from legal sources, but rather, that the theories of judges make objective claims in the sense that they claim to be the best theory to explain the existing materials, and that where different interpreters express differing views, it is appropriate to criticise others for error.

Dworkin has in several places explicitly outlined his theory of objectivity, one of the most recent being the essay "On Interpretation and Objectivity"\(^\text{12}\). Dworkin's theory of objectivity is not itself completely novel. It starts by abandoning the position that a claim to objectivity for a moral or ethical statement involves a claim that the moral value the subject of the statement forms part of the universe

in the same fashion as light waves, or the buses that travel to Circular Quay. Rather, shared community practices provide a background against which one can make statements which do not merely express personal preferences or emotions, but say something about that shared practice which can be true or false. This modified form of objectivity claim which grows from some of the concepts in the later works of Wittgenstein is a common thread in the present versions of moral objectivism.\(^\text{13}\).

In borrowing an argument from the new moral objectivism to found a theory of legal reasoning, Dworkin runs a significant risk not present to those whose only concern is moral theory. On the one hand legal practice can be viewed as being subject to overriding principles which are moral, and if one is a moral objectivist, and believes there is one right answer to a moral question, then the overriding moral values will in the last instance dictate for a judge the answer to how a judicial decision should be made, and there will naturally be only one right answer to that question. The alternative means of deploying the theory of objectivity with which Dworkin is working is to separate legal practice from moral practice, and generate a parallel field of legal objectivity created by legal practice.

Dworkin's views as outlined in the essay, "Hard Cases", seem to lean towards the first of the two alternatives just outlined. Certainly, critics believe that he had founded his theory of judicial decision making upon moral and political principles, coupled with an objectivist theory of morality\textsuperscript{14}. If one takes this view of Dworkin's theory, then it is strikingly similar to the views of legal pragmatists. If this sounds surprising, it is largely because so many legal pragmatists have been utilitarians when it comes to their first order moral theory while Dworkin is a non-consequentialist. Too frequently in the debate about the relationship between law and morals, commentators have not clearly distinguished between the question of appropriate first order moral values which should be applied, and the second order logical question regarding the relationship between judicial decision-making and moral values. The 'judicial decision-making as application of moral principle' interpretation of Dworkin's theory shares with legal pragmatism the same view about the logical relationship between a judicial decision and moral values, namely that judicial decision-making is an act subject to moral appraisal and that this determines the decision. Although sharing this view about the logical connection between morals and judicial decision making, legal pragmatists are not bound to also accept either Dworkin's moral objectivism or his non-consequentialist theory about human rights.

However, even if one assumes that Dworkin's second theory espouses the view that judicial decision-making is a form of moral appraisal, albeit within an objectivist non-consequentialist ethics, there is still this difference from outright pragmatism, namely that the judge does not make a decision by interrogating his own moral beliefs to ascertain what on balance he believes to be the right moral answer, but rather, he consults only that category of moral principles and values which possess 'institutional support'. Of course, it might well be argued that the reason why the judge is limited to those moral values possessing institutional support is because moral and political principles dictate that it would be undemocratic or unfair to consult other moral values or principles. If this be the case, then Dworkin's theory from the point of view of the logical structure of the judicial decision collapses into the same position as that held by legal pragmatists.

12.5 Dworkin's third theory, law as interpretation

The suggestion in the last section that Dworkin's earlier views could be characterised as a form of legal pragmatism might have been thought by some to be an exercise in irony. In Dworkin's most recent significant work, "Laws Empire" Dworkin devotes significant space to an attack on legal pragmatism and sharply distinguishes his views from the pragmatic or sceptical view of the law. The following

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passage shows that there can be little doubt that the views Dworkin has in his sights are the same as those defended in this work. He says of the legal pragmatist that:

"He finds the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one".16

"Laws Empire" amongst other things strongly attacks legal pragmatism and suggests that the best description of existing judicial activity, and the judicial methodology which judges ought to follow, is an interpretative theory in which judicial decision making is guided by the principle of 'integrity'.

Dworkin occasionally refers to the principle of integrity as a 'political virtue'.17 Dworkin clearly does not intend the phrase, 'a political virtue', to be synonymous with 'morally right'. Dworkin is clearly trying to re-invent a category of evaluative concept that is not one of everyday moral judgment. The error of the pragmatist, according to Dworkin, lies in having sought to build the theory of obligation out of what Dworkin strikingly refers to as

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"ordinary, non-political, principles of morality".  

Dworkin relates his concept of integrity, which involves notions of consistency and appropriateness in the conduct of social bodies to the idea that communities can themselves be moral agents. If a community can be a moral agent, then it will have the same constraints in terms of consistency between its collective or communal decisions or actions as rest upon an individual. We would view an individual's conduct as irrational were he to make different judgments depending on which day of the week he pronounced them where the day of the week did not seem otherwise relevant to the subject matter or content of the those decisions. Likewise, Dworkin argues, a community commits a similar breach, this time of the political virtue of integrity, if it hands down decisions that are inconsistent in principle. The community cannot defend this conduct, in Dworkin's view, by pointing to some compromise between conflicting interests as the justification for the apparent inconsistencies.

Dworkin emphasises the distance he is seeking to generate between his concept of integrity and that of mere moral rightness with the strong claim that integrity will on occasions require conduct that conflicts with what fairness or justice would dictate.

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19. Dworkin; R, op cit, p.188.
Dworkin's impressionistic descriptions of the principle of integrity still leave partially unanswered the question, what sort of concept is political integrity, and what is its relationship to moral principles? One obvious parallel is with Aristotle's concept of virtue, outlined in the "Nicomachean Ethics". MacIntyre's recent explication highlights the dramatic difference between the Aristotelian conception of moral virtue and practical reason and the enlightenment views stemming from philosophers like Hume that provide the ancestry for so much modern moral philosophy[^20]. Aristotle does not view moral statements as being incapable of having truth value or incapable of forming steps in a valid argument. Further, the Aristotelian virtues provide the telos of human conduct. Aristotle considers humans to be necessarily social creatures, and there is a telos of the community, as well as of the individual lives of its citizens[^21].

Dworkin does not make clear whether he views integrity as a moral principle albeit that special principle which deals with the telos or virtue of political life. In the intellectual predecessor to "Laws Empire", Dworkin's essay "How Law is Like Literature"[^22], he clearly toys with the


idea that law may have an objective goal pursued by interpretation which, if not totally severed from political or moral value, is not identical with those principles and occupies its own evaluative category the way that aesthetic criteria in art or literature provide an evaluative category independently from moral or political principles.

Although Dworkin may on occasions come close to elevating the values that govern legal interpretation, or 'integrity' into a separate evaluative category, he never actually crosses the threshold. The reason presumably lies with the simple fact that law always remains just one of several social institutions and it would require us to abandon all of our must fundamental views about the nature of morals and social and political life before we could embrace the view that law had any purpose, or could be appraised other than in terms of its ability to fulfil moral and political goals. Dworkin does not disagree with this view. Dworkin's own theories all advocate the view that the judge engaged in the task of legal interpretation theorises about the social and political ends the legislation or line of precedent with which he is dealing is concerned. Legal reasoning is inescapably conducted within the field, and as part of the field of general moral and political decision-making.

If the principle of integrity is to have any usefulness in regard to judicial decision-making, it must be viewed as a moral principle. However, if Dworkin is to successfully
disassociate himself from legal pragmatism, or the view that
judges should decide their own cases in accordance with the
principles of general morality, Dworkin needs an argument
that can insulate the political virtue of integrity from
morals at large. No where in "Laws Empire", or Dworkin's
other writings, do we find such an argument.

One might anticipate a possible response from Dworkin
based upon his views about political and moral rights. The
principle of integrity, coupled with Dworkin's theory of
objectivity, will supply in the case of any possible legal
dispute a single answer, the one right answer, which is the
one any judge should propound. A litigant has a political or
moral right in Dworkin's strong sense of that word to have
his case decided in accordance with that one right answer.
This political or moral right overrides any general moral
principle of justness or fairness.

If one assumes the argument just outlined to be
Dworkin's explanation of why integrity overrides any other
general moral consideration, it is quite clear that the basis
for the argument is no more than a first order moral
principle which confers a supremacy upon certain moral rights
such as those created by the principle of integrity as
against consequentialist principles of general utility or
social justice.

If integrity is not defended by one's total moral theory
as a pre-eminent value in judicial decision-making then its
importance will be arbitrary and subject to the attack Cohen
levelled against all those theories that select some special virtue and arbitrarily nominate it as the telos for legal decision making. This is crypto-idealism revisited.

Dworkin's third theory, "Law as Integrity", thus returns to the same position as his second proposal. While criticising legal pragmatism, Dworkin's position is no different when one looks at the issue of the logical relationship between morals and judicial decision-making. On both views the problem of legal reasoning is displaced to the level of moral reasoning. Dworkin's non-consequentialist moral objectivism creates the illusion that legal reasoning is in some fashion different from the reasoning one would apply using the whole range of one's moral beliefs. But this is an illusion, created on Dworkin's part, because the moral universe of a Dworkinian includes the principle that there are special moral values for use in legal decision-making. However, this last assertion is itself a moral assertion, and Dworkin's Hercules is appealing to his own conscience as much as any legal pragmatist.
13. CONCLUSION

In highlighting the significance of moral judgment in the process of judicial decision-making this work has done nothing novel. Pure formalism as a theory of legal justification has been out of fashion for decades and the law-making function of judges is now reflected upon in judicial pronouncements. Superior Appellant Courts such as the United States Supreme Court and the High Court of Australia have sought to expound judicial doctrines to govern and regulate their own law-making powers.¹

One frequent consequence of this recognition that judges are influenced by moral reasons, and do exercise law-making powers, are theories of judicial decision-making in which moral reasons are described as a source of reasons. Summers' writings, and his theory of substantive reasons, would be a classic example of this genre.²

The difference between writers such as Summers and the

¹. Great Northern Railway Co. v Sunburst Oil and Refining Co. (1932) 287 US 358, Babaniaris v Lutony Fashions Pty. Ltd. (1987) 63 CLR 1 at 15.


(b) For another example, see Peczenik; A, The Basis of Legal Justification, Lund, 1983.
views expounded here lies in the methodological consideration of the nature and status of a judicial decision. It is difficult to know at times whether writers such as Summers or Pecznik\(^3\) would describe themselves as 'legal pragmatists' or stop short of that step and insist that there are still differences between the status of a private moral agent and that of a judge, albeit that the judge is entitled to rely, in certain circumstances, upon moral reasons. What persuades one that these writers are not fully-fledged legal pragmatists is the time and attention they spend on expounding theories of legal reasoning explained in formal and procedural terms which, if the judge's position is that simply of moral agent, would have no significance. If a judge is purely a moral agent, then Summers' theory of substantive reasons could presumably be used equally well to describe the reasons relied upon by any moral agent as to describe those relied upon by a judge.

It follows from the conclusion of this work, at least at the level at which one considers the substantive reasons with which a judge may support a verdict, that there is nothing left of theoretical interest to philosophy. This is not to say that for lawyers much might not still be said about what is the best rule to govern some aspect of human conduct. These however are questions that fall within the area of legal doctrine.

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