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WHAT'S LEFT OF RIGHTS:

ENGAGING LEGAL SKEPTICISM AND CRITIQUE

by

PETER V. RAJSINGH

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

1997

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Abstract

WHAT'S LEFT OF RIGHTS:
ENGAGING LEGAL SKEPTICISM AND CRITIQUE

by

Peter V. Rajsingh

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Skepticism about legal justification is a dominant mode of thinking about law in contemporary legal theory. Skeptical moves are particularly evident in Critical Legal Studies (CLS) which has launched a sustained attack on the fundamental premises of liberal legalism in Anglo-American law. A major reason held to contribute to the deficiency of law is that liberal rights talk cannot be justified. Rather than being neutral and impartial, rights are viewed as politically-charged and ideological, and emanating from a philosophical tradition fraught with indeterminacy and contradiction. This is then seen to vindicate the claim that law generally, is contingent, arbitrary and ultimately lacks legitimacy.

The cohering theme of this work concerns the problem of legal justification. For instance, under the theory of natural law, law is justified by reference to its ability to mirror an objective, categorical, "natural" order of

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morality. In liberal legalism, legal justification obtains through the theory of rule of law. Rule of law contributes the substantive and procedural norms which confer legitimacy upon legal practice, thereby generating deontological authority for law and the legal rights and duties which subjects are obliged to obey.

But liberal legalism, and the relation of the legal and the moral which attends liberal rule of law, also prompts a certain skepticism about law and legal justification. Relying largely upon claims about the indeterminacy of rule of law, CLS is the bearer of a radical skeptical thesis and its conclusions are that legal justification fails. The argument here is that while the radical or hard skepticism of CLS is not correct, liberal legalism does provoke a soft skepticism. This more refined version of legal indeterminacy presents a better understanding of law under liberal legalism and also rescues legal justification and objectivity from the challenge of radical skepticism.

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LIST OF ABBREVIATIONS:

BCGs -- Background Conceptions of the Good

CIT -- Categorical Imperative Test (Kant)

CT -- Critical Theory

CLS -- Critical Legal Studies

F/VD -- Fact/Value Distinction

NLT -- Natural Law Thesis

RAT -- Right Answer Thesis

RC -- Rights Critique

RL -- Rule of Law

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PETER V. RAJSINGH WHAT'S LEFT OF RIGHTS: ENGAGING LEGAL SKEPTICISM AND CRITIQUE.

INTRODUCTION:

It is interesting to note that much recent work in legal theory is driven by some sort of skepticism about law. On one hand this can be chalked up to the Heraclitan and anti-foundational propensities of post-modernism bleeding into the sphere of legal philosophy. But to press the point, it seems that thinking about law, as traditionally conceived of and functioning in contemporary, liberal political systems, prompts a certain manner of skeptical understanding. Skepticism in law, of course, is not new. We encounter skeptical turns at various historical moments related to theorizing about law in both ancient, modern and post-modern contexts. Simply put, this work proceeds on a modest intuition: that under liberalism a skeptical dimension is wedded to the very notion of law itself and that it is reasonable to view law in a narrowly skeptical way.

Clearly, examination of the practice of law, which is to say the way law functions, does not admit of the kind of analytical predicates and degree of precision we could ascribe, for example, to the practice of mathematics; and even here we know from Godel's theorem that mathematics also has elements of randomness and incompleteness. This leads to the ostensible paradox that we come to the most certain

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knowledge of law by acknowledging the limits of our ability to provide a positivistic account that admits of rule-like clarity. The limits which we run up against when trying to sketch out law as a coherent practice are often taken as evidence that legal conclusions cannot be justified. The argument here is that stable or genuine justification is compatible with a limited skeptical understanding of legal reasoning and that skeptical accounts of the law, where plausible, do not necessarily entail skepticism about legal justification as such.

This may seem like a rather trivial affirmation. Indeed, for the fact that most legal decisions usually entail majority and dissenting arguments, it is a truism that a weak skepticism is built into the very nature of the legal process. This is to say that members of a court are generally split on the appropriateness of particular justifications for decisions, but are not skeptical about the nature of legal justification itself. However, this feature of law, despite its commonplace and readily accepted occurrence, warrants philosophical attention. The question of how it is that we can ascribe truth conditions to legal majority decisions and yet also concede truth to dissenting claims, remains a source of philosophical interest and some puzzlement. Apropos of this point, is a certain philosophical prejudice against grand theorizing in favor of attentiveness to ordinary practices which are usually far

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from being understood in any complete or thorough way. Since the everyday happenings of law instantiate skeptical operations, one's interest ought to be just as much piqued by these practices as by the global claims of skepticism made as meta-argument by any formulation of grand theory.

First and foremost a skeptical understanding of law stems not so much from any ontological proposition about what law is, as from a functional view of the role law plays--which is to say how it actually operates--in regimes committed to the rule of law, that is, in contemporary, liberal democracies. The problem with a skepticism which proceeds in any other way is that often one is compelled to propose some excessively complicated ontology[1] before unleashing skeptical claims. And with regard to this antecedent step, it is a virtual platitude to state that we can always doubt the appropriateness of ontological theories which purport to come up with definitive descriptions of law as "x" or "y." Various attempts to define law by ascribing to it some novel ontology are invariably subject to easy

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[1] The point is that law is best understood in terms of the social role it plays. It implicates a distinctive teleology oriented towards social goals. In the wake of post-structuralism with its efforts to de-center or at the very least re-charaterize the subject, law has been described, for example, as an "autonomous epistemic subject that constructs realities of its own" (See Gunther Teubner. 1989. "How the Law Thinks: A Constructive Epistemology of Law.") The utility of conjuring up law as some form of novel episteme is questionable, especially when these efforts neglect to characterize law in functional terms.

It is worth noting also that for the most part Critical Legal Studies (CLS), which is a focus of this work, relies appropriately upon a functionalist understanding of law.

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refutation. The descriptions presented either fail to portray legal phenomena with sufficient particularity and hence leave out significant detail. Or, alternatively, such theories indulge our imaginations to an implausible extent by attributing too much, offering descriptions that annex predicates onto the legal that hardly seem warranted. Further still, in being presented as purged of evaluative ingredients, descriptive theories of law are often vulnerable to the charge of relying on a crude version of the fact/value distinction.

A functional approach that tries to understand law by focusing on the role it plays (institutional, ethical, political etc.) and by being attuned to how law actually operates, is the optimum strategy for making sense of law from both descriptive and normative perspectives. Understanding law is then connected to certain criteria associated with a concrete legal system. In focusing on what law does rather than what law is, one dissolves the alleged distinction between describing "law" and describing "the law," where describing the first is held to be a theory of the general concept of law given at a higher level of abstraction. In a functional account, description or explanation is understood as firmly lodged in the context of an overall normative scheme. Our "facts" are not then thought of as "pure" or corresponding to some kind of objective, empirical reality. Functionalism allows us to

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view law in relation to other variables, helping to explain the interdependence of law and other elements, such as morality or politics, within the socio/political system as a whole. The suggestion here is that a reasonable skepticism is plausible when considering law from this point of view. This skepticism in turn denies the possibility of the level of exactitude or certainty often alleged to inhere in the practice of law.

The main counter-proposition to this claim, namely the view illustrated by positivists who seek to conceive of law as a distinct ontological phenomenon separable from other social understandings, will be examined, as will the position taken by theorists such as Ronald Dworkin that there exists a unique right answer to any given legal problem. With respect to the latter viewpoint, in its strongest form, the Right Answer Thesis (RAT) at base constitutes an attempt to assimilate law into models of artificial languages such as mathematics or logic. Here the internal structure of a problem (e.g. a mathematical operation) constrains the performance of achieving its solution. Correct outcomes are seen as a matter of logical or procedural necessity apparent to all competent practitioners. But the argument for legal objectivism along these lines must gloss over salient features of the judicial enterprise, the most obvious being semantic factors of indeterminacy, ambiguity and interpretive instability

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associated with particular terms in any given natural language.[2] Further, there is the very troubling point that legal narratives (to use Dworkin's term) can be continued coherently in distinct but equally defensible ways. RAT proponents also fail significantly to engage the syntactic question of whether the form and structure of legal argument admit of the kind of truth conditions which their view seems to require.

Nevertheless, the ambition of providing an account of law and legal reasoning which describes it in wholly non-skeptical terms is a natural one considering the role law plays in liberal states. The very legitimacy of law under liberalism is tied to formalist predicates whereby law is held to operate in a stable and constrained manner, ideally guided by constitutive and regulative norms held to be internal to the practice of law. Justification of law and legal reasoning under liberalism appeals then essentially to two notions: its autonomy and its internal coherence. Legal conclusions stand justified by virtue of our being able to apply descriptions which draw upon the distinctive norms that distinguish law from other practices (e.g. "in keeping with precedent," "required by statute," "consonant with rule

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[2] Dworkin of course can admit of the indeterminacy of language in general, since the claims under his particular version of the RAT are for the legally and morally right answer. Dworkin's view is predicated, nonetheless, on a conception of the semantic stability and determinacy of the legal system and the background moral understandings which undergird it.

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of law" etc.) Furthermore, the normative political goals of liberal legalism--such as consistency, fairness, impartiality and the like--are held to be realized as a result of these constitutive and regulative norms which serve to circumscribe law as a distinct practice. At the same time, under the traditional liberal account associated with legal formalism and objectivism, external variables like the subjectivity of practitioners and the interpretive latitude which they might otherwise be said to possess, are seen as being closely bracketed.

In attempting to make sense of legal skepticism and the "soft" version of skepticism being defended here, an heuristic strategy will be to examine the radical skeptical claims which derive from the Critical Legal Studies Movement (CLS). The CLS movement more or less began after a conference at the University of Wisconsin in 1977. By 1984, with the imprimatur of an entire volume of the Stanford Law Review devoted to the subject[3], CLS came of age. At the time of this writing, it would be hard to overstate the variety of work on law and legal theory that falls under the contemporary category of being "critical." As Allan Hutchinson notes, "its presence is strong and incontestable...its qualitative impact is more controversial: its intellectual reception runs from enthusiastic acceptance to vehement rejection...Indeed, the

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[3] Stanford Law Review. Volume 36, Nos. 1 & 2 January 1984

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intensity and heat generated by CLS writers both collectively and individually, testifies to its growing significance in jurisprudential debate and practice."[4]

CLS, currently still very much in vogue, attacks the premises of liberal legalism--or at least, the claims to stability and objectivity the liberal makes--by attempting to deconstruct the related concepts of "rule of law," "legal reasoning," and "legal rights." The CLS Rights Critique (RC) maintains essentially that the system of rights constitutive of the liberal legal order is an ideological artifice fraught with incoherences, contradictions and false consciousness. The critique of course is not monolithic; the claims vary somewhat with their exponents. Duncan Kennedy, for instance, has stated that "rights discourse is internally inconsistent, vacuous or circular. Legal thought can generate equally plausible rights justifications for almost any result."[5] Here the claim is one of indeterminacy, that rights talk fails to implicate any particular substantive politics. Another CLS adherent, David Kairys, claims that the concept of rule of law acts as an instrument of domination and oppression[6], working to conserve the status quo of entrenched power relations of a

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[4] Allan C. Hutchinson (ed.) 1989. Introduction in Critical Legal Studies. 1.

[5] Duncan Kennedy. 1982. "Legal Education as Training for Hierarchy" in David Kairys (ed.) 1982. Politics of Law. 46.

[6] David Kairys. 1982. "Introduction" ibid. 5.

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conserve the status quo of entrenched power relations of a given legal system. This claim is neo-Marxist: that rights talk does connect to a substantive political scheme, but it is the politics of a class-based dominance that we must reject. Roberto Unger, arguably the generative force behind CLS, traces the legitimation crisis in law to antinomies within the "deep structure" of liberalism.[7] According to Unger, the tragic flaw of liberalism which renders liberal law incoherent is that liberalism simultaneously requires a robust political community[8] but refuses to impose upon individuals any particular conception of the good. Liberal neutrality, which demands acceptance of pluralistic visions of the good, privileges individualism and autonomy. But at the same time, individualism cannot be allowed to run to such extremes as to effect an overall breakdown of the social order. Unger argues that since liberalism does not demand stable and settled core values (i.e. a unified conception of the good), non-controversial and neutral rules of law are impossible both to enact and interpret. Legal procedures, the basis for creating rules of social order,

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[7] Roberto Unger. Knowledge and Politics. 1985 and The Critical Legal Studies Movement. 1986.

[8] By "robust" is not meant that liberalism seeks to instantiate a unified conception of the good such as are described under associational models of social life. Community under liberalism is limited and minimal, and is constituted by means of the contractual paradigm i.e. consent based on perceived self-interest. Robust in this context means a political community that is tenable and capable of sufficient cohesion and stability to facilitate the practices of a democratic politics.

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lack authoritative force, coherence and stability in light of the commitment to evaluative pluralism which liberalism must affirm. Here the critique is structural. Liberalism is conceptually schizophrenic and legal reasoning within liberalism must reflect such dissonance at every turn.

Overall, CLS criticizes claims to the autonomy of law as well as its internal consistency by calling into question the traditional formulation of law as a distinctly apolitical and coherent legal domain. The separation of law from the compass of politics, seen by at least some versions of liberalism as expressed in an independent judiciary insulated from politics and charged with performing the peculiar act of adjudication, is held by CLS to be a logical and empirical impossibility.[9] The idea of the judicial process as being immune from political "seduction"[10] is for CLS a fiction. Likewise, judges delineating spheres of public authority and private autonomy using the rhetoric of rights are not in fact declaring or adhering to objective rules of law but rather are engaging in evaluative assessments all cloaked in the language of neutral principles.

According to the CLS argument, adjudication is a

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[9] It should be noted that liberals such as Rawls and Dworkin would never say that law is autonomous in this way.

[10] See Robert Bork. 1990. The Tempting of America: The Political Seduction of the Law as an example of the view that the law is ideally apolitical.

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patently political enterprise and legal language is fundamentally contingent and indeterminate. Acts of judicial interpretation and legal reasoning are regarded as expressions of subjective or class-based preference manifestly charged with political overtones and devoid of logical necessity. CLS holds that language and legal reasoning are by nature ambiguous and malleable, with the corollary that there can be no stable meanings--essential, interpretive or whatever--to the terms and methods of legal discourse. It therefore follows that whatever meaning that legal terms do have will be fixed by less respectable sources, such as private preference, cultural habit, the interests of power or purely arbitrary assignment. Thus, CLS seeks to unmask the elaborate edifice of law with all its claims to strict reliance upon precedent, neutral principles and objective legal reasoning. For CLS, the professed ideals of objectivity and impartiality are, one might say, "grammatically" impossible. As a result they tend at best to serve merely as legitimating screens, bolstering the judicial enterprise while misrepresenting the real character of law. The general upshot of the CLS argument is to affirm the apparently arbitrary character of judicial activity and law in general. Legal reasoning, it is argued, at best is ideology pure and simple, garbed in the sheep's clothing of supposed judicial independence, impartiality, objectivity and formalism.

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Though problematic for a number of reasons, to be examined in due course, the CLS RC is also compelling. But even if we grant the CLS thesis that there are contradictions in liberal rule of law, or that rights-talk can give rise to plausible disparate outcomes, it does not follow that the concepts of rule of law, rights or objectivity in legal argument automatically must be jettisoned. After all, no one thinks that we can have no notion of objectivity or justification in everyday explanations simply because ordinary language is often elliptical or ambiguous. Central to this thesis is the exploration of how one can acknowledge what is plausible in the CLS skepticism towards legal argument while resisting its radical conclusions with respect to justification. There exists a certain terrain which has yet to be charted between the claim that rights talk is sometimes incoherent, and the claim that it always must be so. That terrain is our subject.

The major problems which motivate this project then can be stated thus: first, just what counts as a reasonable version of legal skepticism? Another way to put this issue is to ask, just what degree of indeterminacy can be rightfully ascribed to legal reasoning? In elaborating upon our answer here, we must bear in mind that at least some version of the CLS argument is correct in that an account of adjudication cannot appropriately be analogized to anything

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like mathematical operations. And if hard determinacy is unavailable to us in legal reasoning, how can we intelligibly engage in critical assessments of judicial decisions, characterizing some as being better than others or applying to judges the attributes of competence or ineptitude? Law does not admit of the wishy-washy position whereby we throw up our hands and shrug that "beauty is in the eye of the beholder" or that "pushpin is as good as poetry"--at least not to the extent such an account would leave the stability or legitimacy of the practice intact. It seems obvious that the justificatory language a court employs in a given case could rightly be found more appropriate or satisfactory than the alternative justifying story urged by the losing side, at least in some cases. Moreover, the justificatory bases for legal reasoning generally cannot stand or fall on the level of objectivity we may comfortably claim as obtaining from the arguments employed in any particular case.

Having declared sympathy for "soft legal skepticism" as apparent from the outset, the challenge is to elucidate the content and ground for such skepticism. At stake in this enterprise are the twin issues of legal authority and justification, issues pivotal both to legal practice and philosophy of law. Does skepticism which falls out of liberal legalism, compromise the legitimacy of law? The problem of justification then is the leitmotif in this work.

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Whether it be the natural law thesis or legal positivism, whether theorists couple law with morality, or try to sever the two, all these views ultimately make a point about how law is to be justified. Under liberal legalism which is the dominant anglo-american legal tradition, justification of law has been largely predicated on the theories of legal formalism and the normative principles attendant in liberal rule of law. These are the features of law which the CLS position tries to demolish. On the CLS view, to acknowledge the truth of skepticism is to abandon any claim to a legitimate liberal legal order. In contrast, here it is argued that an authoritative and justifiable legal order is not incompatible with acknowledging the several elements found in law that provoke a soft skepticism.

As an aside, it should be noted that this work is not in any sense an historical account of the rise of CLS, nor is it an attempt to describe its continued development. CLS is an object of interest only insofar as it is the bearer of a certain skeptical argument. For example, it might be thought that there is a fundamental methodological problem related to CLS in that it consists of a skeptical mode of analysis which at the same time purports to offer insights into an ongoing social practice. Skepticism and truth-bearing critique are incompatible at a certain _prima facie_ level. But this issue will not be taken up in any length. There is also no effort in this project to delineate in any

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comprehensive way the many varied positions within CLS. While the source of any CLS position will be identified with its author, it is the idea or argument itself rather than its provenance that is our chief concern. As stated earlier, the various CLS arguments discussed are used largely as a window through which to examine legal skepticism, with no regard, for example, to mapping disagreements within the movement or other matters not material to the main discussion.[11] This is primarily an exploration of the relationship between legal justification and skepticism within the framework of liberal legal thinking. As such, initial chapters are devoted to ways in which law is traditionally conceived of and justified under liberalism. In this regard, the relationship between law and morality, the fact/value distinction, and other issues drawn from ethical theory are discussed extensively since these have bearing upon the notion of legal justification. In exploring the skeptical turn the aim is to illuminate a version of skepticism which is plausible to an understanding of the operation of law.

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[11] For discussion of the so-called radical and moderate wings of CLS see Andrew Altman. 1990. Critical Legal Studies: A Liberal Critique. 18-21.

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CHAPTER 1

JUSTIFYING LAW: THE DISTINCTIVE LEGAL DOMAIN

Liberal Theory and Rule of Law

Before tackling issues of legal skepticism, it is useful to lay out certain salient philosophical moments in the development of legal theory in the liberal tradition writ large. One route into the liberal idea of the state and the normative goals of liberal social order is via the concept of "rule of law," (RL), as that idea has been commonly understood. The evolution of liberal legalism, at least prior to Dworkin, can be viewed as a movement towards an increasingly more elaborate formal theory, a move crucial to the justification of law as a distinct practice.[1] Where justifications for law once simply annexed those employed to legitimate political authority, the impulse behind legal formalism is to establish law as an autonomous domain which can justify itself. This need for law to stand on its own is rooted fundamentally in the role of law envisaged under liberalism, particularly the idea that law provides a system of rules which lend normative stability to the socio-political order while at the same time serving to constrain potential abuses of political power.

To illustrate this general point about the

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[1] This idea, expressed in a variety of commentaries, is perhaps most famously seen in Max Weber's discussion of the move from traditional to rational-legal forms of authority. Max Weber. 1922. The Theory of Social and Economic Organization. A.R. Henderson and T. Parsons. (trans.) 1947.

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justification for law under liberalism, it is useful to contrast two distinct approaches to law found in political philosophy, notably the views of Locke and Hobbes. John Locke, as the grandfather of classical liberalism,[2] understands law's regulative task most significantly as providing a mechanism to ensure bias-free enforcement of fundamental moral entitlements and keeping political power in check. For Locke, the pre-political fact that human beings possess inalienable natural rights to life, liberty and estate demands a political order whose purpose it is to secure and preserve these rights. The state then becomes a custodian of individuals' antecedent natural rights, rights derived by Locke from his theory of the moral worth of persons as rational beings. In addition, law gives us a mechanism for neutral enforcement of all of the moral rules of social order. The state's legitimacy in some sense hence is made contingent upon its maintaining a legal order consonant with the pre-legal natural/moral one. Positive law exists to prevent any exercise of political power which might violate natural rights. Should these natural rights be trammelled, political power is then deemed arbitrary. Such arbitrariness would constitute a failure of RL and this in turn would compromise the legitimacy of the state.

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[2] The liberal tradition is presented here broadly as emerging from John Locke, setting aside discussion of alternative types of liberalism such as utilitarianism, French materialism, T.H. Green's idealism etc.

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Under the Lockean account, positive law provides a central ground for the state's justification. It is the need for positive law to redress the inconveniences of the state of nature which inspires the social contract, bringing the state into being. The state's purpose is to realize, through positive law, certain normative criteria of the natural moral order, providing institutional codification and procedural mechanisms so that these moral principles might have the right sort of force. Thus, justification of the state in a fundamental sense occurs by virtue of positive law which the state brings into being. The legal system set up by the state enables the state to replicate conditions of the antecedent pre-political natural world, as well as to circumscribe closely the contours of political power according to the parameters of positive law.[3]

An alternative point of view vis-a-vis law is advanced by Thomas Hobbes who, in contrast to the liberal Locke, grounds the need for a political regime in the specter of chaos and fear of death attendant in his version of the hypothetical "state of nature." The pervasive insecurity of lawlessness generating a war of each against all compels rationally self-interested individuals to effect a social contract to achieve peace and security. Recognizing that

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[3] The general pre-social conception of persons attendant in this account, as atomistic and fundamentally equal in their capacities as rights-bearers, has obviously been the brunt of critique from various quarters.

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the law of a commonwealth is eminently preferably to the law of "tooth and claw," subjects bind themselves to obey laws which issue from an absolute sovereign. For Hobbes, law, as exercised through the sovereign's will, provides the basis for personal safety and is primarily the means for escaping the brutish circumstances that otherwise await us. Unlike Locke, Hobbes does not view law as meant primarily to delimit civil authority. On the contrary, given the absolute authority Hobbes vests in the sovereign, positive law is synonymous with political power. And hence the legal and the political are simply coterminous. More importantly, there is very limited sense in which the content of positive law can itself be assessed in Hobbes.[4] Laws and edicts of the sovereign, for the most part, are "just" simply by definition, rendering explicit the will of the sovereign and obliging subjects to absolute obedience.

According to both Hobbes and Locke, subjects consent to surrender themselves to positive law and in so doing voluntarily relinquish some aspect of natural liberty. They do this for prudential reasons in order to gain benefits which, by rational calculation, are held clearly to outweigh

[4] Granted, Hobbes has been interpreted in diverse ways and it can plausibly be argued that Hobbes perhaps envisaged the will of the sovereign as limited in some general sense, such as that the sovereign is obliged to act in a manner consonant with the dictates of God, or that the imperative to preserve life circumscribes sovereign political behavior. Not especially concerned with these subtleties, we use here a raw interpretation of Hobbes simply to illustrate a stance with respect to law and political power.

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the single alternative offered, that of surviving in the respective states of nature. Both Locke and Hobbes draw upon certain supposed facts associated with imagining away the state and legal order so as to justify the need for the existence of political authority and law. But, between the two, only really in the Lockean narrative, does law require some further elaboration. This is because of the more substantive limiting function law is envisaged to play for society and politics in the Lockean scheme.

As stated earlier, Locke and Hobbes diverge in their separate conceptions of what counts as an appropriate exercise of political power under the rule of law. Hobbes, unable truly to think of political stability as compatible with limiting power, does not consider political sovereignty as jeopardized when law does not constrain authority. Law is the expression of empowerment of the absolute authority of the sovereign, and so law thus unfettered is actually constitutive of the Hobbesian notion of political power. In Hobbes there is minimal attention to the issue of how either power or law can be de-authorized by inappropriate use.[5]

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[5] Once again, it must be reiterated that we have chosen to bracket the issue of how one is to treat cases of a tyrannical sovereign who deprives subjects of their lives. This allegedly poses a problem for Hobbes given his formulation of political authority as an absolute. And yet preservation of life, the reason for quitting the state of nature, is explicitly made immune from the absolute will of the sovereign. This is because the justification for civil authority is based upon the notion of escaping fear of death associated with the lawlessness which prevails in the Hobbesian state of nature.

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On the other hand, the idea of positive law as a mechanism for checking power in the interests of natural rights is a primary concern for John Locke. Locke is deeply cognizant of the inability of his natural moral order to survive without politics and also that politics represents the possibility of power being employed tyrannically. For him the efficacy of positive law is twofold: law saves politics from arbitrariness by constraining power, and law through politics provides a means for the moral principles of nature to percolate into civil society. Positive law in Locke stands in a special normative relationship to politics and political power, and so the political and the legal must necessarily be non-identical.

This non-identity has to be the case if law is to be thought of as that which curbs potential abuse of political power. Since law arises in large measure as a check against political power, to see positive law as a mere mirror of state power would be incongruous. Law would then conceptually have no efficacy as a limit upon political action. As a Lockean, one must therefore sheer off the idea of positive law from that of political power, or at least think of some component of positive law as non-reducible to political power. At the same time, we cannot see positive law as simply synonymous with natural law. The whole argument for setting up the state to protect some pre-political moral notion of rights would become obscure. The

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very point of positive law is lost if it is not in some sense correcting an incompleteness in natural law--the inability of natural law to survive without a socio-political order. Positive law, after all redresses defects of the natural legal order associated with the state of nature. This is the very reason which motivates the compact out of the state of nature. And so, since it occupies a critical role with respect to the state, positive law cannot be seen to be merely synonymous with political power nor with natural law.

We have in Locke the introduction of what might be called the "redemptive" quality of positive law. This stems from an enduring tension of liberal politics: the fact that liberalism cherishes personal liberty as a core value and yet the goals of civil order demand that individuals submit themselves to laws made to promote the common good. In the social contract view, the advent of civil authority requires that individuals give up the practice of self-ruling to some sovereign body, a delegation which leads to Rousseau's famous retort at the beginning of the Contrat Social that "man is born free yet everywhere he is in chains."[6] The political state possesses the potential to coerce subjects

[6] For Rousseau it is not sufficient that individuals consent to surrender aspects of personal liberty and decision-making autonomy. Consent simply cannot engender legitimacy for delegations to others of one's own personal sovereignty. Representative government, envisaged through the doctrine of social contract as legitimate by the Lockean, is here viewed as an encroachment upon the a priori freedom of subjects.

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into obedience, a feature which serves to distinguish political life from any pre-political state of nature. Granted, liberal theory posits that being vulnerable to this coercive ability is something that all subjects consent to assume. But still, the notion of individuals possessing inalienable, antecedent, natural rights to liberty--that is freedom to order their actions as they see fit--is called into question by the state's potentially coercive capacities.

The task of providing a justification for coercion is therefore a fundamental concern for liberal political theory. The relationship generally posited in political theory between coercive political power and law, is that law both authorizes and constrains political authority. This point is elegantly put by Ronald Dworkin:

> "...the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."[7]

The conception of law under liberalism consequently not only legitimizes the existence of political power which we can equate with the state's ability to coerce obedience, but law also, at least within the liberal tradition, is seen as curbing the state from the arbitrary

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[7] Ronald Dworkin. 1986. Law's Empire. 93.

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exercise of its coercive capacities.[8] Thus, law can be described as "redeeming" political power in that law acts as a mediating concept through which justification for state authority is constructed.

We can, in the idea of legal authority, both causally and functionally locate the source of justification for the political/coercive authority associated with state action. It is this idea that is expressed in the familiar remark that "all political power is legal competence."[9] However, from a pragmatic point of view it is obviously a mistake conceptually to see coercion as issuing from law as such, since law must depend upon the coercive capability of the state for its enforcement. Without political force, law is powerless. In sum, there are two points to be made regarding the relationship of law and coercion within the liberal tradition. First, although the coercive power of the state is authorized through law in liberal political

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[8] Skeptics about law of course will argue that law does not really operate in the manner proposed by liberal theory. For instance E.P Thompson and Douglas Hay in various contexts advance the general Marxist thesis that law's real force and historical role was as an instrument to maintain dominant systems of class relations by protecting private property interests. For example, see Douglas Hay et al. 1977. Albion's Fatal Tree and E.P. Thompson. 1975. Whigs and Hunters: The Origins of the Black Act.

[9] Alf Ross. 1958. On Law and Justice. 58. This quote has been echoed in a variety of works as virtually a truism. It is worth noting that what is being described is political power qua the state. Obviously, political power can operate in other contexts, such as through social movements, which are not linked to legal competence.

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theory, law is also viewed as constraining the legitimate reach of that power. Second, state coercion is the means by which the law is enforced. The first point can be taken as crucial for the justification of political power under liberalism, whereas the second is a source of paradox for liberal political regimes. If Socrates and not Thrasymachus is correct, might does not make right. Rousseau also makes this very point against Hobbes. At the same time, right (i.e. the moral force of law) not bolstered by political might can have no ability to insure execution. This, after all, was the central defect of natural law in the Lockean state of nature which the move to civil society sought to cure.

From the foregoing discussion concerning the special role of law in liberal theory, and of its relationship to politics, it should be clear that law generates a justified politics by instantiating regulative curbs upon the political order. Moreover, though the legal order is in a sense parasitic upon the political system for its implementation, law is not justified by politics and stands in need of its own justificatory account. This demand is answered in the Anglo-American tradition of jurisprudence by the theory of rule of law.

Rule of Law (RL)

The *locus classicus* of the "rule of law" theory in the

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Anglo-American jurisprudential tradition is generally seen to be A.V. Dicey's discussion of the English constitution.[10] Dicey identifies three main elements of a legitimate RL: law precludes arbitrary punishments and the arbitrary exercise of power, all people are equal before the law and equally subject to the law, and individuals' rights derive from the privileges and liberties found in the remedies granted by the ordinary, common law of the land and not from the English constitution. On Dicey's view, RL not only provides for procedural regularity in a legal system but also creates substantive restrictions on political action by subjecting public officials to its constraints. Also, the source of the moral principles which vest law with normative authority is the commonly accepted customs of the realm and not some set of codified, enumerated rights. Law here relies upon the moral cloak of everyday practices to provide it with a set of background moral understandings. And this normative foundation to law reaches beyond or trumps, as it were, even the sovereignty of Parliament. For Dicey it would be a violation of RL for the legislature to pass tyrannical laws conflicting with citizens' rights as recognized by the ordinary law of the land even if it did so

[10] A.V. Dicey. 1939. Introduction to the Study of the Law of the Constitution. 10th ed. E.C.S. Wade (ed.)

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in the correct procedural manner.[11] On this point Dicey follows Locke who writes:

> "[the legislative] power in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave or designedly to impoverish the subjects...the legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated, standing laws and known, authorized judges."[12]

The idea of controlling those who govern is central in liberal political thought. Limiting government is to be achieved through separation of powers, strict departmentalism of branches, and faithful determination and application of general rules implicit in the assumption of rule of law. The theory of rule of law provides the legitimating basis for the liberal legal order by tying law to a normative scheme which stands apart from politics and also is distinct in a sense from the idea of law as well. This idea can be explicated in the following manner: Peter Winch suggests that practically all major human activity

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[11] There is a deep point here about the way in which the political is parasitic upon the moral and also how what counts for moral life is simply the practices which have been tested by time and become customary modes of action. It is simply our distinctive habits as moral creatures which we accept as moral norms. The task of politics is then to recognize and instantiate these norms by way of its institutional structures and the political process. The insights of Aristotle, Hume and Rawls here in some sense elegantly intersect.

[12] John Locke. The Second Treatise of Government. Peter Laslett (ed.) 1960. s 135 & 136 pgs 403-4.

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with meaning is rule-governed.[13] Participation in such activity, what he calls "practices," constitutes an acceptance that there are right and wrong ways of doing things. Alasdair MacIntyre conceives of practices in this way:

> "by a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended."[14]

Both writers speak to the notion that practices are characterized by certain evaluative criteria. Moreover, the way a practice is carried out may be separated from the content of the practice itself. Rightness or wrongness is assessed by reference to whether or not a practitioner abides by stable, regular general norms of the practice in question. The syntactic structure of a practice is therefore predicated on a finite set of predictive rules which are content independent. Kant's view of the moral with his Categorical Imperative Test (CIT) is a plain example of a formal account of a practice, in this case the

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[13] Peter Winch. 1967. "Authority" in Anthony Quinton (ed.) 1967. Political Philosophy. 99.

[14] Alasdair MacIntyre. 1984. 2nd ed. After Virtue. 187. The normative aspect of a practice is therefore tied to a conception of carrying forward the activity with excellence, or at the very least, with competence. Excellence means realizing the distinctive telos of the activity being engaged in, and serves to distinguish the mediocre practitioner from the virtuoso.

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practice of morality, which transcends the contingency of particular content. It is the general form of rational willing which Kant seeks to describe and this form, which perdures through changes in contexts, lends normative weight to the prescriptions of morality.

RL imports the concept of right into legal practice in an analogous fashion by providing an account of the general form of law.[15] Right obtains by virtue of the idea that rule of law and law are separate notions with the latter providing the justificatory grounding for the former. Under RL, right is conferred neither by might nor from the mere fact that law is created by a sovereign authority which possesses the appropriate marks of power. This last point, held by the Hobbesian and some early positivists, ultimately connects the authority of law with brute force or coercion, a move which the liberal understandably eschews since force cannot be equated with moral authority. RL bridges the legal and the moral by proposing that law is hitched to a categorical, relatively non-negotiable general system of norms. Commitment to these norms contributes moral worth to law. Rule of law is then not simply an institutional

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[15] This generates the notion of a normative undergirding for law so as to dispute claims that law is simply brute force. The fact that RL contributes a justificatory grounding, based upon a theory of the right does not, at face value, implicate a theory of the good. To avoid empty formalism, a theory of the right needs to connect with substantive conceptions of the good. Whether a theory of the good ought to be the source of the theory of the right remains a point of debate in moral philosophy.

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mechanism, but is also a justificatory ideal, a point which is often missed by those theorists who tend to focus exclusively upon institutional arrangements.

Legal Formalism: the Kantian Turn

We might consider the doctrine of rule of law in liberalism as the Kantian turn in legal narrative. The idea that there exists a set of propositions about law which constitutes its stable, general form is not a novel claim. In artificial languages such as logic or mathematics it is obvious that there exists a general form of, for example, a syllogism or commutative equation, which survives as distinct from the content of any particular syllogistic argument or commutative equation. The same applies to other practices such as sport. The fact that one can describe the general form of a baseball game allows one to assign meaning and comprehend the particular antics of the Yankees playing the Red Sox. What is most significant in a formalist account is the way in which the idea of the normative is carved out as distinct from descriptions of our first order practice. This is Kant's great insight, stemming from his quarrels with David Hume. Where Hume would have it that morality is driven wholly by the interests of human beings, Kant maintains that to see the moral in terms simply of human desires or preferences fails to provide a normative groundwork for the practice of morality. If one claims that

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morality can be reduced to the passions, simply describing the passions and desires of moral agents fails to give any account of why subjects ought to hold or follow those desires. This is based on the view that first order descriptions of passions are devoid of a suitable justificatory underpinning. The CIT in Kant therefore supplies a theory to endow our first order practice with a normative grounding. An action is held to be moral because it passes the CIT which is itself imbued with moral authority because of various characteristics such as its capability of being universalized as a general maxim, the respect it shows for the integrity of persons by treating them as ends and not means, and so forth.

RL, likewise, plays the same role for legal practice in liberal theory. We can distinguish between law and RL as a distinction between two kinds of claims. The fact that it implicates terms of a higher level of generality and formality, indicates that a discussion of RL is not the same as speaking about the law. RL conveys moral sanction to law by its demonstrable commitment to certain ends. These ends are conducive of legitimacy, in light of, among other things, the liberal anxiety over coercion which requires the notion of constraining power. This is achieved through procedural regularity, substantive checks on power and from the general stability seen to be attendant in the concept of RL itself. Furthermore, the theory of RL conceptually binds

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law with those principles of morality such as justice, impartiality, fairness, and in general those background conceptions of the good, to which a given political community is committed. This moral dimension to RL stands separately from issues of whether the law in a community genuinely instantiates and codifies its moral norms.[16] One can conceivably allege that a law fails to pass the moral test without calling RL into question. Additionally, the point that RL law connects law to moral principles does not entail advocating any particular principles as correct or appropriate. Instead, the argument is merely that RL equips law with a normative basis for its justification in the liberal scheme of things, linking the legal and the moral in order to supply a reason why law ought to be obeyed.

The impulse to view law as bound by some general normative scheme which lends it moral authority is evident also in the writings of early natural law theorists such as

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[16] Here the normative, moral dimension of RL is being distinguished from any discussion as to how or whether the law and morality are to be connected. Recognizing the moral dimension of RL as a general, normative doctrine does not entail any claims about the specific moral content of the law. This point recalls the famous debate between Lord Patrick Devlin and H.L.A. Hart regarding whether legislation ought to follow moral prescriptions. Devlin's Enforcement of Morals (1959) sought to locate so-called basic principles of law in generally accepted moral standards. Law then enforces the content of morality and this is justified on two major grounds: society's right to protect its own existence and the right of the majority to uphold its shared moral convictions from social change. Hart, challenging Devlin in Law, Liberty and Morality (1963), maintains that it is inappropriate for society to proscribe every practice that it views as objectionable or potentially injurious to its survival. This is a debate more about the content of law than about its general form.

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St. Augustine and St. Thomas Aquinas, as well as in more modern work such as Lon Fuller[17] and Ronald Dworkin[18]. However, the modern doctrine of rule of law represents a justificatory move related to formal principles which bind law to a general scheme of moral norms rather claiming to connect law to the particular content of a given morality derived from a pre-existing natural order. In this regard, Fuller and Dworkin are moderns whereas the projects of Augustine and Aquinas, to propose the linkage between the content of the moral and the legal as a symmetrical one, is not a justification in the formalist mode. The theory of RL in liberal legalism simply ties a legal system to a justificatory formal moral scheme which vests the legal with moral authority. Yet given the fact that the connection between law and morality can be made at first and second order levels, the relationship between the two continues to be a perplexing matter worthy of attention.

A classic example of this latter puzzle i.e., the relationship of the moral and the legal, concerns the dilemma of civil disobedience. As an example, in the Sophocles play, the protagonist, Antigone, finds herself in

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[17] Lon Fuller. 1964. The Morality of Law. Fuller argues that a legal system as a whole must fulfill certain formal, procedural moral norms to satisfy the demands of justice and fairness in order to count as legal. He calls this the "internal morality of the law" or "the morality that makes law possible."

[18] Ronald Dworkin. 1986. Law's Empire. For Dworkin the ideal of "integrity" provides the normative basis for a legal system.

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a quandary of either obeying her uncle Creon the King, or following her own convictions as to what is the morally correct course of action. As we know, the conflict turns around the King's refusal to allow Antigone to bury her brother Polynices, who had been deemed a traitor to Thebes, and this sets up clashing imperatives of law and morality. Having to decide either to heed the King whose word is law or yield to the moral dictates of piety and familial obligation, Antigone exemplifies the common notion that our moral duty to obey the law can on certain grounds justifiably be overridden. When asked to supply a reason for disobeying the laws, Antigone proclaims, "it was not Zeus who gave them forth, nor justice dwelling with the gods below who traced these laws for the sons of men; nor did I deem thy edicts strong enough coming from mortal men to set at naught the unwritten laws of god that know not change."[19] In her choosing familial obligation, Antigone submits an edict of law to a superior court of appeal, that of morality or conscience as contributed by higher principles of nature and justice.

An interesting problem of civil disobedience concerns whether the predicate "unjust" as applied to a specific law in some sense deauthorizes the rule of law overall in a given legal system. When we look at most modern civil

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[19] Sophocles. Antigone. E.H. Plumptre (trans.) 1937. 269.

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disobedients such as conscientious objectors, civil rights activists and so on, their usual claim is that only the content of a particular law is at issue, not the general form of law as furnished by RL. In effect, the disobedient's protest is not that RL writ large ostensibly has been violated, but rather just that some particular law is immoral and thereby transgresses the principles of RL. Invariably the disobedient merely points out a dissonance between the particular law which he or she has pronounced deficient and the general moral principles to which the legal system operating under RL purports to uphold.

The notion that the moral validity of law in general is not undermined by a questionable law is voiced by many writers on civil disobedience. Non-compliance with a specific law as an act of conscience is held not to be incompatible with a general faith in RL. Dworkin for instance writes,

> "in a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed...if he decides he must break the law, however, then he must submit to the judgement and punishment that the State imposes..."[20]

By succumbing to the punishment meted out for transgressing a law one reaffirms commitment to the general moral duty to obey the law, disagreement with a particular law notwithstanding. In William Sloane Coffin Jr's formulation,

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[20] Ronald Dworkin. 1977. Taking Rights Seriously. 186-7.

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"those guilty of civil disobedience are actually upholding the legal order by submitting to the legal punishment."[21] Nonetheless, one might ask whether there comes a point at which particular violations of law become so grievous as to subvert rule of law in se? While acknowledging the nuances of difference between civil disobedience, rebellion and revolution, let us assume that revolution is simply an extreme form of civil disobedience. Let us consider the rhetoric of say the American revolutionaries that culminated in the Declaration of Independence, highly charged with indignation over the actions of King George III. Their language seems at least to hint at a wholesale violation of rule of law, which might be construed to mean that the general moral authority of law has been called into question.[22]

There are three clear ways of proceeding on this issue. The first (which we can call position one, P1) would be to argue that all moral judgements of laws are singular and name predicates which relate only to particular laws. Even if all the particular laws in a given legal system were to be regarded as unjust, this would not disjustify the

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[21] William Sloane Coffin Jr. 1967. "Second Lecture" in Charles E. Whittaker and William Sloane Coffin Jr. Law, Order and Civil Disobedience. 35.

[22] It is also a plausible reading that they were not questioning the moral authority of law in the abstract but rather the specific acts of a specific law maker. On the other hand, for the purposes of argument let us presume that English rule of law writ large at some level is being protested.

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moral authority of RL for that legal system generally, since critical assessment can only be applied singularly. The claim above is largely based upon the fact that principles of RL provide the source of the criteria by which particular laws are assessed. This point is key. First we assume that all moral principles relevant to law are built into the theory of RL. To leave some out would be to render RL incomplete and unable to supply the moral buttresses for a legal system based upon it. The next move is to argue that the moral principles instantiated by RL cannot be turned back upon themselves, while denying that there exist any extraneous principles upon which to base critique.[23] RL is the Zeus of liberal legalism beyond which no supplication is possible. To claim that there are any higher order moral principles by which to assess those attendant in RL leads to the problem of an infinite regress. Hence, RL in some sense is completely exempted from criteria of assessment. This is to say that RL cannot be evaluated either by criteria applied to assessing actual laws (since it provides these criteria) or by recourse to any independent criteria (which would be to fault RL with incompleteness.) One must hasten to add, that this in no way suggests that the content of what describes RL itself cannot be debated. Thus, we can have substantive disagreement as to whether RL in a

[23] This point is similar to the Kantian problem of whether reason can be applied to critique itself since it is the source or vehicle of critique.

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particular legal system ought to say privilege conceptions of equality over liberty. Or similarly, there might be conflict between distinct particular conceptions of equality as to which one ought to denote the term. It is the idea of RL itself which, in the liberal scheme, is exempted from challenge.

Under P1, generalizations can only be offered about singular laws and cannot be applied to the concept of an entire legal system under RL, even where every single law of a legal system could indubitably be held to be tainted with injustice. On this account, RL might be seen as akin to Kant's conception of freedom of the will: freedom for Kant is formal requisite for morality, which he claims to be a noumenal, synthetic a priori and something which must be presupposed. By analogy, RL also can never be dissociated from law as its moral undergirding, just as say an impressionist painting can never be dislodged from the general theory of impressionism. So under this account, for the liberal, RL likewise can never be wrenched out as the moral undergirding of law and law is always able to avail itself of moral bases.

To argue that the idea of rule of law is the moral buttress which stands in a justificatory relationship to law might appear to be an empty and rather abstract claim, where substantive content is not specified. This arises most notably when there is disagreement as to how the content of

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RL is to be fixed. After all, to be meaningful RL must be more than merely an abstract idea and needs to implicate certain concrete moral principles which is to say conceptions of the good. An instance of the kind of significant disagreement which robs rule of law of necessary content is the familiar debate between originalism and sociological jurisprudence. This concerns the question of whether the fundamental terms of RL ought to obtain by reference to the conceptual sensibilities of the framers of the Constitution or be imputed in light of the felt necessities of the time. Where each side in this conflict is drawn to completely incompatible conclusions and is also unwilling to compromise, we have a kind of moral stalemate which cannot be surmounted. Antinomies such as this, which render aspects of RL as empty abstractions devoid of substantive content, are at the core of the skeptic's argument regarding the alleged vacuity or indeterminacy of law and legal principle. This very significant problem for liberal legalism which the skeptic raises will obviously be discussed at a later turn.

Like P1, P2 would also argue that the validity of particular laws is measured by reference to standards of moral legitimacy enunciated in the principles of rule of law. Where the two differ is in that P2 allows for disjustification of the higher order principles of RL. This might occur in two ways. It could be argued that when a

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legal system purports to be committed to a moral principle under RL and then violates that principle, under certain circumstances RL is discredited because consistency from first to second order practice does not obtain. Specifying just when those circumstances occur seems elusive. It would not make sense for every challenge to a law to coincide with an attack upon RL. At the same time, all challenges to particular laws arise by reference to principles associated with RL, having been made on grounds of an inconsistency between first and second order practice. But, where the same criteria used for assessing the faults of a law cut both ways such as to discredit RL as well, RL no longer enjoys a meaningful normative relationship to law.

Under P2, the second manner of alleging a breach of RL would be in virtue of some alternative moral principle in existence, independently brought to bear to assess RL. Thus, a law is unfair because it fails the test of fairness which RL imposes. On the other hand, RL collapses when something else does not obtain. For argument's sake let us call this something else, independent principle "X." RL lacks moral authority when it no longer does "X" and instead "~X" occurs. The claim here is the following: it seems impossible to conceive of any "X" that you would not also want present as a constitutive principle of RL itself, as well as want to have bleed into the first order practice of law. It is impossible to avoid this kind of circularity.

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And once we admit the pervasiveness of "X" we cannot posit "X" as both inherent in RL and also as an external criterion for critique of RL overall. If "X" were justice, we can use the predicate "unjust" for a specific law but it is unintelligible to apply the term to RL. This view relies on Quine's insight[24] which might be analogized to the idea that a sentence but not a whole language can be ungrammatical. Languages generate sets of predicates and there is no way of getting outside of a particular language game to test the normative criteria constitutive of its terms. The term "X" operates symmetrically at the first and second order levels of practice and we lack any meta-term "X1" or meta-language which would permit us to step back from "X".

Finally, under P3 the legitimacy of RL is directly tied to the content and operation of specific laws. Any questionable law directly burdens the legitimacy of RL and compromises the moral worth of the entire legal system. This is analogous to the proverbial single rotten apple which infects the entire barrel. This view contains a host of problems including the sheer reductionist folly of equating RL and law, which does not allow RL to perform any real normative work. From the mere fact that our linguistic practice allows us to speak of law and RL as conceptually

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[24] W.V.O. Quine. 1953. From A Logical Point of View. This view can also be associated with Wilfrid Sellars and Ludwig Wittgenstein.

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distinct, a difference between the two can reasonably be claimed. Furthermore, if the distinction is collapsed any challenge to a particular law would also denote an assault upon RL and this would inappropriately cast every civil disobedient as an anarchist or rebel or revolutionary.

For reasons already alluded to, within the framework of liberal legal theory we cannot get outside of the normative bases of law. It is impossible to pull the rug out from under RL. RL law stands in a fixed justificatory relationship to law which cannot be dislodged, and RL itself cannot meaningfully be disjustified in the same principled manner as a particular law. As a concept, RL straddles the legal and the moral in an interesting way. It establishes the moral bases of law as a quasi-autonomous domain by creating the normative criteria which lend law its moral authority. This does not, however, foreclose the opportunity for skepticism as suggested above. In fact, this fixed relation between RL and law is the very source of the possibility of skepticism. Continued discussion of the relationship between the moral and the legal will be taken up in the next chapter.

A further issue to consider here with respect to RL is whether it is in a constitutive or regulative relationship to law? If RL is constitutive of law, we cease to have law when RL is breached. This is akin to the notion that the constitutive norms of chess determine what chess is and any

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violation of these norms would mean that we would no longer be playing chess. A regulative norm is more of a technical rule which manages the practice. A technical rule might to linked to what it would be to be engaging in the activity with appropriateness, procedural accuracy or virtuosity. But in no sense would non-compliance entail the idea that the practice of law itself has been exceeded. The view being defended here is that the liberal theory of RL includes both constitutive and regulative dimensions. RL as an overall concept is constitutive. Law would not be law under liberalism without RL. On the other hand, the actual content of RL in a given legal system is in a regulative relationship to law. Regulative norms are checks on action and allow us meaningfully to speak of making mistakes within practices. If every breach of a norm were considered a breach of a constitutive rule, then we would have no basis for critical assessment of actions within the parameters of a given practice. For instance, you could not speak of someone having made an inappropriate move in a chess game if the norm they breached signified that they shifted beyond the domain of what it was to play chess.

Before concluding, one further point needs to be discussed. While arguing that RL can never be disjustified in a meaningful way, one still must make sense of the political phenomenon of rebellion as distinct from civil disobedience. On rebellion, John Locke offers the

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following:

> "and if those who by force take away the legislative are rebels, the legislators themselves, as has been shown, can be no less esteemed so; when they, who were set up for the protection and preservation of the people, their liberties and properties, shall by force invade and endeavor to take them away; and so putting themselves in a state of war with those who made them the protectors and guardians of their peace, are properly and with greatest aggravation rebels."[25]

Locke appears to suggest that subjects who rebel against the government are justified by the fact that it is really the government which is in rebellion. If it reneges upon the trust reposed in it through the social contract by violating fundamental rights, government loses its legitimacy. Does the existence of an illegitimate government, which is to say one that engages wholesale in illegal acts, constitute a breakdown of rule of law? The intuitive response would seem to be in the affirmative. Government has placed itself in the position of transgressing those moral principles from whence derive its legitimacy. And yet, however pronounced a practical breach of RL, it could be said that RL never ceases to work as a normative principle. As for any theoretical system the validity or worth of an operative principle does not stand or fall according to occasions of its use or violation. The norms of Newtonian physics continue to govern and be constitutive of that scientific enterprise even though Newtonian physics is now no longer practiced. And since under liberalism law is not conceived

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[25] John Locke. ibid. Second Treatise at s 227. 464-5

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of as entailing the paradigm shifts[26] and conflicts associated with science, RL under liberalism can be seen as the single, seamless normative framework which undergirds the entire practice of law.[27] Admittedly the liberal acknowledges that moral principles can change, such as the change which occurred in the American conception of equality after the civil rights movement, but the general paradigm of law and the relationship between law and RL can be conceived of largely as a constant under liberalism. For the liberal, all actions pertaining to law and breaches thereof can be situated within the overall context of RL.

Locke goes on to identify two forms of dissolution of government: when society is dissolved and when the legislature is altered.[28] Even in an inter-regnum between political regimes where a complete legal system is dismantled in order to institute a new one, rule of law in a sense still obtains. There may exist a vacuum with respect to law itself insofar as the operation of an actual legal system may be absent. And yet the idea of rule of law--that certain normative moral principles underlie a legal system--is something of an eternal verity in the liberal scheme. RL

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[26] This term is taken from Thomas Kuhn. 2nd ed. 1970. The Structure of Scientific Revolutions.

[27] It is important to stress that this is not pitched as a defence of liberal RL. The aim has been to describe the relationship between a practice, namely law, and an underlying normative scheme (RL).

[28] John Locke. ibid. Second Treatise at s 211-243. 454-77.

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under liberal legalism is law's pole star. It provides a single language, a conceptual undergirding by which all activities pertaining to law can be understood. Linguistic breaches of grammar, like perverse legal operations which are analogues of ungrammatical sentences, are only intelligible by reference to the constitutive norms of the language. And unlike natural languages where a number of different types of grammar exist, there is but one single, general, normative scheme to law in the liberal's understanding. This scheme gives law both its form and supplies its justification. For the liberal then, even revolution is not to be thought of as an institution of a new language but is just a revision of vocabulary. The basic formulae of syntactic and semantic structures remain intact through both moderate and radical changes, the only exception being a rare instance where there is complete abolition of law in its entirety. Such a radical move would mean the end not only of law but also of politics as we know it.

This sketch of the doctrine of RL law has couched the latter as integral to the conception of law under liberalism. RL represents the drive to cast law more and more in terms of formal theory marked by axiomatic general predicates, a fundamentally Kantian move aimed at carving out a distinctive domain for law. The explication of law in terms of a stable and finite set of general predicates

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internal to the practice avoids law having to be seen as a mere subset of other forms of life such as politics, which would be to deny law self-sufficient justification. The liberal is notably suspicious of simply equating law with politics since political authority is authorized by law. The liberal hence distinguishes legislation from adjudication and considers the latter as ideally purged of political causal dimensions. This perceived autonomy of law under liberalism, with law clad in its own normative garments, vests the law with a cognitive content so that legal terms might be seen as having fixed and distinct meanings in the context of an overall stable and determinate practice.

At base, this account of the liberal model of law denies any meaningful severance between law as it is and law as it ought to be. Arguing for the inextricable connection of the two, formalism, which is integral to the liberal's view of law, can be seen as both describing the general form of law and also providing a stipulation of its normative scheme which is founded on moral principles. At the same time, this view resists the notion that all legal statements are just moral statements, a reduction which blurs the distinction between first and second order legal predicates. We can meaningfully speak of a legal right as something

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different from a moral right.[29] Admittedly, the two may coincide, but this is not to say that they are simply synonymous. The content of our legal talk is fundamentally distinct from our moral talk, though one does inform the other in a significant way. It is this interesting relationship between the legal and moral in our first order practice to which we now shall turn.

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[29] This point is in part explored later through discussion of the distinctions between natural law and legal positivism. The strong positivist who argues for a strict distinction between law and morality is hard pressed to explain the fact that liberal legalism relies upon a moral theory, i.e. RL, to provide the normative, justificatory premises for law. This is the source of moral authority for law giving it deontological legitimacy as opposed to equating law with brute force. To be a Hobbesian about positivism is to deny any ability to assess the moral content of law since legal validity is synonymous with sovereign utterance. Since law does not implicate any specific moral criteria, in this regard the Hobbesian is not a liberal when it comes to law.

A weaker form of positivism might acknowledge that law connects with an underlying moral scheme but will simply insist that RL is an autonomous feature intrinsic to law itself and not derivative from extra-legal sources such as evolving moral consensus in the society at large.

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CHAPTER 2

THE ISSUE OF LAW AND MORALITY

Natural Law

The idea of a distinctive legal domain is an obvious outcrop of the need under liberalism to place law upon its own firm normative footing whereby it can justify itself. This claim for autonomy arises because of the special normative relationship between law and politics that exists in liberal political philosophy. As such, the doctrine of rule of law provides the conceptual framework to ground law as a stable practice which possesses elements of determinacy, coherence and predictability. Coupling rule of law and law moreover also addresses the need for a relationship between the legal order and some conception of a moral scheme from which the former can derive its justification. This connection between the legal and the moral satisfies minimal conditions for what it means for a legal system to be justified but does not deny us the ability to question the validity of particular laws as is possible under a theory of civil disobedience. In addition, this general relationship between law and morality under the theory of rule of law allows law to perform its normative work as a check upon political action as envisaged in liberal political theory.

Given the idea of RL as a bridge between the legal and the moral, skeptical moves will obviously seek to show how

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there is dissonance between the normative goals of liberal legal order set by rule of law and actual legal practices. Claiming lack of transparency between first and second order descriptions of practices is a classic mode of skeptical attack. It should be noted that this line of critique can only proceed with the following assumption: The skeptic must accept a certain level of stability in the connection between the first order practice and meta-level--that is between law and rule of law--which is what liberal theory itself proposes.[1] Alternatively, another shift into skepticism will be simply to attack the normative bases of rule of law themselves as being inappropriate, indeterminate, ideological, conservative, disingenuous and so forth.

Asserting a general linkage between law and morality under rule of law does not, however, tell us much about the relation of law and morality in our first order practice. As already argued, viewing law generally as consistent with the principles of RL does not commit one to considering every law as morally right. An on-going problem in legal philosophy is to understand the connection of morality and law, and the extent to which the former implicates the latter. The law/morals issue is taken up at length in

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[1] This is to say that claims about the normative framework of law being unstable or indeterminate foreclose our ability to engage in a critique which alleges an asymmetry between law and rule of law. Thus, for such argument to proceed we need to accept stability in the background normative structure.

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debates between proponents of legal positivism and natural law. Natural law raises as many questions as it appears to answer. For instance, in the appeal to nature on which the Natural Law Thesis (NLT) is premised, it is not clear whether nature contributes moral facts or values and as to just what is the relation between these two.

This chapter is devoted primarily to discussing natural law, which might appear antediluvian given natural law's roots in stoicism and principal exposition in Roman law and the medieval doctrines of St. Thomas Aquinas. The idea of self-evident truths and the transcendental metaphysics that natural law seems to require tends immediately to prompt scornful dismissal. But in legal theory, both traditionally and in the more contemporary context, the notion of an inextricable relationship between the moral and the legal is couched in terms of some version of the NLT. Obviously, Dworkin is not Aquinas and does not share the latter's views on the necessity and universality of natural law prescriptions. Nonetheless, there is a common stance towards moral knowledge and a view of what counts as legal justification which runs consistently through the NLT.

The NLT has been interpreted in a variety of ways. For instance, natural law has been contrasted starkly with natural rights, a distinction famously discussed by Leo Strauss. Strauss argues that for the former nature supplies

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categorical propositions of right by reference to an objective and substantial natural order whereas the natural rights theorist, by comparison, does not consider that the criteria for determining the right are universally valid propositions.[2] The general assumption in traditional natural rights theory was simply that there was a match between human reason and the truths of nature. On the Straussian reading, the natural rights theorist contends that principles of the right are not universal but change according to particular circumstances. There exists no single, abiding, external source which supplies objective standards of rightness by which to guide conceptions of the good. Instead, it is the judgement of the virtuous man in particular cases rather than any universally valid law which determines the theory of the good. In Strauss' formulation, "there is a universally valid hierarchy of ends, but there are no universally valid rules of action."[3]

In relinquishing the Greek idea of an ordered natural cosmos as the origin of morality Strauss argues that the relation of man to nature is reversed, turning into a technical relation. Where once man looked to nature to furnish standards completely independent of man's will, in modernity man seeks increasingly to dominate nature by seeking mastery over it. "Man calls nature before the

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[2] Leo Strauss. 1953. Natural Right and History. 162-4.

[3] Leo Strauss. 1953. ibid. 162.

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tribunal of his reason; he puts nature to the question...conquest of nature implies that nature is the enemy, a chaos to be reduced to order; everything good is due to man's labor rather than to nature's gift."[4] For Strauss the fact that questions of morality and the good life are posed in relation to man himself and not in relation to an external, objective natural order denies the possibility of a true morality. This is because the source of morality which is meant to guide politics is how men actually live. Since principles of the right emanate from social and political life rather than from outside of political society, the right does not constrain as an independent, objective standard for the good.

Strauss' demand that morality must somehow be vindicated by finding for it an objective, natural foundation revisits the Platonist anxiety over relativism. The idea of a morality generated by social conventions constitutive of a given political community provokes disquiet about slipping into a form of moral nihilism--denial that moral truths have any independent grounding. Strauss' Platonism notwithstanding, his distinction between natural law and natural rights is worth exploring. If Strauss is correct, the rise of natural rights talk as

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[4] Leo Strauss. 1975. "The Three Waves of Philosophy" in Political Philosophy: Six Essays by Leo Strauss. Hilail Gildin (ed.) 87-8.

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distinct from natural law can be viewed as part of the secularizing trends associated with modernity. Where once nature was pictured as a higher divine order and handiwork of the gods, natural rights represent the on-going conquest of nature to render her less mysterious and inaccessible. Man claims to know or intuit the truths of nature as self-evident facts intelligible to all rational beings. Freeden calls this an anthropocentric transformation:

> "Instead of seeking to establish the content of the natural laws that governed, or ought to govern human beings, and thence their compliance with such laws, the question became how to ensure that the individual would be entitled to, and able to benefit from, their application. Individuals now claimed the right to enjoy the protection and succour of natural law."[5]

By distinguishing natural law from natural right Strauss appears to be arguing that natural right trivializes morality by humanizing it, as opposed to natural law which posits a transcendental natural order of things set apart from human definition. In natural rights talk, it is man and not an external natural world that is the measure of all things.

On one hand the Straussian thesis about the NLT makes an ontological point that natural law, like a theorem of geometry, is out there waiting to be discovered. Natural right, on the other hand, is not construed as universal propositions independent of human beings. Next, there is an epistemological claim about how we are able to know natural

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[5] Michael Freeden. 1991. Rights. 26.

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law as opposed to natural right. Natural law allegedly entails statements which are naturalistic and held to be true objectively as universals, whereas on Strauss' view natural rights, while also trafficking in naturalistic, factual statements, asserts its truths as particulars. Just what this last idea amounts to is not apparent.

One reading of the Straussian distinction might be to liken natural law to analytic a priori statements such as the sentence "all triangles have three sides." Natural right then might be analogous either to the sentences "all triangles have three sides in my estimation" or "this triangle has three sides." From the foregoing linguistic analogies, the problems with Strauss' distinction are manifold. Let us label the three statements X,Y and Z respectively. Statement X can be held to correspond to an analytic truth, a proposition which is indubitably true as matter of logical necessity. If this is the case, statement Y is an absurdity since it seeks to qualify a universal postulate which is noncontroversially and unconditionally true. The move towards relativizing X in Y is simply not intelligible. If, alternatively, the relationship between natural law and natural right can best be expressed as the relation [X,Z], the distinction is trivial since Z can be derived from X by simple deduction. The particular case is parasitic upon the truth of the universal, general postulate.

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Another option would be to compare natural law to synthetic a posteriori statements. After all, the appeal to nature as Strauss portrays it, seems at base to provide a scheme for verification. If a moral truth under natural law were held true simply as a statement of an analytic a priori, this would render superfluous the need for a natural order. On this reading, we must regard a natural truth which is true by reference to the external world, as distinct from an analytic truth which needs appeal to nothing beyond itself since it is self-verifying as a matter of its own internal logic.[6] Now self-evidence, a term much bandied about in both natural law and natural rights talk, must mean "knowable" or "capable of being known by rational subjects" and cannot be used as a synonym for the analytic a priori.

If the truth conditions of natural morality claims obtain a posteriori, that is by reference to a natural order against which they can be verified, then natural law offers universal propositions of right which are cognitive and known through experience. Nature is held to ground morality through the fact that she provides a notion of regulative laws which exhibit rationality. Human law is then seen as a token of the general type of law which nature supplies. The assumption that runs through this entire argument is that

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[6] Of course, certain early versions of the NLT thought that logic was about the natural order. A logical truth was by definition natural.

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nature's laws are transparent and unambiguous. As a legacy from Thomism, which is discussed in more detail below, we inherit the idea that the principles of nature are known to all rational beings. And yet for the Thomist, natural truths are knowable simply by reason, either practical or speculative, and not observation, which causes the a priori again to rear its head. If man can know morality by reason alone, and indeed this is what is constitutive of the meaning of a natural moral truth, why does Strauss understand the NLT by insisting upon a substantial external, natural order as the source for moral principles? This very point causes Strauss' misgivings over natural right whereby man, through his own rational nature, supplies natural moral principles, as opposed to nature as an externality being the conduit. And this, for Strauss, is seen as robbing morality of its universal and categorical content.

Strauss' thesis would seem then to compare natural law and natural right as the contrast between two statements, where one sentence is a universal postulate and the other is a particular, with both true a posteriori. The propositions of natural law and natural right are both true as matters of objective fact but natural right entails more particular claims than natural law. Strauss' point could be considered as follows: take the statement, "murder is wrong." Under natural law this would be true according to an objective, universal, natural standard whereas under the Straussian

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formulation of natural right, truth would obtain in virtue of an objective, particular, natural standard, namely by reference to particular groups of human beings. The statement above is true as an objective fact in two different ways under natural law and natural right because of differing criteria of verification. In both cases, truth is predicated a posteriori but according to alternative standards of the natural. Under Strauss' NLT, truth may be ascribed to the sentence "murder is wrong" by rational, experiential appeal to the framework nature supplies. Under natural right, truth is based more contingently upon human standards. This leads to the curious, unsatisfactory position of there being alternative versions of what makes up the natural order--duelling versions of the NLT as it were--with subjects able to employ the word "natural" in virtually contradictory locutions. Overall, Strauss' attempts to distinguish natural law and natural right seem only to give rise to intractable problems when trying to make sense of the distinction.[7]

Facts of nature, in general are also facts about the nature of human beings. For a creature from another possible world, such as a Martian not equipped with human

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[7] As will be shown later when discussing St. Thomas Aquinas, the idea of nature under the NLT as being a standard for verification of empirical claims about the world is not necessarily what the NLT, especially in early versions, primarily entails. In this regard, Strauss seems to offer us a misreading of the NLT, albeit one that is thought-provoking.

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rational faculties, the apparent facts of nature would be radically different. Natural law and natural right must be viewed as both necessarily relativized, in some primary sense, to human understanding and thus the fact that what it means to be a moral creature <u>qua</u> human being in some fundamental manner informs our moral understandings. This point draws upon the basic Humean insight that facts about the world which we draw upon are not divorced from our interest in them. Strauss' reading of the NLT in general is motivated by a desire to treat moral facts like Platonic ideal forms or Fregian propositions in language which are held to be independent of thinkers and speakers and standing apart from the conventions of ordinary language by which they are named. Strauss locates the principles of natural morality as completely independent of human interest as if they were physical laws. It is clear that there are some truths about the world expressed as natural laws which are independent of thinkers and speakers. It is generally thought that human beings do not "make" but rather "find" the principles of physics.[8] Gravity as an objective fact would still be gravity independently of our being able to give a rational account of it. But it seems obvious that moral principles are not to be viewed as being of this

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[8] And here after Quine we know that scientific truths also can be relativized to a conceptual scheme which provides a framework of background assumptions whereby the reality of the external world can be apprehended.

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general type.

The overall question needing consideration is the relationship of facts to values in moral theory. Strauss seems to require that the factual nature of pre-moral facts must be preserved intact in moral theory such that facts can continuously be regarded as independent of human interest. To concede interestedness for Strauss is to deny persuasiveness to a moral principle because of the taint of relativism. And this is held to compromise the possibility for justification. Assuming determinacy of natural law as a source of morality, Strauss' demand that we appeal to nature as the categorical, invariant order of things external to human cognizance and interests also fails to supply a theory as to why nature ought to be followed to guide human affairs. This issue of the "why" with which Strauss seems so uncomfortable, is the very province of moral philosophy. And the reason as to why we ought to be beholden to some facts of nature and not others in our moral judgements can only be understood in virtue of our distinctive interests as moral agents.

The problems of morality and the criteria for assessing conceptions of the right and the good must necessarily be posed in terms of human teleology, an insight which we might broadly attribute to Aristotle. Our moral vocabulary translates facts about the world into an evaluative, normative register. We can use facts about

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persons as bases for being able to formulate moral implications about, say, human life preservation or autonomy, whereas we have little interest in speaking of the moral significance of the fact that water boils at 100 degrees celsius. It is implausible to claim that propositions of morality are like physical laws of the universe waiting to be discovered and to give an account of moral facts in these terms would be to engage in a form of the category mistake.

Our moral interest in certain facts and not others ultimately is constitutive of what it means to be a moral creature, and those natural facts about the world for which we evince interest are woven into our normative theories of evaluation. This circularity problem we must just accept for it cannot be escaped. Since we possess no meta-language to allow us to judge between competing evaluative theories, a moral theory is perhaps usefully understood as a self-contained discourse, as Wittgenstein's "form of life" or Kuhn's "normal science" or in terms of Quine's general epistemology.[9] In cases where incommensurable moral

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[9] The basic point is that the meanings and truth of predicates in a moral system are assigned according to the standards of the participants in the particular language game. These standards are supplied by the theory itself which we are justifying. Thus we refer back to the theory in order to determine just what facts of the matter count as justification. Both truth and good hence are relative to a particular theoretical system or, to put it another way, to a conceptual scheme. However, this preponderant feature of moral theorizing does not in any sense necessarily entail, that we be skeptics about either truth or about justification. While the source of moral truth is not associated

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theories pick up the same indisputable pre-moral facts but evaluate them differently, we have few principled, theoretical means of adjudicating between two plausible competing theories. This is because any given moral theory supplies the first order judgements as to how one is to read pre-moral facts as a justification for that particular theory, a feature which is intrinsic to the very activity of theorizing.

To return to natural law, the best course may be to ignore any supposed distinction between natural law and natural rights. MacDonald, for instance, is one of many who take this position when she writes,

> "propositions about natural law and natural rights are not generalizations from experience nor deductions from observed facts subsequently confirmed by experience. Yet they are not totally disconnected from natural fact; for they are known as entailed by the intrinsic or essential nature of man. Thus they are known by reason. But they are entailed by the proposition that an essential property of men is that they have reason. The standard of natural law is set by reason and is known because men have reason. But that men have reason, i.e. are able to deduce the

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with Platonist-like foundations, we nonetheless possess criteria of assessment and verification.

Consider, as an example, impressionist painting. What facts count as justification that a particular painting is an impressionist painting or a good impressionist painting derive from the theory of impressionism itself. The evaluative and factual predicates by which we talk about impressionism emanate from our theory of impressionism. And yet no one would argue that we lack appropriate criteria for distinguishing a good impressionist painting from a bad one. There is simply no uneasiness about the fact that we have no access to any neutral, impartial and disinterested language of critique.

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ideal from the actual, is a natural fact.[10]

On this characterization, knowledge of natural facts emanates from human reason and not a posteriori as inductions from experience.

This revives the theory of self-evidence and also appears to frame natural law as possibly a kind of intuitionism. Natural law is discovered by an internal faculty of understanding and ceases to be derived from the world. The apprehension of a moral truth either intuitively or from the internal conviction of reason both discount the relevance of an external world as the source of moral principles. The truth conditions of moral statements hinge not upon empirical proof but pertain instead to the reason or intuition of moral agents. What is rather elusive in this account is the role of the "actual" in deducing the "ideal." Authors of state of nature arguments surely consider that nature is real. What is not apparent is whether ideals are real in the sense of say, Platonic forms or noumena? Is the natural to be construed as a hypothetical or empirical category? How does the categorical or prescriptive content of nature obtain? Kant, for instance, can be considered a natural law theorist but at the same time thought that the moral contained nothing of the empirical; this is the basis of his distinction between

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[10] Margaret MacDonald. 1984. "Natural Rights" in Jeremy Waldron (ed). 1984. Theories of Rights. 25.

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categorical and hypothetical imperatives. Nevertheless, Kant predicates his views of morality upon certain facts about persons, namely their rational autonomy. These facts about persons which Kant chooses to stress themselves fall out of his distinctive normative view. The facts perform justificatory work to supply the reason in virtue of which prescriptions flowing from them ought to be obeyed. So, we "ought" to treat all human beings as ends and not means "because" this respects the fact that we are all rational, autonomous creatures. But generally speaking, to portray nature, with human nature included, as a rational ideal rather than associating it with an observable realm of facts is a conceptual position which appears somewhat at odds with a number of the assumptions of the NLT.

What can surely be said about the Natural Law Thesis is that it involves certain claims about moral predication. However, as is evident, the NLT appears in a variety of forms both in its primary sources and commentaries, and it is open to debate just what constitute the basic premises of natural law thinking.[11] On one hand, the appeal to nature seems in a broad sense to imply certain prima facie

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[11] As should already be obvious, the very idea of a coherent natural law or natural rights tradition stretching from the stoics through the scholastics and the Protestant Reformation to the present is plainly a fiction both in terms of historical continuity and complete philosophical consistency. A useful commentary on this subject is Richard Tuck. 1987. "The Modern Theory of Natural Law" in Anthony R.D. Pagden (ed.) The Languages of Political Theory in Early Modern Europe. 99-119.

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presumptions about an accessible order of things out there in the world with truths that can be somehow discovered. Natural law (lex naturalis) thus conceived is predicated upon a certain vision of the autonomy and necessity of nature. Nature generates principles such as the laws of physics which are accessible and knowable to the human mind. But since it is the mind through reason that is the vehicle for the apprehension of nature's laws, the appeal to nature seems as much to implicate the nature of reason as an ontology of an ordered external world. And yet, those who would posit regularities of nature--and even of human nature--which are known by observation as an empirical and concrete reality, often submit that these truths about the natural world in some sense have a status independent of human experience. Also, these truths are not usually framed to be thought of as simply constituted by the activities of mind.

Conversely, stressing the element of mind and human reason in the apprehension of nature, and most notably moral nature, lends credence to the view that our knowledge of natural phenomena, at least in part, entails concepts which are contributed by the human mind in the manner by which it structures experience. Here the truth of physical objects in nature, and nature's laws as we perceive them, do not possess a necessity and autonomy such that we discover or deduce them as neutral principles by observation. To the

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contrary, nature is relativized to mind and natural propositions are, in a sense, contingent elements of human experience. On this account there are no "pure" facts and natural law is as much an issue of <u>human</u> nature as being about empirical external phenomena.

Yet another approach, is to distinguish the physical sciences and natural morality, and hold that while physical laws have independent ontological status, moral laws are the product of human convention, attitudes or experience. While it might seem obvious that our moral norms are best not likened to physical laws, the status of moral truth as being empirically real or as having objectivity is not wholly relinquished under the NLT. The issues attendant in naturalism turn upon how one is to consider perception. Do the objects of perception exist independently in time and space in an external world where they are apprehended by our consciousness as outer perceptions of experience. And can the same be said of knowledge of physical and/or moral laws? Are moral laws, if they do indeed exist, a matter of inner experience relative to human agents and if this is so, does this compromise their truth or reality?

In its vagueness as to the ontological and epistemological status of the truths it purports to provide, the NLT entangles us in philosophical debates over subjectivity versus objectivity and realism versus idealism. It is not always apparent just what is a natural truth or

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natural fact under natural law. Furthermore, the relationship between factual and evaluative predication under the NLT is also a matter of curiosity.

In his "Treatise on Law" in the Summa Theologica, St. Thomas Aquinas conceives of law as "an ordinance of reason for the common good, promulgated by him who has the care of the community."[12] Self-evident moral principles bind in conscience because they are consonant with higher order truths of God's eternal law. But truths of divine law cannot fully be grasped[13] and natural truths which are known by the powers of human reason are but a surrogate for the complete knowledge possessed only by God, an omniscient, transcendent Being. At the same time, the symmetrical tie between natural law and a divinely-ordained moral scheme is what gives natural law its normative force. It should be noted that conquest of nature in terms of turning nature into an object of study is not the scholastic enterprise. Nor does the scholastic seize upon nature as an autonomous vehicle through which to develop self-knowledge.

On the status of self-evident truths for Aquinas, Boyle writes,

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[12] St. Thomas Aquinas. Summa Theologica. in William P. Baumgarth and Richard J. Regan (eds.) St. Thomas Aquinas On Law, Morality and Politics. 1988. 14.

[13] The alienation of man from divine knowledge is effected through the Fall. But man nonetheless is able to participate limitedly in divine knowledge through reason. This last point--reason as the divine spark--links the Medieval scholastic to his stoic natural law forebear.

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> "Aquinas' conception of self-evidence, which by his own account is Aristotelian, is not primarily a thesis about the cognitive response of knowers but about the character of certain propositions. According to this conception, certain propositions are 'known through themselves.' And what defines a proposition as per se nota is that it is a necessary truth in which the connection between the terms is immediate, unmediated by the middle term of a demonstrative syllogism... self-evident truths are basic and cannot be demonstrated, that is they cannot be deduced from more basic truths."[14]

Furthermore for Aquinas, while all people are capable of grasping the self-evident character of these natural moral truths, some people may not understand the necessity of them as self-evident propositions.

The objectivity of self-evident truths of natural law is hence contributed by their nature. Nature here means the nature of the propositions themselves and not their derivation from a natural order or the manner in which the propositions are known. Indeed, Aquinas and the scholastics did not concede to the physical, natural world a complete autonomy from revelation as was later initially proposed in the Renaissance and developed through the Enlightenment. And so Thomist natural law principles are objective, rational principles revealed to man qua rational agent.[15]

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[14] Joseph Boyle. 1992. "Natural Law and the Ethics of Tradition." in Robert P. George (ed.) Natural Law Theory. 23.

[15] The scholastic doctrine of natural law seems at base to presume that certain self-evident knowledge about God, human nature and the world occurs naturally in human beings. The source of this knowledge is both human nature and revelation. Since not all humans and certainly not all creatures are privy to the self-evident truths of natural law, scholastics consider important the role of God's grace in awakening knowledge of natural law contained

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There is likewise a cloud of uncertainty over whether the mind, reason, the innate power to understand moral truths, (called synderesis by Aquinas), and so forth, also lack functional autonomy and are consequently also serviced by revelation.

Since natural law principles are self-evident and true a priori, the external natural world contributes nothing in terms providing criteria for verifying truth.[16] The extent to which Aquinas would consider that truth claims about nature refer to the world, and as such are analogous to the statement that snow is white, is not obvious. What is clear is that his natural law thesis does not seem necessarily committed to the view that truth value obtains as a matter of empirical fact and natural law propositions do not rely on any language of direct experience for their verification. They are natural simply because they are objective, rational principles. Some commentators such as John Finnis suggest that we can speak of Thomistic natural law "without needing to advert to the question of God's existence or nature or will."[17] George maintains that this view dispenses with

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within us. Renaissance critiques of the scholastic doctrine attacked the universality of natural law by showing that these moral notions were empirically relative to time and place.

[16] As suggested in the previous footnote, reference to the external world, if anything, is more a source of skepticism rather than verification and was used to show how natural law propositions do not hold universally.

[17] John Finnis. 1980. Natural Law and Natural Rights. 48.

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the idea of a normative natural order in its framing of the natural law thesis as primarily involving claims about the deontological status of moral propositions and not their ontological status.[18]

In this regard, the natural law theorist does not need to embrace a naturalized ontology and in fact might even be skeptical that mind is a mirror of nature, to use Richard Rorty's turn of phrase. This skepticism could also deny that nature as outward experience even exists or that nature underwrites the truth of her propositions in the Tarskian sense that snow is white if and only if snow is white. As Strawson points out,

> "at its most general, the skeptical point concerning the external world seems to be that subjective experience could, logically, be just the way it is without its being the case that physical or material things actually existed."[19]

Under this form of skepticism our beliefs about the world are not necessarily caused by the world nor do our beliefs correspond to any external reality by which they are also verifiable in experience. To engage the question of ontological skepticism concerning the existence of external

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[18] Robert P. George. 1992. "Natural Law and Human Nature." in Robert P. George (ed.) Natural Law Theory. 31. George notes that this conception of natural law was originally formulated by Germain Grisez. 1965. 10 The Natural Law Forum. Grisez' theory has been criticized by Lloyd Weinreb. 1987. Natural Law and Justice.

[19] P.F. Strawson. 1985. Skepticism and Naturalism: Some Varieties. 5.

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things takes us off into a domain which is not of any immediate relevance.[20] Insofar as the NLT is concerned, we are simply interested in the extent to which the natural world provides a grounding for certain beliefs about morality.

With respect to moral philosophy, Strawson proposes a way out of the philosophical impasse. He suggests that we consider the raw material of moral life, which is to say people and their doings, objectively and as natural objects, as "occurrences in the course of nature--whether causally determined occurrences or chance occurrences--then the veil of illusion cast over them by moral attitudes and reactions must or should slip away."[21] This stance somewhat echoes the Humean view that facts about the world do not stand apart from our interest in them.[22] But the foregoing point

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[20] Kant's famous response to skepticism is to try to defeat the paradox of the real and the ideal (i.e. the reality of the external world versus what the mind contributes to reality) with transcendental idealism and the synthetic a priori. For Kant the external world is empirically real and is hence independent of us but is transcendentally ideal. Thus, things that we perceive and know of the world--phenomena as opposed to noumena--are dependent upon the structure and categories of mind. We cannot know noumena or things-in-themselves, even though these do exist. In Kant's view the conditions for knowledge are supplied by us as knowing subjects and cannot be derived simply from an independent, external world, the reality of such a world notwithstanding.

[21] P.F. Strawson. 1985. ibid. 32. This point is also made by Thomas Nagel in his essay "Moral Luck" in Mortal Questions. 1979.

[22] It should be noted that Hume did not consider that moral sentiments necessarily implicated any empirical claims about the world. For Hume judgements of value lacked a subject-independent

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does not, however, deny us the ability to speak of moral objectivity. Our attitudinal commitments and distinctly human responses to the world are themselves a natural fact, rooted in our natures as sentient, intelligent and social beings. Moral knowledge emanates from distinctive facts about persons which we have natural access to as moral creatures. Granted, we can still debate which facts about persons ought to be privileged over others, but the factual status of the propositions being argued, at a certain level, would be uncontroversial.

That we are naturally disposed to believe in external things can also, in Strawson's view, be treated as a natural fact. This evaporates the quixotic demand for a "pure" naturalism or "pure" objectivity prompted by dichotomizing the objective and the subjective, realism and idealism. Consequently, questions regarding the underlying ontology of natural law are dissolved, or at least no longer concern us in terms of whether we are to consider natural moral facts as being "out there" objectively in the world or being merely subjective beliefs which we map onto the world. Just because we talk about moral truths as emerging from certain facts about persons does not mean that those truths have no truth conditions. Our characterizing of moral facts by various contingent predicates (such as relativizing them to

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empirical basis whereby judgements of fact could be demonstrated from experience.

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human nature or to a certain conceptual scheme or language game) does not deny natural predicates to these facts. How moral facts come into being--whether, as Hume would assert, by our projecting them onto the world, because of our distinctive teleologies as moral creatures as in Aristotle, by way of social conventions etc.--does not entail having to deny that moral properties are real or that they exist.

The NLT, generally, reminds us of the role of the factual as a linguistic register in justification. Being able to rely on facts when engaging in moral argument is taken to be key in order to link justification with a notion of objectivity. It is this reliance upon the factual which makes a position more persuasive or worthy of being adopted than its counterpart. As a very simple and uncontroversial example, the notion of an outcome of a case being determined by its being analogous to an earlier case proposes facts about precedents as controlling and serving to justify the decision handed down. Similarly, sociological facts are used to justify outcomes in cases, as are also interpretive claims, couched as facts, about the meaning of statutes or the intentions of their framers.

Legal positivism shares something of the inclination to facticity associated with the NLT in that it too seeks to treat law factually. For positivists, law is a social fact autonomous of moral considerations, which, in contrast, are thought non-factual and evaluative. The traditional version

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of the NLT, on the other hand, regards law and morality as linked and views the moral considerations by which positive law is assessed to be also given as matters of fact. While it is useful to be able to understand law as parasitic upon background moral understandings, to see the latter in terms of strict facticity is problematical and gives rise to a certain skepticism. The NLT can be distinguished from the theory of RL in that the latter, in liberal legalism, is not committed to the idea that the conceptions of the right and the good associated with RL are persuasive only because they are thought to be natural facts.

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CHAPTER 3

LAW AND MORALITY CONT.

The Fact/Value Distinction[1]

The naturalist is committed to a certain version of natural facticity or objectivity with respect to moral propositions. The extent to which moral talk implicates evaluative predicates remains a puzzle under the NLT. Nature under the NLT would seem to be primarily conceived of as a realm of facts and yet moral discourse is usually thought of as implicating a realm of evaluation or judgement. Generally speaking moral philosophy has sought to distinguish between factual and evaluative claims as distinct kinds of statements. For those who hold fast to the Fact/Value Distinction (F/VD), no term can be both factual and evaluative, since this would mean that the distinction would, at some level, cease to be meaningful. Moreover, there exists no entailment relationship between

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[1] This distinction frames something of a perennial debate typified by the following positions at philosophical extremes. The pedantic schoolmaster Thomas Gradgrind at the outset of Dicken's Hard Times declaims: "Now what I want is, Facts. Teach these boys and girls nothing but Facts. Facts alone are wanted in life. Plant nothing else, root out everything else...in this life we want nothing but Facts, sir, nothing but Facts." Alternatively, there is Nietzsche's well-known argument for perspectivism in section 481 of The Will to Power, echoed in The Genealogy of Morals, On Truth and Lies in an Extra-Moral Sense etc. "that there are no facts, only interpretations." The issue of just what is facticity--whether there are "pure facts", or whether, to be meaningful, Nieztche's assertion must itself be taken to be a form of factual claim which appeals to truth--is a matter that is far from settled and remains an on-going subject of philosophical debate and enquiry.

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facts and values. Nor are there laws which govern moving between the realms of facts and values. Under the F/VD, factual descriptions and non-descriptive evaluative claims are held to stand apart from each other.

The F/VD was amplified by the logical positivist A.J. Ayer.[2] Ayer argued that moral statements are not analytic since they are not definitions and hence are not true a priori in the way the statement "a bachelor is an unmarried man" is true. Nor are moral statements synthetic and true a posteriori based upon verification criteria from experience. This leads Ayer to deny that evaluative predicates are cognitively meaningful and to argue that it is impossible to assert that moral judgements refer to real or objective properties of objects or actions. Moral language for Ayer is neither logical nor factual but is emotive and reflects dispositions, beliefs and emotions which have no reference to any real, natural properties in the world.

We have already seen Strawson's response to moral skepticism which argues that dispositions and attitudes can be thought of as objects and events in nature and that the possibility of rational justification for moral judgements is not undermined by reducing or relativizing moral truths to human nature. Philippa Foot also has a useful critique of moral non-cognitivism as it falls out of the F/VD. She identifies two problematic assumptions which fall out of an

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[2] A.J. Ayer. 1946. Language, Truth and Logic.

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emotivist view of evaluative belief. First, it is assumed that individuals may hold views on evaluative questions based upon premises which other people would not accept as evidence for holding such views. Next, individuals may reject as evidence for moral beliefs premises which other people use to draw their moral conclusions. These two points on the surface seem innocuous in that they describe how people can disagree with regard to moral judgements. But what poses a problem for the emotivist non-cognitivist is that moral discourse reduces to a form of extreme subjectivism whereby agreements about moral attitudes can not meaningfully be reached. This denies the possibility of justification working transpersonally in moral judgement.

The upshot of Foot's argument is that moral beliefs refer to certain objects and to be meaningful cannot be seen as non-cognitive and thereby impervious to assessment of their justification on some objective grounds. And the criteria for determining reasonable, appropriate or meaningful use of evaluative predicates such as "rude" or "courageous" are factual criteria. She states,

> "there is no describing the evaluative meaning of 'good,' evaluation, commending, or anything of the sort, without fixing the object to which they are supposed to be attached."[3]

Foot argues that the term "good" has a stipulative function which guides action which means that agents use the term

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[3] Philippa Foot. 1979. "Moral Beliefs" in Philippa Foot (ed.) 1979. Theories of Ethics. 85.

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with a pro-attitude. And the action-guiding element of moral judgement--which is to say how something can be recommended to others--is based upon evidence as to why an individual ought to hold that judgement. Foot calls for evaluative terms to be analyzed naturalistically, arguing that moral terms necessitate some acceptance of factual predicates. Hence, the picture of moral life portrayed by strict severance of the factual and the evaluative does not do justice to connections we routinely invoke in our moral language between moral attitudes and use of facts as reasons for why one ought to hold them.

The claim that "good" or "right" can be thought of as a natural property has been criticized as commiting the naturalistic fallacy.[4] This concerns the ostensible fallacy of premising a normative theory upon natural factual claims about the world. Hume also makes a somewhat similar point in the Treatise (Book III, part ii, section i) when he says:

> "I cannot forebear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. For as

[4] G.E. Moore. 1903. Principia Ethica.

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> this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason."

In Hume's view we project properties of approval or disapproval onto their objects and erroneously consider these properties as factual predicates of these objects.

In addition, according to Hume, Moore, Hare[5] and others, one cannot obtain an "ought" from an "is:" prescriptivity is not logically entailed and cannot be derived from mere descriptions of the world. When we use descriptive language we cannot smuggle in evaluative commitments since these must stand apart as a different form of linguistic usage. Words such as "ought," "right," "good," "wrong: and other ethical predicates cannot be held to refer and have truth value in the same sense as do purely descriptive terms. Thus, moral language names non-natural qualities and is irreducible to natural descriptions.

William Frankena claims that the generic fallacy which underlies the naturalistic fallacy is really a definist fallacy. This is to say that the fallacy is not so much a

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[5] R.M. Hare. 1952. The Language of Morals.

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matter of mistaking a non-natural quality for a natural one as of confusing or identifying two properties, of defining one property by another, or of substituting one property for another.[6] He proposes that the so-called fallacy only involves treating two qualities as one, irrespective of whether one of them is natural and non-ethical and the other is non-natural or ethical. Frankena believes that Moore failed to show anything beyond this and that he begs the question as to whether goodness is indeed a non-natural quality.

As an intuitionist, Moore holds that moral statements do not acquire their truth conditions in the same way as do natural facts. Since it is always an "open question" as to whether any natural property can be defined or analyzed in terms of it being good, there is nothing normative which can be either derived from or entailed in, any factual statement. This is to say we are none the wiser as to what ought to be done in light of any description of what is the natural state of affairs unless we have already made a normative assumption about the empirical conditions being good or bad. And these assumptions on Moore's view do not follow in any logical or empirical way from the descriptive conditions themselves. For Moore, the property "goodness" is an autonomous quality which cannot be defined or analyzed

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[6] William K. Frankena. 1939. "The Naturalistic Fallacy" in 48 Mind. 464-77.

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in terms of anything other than itself. We know something to be good, and this has truth conditions, because of the faculty of moral intuition. The moral, therefore, is a way of seeing the world. The most significant problem with the intuitionist view of moral judgement is in its portrayal of justification in an unsatisfactorily circular manner. Insofar as I can supply a reason for any moral intuition I hold, that reason is of the form "because I see things that way."

Moore the intuitionist is not, however, skeptical that there are moral facts. Moral predicates do name facts but these are non-natural facts which are known through the special faculty of intuition. Moral statements have truth conditions and are cognitive, but the problem for the intuitionist is that the facts in question which are known by intuition have no relation to other sorts of facts, most notably natural facts. The appeal to moral facts under intuitionism seems to collapse in that there is weak consensus and unanimity and no standard observer whereby moral intuitions are known or by which disagreements about intuitive moral facts can be settled.

Moore makes his point about moral properties in part through an analogy between "good" and "yellow." Moral predicates are like colors in that they simply cannot be defined non-tautologically, which means analyzing a complex term by imputing constituent elements to it which are not

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mere restatements of the term itself. For instance, colors cannot be reduced to the physical properties of light which helps us to see them. I think something is yellow because I "see" it as yellow and yellow is not identical with light of a certain wavelength on the color spectrum. While it could indeed be true that moral predicates do not name complex wholes and cannot be analyzed in terms of other properties, it does not follow that other properties have no bearing upon moral predicates, particularly in terms of contributing a justificatory story. Returning to the notion of color, to state that "X is yellow because I see it as yellow" is not a sufficient condition for truth to obtain. It is important to separate the content of a belief as being quite distinct from its ground, and it seems obvious that while I am free to believe that X is yellow, the grounds by which the belief is justified or verified must hinge on something stronger than the simple fact of my believing it. This is especially so in the domain of moral argument where I must also try to convince others that to be moral they ought to hold the same belief and conduct their actions accordingly.

Justification of a moral belief cannot be simply a description of the content of the belief itself. This is a point already alluded to in describing Kant's critique of Hume in Chapter 1. How is one to correct a mistaken belief if the content is all one can cite as grounds for holding it? How then can we speak of any belief as being erroneous?

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In the color example, imagine that we have various persons suffering from forms of color-blindness where each perceives a different color as yellow. We have no transpersonal conception of justification to settle this dilemma since the content of each person's belief is the same as its justification or grounds. Evidently, to avoid collapsing into extreme subjectivism, the intuitionist has to hold that moral intuitions reach across persons. And yet, the idea of an ontology of primitive moral facts which all, or even most, persons intuit is clearly problematic.

The intuitionist has something in common with the emotivist who maintains that moral propositions are really just statements of dispositional states or attitudes of those who hold them. As stated earlier, while the emotivist thinks that moral propositions have no truth value at all, intuitionists hold that moral propositions can be true but they are not true as natural facts which have physical properties. Against the naturalist, both the intuitionist and the emotivist consider that we cannot point to any facts about the world in order to justify or elucidate our moral talk. Pushed to their logical conclusions, the intuitionist and emotivist conceptions of moral discourse do not afford us a satisfactory picture of justification. And when we jettison the idea of robust justification, or couch it in terms so thin, such as intuitions or emotions, they have little or no genuine justificatory authority and we lose a

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meaningful conception of truth value. This makes us unable to explain the fact that moral disagreements between equally rational agents are usually settled by reference to some notion of truth conditions which are generated by reference to factual predicates which have some bearing upon the world.

Frankena's point about the generic fallacy is certainly useful in declaring that reducing any two properties to one another is a semantic error. To preserve linguistic and analytical clarity we do need to maintain a distinction between facts and values and this distinction is fundamental to the manner in which our moral talk proceeds. Nonetheless, it is equally erroneous to regard facts and values as mutually exclusive. In this sense Foot is correct in that her position leads to a linkage between facts and values. Moral claims can be seen as both descriptive and evaluative such as the terms "rude" or "courageous" which, when employed, both describe a person or state of affairs and also cast an evaluative aspect over the thing being described. To say that Robin Hood was courageous points to certain facts pertaining to his behaviour. What is implicit in this description is that courage is good and this is a distinctive belief about the predicate courage which cannot be deduced from Robin Hood's objective actions. For the Humean this means that the goodness of courage is a non-cognitive response which cannot have truth conditions

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because it just reduces to belief about a state of affairs. The reductio ad absurdum of this view would mean that all evaluations are projections derived not from facts about the world but from the psychological dispositions of those who utter them. How are we then to make sense of the issue that there are objective states--facts of the matter--to which our evaluations refer? And it is these facts which we hook onto when justifying our moral beliefs.

To be meaningful, moral evaluations must be seen as somehow resting upon predicates which refer to the world, even to the extent that these predicates are embedded in a language game, filtered through a conceptual scheme, or derivative from psychological attitudes of moral agents. As already stated, in no sense does this suggest that the facts that bear upon moral evaluations are "pure" and obtain by a mechanism of neutral discovery or detection. While it is evident that factual statements can never yield precepts of morality in and of themselves, the task of a moral theory is to pull facts into shape by holding them worthy of attention as justificatory grounds for certain moral judgements. In general we might consider the naturalistic fallacy as a problem that is overblown. In some implicit sense, as Foot demonstrates, there always is an "is" behind every "ought." Moral theories invariably refer to facts about the world which are nuanced evaluatively in order to generate a moral "ought."

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The position--that some reference to facts is the very basis on which moral theories justify themselves--seeks to explain the way in which a moral theory supplies a reason why it ought to be embraced over some competing conception of the right or the good.[7] This is also the basis for ascribing truth conditions to moral judgements. Hume is correct in that if evaluations are simply beliefs then they are not amenable to truth conditions in any meaningful sense. At best, truth would obtain in the trivial sense of the form "it is true that I believe X about Y." In order to be meaningful and intelligible evaluative statements need a more substantial cognitive element than this. What it means to say that moral judgements admit of justification and are capable of generating a moral "ought" enlists more than describing them as beliefs or intuitions.

The idea of a justifying relationship between pre-moral facts and moral judgements is best seen as a movement from more to less evaluatively loaded. We justify a moral judgement by pointing to a fact about the world which has yet to have moral significance and which stands apart from

[7] This does not commit to moral realism, if the latter means embracing a view that justificatory facts stand apart from persons. Facts cannot wholly be distinguished from values in moral discourse. But facts and values can be held distinct in the role the former play as features of a justificatory story used to ground a moral evaluation. Evaluative predicates can be thought of as in a sense supervening upon non-evaluative factual predicates. For a useful discussion of these issues see Steven Ross. 1991. "The Nature of Moral Facts" in The Philosophical Forum. Volume XXII, No. 3, Spring 1991.

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our moral claim and yet bears upon how our moral judgement ought to go. And this move back and forth between the factual and the normative is seamless, inherent to all our moral talk, and built into the very notion of justification. Prescriptions are intelligible and possess justificatory authority wholly by reference back to some asserted set of facts to which they refer. To see moral theory as somehow free-floating and unable to refer to the world seems to misdescribe and misunderstand our moral talk. Granted, moral evaluations of facts are not the same as factual descriptions. This is a point which Moore appears to get right against the naturalist who would seem to see moral judgements as reducible to factual descriptions. But to be an anti-reductionist does not mean that one must then hold a severance view on the relationship between facts and values. To see factual descriptions as having no bearing upon moral evaluations affords us a very thin picture of justification in moral life.

The argument here on the relationship of facts and values is that while facts and values cannot be reduced to each other, there is a justificatory relationship between the two. There are factual descriptions which bear upon moral talk. For instance, consider a line of argument which could be proposed as a possible justificatory ground for the prescription that torture is wrong. We can justify this by pointing to the fact that torture ought to be disapproved

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"because" human beings feel pain. Admittedly, pain is already in some sense an evaluatively loaded term rather than a morally neutral one, but regardless, the factual proposition supplies a reason which is less of an evaluation and more of a description, as to why one ought to comply with the particular moral edict. This point counter-argues the entire fact-value distinction in proposing that there is no hard and fast logical nor linguistic gap between a moral judgement and its justification. But at the same time the justification which elaborates why a judgement ought to be followed generally is always advanced in quasi-factual terms, which is to say in terms less prescriptive than the judgement itself. The closer our moral judgements are to the factual bases on which they seek to be predicted, the more a moral theory is liable to the reproach of being circular for the fact that the justification is couched in an evaluative register equal to the actual judgement. For example, Aristotle's justification of the goodlife in the Nicomachean Ethics is simply a description of that life with the same terms, equally evaluatively loaded, appearing as both prescription and description. Aristotle's reasons for why one ought to lead the goodlife is to achieve eudaimonia or happiness. Happiness and the goodlife is also what all human beings ought to aim for as a matter of their distinctive teleology. Here we have a more acute problem of circularity than in the earlier example of why torture ought

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to be proscribed because of the fact that human beings feel pain.

If we were to view the NLT simply as a point about the way in which evaluations and facts are mutually implicative in moral theory, natural law becomes a rather innocuous phenomenon. On the other hand, fudging natural law with intuitionism inevitably leads to the anxiety which Alf Ross expresses:

> "Like the harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature. And indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of intersubjective control and opens the door wide to unrestricted invention and dogmatics."[8]

Ross criticizes the level of instability and indeterminacy associated with the term "natural," and how one can be skeptical about truth conditions grounded in private subjectivity. He points out the need for more of a transpersonal evidentiary standard to establish the veracity of natural law claims. The two major objections to natural law to which Ross seems sensitive are as follows: First we can come to no meaningful agreement as to what connotes natural law given the ambiguity as to what counts as nature. And second even if we could have consensus at the first

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[8] Alf Ross. 1958. On Law and Justice. 261.

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order level about the concepts of natural law, there still endures the denotational problem as to just what particular conceptions instantiate our first order natural law concepts such as justice, equality, rights or whatever. We mitigate these problems if we take natural law simply to mean that an appeal to certain agreed upon facts to justify our moral judgements is both warranted and required in moral argument. We can speak in quasi-factual terms about the dignity of persons generating and justifying rights and obligations to being treated with respect and consideration. At the same time, we must acknowledge that the semantic status of the term "dignity" as being a fact about persons rather than a value is open to debate. Ross' quarrel with natural law, in a sense, is just as much about his reading of naturalist ethics as about natural law *per se*. And curiously, versions of these same contentions are made by legal skeptics to critique not only natural law but positive law overall.

Natural Law Revisited

The NLT, broadly speaking, embodies certain general assumptions about law and morality. First, the NLT prescribes that positive law does or must follow certain moral principles. The truth or justification of legal propositions is contingent, at least to some degree, upon moral propositions, and the idea of moral duty gives rise to legal duty. Second, the NLT assumes against the non-

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cognitivist that moral knowledge is possible and that moral statements have truth conditions. Michael Moore terms the first thesis the relational thesis and the second he calls the moral realist thesis.[9]

We can now set aside whether natural law principles are seen to be intrinsic to human nature or to the nature of things and state that certain pre-moral facts have some bearing upon moral judgements which in turn are held to generate moral duties to be obeyed. Legal terms under the NLT are reduced to moral ones and moral terms are ultimately related in some justificatory way to facts. This closes any conceptual space between morality and law. A law is by definition then also a moral norm. As exemplified by St. Thomas Aquinas,

> "every human law has just so much of the nature of law, as it is derived from the law of nature. But if, in any point, it deflects from the law of nature, it is no longer a law but a perversion of law."[10]

Perversions of law which fail to satisfy the conditions of what counts as law are unjust and do not bind in conscience. Aquinas speaks in clear contrast to Hobbes who in Chapter 30 of the Leviathan writes that no law can be unjust.

The NLT can be distinguished from the moral dimension of rule of law under liberalism in two ways. First, the

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[9] Michael S. Moore. 1992. "Law as a Functional Kind" in Robert P. George (ed.) Natural Law Theory. 189.

[10] St. Thomas Aquinas. On Law, Morality and Politics. 1988. William P. Baumgarth and Richard J. Regan, S.J. (eds.) 59.

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NLT, in its traditional form such as in Thomism, requires that the content of all of black letter law be symmetrical with morality. Rather than view these two as bound in any form of strict entailment relation, the connection as conceived of under liberal legalism exists at a formalistic second order level. Legal systems as a whole and not individual laws are justified by reference to a moral scheme via the theory of rule of law. In the liberal scheme, this general justification for all laws which issue from a legal system generates the deontological moral duty to obey the law. On this reading of liberal legalism, it is inaccurate to describe legal validity as requiring that political subjects assess the moral worth of every single law by which they are governed. Second, morality under the NLT is framed as a matter of objective truths with little consideration of the manner in which objectivity in moral argument obtains as a matter of social understandings and conventions. On the basis of a more Rawlsian view, it could be argued that the moral norms which steer the course of politics are not natural truths but are founded on some notion of transpersonal rational acceptance. And the mere fact that moral norms need to be accepted does not foreclose our ability to speak of objectivity in moral judgements. It is not the same objectivity which pertains in science where facts can be thought of more in the sense of having ontological status independently of persons. Moral facts

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are contingent upon persons and are facts which do not stand apart from the way in which we nuance them.

It is useful to conceive of moral terms as analogous to aesthetic predicates. For instance, we can speak objectively of Picasso's cubist oeuvre. But cubism, unlike say gravity, does not have ontological status apart from the aesthetic theory which defines it. In any event, the source of our moral conceptions of the right or the good is not an issue of any immediate concern. It goes without saying that for society and politics to function there exists a set of certain stable norms which can be justified and which have acquired general approbation. Stability is secured more by the level of acceptance which obtains and less by the source of the norms which are accepted. The idea that acceptance can only be achieved by reference to a natural order is implausible. We can still have considerable agreement that human rights, say, warrant codification, respect, and non-violation without having to commit to any particular ontology of rights and nature.

So far our discussions have dealt more with exploring naturalism in ethics in order to frame the relationship between facts and values in justification. Another key element of natural law theory to which we have only somewhat alluded is that of legal validity. This goes beyond claims concerning factual objectivity since one could conceivably reject naturalist ethics but still adhere to the relational

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thesis aspect of the NLT which proposes that moral validity is a precondition for legal validity. Here we set aside the type of moral theory, "M," that has been adopted, and argue only that law be symmetrical with whatever "M" prescribes. Our natural law thesis now might be seen as "N*" which is to say that law must be consonant with morality per se, but not necessarily with a naturalistic morality such that moral qualities are held to be necessarily identical with natural facts.

In discussing rule of law in Chapter 1, RL was proposed as the idea which supplies the normative underpinning for the concept of law; rule of law generates the deontological moral duty for why laws ought to be obeyed. It was also stressed that rule of law is not beholden to another moral theory drawn from the outside, such as natural law, to acquire its normative force. Just how one is accurately to describe the relationship between the legal and the moral has proven rather elusive. Virginia Held writes:

> "[if] law can only truly be law if it is not contrary to morality, then we will have to say of what looks like an existing but immoral law or legal system either that it does not after all "exist" as law or that if it really is law, it must be morally acceptable...We can discern, I think, between positivist and natural law theories, room for a new category of theories of law...We can have separability between morality as a whole and legal validity even if we hold that we cannot have separability between legal validity and legal morality."[11]

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[11] Virginia Held. 1984. Rights and Goods. 117-8.

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Held advocates a necessary connection between law and part of morality. This allows for a morally defective law to be still considered a law while not being viewed as a valid law. In principle it seems indisputable that Held is correct in thinking that law and morality are linked in some fundamental way. But the terms "moral" and "legal" do not stand in an identity relation to each other. Nor can the relationship be held to be one of simple entailment. It also does not seem correct to analyze the relationship of the legal and the moral as being a matter of severance, as do early positivists such as Bentham and Austin.

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CHAPTER 4

LAW, MORALITY AND INTERPRETATION

Legal Positivism

As a preface to discussing legal positivism, it is useful to separate two areas where the effect of morality on law can be discerned. Admittedly the distinction being advocated is somewhat artificial and at a certain level breaks down since the two terms are mutually implicative. Nevertheless, the stability of the distinction is sufficiently sustained by linguistic practice such that it describes a genuine difference which is helpful for understanding. These two distinct domains in which the moral has an impact in law are the areas of justification and interpretation. Both legal positivists and their critics sometimes tend to blur this distinction, which leads often to confusion.

The word interpretation in law as used here refers to judicial interpretation, that is, the activity of judges in declaring the law. Justification, on the other hand, is the activity of supplying reasons as to _why_ those interpretations ought to be considered persuasive and correct. Justification is further implicated in supplying a reason why law as a whole ought to be obeyed. As an aside about interpretation, the so-called linguistic turn has given rise to an intellectual climate where "all the world's

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a text and all the men and women merely interpreters,"[1] (or worse still, where there is allegedly no text to be had at all and any reading whatsoever can be sloughed off onto a shifting array of indeterminate signifiers), one is compelled to note that describing law, judicial decision-making or justification, as for any social phenomena, is also, at some level, an act of interpretation. But interpretation does not necessarily collapse into extreme relativism or subjectivism. If the reality of one's interpretive assertions cannot be established beyond Hamlet's retort to Rosencrantz that "there is nothing good or bad but thinking makes it so," then as Socrates declares in his critique of Protagoras in the Theatetus (171b) "[you] would acknowledge [your] own belief to be false, if [you] admit the belief of those who think you wrong is true." Any extreme relativist, such as the radical post-modernist, bumps up against the logical rule of bivalence. Moreover, under an extreme relativist or subjectivist view of interpretation we are hard pressed to give a meaningful account of questions related to translation and reference in language. A linguistic understanding is predicated in some fundamental sense on what it means for any given sentence to be true. And the truth of our linguistic conventions is

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[1] Here apologies are extended to William Shakespeare for this small conceit.

The linguistic turn in social theory proposes, to various degrees, that language constitutes reality and that meaning does not obtain by reference to a world outside of language.

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parasitic upon some general notion of the real; the fact that there are objects and entities to which our language refers. Whether the idea of the real is generated from within linguistic usages or from without, whether these objects are linguistic, behavioral entities, or reducible to nonphysical "propositions" is not a matter to be taken up here. Suffice it to say that our linguistic practices are so wedded to some notion of truth as to render extreme relativism and subjectivism unintelligible. The point is that any interpretations generated by theorizing rely on certain criteria of plausibility, reasonableness and truth which cut across subjective individualism.

Positivism in its various forms tends to defend the thesis that there exists a world apart from the interpretations generated by our cognitive faculties. Motivated by a scientific view of verificationism, the positivist shares with versions of naturalism the belief that the real is essentially factual and not interpretive. "Facts of the matter" are conceived of as plainly evident by simple observation. The non-controversial nature of these facts is held not to warrant any need for justification beyond simply stating what actual facts obtain in any given case. Under positivism the enterprise of social theory is modeled on a conception of the exact sciences in order to render it purely descriptive and thoroughly purged of

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normative content.[2] We know that the positivist is self-deluded in thinking that complete severance of facts and values is possible to achieve. Yet there is a meaningful distinction which we can draw in our theoretical talk between descriptions, which are less evaluatively loaded, and statements that are patently normative.

Legal positivism was associated primarily with Jeremy Bentham, John Austin and Hans Kelsen. Later H.L.A. Hart reshaped the central thesis of the early positivists into what has come to be known as the "model of rules." Legal positivism and natural law both maintain a realist view of truth but part company in that only the former advocates strict separation of the factual from the evaluative. The legal positivist thus frames law as essentially distinct from morality. Driven by a fundamental puzzle attendant in traditional natural law theory--the obvious error of considering that an unjust law is not really law--legal positivism couches the meaning of law as falling out of logical analysis of the law as an autonomous concept. For the positivist, running law into morality by requiring that the content of law be symmetrical with morals, denies us the ability to speak of the distinctive thing that is law. Above all, the positivist searches for a test to determine

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[2] It should be noted that legal positivists differ from logical positivists in that most of the former, with few exceptions, are not non-cognitivists with respect to moral truth.

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just what is law in a legal system. Conferring the status of legality to law by extra-legal means, namely through its connection to morality, is held to blur the distinction of law as it is and law as it ought to be. Ironically, in reducing law to morality, the traditional NLT in point of fact makes it more difficult to assess the moral dimension of law since we are unable to speak of law as an entity distinct from morality. This means that we are less able to assess law by drawing upon moral principle because legal and moral principles are seen as being synonymous. If we decide that something is law, we cannot evaluate it as morally wrong.

In addition, under natural law, legal obligation is reduced to moral obligation. Clearly, as already argued, the obligation to obey the law needs to rest upon some general moral duty in order to go beyond the idea that coercion is the only reason for subjects to submit to legal authority. In liberal legalism, consent of the governed is the major justificatory premise for legal authority. This consent is tied to the fact that law itself, because of its general connection to a certain normative idea, namely rule of law, merits deontological moral support. But moral duty cannot be held to be generated by the content of any given law, as certain versions of the NLT would appear to imply. Many actual laws, such as the legal obligation to possess a valid driver's license, are relatively morally neutral and

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in and of themselves do not give rise to any moral obligation. Moral obligation must then obtain in virtue of some general theory since it is not plausibly tied to the content of every particular law. In moral theory itself, we do not think of moral obligation as generated by the content of any particular moral act. For example, the moral duty to tell the truth is not predicated upon the content of any specific truthful utterance so much as upon a general duty concerning truth-telling. The legal positivist's account of law, while sensitive to the principal problems of a natural law theory which reduces law to morality, swings to the reverse extreme of denying any immediate relationship between law and morality. This posture of severance is equally misguided.

On the severance point, David Lyons argues that the view of legal obligation which positivists uphold is in fact closely tied conceptually to how they would think of moral obligation. Lyons writes:

> "The usual positivistic idea is that legal and moral obligations are conceptually distinct and have independent existence conditions. The necessary and sufficient condition for the existence of a legal obligation is that one be required or forbidden by law to behave in a certain way, and this is assumed to imply no moral conditions. But the typical mode of analysis of legal and moral obligations to be found in positivistic theory puts them on a par as two species of a single genus with parallel implications. If one is under an obligation, moral or legal, then one's

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behavior may be criticized accordingly."[3]

Lyons believes that it is a mistake to draw strong analogies between legal and moral obligation since the nature of law and the nature of morality are substantively different. In this regard he is sympathetic to a soft positivism which simply states that what makes law cannot be reduced to what makes law moral.

The main components of legal positivism may be summarized as follow: First, the legal positivist asserts the autonomy of law by at some level disconnecting law and morality--the is and the ought--thereby distinguishing so-called analytical from normative jurisprudence. The legal positivist claims that "law as it is" can be posited ontologically as an objective social fact. John Austin's theory of law, which is typical of early legal positivism, entails two theses, one about sovereignty and the other concerning sanction or enforcement. Known as the command theory or imperative theory, Austin proposes that law can be described as the commands of a sovereign which are habitually obeyed. Commands are defined as a signification of desire and the ability to inflict harm for the nonsatisfaction of that desire. As a corollary to viewing law as sovereign commands, Austin proclaims the autonomy of

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[3] David Lyons. 1982. "Moral Aspects of Legal Theory" in Peter A. French, Theodore E. Uehling Jr. & Howard K. Wettstein (eds.) Midwest Studies in Philosophy: Volume VII Social and Political Philosophy. 232.

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law in his retort: "the existence of law is one thing; its merit or demerit is another."[4] Under the command theory, law is described in virtue of its causal mode of production. A law is a law not because it is morally acceptable but from the fact that it enjoys, as a matter of fact, an appropriate pedigree. Austin's view of legality portrays law in fundamentally conventionalist and procedural terms. Laws are the products of certain specific procedures or processes and legal rights and duties are the creation of a particular sovereign body in a particular legal system. Subjects adhere to law because of general habits of obedience and the threat of coercive sanction. For any law to be considered as law does not require that it instantiate any moral principle or display a moral essence. For Austin, legality is a matter of sovereign creation; it is hence a quality that the legislature brings into being. No legal proscription can be meaningfully described as malum in se, but rather all are malum prohibitum.

Austin's command theory poses two significant questions. Firstly, can a system of rules which fails to fulfill a moral minimum count as a legal system? And secondly, if the authority of law is derived not from a connection with morality but simply from the performative notion of a sovereign utterance, how are we able to speak of

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[4] John L. Austin. 1832. The Province of Jurisprudence Determined. 1954. H.L.A. Hart (ed.) 184.

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a bad law, or the legal obligation to obey the law? On this second point, H.L.A. Hart, as a later legal positivist, takes issue with Austin and suggests that his command theory, by not sufficiently distinguishing the concept of legal obligation from that of being obliged in the coercive sense, forces us to view a stickup by a gunman as generating a legal duty to be obeyed.[5] Besides, a command theory does not explain how law possesses continuity and continues existing through changes in sovereigns.

In fairness to Austin, Hart's gunman example is easily dispensed with on grounds that not all commands count as obligatory ones. It is only those that exhibit the correct pedigree which are entitled to be considered as law. A non-sovereign command is not tantamount to legal obligation just because it entails an element of imperative and coercion. At the same time Austin resists any notion that sovereignty is to be associated with legitimacy or a right to rule. For him to do so compromises the positivistic thrust of his account as a purely factual and descriptive theory.

Austin's notion of legality--that it is a conferred property analogous to knighthood or baptism--draws on the idea associated with certain nominalists that a quality can be brought into being by the performative act of naming it. For the very fact that a de jure legislature has created a

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[5] H.L.A. Hart. 1961. The Concept of Law. 23.

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law and labeled it as such, the created object is law. This contrasts with the Thomist who would hold that a law is legally binding only because it exhibits certain intrinsic moral qualities. As already suggested, the Thomistic NLT proposes too close a relationship between law and morality which does not allow us to speak of the distinctive thing that is law. Nor can we assess its moral qualities since law simply reduces to a subset of morality. On the other hand, for Austin who declares that there is no relationship between law and morality, our ability to determine the moral worth of law is foreclosed. Though a gunman's imperative utterances are not law and could never be thought of as legally or morally binding, if a sovereign were to emulate the gunman, subjects have no basis for redress. Moral condemnation is of no relevance for assessing legal validity since for the positivist law does not connect with morality.

Hart's thesis in The Concept of Law might be termed soft-positivism, especially regarding the separation component of the autonomy thesis.[6] Hart also is committed

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[6] Hart's philosophy of law relies greatly upon the work of the Austrian legal positivist Hans Kelsen. Murphy and Coleman go so far as to state that "in many respects [Hart is] derivative...he manages to preserve most of Kelsen's central insights without surrounding them with Kelsen's complex prose and without preserving the obscurity and ambiguity often found in Kelsen's own development of positivism. Jeffrie G. Murphy and Jules L. Coleman. 1990. Philosophy of Law: An Introduction to Jurisprudence. 27. A generally cited useful discussion of Kelsen's theory is Martin Golding "Kelsen and the Concept of 'Legal System'" in Robert S. Summers (ed.) 1971. More Essays in Legal Philosophy.

Kelsen's general thesis is that law is a matter of objective fact albeit one that implicates a norm. Kelsen terms the rule

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to the idea of treating law as a distinctive ontological social fact. But he is nevertheless willing to recognize an intersection of the moral with the legal. For one thing, Hart finds in the concept of law an implicit principle of justice which prescribes that officials treat like cases alike. Hart's central thesis is that law is not appropriately described as sovereign commands but rather as a system of rules, where rules are more than just habits or regularities of behaviour. Law, in his view, is a union of primary and secondary rules. Primary rules impose obligations and the majority of subjects assume what Hart terms an "internal" perspective towards these constitutive rules of conduct which define the social order. Hart states:

> "When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertions; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides for conduct. We may call these respectively the 'external' and the 'internal points of view'...whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose occupy the position of an observer who does not...refer...to the internal point of view of the group." [7]

Hart describes how an external point of view, while allowing

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which determines the source of legal validity, the "basic norm." But this norm can be considered without having to draw upon moral notions such as justice and so law can be understood independently of moral considerations. See Hans Kelsen 1967. "The Dynamic Aspect of Law" in Pure Theory of Law.

[7] H.L.A. Hart. 1961. ibid. 86-7.

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one to predict human behaviour based upon observable regularities of people adhering to particular rules, fails fully to grasp the social and normative character of those rules. With regard to the example of red traffic lights, Hart writes that an external observer,

> "...will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view."[8]

Hart's view of primary rules from the internal point of view implies that primary rules are justifications for behavior and not mere neutral descriptions how people behave. A rule in Hart's theory implicates the concept of the normative but at the same time Hart holds that his concept of law as the union of primary and secondary rules is a descriptive, morally neutral and general theory of law which has no justificatory content. This is simply because his theory is not tied to any particular legal system but instead supplies a general description of law.

Hart next acknowledges the three main shortcomings of a legal regime composed of primary rules alone: There is uncertainty about both the content and scope of rules, as well as no guidance for cases where rules conflict. There

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[8] H.L.A. Hart. 1961. ibid. 87-8.

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is the static character of primary rules which have no mechanism for accommodating changing circumstances. And finally a regime made up solely of primary rules is inefficient since disputes can never be resolved absent authoritative agencies for resolving conflicts. Hart's remedy for these three deficiencies is that there are also secondary rules which are rules about primary rules. These secondary rules specify such things as how to recognize primary rules, how to change them, how to adjudicate violations in a conclusive way etc.

In Hart, Austin's command theory of sovereignty is redescribed as a rule of recognition. Rules of recognition identify primary rules by reference to some general characteristic possessed by those primary rules. For Hart, this characteristic can be based upon enactment by a specific body, longstanding customary practice, or relation to other judicial decisions. Rules of recognition hence perform a variety of functions in Hart's theory, including supplying authority and unity to the primary rules which make up law and thereby generate the idea of a legal system, as well as giving rise to the notion of legal validity.[9] Hart therefore allows us to consider how legal validity is connected to the evaluative criteria of a normative rule as opposed to Austin's notion that this arises from the simple

[9] H.L.A. Hart. 1961. ibid. 92-3.

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fact of a sovereign command which is habitually obeyed.[10] But nonetheless, while admitting the normative underpinning to law, Hart's theory does not allow us to predicate terms such as "unjust" or "immoral" as a way of disjustifying a law. The only authoritative judgement of illegality would be if a law failed to satisfy the conditions of a rule of recognition. The point of view defended earlier concerning the concept of rule of law, on the other hand, goes further than Hart's rule of recognition by allowing for more substantive moral concepts such as justice, fairness, equality etc., to be built into the idea of law. And this, arguably, is closer to the way in which law actually functions under liberalism and allows for a more coherent understanding of legal justification.

Hart also declares that the general terms which set up the criteria for a rule of recognition often have an "open texture" rendering them "partially indeterminate" when the question arises as to whether a particular rule applies to a given case:

> "The authoritative general language in which a rule is expressed may guide only in an uncertain way much as

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[10] Hart's account does not adequately explain how rules sometimes can fall into disuse, such as adultery laws which certain states still have on the books but never enforce. These rules are clearly associated with a rule of recognition and would seem to continue to count as valid law in Hart's view. Hart does acknowledge that enforcement is necessary in law but takes enforcement primarily to mean the fact that all laws are backed by the threat of coercion. It is not obvious whether adultery laws are appropriately considered as falling within Hart's concept of law.

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> an authoritative example does...Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do is to consider (as one does who makes use of a precedent) whether the present case resembles the plain case 'sufficiently' in 'relevant' respects. The discretion left to him by language may be very wide; so that as he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice."[11]

Hart here rejects a mechanistic view of jurisprudence under which no room is left for latitude of human agents. In so-called "penumbral" cases where law as it were "runs out," Hart acknowledges rules are not definitive on how to proceed. In this regard, law as a system of rules cannot possess such prolixity as to specify in advance how all cases are to be decided. In cases of law running out, we are left with the question of whether any party that prevails in a legal dispute had a pre-existing right to win. If law is silent in these cases, then how can we state that these decisions have any legal status? This difficulty for Hart--that judicial discretion springs from indeterminacy and indecisiveness on how to proceed--is the issue which animates Dworkin's response to positivism.

The problems with hard and soft theories of legal positivism notwithstanding, both versions allow us to salvage the idea of a morally bad law. Also, under legal positivism we can view law in anthropological terms, as a

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[11] H.L.A. Hart. 1961. ibid. 124.

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distinctive form of life as it were. But in stressing that the authority of law arises in some causal way by sovereign command or rule of recognition, legal positivism describes law as self-caused and existing for its own end which overlooks the need both for a more robust account of the distinctive task which law performs and for a more fully fleshed out conception of legal justification. Even though Hart concedes a minimal moral content in law as a matter of contingent connection, legal positivism skirts around explaining how law can draw upon moral justifications without necessarily collapsing the distinction between the legal and the moral. The norms which Hart admits are largely pragmatic procedural norms rather than substantive moral ones. Lacking sufficient substance, a rule-driven account of law falls swiftly into the difficulty of rule indeterminacy.

Lon Fuller, who is considered a natural law theorist, criticizes Hart's paradigm of law as a model of rules. Fuller speaks of law as entailing an intrinsic moral character which needs to be satisfied for a legal system to count as law. These moral criteria relate to such things as how rules are promulgated, interpreted and enforced, the fact that rules must be public, the fact that they are not applied ex post facto etc. Fuller submits that the formal, procedural norms of a legal system instantiate moral concepts such as justice and fairness. Law therefore

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entails an "internal morality" which is more a matter of its procedural regularity than concerning any substantive moral checks upon legal action. Fuller allows for the possibility of particular immoral laws being law but does not concede that an entire immoral legal system can count as being legal.[12] Laws then do not always need to satisfy the demands of morality and so Fuller shares with the positivist a semblance of the separation thesis. Furthermore, the actual connection Fuller proposes between the procedural rules which make up the internal morality of law, and moral principles, is not clear, especially since he thinks that legal systems with internal morality can have bad laws. Absent more substantive moral norms, the rules which Fuller holds govern legal procedures in a legal system do not seem to add much to Hart's positivist account.

The positivist intuition, that law is a social phenomenon and cannot be spoken of simply in terms of abstract moral principle, is a significant point. Positivists aim for a more anthropological understanding which draws upon facts about human beings, their behaviour, beliefs and institutions. But this social conception of law in its inclination to treat law as an objective social fact, overly discounts the relevance of the evaluative. Joseph Raz, for instance, argues that:

"A jurisprudential theory is acceptable only if its

[12] Lon Fuller. 1964. The Morality of Law.

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> tests for identifying the content of law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument."[13]

Like Hart, Raz does not claim, as would be ludicrous to do, that moral considerations do not have some bearing upon the law. But law's moral aspects do not arise as a necessary element of its nature, but are instead a mere contingent quality; law does not require moral sanction in order to be law. The general idea that there are pure facts in social theory which do not implicate evaluative considerations is deeply problematic. As already argued, it is more plausible to view social facts as being contoured by moral considerations and give up the demand for value neutrality.

Dworkin's Response to Positivism

Premised on the belief that it is impossible to characterize the legal enterprise merely in terms of fact-finding, Ronald Dworkin's theory of law is a general attack on positivism. Dworkin argues that there are criteria of law other than rules and these are principles and policies. He holds the difference between legal principles and rules to be a logical distinction, adding that

> "both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing

[13] Joseph Raz. 1979. The Authority of Law: Essays on Law and Morality. 39-40.

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> fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[14]

Principles, alternatively, are general and do not necessarily define specific duties or obligations. Unlike rules, they do not operate in an all-or-nothing fashion but have a certain elasticity in the way they are brought to bear as reasons for why an interpretation ought to go in a certain direction. When two rules contradict each other, one of the two cannot be a valid rule whereas principles can be in conflict but one can outweigh the other. Principles possess the dimension of weight or importance that rules, which are only functionally relevant, do not. For Dworkin, judicial interpretations ought always to be based upon principles which elaborate rights and duties and serve to trump mere policy considerations predicated upon social utility.

An important insight Dworkin contributes is that the judicial principles of law are only intelligible by reference to background normative principles which serve as a set of more or less stable understandings to anchor the practice. This reliance on background principles is evinced in what Dworkin calls the "hard case" where a lawsuit is not covered under a clear rule of law. Here, for Dworkin, the law does not run out as it does for Hart, since there still

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[14] Ronald Dworkin. 1977. Taking Rights Seriously. 24.

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exists in the background a principle to which we can always repair. It just happens that elaboration of that principle is more difficult in hard cases. But, nevertheless, legal interpretation is not a matter of complete policy discretion for hard or easy cases. To claim as such, in Dworkin's view, would raise the spectre of arbitrariness and leads to skepticism about justification for legal decisions. In trying to apply the existing body of law to new and novel cases where there is no clear indication on how to proceed, judges extend or carry forward what they interpret as the background normative principles which underlie the law. This excavation relies upon political theory, moral philosophy and the general array of values and social understandings which implicitly bear upon the legal narrative. Dworkin uses his idea of principle to circumscribe judicial action in order to capture what is, to his mind, the degree to which judges are limited in the discretion exercised in hard cases. Judges are bound to uphold the background conceptions of a legal system, and this factor, which apparently shapes the judicial decision-making process, is seen as precluding notions that judges act in an arbitrary or non-principled manner. This stabilizes the notion of judicial discretion against skeptical attacks. Dworkin is also able to claim that the activity of weighing principles in a hard case generates the right to win for the litigant that prevails.

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Dworkin's overall legal theory proposes law as primarily entailing the notion of fit. The best elaboration of law in hard cases is the reading that is most consonant with background principles. Dworkin rejects Hart's position that the judge arbitrarily fills in gaps for where the law is indeterminate or incomplete. In Dworkin's view, judges are always engaged in the practice of law and are never outside of or in the interstices of law, nor do they engage in law-creation. He advances a norm to describe how judges act when drawing upon the various background principles of a legal system to justify their interpretations. This norm which he terms "integrity," is the bridge between the legal and the moral, serving to connect the sphere of legal practice to underlying moral principles which animate it.

Among other things, integrity demands that principles are enforced consistently across the entire legal terrain, while policy variations do not contravene integrity. When integrity obtains in a given legal system, propositions of law are given the best constructive interpretation which concurs with the settled legal practices of the community. Dworkin writes:

> "law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and asks them to enforce these in fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle. But...integrity does not recommend...that we should all be governed by the

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> same goals and strategies of policy on every occasion."[15]

Terming integrity "our Neptune," Dworkin maintains that this norm is a touchstone for legal justification and legitimacy, and that the background principles over which integrity presides are those which generate the notion of a political association committed to shared values.

Steven Ross has presented a trenchant critique of Dworkin in a recent article. Ross argues that integrity is a conservative concept which can always be marshalled to justify whatever actual substantive norms do exist in a political culture. He also submits that integrity is virtually meaningless as an overriding justificatory norm in contrast to the actual substantive principle which it controls. For example, if we were to imagine "R" as a justificatory principle in a legal system, then,

> "we understand the idea of integrity in a way that presupposes "R" or we do not. If we do, if we say that schemes that fail to satisfy "R" necessarily fail to have integrity, then the idea of integrity on its own is now doing no interesting work...If we do not understand integrity in this way--and I think this is how Dworkin would have to understand it--we have preserved conceptual purity, for on this reading integrity is distinct, non-synonymous with other norms, but at the cost of significance. For now the fact that a scheme has integrity is politically trivial. The real question will still be before us--does the scheme satisfy "R?"[16]

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[15] Ronald Dworkin. 1986. Law's Empire. 243.

[16] Steven L. Ross. 1994. "Assessing Dworkin's Recent Jurisprudence." The Philosophical Forum. Volume XXV, No. 3, Spring 1994. 192.

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Ross' point is that we can suspend interest in the concept of integrity since ultimately any evaluative discussion will necessarily concern itself with the philosophical soundness and justification of actual political principles themselves. Ross further notes that all legal decisions to some degree are predicated on general justificatory language and can usually be interpreted as upholding some general principle of law. Given the pervasiveness of appeals to the language of principle in case law, it is often unclear when an actual legal principle, as opposed to what in Dworkinian terms would be a mere policy, is being elaborated. Ross puts the point as follows:

> "Principle in short is either too close or too far, too common or too rare. Either it is whatever obtains as soon as general justificatory language is used, in which case it is everywhere and we have paralysis.[17] Or it is relegated to a specific set of central legal propositions whose importance admits of some prior independent argument."[18]

What Dworkin gets right would seem to be that contrary to skeptics who trade on the assumption that there are no moral background principles which are implicated in legal practice, it is clear that law connects with a general justificatory moral scheme. However, Dworkin's elaboration of the relationship between law and morality through use of

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[17] Paralysis is Dworkin's own term which is to say that every particular law such as a zoning ordinance or traffic regulation would have to be consistent in content across the entire legal system. To avoid this problem Dworkin distinguishes a principle, which demands congruity, from a policy which allows for variance.

[18] Steven L. Ross. 1994. ibid. 196.

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the concepts of integrity and background principle is too thin and obfuscatory to tell us much about how moral justification bears upon legal practice.

Dworkin's methodological view of law is interpretive. And interpreting what law is, for Dworkin, necessarily entails also elaborating what law ought to be.[19] This contrasts with Hart, who insists that his theory in The Concept of Law is a factual, neutral, descriptive account with no normative aspirations. According to Hart, even when a theory of law grants that there are moral justifications that play into legal practice, this would be a plain-fact, morally-neutral description of law without justificatory aims. Hart maintains that articulating the grounds of law is a descriptive enterprise, albeit one that could allow for discussion of what is a better or worse description. The criteria of legal validity under Hart's positivism are facts about what the law is and these facts pertain to primary and secondary rules. This is the manner in which the truth conditions for law obtain, i.e. when law fulfills these objective criteria for validity.

Dworkin's conception of interpretation--that

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[19] It is interesting to consider whether the positivist insistence on severing the descriptive and the evaluative entails that positivism cannot be an interpretive theory. Presumably, some positivists could hold that law is an interpretive concept, but that interpretation does not implicate normative considerations. Law is an ontological fact without explicit normative content that "just is." As a Quinean about ontology, Dworkin would regard such a view as unintelligible.

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interpreting law necessarily entails posing evaluative questions as to what is the best justification or best fit etc.--draws upon the general view that we cannot strictly separate evaluation and description. Thus, Dworkin's theory of law as integrity is both a normative theory of what law ought to be, and an empirical description. In the concept of integrity we have a criterion for evaluating a legal system as well as a description of that legal system. This methodological stance captures Dworkin's idea that we cannot get outside of a practice when trying to discuss or understand it. Dworkin thinks it meaningless to claim any archimedean point of external observation from which one can assess and observe a practice. He instead holds that right understanding of a practice entails supplying the normative bases by which that practice proceeds.

At this juncture let us revisit the distinction between justification and interpretation drawn earlier. Dworkin makes the point that there is no semantic or analytical claim which can be made about a practice which does not, in point of fact, rest upon an interpretive statement. While he does not reject that there are such things as descriptions, descriptive claims in law are themselves interpretive, and ultimately interpretation relies upon a normative scheme. He sees the positivist as proposing a semantic theory of law whereby the grounds of law are fixed by linguistic rules. As such there are no

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substantive disagreements under positivism as to what constitute the grounds of law as these are a matter of fact. Dworkin suggests that law is always constructive and interpretive and can be held analogous to a chain novel whereby different individuals continue a distinct narrative in plausible and coherent ways. This is not to say that the grounds of law are indeterminate, but rather that they are normative, not a matter of plain fact, and that they entail interpretation. What he means by the grounds of law are

> "the circumstances under which claims about what the law is should be accepted as true or sound...law as integrity replies that the grounds of law lie in integrity, in the best constructive interpretation of past legal decisions, and that law is sensitive to justice..."[20]

Interpretations hence stand in need of being justified, and this significant issue in Dworkin is solved in a rather curious way. While holding steadfastly to an interpretive theory of law, Dworkin is also committed to a right answer thesis (RAT). For him, the solution to any given legal problem which is solved in a manner consistent with integrity, can be said to be the right answer. This seems to mean two things for Dworkin. First, through the idea of fit, we have the best possible outcome which most appropriately instantiates the background normative understandings which animate law, and which best continues the legal narrative in a plausible and coherent manner. So,

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[20] Ronald Dworkin. 1986. Law's Empire. 262.

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our legal principles connect with background moral principles, such as conceptions of the right and the good, and when these principles are elaborated in a consistent manner, this is what it means for a legal system to have integrity. This, in turn, lends a moral undergirding to law. The RAT in this sense entails a notion of virtuosity in that the best result must be achieved for a decision to stand justified. Interpretation in hard cases is not a matter of judicial policy discretion, but concerns instead the interpretive performance of virtuosi judges who try to apply the existing corpus of law to new and novel cases, excavate background moral principles etc., all the while constrained by normative principles.

In addition, a second meaning of the RAT is that the legal outcome achieved through the idea of fit is also true. Dworkin here is able to rely on a certain, if obscure, notion of objectivity to generate justification for a legal outcome. For a judicial decision to be justified means that it is correct; it is an accurate and "true" elaboration of what the law requires and is able to resist the counter-argument which asserts the appropriateness of the reverse outcome. This move, to consider legal outcomes as right answers, is Dworkin's strong rejoinder to the claims of skepticism--a pandora's box that Hart accepted in his professing that the law runs out in penumbral cases and here no party can be said to have a pre-existing, determinate

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right to win.

In the face of a barrage of criticism on the RAT, Dworkin has retreated somewhat to the position that what he means by true with respect to legal decisions is that we must act as if they were true. In one sense, this is a tenable position with respect to the legal practice. Dworkinian judges elaborating law as integrity can only do their best in performing with good faith what they believe are the best interpretations which present the optimum level of fit required for interpretations to be justified. Whether judges in fact present genuinely true decisions is perhaps not relevant. All that need be of concern is that their decisions stand justified which means that they satisfy the criteria set up by the notions of fit, coherent continuation of the legal narrative, integrity etc.

Yet we can also readily imagine a decision which is justified under the Dworkinian criteria and entails judges acting out of sincere belief that they are providing the right answer, but where judges are obviously mistaken. Dworkin would not want to say that judges are infallible or that wrong decisions are always justified, but nevertheless, when Dworkin's criteria of justification obtain, on what basis can we allege that judges make errors? This raises the question of whether judges doing their best but rendering false decisions does, in fact, admit of justification at all. Then again, if law boils down to the

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interpretation of judges, and judges avail themselves in good faith of the appropriate, accepted justificatory norms (i.e. following precedent, upholding integrity, elaborating fitting background principle etc.), how can judicial action ever be assessed for truth or falsity beyond what counts as justification? All throughout, Dworkin insists that legal interpretations do intelligibly have truth conditions. Are we then to assume that justification for judicial action does not fully generate the grounds for legal validity; in other words, that truth conditions--the basis by which we can allege judges are mistaken--obtain by some independent criteria?

For Dworkin to state that we must merely act as if legal decisions were true implies that in certain instances we know this not to be so, but nonetheless must act to the contrary. This is an accurate description of how a legal system actually operates in certain circumstances. Judicial mistakes are legally binding until such time as those decisions are statutorily reversed or earlier cases overruled. But, simply treating an anomalous decision as if it were true does not make it true. The ontological and epistemological difficulties do not disappear just because we imagine them away. And we have a direct stake in not imagining them away completely if we are to preserve a basis for being able to engage in critique of judicial interpretations we believe to be wrong. The central problem

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is then as follows: Where there are competing interpretations of what the law is, can both accounts equally draw upon the justificatory bases of fit, integrity etc? If this is so, then Dworkin's notion of justification as the grounds for ascribing truth conditions to interpretations would seem to be mistaken.

Take, for example, the issue of abortion. One group of judges thinks that reproductive freedom is protected under the penumbras of privacy established in judicial precedent. For them, Roe v. Wade (1973) is justified with respect to its constitutional fit, its being a consistent elaboration of the legal narrative, and so forth. Another judicial bloc considers Roe to be an anomaly and sees justificatory conditions best satisfied by protecting the fetus on due process grounds.[21] It goes without saying that both groups act in good faith and from convictions that they believe to be correct. Since they can each employ Dworkinian justificatory language to virtually equal degrees, how can we decide which is the right answer? Let us then imagine that the pro-life group prevails, and this

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[21] There is also the dichotomy of those who justify abortion as entailing a transcendental right to self-determination where reproductive freedom and bodily autonomy are moral absolutes, versus those who see abortion rights as emerging from the majoritarian will and social consensus. Admittedly, any transcendental rights talk ultimately needs social agreement in order for these rights to be codified and protected. However, the question at issue turns upon the derivation of the right, its justification in terms of causal history, rather than concerning merely the procedural matter of enforcement.

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is not what we believe to be the correct position. Are we then to treat this ontologically and epistemologically as the right answer by dint of it being the majority's, even though our own beliefs run to the contrary? For us to claim that the majority is mistaken means that we must have some justificatory ground to appeal to in order to ground our own views. So Dworkin's conception of what counts as legal justification and truth is not very helpful.

Dworkin acknowledges that before one can disagree about the truth or rightness of a given legal interpretation, there needs to be some basic agreement as to what are the criteria which make up legal validity. This need for semantic stability is primitive in Dworkin's account of law and entails normative judgements, and these precede any disputes about the law in particular instances. On this point, Dworkin is surely correct and this is his major insight against the positivist. For law to be able to proceed as it does, as a practice which exhibits a semblance of minimal stability, some general normative understandings which bleed into the quotidian operations of law must be present. But what Dworkin does not provide is an adequate account of the content of these normative judgements and the manner in which they supply a justificatory undergirding for legal interpretation, especially considering his views concerning unique right answers to legal problems. Moreover, given this latter commitment to single right

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answers, it is a puzzle how the criteria for truth conditions of valid law can accommodate, and indeed also generate, false outcomes, which are treated as if they were true. It is also particularly bewildering how accepting these untruths, as it were, can be compatible with his strongly objectivist general theory of unique right answers in hard cases.

This problem in Dworkin is instructive in that it points out how law is indeed interesting with respect to questions of justification. Dworkin is led into difficulty by his strongly objectivist leanings which require him to posit unique right answers even in hard cases. He cannot make sense of how law allows for equally plausible competing outcomes both of which can admit of genuine justification and truth conditions. To concede this point, in Dworkin's eyes, is to fall into skepticism and the claims that legal decisions are unprincipled, arbitrary or cannot be justified.

Dworkin's philosophical capitulation on truth--that truth simply means "acting as if"--weakens the RAT as a thesis that seeks to frustrate the claims of skepticism. If the RAT simply means harboring the noble fiction that legal outcomes are true, when in fact they might be patently false, or that we might actually believe them to be false, we are left with the same array of justificatory and interpretive difficulties for which Dworkin criticized Hart.

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For Dworkin it would be entirely unsatisfactory to see the activity of adjudication in a legal system as analogous to other less stable and more arbitrary forms of judging, such as say, the judging of beauty contests. Here, while we can always act as if it were true that Ms. Venezuela had a preexisting right to win the Miss Universe pageant and that this was the right outcome, very few people really believe that of the six semi-finalists a single one of the women is plausibly the one and only person who correctly is the winner. A willingness not to question an outcome does not generate the rightness or justificatory authority of that outcome. To state as much is to allow skepticism to reign free and Dworkin's project against the skeptic is then rather trivial and inconsequential. For Dworkin's own sake, we must take his RAT to mean that an outcome is actually right and not just right by imaginary imputation. This is the strongest thesis against skepticism which we can weigh against the claims of skeptical challenges.

Dworkin's contributions can be summarized into three central propositions. First, against the positivist claim that law is an objective social fact, Dworkin argues that law is interpretive. He then correctly perceives that interpretations need to rely on a plausible and reasonable mode of justification so as not to collapse into the agnostic view that only force compels acceptance. Next, he redresses Hart's problem regarding the law running out in

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penumbral cases where the settled law cannot supply a rule on how to proceed. Dworkin replaces rules with principles and argues that normative understandings are coterminous with interpretive decisions and these serve to justify interpretations. Finally, against the skeptic, he suggests that there are unique right answers, in other words correct interpretations which emerge from the best application of background justificatory understandings. So Dworkin's interpretivism leads him neither to skepticism about legal conclusions nor their justifications.

Dworkin conceives of the skeptical problem in interpretation thus:

> "Can one interpretive view be objectively better than another when they are not merely different, bringing out different and complementary aspects of a complex work, but contradictory, when the content of one includes the claim that the other is wrong...Some literary critics...say...it is a mistake to think one interpretive opinion can really be better than another...This characterization of interpretation seems hostile to any claim of uniqueness of meaning, for it insists that different people, with different tastes and values, will just for that reason 'see' different meanings in what they interpret. It appears to support skepticism, because the idea that there can be a 'right' answer to questions about aesthetic or moral or social value strikes many people as even stranger than that there can be a right answer to questions about the meanings of texts and practices."[22]

He distinguishes internal from external skepticism. Dworkin describes the former as coming from within the enterprise of interpretation. Using Hamlet as an example, Dworkin writes:

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[22] Ronald Dworkin. 1986. Law's Empire. 76-8.

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> "The internal skeptic addresses the substance of the claims he challenges; he insists it is in every way a mistake to say that Hamlet is about delay and ambiguity, a mistake to suppose it is a better play read that way. Or indeed in any other particular way. Not because no view of what makes a play better can be 'really' right, but because one view is right: the view that a successful interpretation must provide the kind of unity he believes no interpretation of Hamlet can provide. Internal skepticism, that is, relies on the soundness of a general interpretive attitude to call into question all possible interpretations of a particular object of interpretation."[23]

Internal skepticism can be limited or global. When limited, internal skepticism questions the truth of a particular interpretation or belief. It does not hold that the possibility for truth claims about belief in general cannot exist. In its global form, internal skepticism sees no first order judgements as true; all are false and misinterpret reality. Dworkin sees global internal skepticism as an untenable position since it is contrary to the fact that people do generally entertain convictions about the world which they believe to be true.

External skepticism, alternatively, describes a second order skepticism and is not about the content of judgements but their grounds. The external skeptic "insists that all these opinions are projected upon, and not discovered in 'reality.'"[24] Dworkin terms this skepticism archimedean, whereby one denies that there is any means by which any given particular interpretive belief can be justified and

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[23] Dworkin. 1986. ibid. 78-9.

[24] Dworkin. 1986. ibid. 80.

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thereby deemed true over any other. All interpretations are relative and can only refer to other interpretations with no possible algorithm for choosing between competing interpretations. To make such a claim requires an external vantage point outside of interpretation from which all points of view can then be seen as relative. External skepticism is akin to non-cognitivism in its claim that there are no grounds for ascribing any epistemological status to interpretations and judgements. This does not mean that we cannot have beliefs or judgements, but just that they cannot meaningfully be thought of as objects of knowledge or as being true or false.

The problem with external skepticism is that we cannot make sense of how the interpretive disagreements which occur between equally rational and competent interpretive agents are subsequently settled. How is it possible that any two people, or more significantly a community of interpreters, can come to a consensus, as indeed they do, about any aspect of reality being interpreted? The extreme subjectivism which arises from external skepticism misunderstands the inter-subjective nature of interpretive judgements, both in terms of how they arise and how they are justified. Given our situatedness as social creatures, our distinctive natures as persons etc. whenever we engage in interpretations there exist transpersonal standards cutting across individual subjectivity, according to which valid

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interpretations can be accepted as being justified and true. All interpretations simply are not equal. Nor is it satisfactory to reduce interpretation to projections, cultural perspectives, the will to power and the like. Nonetheless, supplying the justificatory grounds for interpretation remains the fundamental challenge of any view, such as Dworkin's, that holds to an objectivist theory of truth while at the same time acknowledging the interpretive aspect of social practices.

A popular reductionist strategy which stops short of complete skepticism, is to relativize interpretation, often to a community of interpreters. A paradigm case of this is Clifford Geertz's oft-cited account of the Balinese cockfight.[25] Geertz describes the various rituals as representing one thing "for us" and another for the Balinese. Bets on cockfights, for example, are not engaged in as fun but actually are "deep play" relating to the status of participants. Interpretation is held to be eminently contextual and relative to the interpretive culture which cannot escape its own community-centric prejudgements. Interpretation is therefore considered to be

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[25] Clifford Geertz. 1973. "Deep Play: Notes on the Balinese Cockfight" in Interpretation of Cultures. 412. The general thesis concerning interpretation can be traced to German hermeneutic philosophy associated with Dilthey, Heidegger, and Gadamer. We find aspects of the interpretive thesis also found in the work of French structuralism, post-structuralism and deconstruction. In contemporary Anglo-American philosophy examples of those who have variously argued versions of this thesis are Peter Winch, Stanley Fish, Charles Taylor, Richard Rorty and Terry Eagleton.

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contextual and circular since interpretations can only refer to other interpretations, no one of which can be privileged over another.

The critical question is whether justifications of interpretations--which is to say the reasons that support interpretations and determine their truth--refer to something outside of interpretation. And if they cannot be held to do so does this lead to skepticism about truth? The problem turns on what it is that would count as evidence for a particular interpretation being correct. The advocate of hermeneutics would argue that the evidence itself is subject to interpretation and so does not yield more determinacy than the interpretation which that evidence seeks to justify. The cultural relativist position is that justification simply means that the interpretive culture accepts a certain understanding and this acceptance corroborates the interpretive belief such that there is no need for further justification. In both instances, justification is made contingent upon something else. There is no Ding an sich, pure objective reality, or world purged of interpretivist ramifications by which to verify interpretation.

Dworkin's move in legal theory is to argue that legal justification implicates moral principle and this, in turn, seeks to address the problem of indeterminacy in law. The positivists' error is to insist upon clear cut self-

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sufficiency of what counts as law, whereas Dworkin casts a wider net to show how law is parasitic upon other social practices, namely moral and political theorizing. While it is obvious that law requires interpretation and this implicates a social context and points to law as a socially constituted phenomenon, it does not follow from this that interpretation proceeds in an arbitrary fashion, or that law is indeterminate. Just because interpretation mediates legal meaning does not entail that there is no meaning. Furthermore, granting the element of indeterminacy does not commit one to the proposition that all of law is indeterminate. Surely indeterminacy, to the extent that it prevails, would obtain at various relative strengths for different aspects of law across time. We can also plausibly grant that there are regions of legal form which are stable and determinate and where interpretive challenges are particularly slight.

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CHAPTER 5

INTERPRETATION AND JUSTIFICATION

The prominent theme of Dworkin's jurisprudence addresses the need to move beyond positivism. To this end, he confronts the positivist difficulty over justification--i.e. when law, conceived of as a system of rules, runs out and, in the face of this indeterminacy, judicial action appears arbitrary. Dworkin also discusses the ontological issue of whether law is best viewed as an objective social fact. Here Dworkin rejects the positivist's plain-fact model and instead maintains that law is interpretive. Curiously, while Dworkin slams the door on skepticism in the first instance by holding that law as a matter of principle does not lapse into indeterminacy, he opens things up again to skeptical possibility in taking the interpretive turn. At issue is whether Dworkin's thesis of unique right answers is compatible with interpretivism. Put another way, we must ask whether Dworkin's view of legal justification can sit comfortably with his ideas concerning interpretation.

The idea of law as interpretive is both plausible and would seem to be descriptively accurate. The positivist desire to view law as fact, on the other hand, imputes a level of stability and determinacy to law not consonant with our general intuitions about how law functions. The same difficulties also obtain in the positivist's severance of law and morality. To conceive of law as having no moral

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implications is obviously problematical. Dworkin's position is that the moral stands in a firm justificatory relationship to the legal and this determines the idea of fit in order to yield right answers to legal problems and thereby coherence in the unfolding of legal narrative. For Dworkin, justifications of legal interpretations inevitably rely upon background normative conceptions of the right and the good. Moral principle completely pervades legal justification which rescues the latter from collapsing into indeterminacy. Legal predicates can thus in some sense be seen as relativized to the array of moral understandings which undergird legal interpretations.

Clearly, law overall has normative goals and a legal system, at least in the liberal's understanding, must satisfy minimal conditions of morality for its justification. Whether this implies that all laws are normative is open to question. We can certainly think of a particular law with no patently moral implications, but this does not necessarily vindicate the positivist thesis regarding the autonomy of law, that is, that law has no explicit connection to morality. Nor is there any justification for considering law and morality as synonymous. There _is_ a _prima facie_ distinction to be had from the linguistic fact that we can speak separately of legal and moral predicates. For instance, to state that "law X is moral" is not a mere tautology and is cognitively

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different from stating that "law X is legal." In each instance, a different type of information is conveyed about "X" and the predicates "moral" and "legal" do not stand in any kind of identity relation. Nonetheless, what is interesting is the extent to which one of the foregoing predicates might be held to be implicative of the other. Is the moral to be thought of as a precondition for the legal; how are moral attributions made for laws, especially given that moral imputations are not analytical a priori definitions of law? These are puzzling questions which warrant enquiry.

Supervenience and the Moral and the Legal

The relationship between the legal and the moral is of considerable interest for anyone intent on making sense of legal justification. The positivist and the legal skeptic also, as a cousin of the positivist, largely misunderstand legal practice in asserting that there is no connection between law and morality. Skeptics who hold that law is an amoral expression of brute force, or power, or will of the ruling class, also deny themselves critical implements. By amoralizing law we cannot bring morality to bear in our assessments of legal action. Dworkin is the consummate anti-skeptic insofar as he is a cognitivist about moral values--which is to say that moral properties are in some sense real and knowable--and also believes that a connection

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between law and morality is imperative for legal justification. He has been called a contemporary natural law theorist and has never really sought to shake this appellation. Dworkin's pivotal role in making us think about law in more meaningful terms cannot be overstated, nor can he be disparaged for the contribution his efforts represent for legal philosophy. And yet, as previously suggested, his work is far from being the final word on law and morality. We have already alluded to critiques of Dworkin's view of "law as integrity:" that integrity is an empty concept, supporting or accepting uncritically the status quo, and lacking in critical bite as a tool for assessing what legal interpretations are indeed best, appropriate or correct. Furthermore, beyond his general statements about moral justification in law and other claims which can be found in a variety of alternative sources, such as that legal rights are moral "trumps" over utilitarian concerns,[1] we have gained little analytical understanding of how the actual relationship between law and morality can be elucidated.

When trying to determine the relationship between two entities or phenomena, philosophers generally employ a

[1] For instance, the idea is famously expressed by Justice Robert H. Jackson when he wrote, "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Board of Education v. Barnette 319 U.S. 624 (1943)

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number of different descriptive categories. They might speak of conceptual or semantic equivalence of two things, such as terms in translation. They might hold two things to be in an identity relationship such as Frege's well-known example of the morning star and the evening star. Other descriptions of relations can be in terms of causality where causal laws obtain, emergence, necessity, reduction etc. Yet another expression for relating two terms is supervenience. This concept stems from the idea that physical predicates have ultimate ontological status and that mental, moral, or aesthetic predicates supervene upon more stable and determinate physical terms which remain as fixed elements of a non-intentionalist universe. For instance, the predicate "liquidity" can be held to supervene over molecules. So, while there is no law-like relationship between the two predicates, and they do not strictly entail each other, molecules must be present for liquidity to obtain. If something possesses the supervenient property of being a liquid (Property-L), then it also must have the underlying property of having molecular structure (Property-M). We can predict P-M from P-L as an epistemological certainty.

Supervenience describes how physical properties, for instance the physico-chemical constitution of say a lemon, are causally prior to the supervenient properties, here the mental reaction of displeasure which one feels when a lemon

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hits the tongue. We can read the natural properties back from the mental ones in the supervenient relationship. Using the concept of supervenience as an heuristic tool can help us explore the relationship between the legal and the moral. Obviously, the term is not entirely apposite since we cannot precisely analogize legal predicates with the natural world. For one thing legal terms are interpretively constructed and in this respect they are not like physical predicates, not admitting of the same level of descriptive and ontological stability but are, instead, largely contestable. The interpretive point can also be said of moral predicates. But setting aside these difficulties, we can still pose questions about legal and moral properties of law in terms of supervenience.

What supervenience aims to show is how there exists a certain relationship between two families of properties. The first issue to decide is which of the two properties is to be treated as the base and which the supervenient? If we were to accept the positivist intuition about law--that it is a social fact and hence that laws can be discussed in factual terms according to their properties such as pedigree, causal history, connection to the rule-governed legal system etc.--then we can perhaps take the moral to supervene over the legal. The basic question to be posed in order to establish the issue of priority in the supervenient relationship is whether it is legal properties that

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determine the non-legal moral properties, or whether the reverse is the case?

We have seen that under liberalism law is conceived of as connecting to a general normative scheme. This connection is stipulated in the liberal theory of rule of law. Dworkin amplifies this theme in his view of legal interpretations in a given legal system being justified by reference to background conceptions of the right and the good. While the positivist may be discredited for being too loathe to admit that law and morality are connected, a limited version of the positivist thesis might be correct. This is that although the relationship between law and morality is clearly not one of severance, explaining why a particular law is legal can possibly be made in purely legal terms without recourse to moral predicates. This seems especially to be the case where there is no controversy about a legal interpretation and its meaning is evident as a matter of fact.

Let us take as an example an unequivocal, uncontroversial enactment dealing with traffic regulation. There is little need or relevance, for that matter, of any justificatory moral principle to support such a statute. Dworkin's rejoinder would be that laws which are "policies" are to be distinguished from legal "principles" and only the latter implicate a robust notion of normative, moral considerations. But even for so-called legal "principles,"

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Dworkin would have to acknowledge that at some basic level a law is a law simply because it was created by a de jure body empowered to enact it. If it is not consonant with certain moral principles, this does not necessarily make it any less a law in legal terms. On the other hand, if the law were to offend the moral principles constitutive of a legal system, such as the commitment to due process, then the law's legality would indeed be compromised. And so, moral evaluations can and are brought to bear upon laws as means of critique and justification. This is a cherished premise of liberal legalism and is at the core of why a liberal legal system stands justified under liberal rule of law.[2] But whether morality abides in the background of every given law of a legal system, which is to say that in some manner of speaking any given law implicates a theory of the right and the good, remains to be seen.

Certainly, in social contract theory all law is preferable to anarchy or lawlessness associated with the state of nature. Thus, the political state gains justification for the fact that it provides security to its subjects. But this general normative proposition is not brought into play in order to justify a law on the subject, say, of zoning regulation. The right to make law vested in a democratic legislature is simply presumed in the above

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[2] We have also seen how the natural law theorist such as Aquinas resorts to moral notions such as conscientiae to put positive law to the test.

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instance and there appears no need for judges to avail themselves of moral theory when interpreting these kinds of statutes. They can rely simply on rules of stare decisis by looking to analogous previous decisions. Granted, these rules provide the general normative architecture of law. Also, in the manner in which law functions in a society, citizens are under a general moral duty to obey the law.

The question is whether judges continuously rely upon moral conceptions in the ordinary, mundane practice of law. Where Dworkin is surely correct is that legal interpretations in so-called "hard cases" generally do demand appeal to background moral understandings. Here the activity of adjudication would seem most strongly to entail the factor of judges articulating their conceptions of what the law ought to be, which implicates the realm of the normative i.e. background conceptions of the right and the good. This is where positivists have little to say. They can make ontological points about law's pedigree or causal history, but cannot explain how the interpretive business of law is conducted and justified.[3] The positivist rejects

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[3] It should be noted that as Steven Ross 1994 points out in "Assessing Dworkin's Recent Jurisprudence" 183-4, the positivist need not be prudish about accepting law as being interpretive and constructed from social conventions by recourse to background moral understandings. This can simply be built into the positivist's view of what law is. Ross takes as disingenuous Dworkin's view that the positivist cannot make sense of legal interpretation. And yet in insisting that law be conceived of as autonomous of extraneous phenomena, most notably moral considerations, the positivist logically forecloses the option that Ross proposes for a more meaningful positivism.

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the view that the legal system must intelligibly and meaningfully be seen as lodged in a broader conceptual moral scheme, a scheme which implicates normative moral and political theories and the various conceptions of the right and the good which fall out of these theories. In hard cases fraught with greater controversy, the social and political stability of law and its justification are clearly tied to moral understandings. For instance, when a law fails certain tests for legality such as being declared unconstitutional,[4] this usually occurs by reference to moral predicates either explicitly or by implication. These moral notions could be precisely stated in the constitutional text, or be read into the text as part of its background interpretive context.

To return to the original question, it is still an open question as to whether the legal is prior to the moral or if the reverse is the case. That a relationship exists between law and morality, and that the relationship is not appropriately to be considered as merely accidental, cannot be considered a matter of any great contention. But attempting to tease out logical equivalences when connecting

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[4] The question of how a law is rendered unconstitutional is an interesting problem which will be discussed at a later point. At issue is whether an unconstitutional law is unconstitutional from the very moment of its creation or whether it becomes unconstitutional as a result of being declared as such by the Supreme Court. This question is first posed but only partially addressed by Chief Justice John Marshall in Marbury v. Madison (1803) when he asks whether an act repugnant to the Constitution can become the law of the land.

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the legal to the moral is problematical. At best we are left with the platitude that justification in law involves moving from legal properties to moral properties in the absence of causal laws which determine how the move is to be effected. Justification of a legal system writ large is effected through the moral theory of rule of law which provides the normative undergirding to all laws belonging to that system. Particular laws do not all stand in need of moral justification if the system itself as a totality is consonant with rule of law. When particular laws violate rule of law they can be struck down as illegal. Also, under the theory of civil disobedience it is particular laws and not the entire legal system which generally are called into question.

The philosophical dilemma can be summarized as follows: First, how is it that the moral can supervene over the legal when from a justificatory point of view, it is moral properties that seem to shore up legal ones. So, is it better to argue that legal properties supervene over moral ones? This move would seem to undermine the positivist thesis that law is a fact, from which we extrapolate that the legal is the fact substrate upon which the moral supervenes. Is it then more appropriate to think of the moral undergirding of law as being the so-called "fact" substrate? After interpretive deliberation, when the moral theory takes on a determinate and acceptable contour,

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the legal predicates are pulled into shape to conform to the controlling moral theory.[5] This account posits a degree of elasticity to legal principles whereby they are easily molded to conform to, and are ultimately animated by, an external variable, namely morality. Many legal practitioners bent on some notion of the autonomy of law would be quick to dismiss this account. And yet, the stability of a law seems more than trivially contingent upon the stability of the background moral predicates used to justify it. The settled law on reproductive freedom, for example, remained relatively stable until such time as the moral tide--which is to say background moral conceptions--began to turn and this served to unsettle the law. The relationship between legal justifications and the stability of background moral conceptions seems at least to be one of loose dependency.

While legal properties do not necessarily determine

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[5] This view would consider that any substantive debate in so-called hard cases really takes place at the level of moral theorizing. The role of the judge in aiming for a suitable interpretation of the law, is to reach for an appropriate background moral theory (of which there may be several plausible alternatives) and propose the one that is most conducive of the outcome sought, or the one most likely to achieve transpersonal acceptance, or the one that best accomplishes a neat level of transparency between law and moral theory, or a combination of the three above.

The shaping of law to conform to the chosen moral position is the least problematical operation since under this account law admits of a high degree of plasticity. The stability of law is not, then, to be associated with its own determinacy, so much as with the stability, determinacy and social acceptability of the background moral principles which undergird it.

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non-legal properties and vice versa, it can be said that legal properties can be structured, in the interpretive legal universe, in such a way as to bring about the moral properties that are used to justify them. Obviously, since law entails human activity and its ontology and meaning do not stand apart from persons, we cannot conceive of it as value free and purged of intentionalist implications. Both legal properties and moral properties are both deeply reflective of human responses and the ascription of both legal and moral predicates depends fundamentally upon the particular moral and legal theory to which one subscribes. Furthermore, when discussing supervenience, there is also a sortal problem of classifying terms. It is not entirely clear whether predicates such as "just," or "equitable" are in fact legal terms or moral terms or both.

For example, when we state that Brown v. Board[6] promotes equality, is "equality" in this locution a legal description falling out of the Equal Protection provisions of the Constitution, or is it a moral term imported into legal discourse? Chief Justice Warren speaks of public school segregation depriving children of the minority group of equal educational opportunities. Is he here alluding to an explicit constitutional principle or a background conception of the good? Or perhaps, he is using the idea of equal educational opportunity as both a moral and legal

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[6] 347 U.S. 483 (1954)

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notion? If this were the case, then certain predicates might be seen as straddling the realms of the legal and the moral. This, however, would give rise to a certain fuzziness and we could no longer speak very meaningfully of how moral conceptions underlie legal justifications. Alternatively, we might think of certain singular terms as having distinctive moral and legal meanings. Thus, "E-L" could be distinguished from "E-M" where the former is the legal conception of equality and the latter is the moral one. The latter would have preponderance in constituting the former. This distinction would allow us neatly to continue with viewing morality and legality as distinct and also to speak of how the moral justifies the legal.

Another issue is whether legal principle relativized to moral understandings, in point of fact, promotes charges of arbitrariness and nihilism? The moral structure of law is not a given but arises from interpretation. Once again, we return to the Humean point that moral principles are not so much facts about the world per se as much as human responses to it. To the extent that they are interpretive, both the moral and legal aspects of a law are not naturalistic phenomena and cannot be thought of as pure facts or as being intrinsic to the order of things. And when trying to articulate background moral principles which undergird law, one is perhaps at a higher level of speculative interpretive engagement than when simply

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performing the first order practice. Where the substantive moral principles themselves can be thought of as more contingent than as a matter of strict necessity, law seemingly loses its ontological moorings.

In counter-action the positivist proposes the autonomy of law--law as a pristine island of inherent determinacy. To see law as free-floating in a sea sullied by flotsam and jetsam of morality renders her an object of ambiguity. Dworkin's move is to herald the moral as a wholly determinate and unequivocal corollary to law. His view, couched in the notions of fit, integrity, background moral conceptions and right answers, does imply that moral predicates supervene upon non-moral legal predicates such that if something has the legal property "L", then it also necessarily has a determinate background moral property "M." In Dworkin's understanding, we could state that "L" emerges out of "M;" the legality of "L" can in some sense be reduced to "M" since "M" justifies "L." For him, we must then be able to predict the moral from the legal as a form of token-token identity since the moral reaches all the way down, as it were, in judicial interpretation.

Even in the most elementary case where the law is settled and there is no confusion as to how to proceed, Dworkin would have us believe that moral determinations drive legal interpretations. Though he maintains an inextricable relationship between analytic and normative

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jurisprudence--what the law is and what the law ought to be--the precise nature of the connection is never specified.

But, as already suggested, this degree of epistemological certitude concerning the move from "L" to "M" does not agree with actual legal practice since "L" and "M" are not singular terms which occupy an unequivocal and determinate semantic field. Though Dworkin purports to embrace a thorough-going interpretivism, he appears not to acknowledge the skeptical implications of this position. In an interpretive universe, we can, for instance, readily imagine two laws "L" and "L*" identical in all respects except that "L" -> "M" and "L*" -> "^M." In addition, disputes about whether a law is "M" or "^M" are not so easily resolved simply by recourse to Dworkinian ideas of fit, integrity, coherence of the legal narrative etc. For instance, the antebellum segregationist judge would interpretively hold that separate but equal laws have "M" but the abolitionist might not. The power struggle over the appropriate background conceptions of the right and the good in this case was so contentious that it had to be settled by civil war.

On the other hand, while we can speak of mixed worlds where "M" and "^M" can obtain for a given "L," there is no world where a legal system can be both "M" and "^M." We also cannot say that just because the base properties of any "L" remain stable, that the supervening moral properties

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possess commensurate stability. If anything, as earlier suggested, the reverse is the case insofar as legal attributions acquire their stability from the settled nature of underlying moral attributions. And even for any given "M" we must recognize interpretive relativity. Furthermore, we can also think of a situation where "M" for a given "L" remains stable but the law is nevertheless struck down purely on legal grounds because of some procedural technicality which has no bearing on "M." Also, in some instances, certain judges might recognize that a law is not consonant with norms of morality but still feel that there are not sufficient legal constitutional grounds for striking it down. Here the attribution of legality is disengaged from moral justificatory considerations.[7]

Overall, "M" can become an altogether nebulous notion. Consider a particular legal system which esteems fairness, equality and justice as its cardinal moral principles. A given "L" instantiates fairness and equality but somehow fails on justice. Does "M" obtain for "L?" There is no plausible cut and dried answer without alluding to attendant

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[7] Justice Hugo Black seems to be making such a point in his dissent in Griswold v. Connecticut 381 U.S. 479 (1965) when he argues that privacy is a worthy moral principle which he endorses but he nevertheless cannot bring himself to recognize a constitutional basis to privacy. Yet, one could always argue that Justice Black is not really separating the legal from the moral since his supposedly purely legal justification inexorably is an expression of a normative conception of the good which bleeds into his constitutional jurisprudence. As such Justice Black is then merely choosing between competing moral theories.

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conceptions of sociology, history, political theory and practice, jurisprudence etc. which would all play into the outcome. In one universe "L" could be "M" and in another not. The reason for this discussion is simply to show the difficulty in elaborating with any level of exactitude the rather elusive connection between law and morality while at the same time continuously acknowledging that a justificatory relationship between the two is undeniable. The separation thesis concerning the autonomy of law associated with positivism does express a limited aspect of the ontology of law but fails fully to capture the issue of justification which necessarily implicates moral considerations. In the philosophical analysis of law it proposes, positivism obscures a fundamental pre-philosophical practice which has stability both in language and in our general intuitions about law--that in the first order practice of law, legal justifications draw comfortably upon moral predicates. But still the general philosophical puzzle remains. This concerns the means by which law acquires moral appraisal, in other words the way the move between the moral and the legal is effected, something which can neither be described in terms of entailment, nor by use of any conception of there being causal laws whereby "L" -> "M".

Law and Interpretation

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In light of the arguments above, the interpretive turn seems to amount to the following proposition. The justificatory moral principles which undergird law are the product of certain background understandings and serve to lodge legal practice in a moral framework or conceptual normative scheme. This scheme exhibits a certain fluidity (more than Dworkin would allow) and is distilled as a product of a number of extrinsic variables and is not appropriately to be seen as an intrinsic or entailed property of law. Moral attributions are in some sense distinct from legal attributions in that one does not necessarily yield the other, but nonetheless legal justification can be considered as related to moral attributions. And since interpretations do not stand apart from the agent doing the interpreting, the perspective of the individual making the attribution--namely the judge as an agent in a distinct interpretive culture called the judiciary--plays a significant role in determining outcomes. Despite protestations to the contrary about being bound by the letter of the law, judges enjoy considerable interpretive latitude. As such, we can identify an array of non-legal variables which serve to shape legal and moral interpretations and this creates the overall interpretive context within which interpretation takes place.

Arguments about interpretive latitude which allow law to be considered in terms of external variables are at the

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crux of the skeptical position on law advanced by Critical Legal Studies (CLS).

Viewing law in terms of external factors can be traced historically to the rise of American legal realism[8] in the late nineteenth century and its development into the twentieth. The manifesto of legal realism is perhaps the renowned statement by Oliver Wendell Holmes in his Lowell Lectures on the common law in 1881. Debunking the rigid legal formalism of analytic jurisprudence Holmes writes,

> "the *life of the law has not been logic: it has been* experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics...The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."[9]

This guiding impulse behind legal realism was the demand for a sociological jurisprudence so as to make the normative thrust of law more relevant to prevailing social circumstances and needs. For instance, Louis Brandeis as

[8] Neil Duxbury argues that the pervasive historical pattern in American jurisprudence is in the form of a kind of dialectic between realism and formalism. Patterns of American Jurisprudence. 1995. 2.

[9] Oliver Wendell Holmes. 1881. The Common Law. Mark De Wolfe Howe (ed.) 1963. 5.

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one of the attorneys in Muller v. Oregon (1908)[10] launched the famous Brandeis brief with his 110 page document presenting sociological evidence as to why a state labor statute limiting working hours for women ought to be upheld. This instrumentalist view[11], whereby law was to be a tool in the hands of judges to ameliorate social conditions, implies the idea of legal engineering--the judge as an agent for progressive social change.

The idea in analytic jurisprudence, that the parameters for interpretation are strictly circumscribed according to the norm of judicial restraint, are relaxed under legal realism. Law is not fixed but in a constant state of flux. Given its interpretive nature, judges make rather than discover legal principles. For the realist, it is descriptively inaccurate to consider legal rules as the source of law. Law comes into being not as an application of abstract formal principles, but rather finds its source in other causal factors. Jerome Frank, for instance, posits the importance of psychology and in large measure reduces law to the psychological predispositions of individual judges.[12] Fundamentally, law for the realist is identified

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[10] 208 U.S. 412.

[11] Instrumentalism is placed in contrast with theories upholding the strict autonomy of law.

[12] Jerome Frank. 1936. Law and the Modern Mind.

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with observable phenomena connected with experience.[13] And the relativist component of interpreting experience means that any two judges under the same rubric can arrive at different legal decisions. But the realist is not a nihilist about truth and views experience as the touchstone for judgement, holding thereby to a pragmatist conception of truth.[14] The indeterminacy that the realist associates with law does not translate into denial that law has utility. The realist is simply skeptical of the idea that interpretation is a mechanistic activity, long asserted by the analytic school of jurisprudence. Due to the considerable interpretive discretion entailed in adjudication, judges should be oriented to furthering social agenda which optimize pragmatic considerations; in other words they must not blindly apply legal rules but rather ought to shape law to fulfill societal needs.

The level of interpretive latitude which legal realism acknowledges along with the notion of the basic malleability

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[13] It should be noted that early legal realism in the United States was deployed to attack substantive due process and the conceptions of laissez-faire economics to which legal formalists tended to subscribe. For instance, the sanctity of freedom of contract was treated as a formal principle of law and ascribed the status of being a scientific truth. This occurred through a considerable line of cases for which Lochner v. New York 198 U.S. 45 (1905) is a paradigm example. The tendencies of Lochnerism are not, of course, put to rest until FDR's infamous plan to pack the Court in 1937 and West Coast Hotel v. Parrish 300 U.S. 379 (1937).

[14] This entails the notion that truths are constructed out of the raw material of experience, created not as a matter of correspondence with an external reality but with a view to what has pragmatic utility.

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of law sits uneasily with traditional ideas of jurisprudence. Harking back to conceptions of legal formalism from Blackstone's Commentaries (1765), mainstream jurisprudence has tended to stress the idea of strict internal constraints upon judicial action. The rise of legal formalism as the dominant model of law in the United States is traced to the efforts of Christopher Columbus Langdell in the 1870s. Langdell's project, to frame law in terms of science, created the so-called "Harvard model" whereby the principles of law are held to be produced by induction from the study of individual cases.[15] As a quintessential expression of certain tenets of legal formalism law, Langdell writes:

> "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best of, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied."[16]

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[15] As Joan C. Williams points out, the claim that law is a science was soon to be challenged, but Langdell's case method continued largely for reasons of economic expediency since it allows for large class sizes. "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells." 1987. 62 New York University Law Review. 430 at footnote 3.

[16] Christopher Columbus Langdell. 1871. A Selection of Cases on the Law of Contracts. viii.

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Langdell was joined by others, such as Joseph H. Beale who likewise claimed that law was a body of "scientific principle."[17] Judges were held to declare principles of law which had the ontological status of scientific truths, out there in the world, waiting to be found by those with the appropriate training and expertise.

This normative view of law[18] as determinate principle stems from the fact that under liberal legalism the judiciary is envisaged as a neutral, independent and apolitical body charged with performing the distinctive act of adjudication, which is conceived of quite separately from the political activity of legislation. Not ideally subject to the constraints of political processes, an independent judiciary is empowered with considerable discretionary authority. This gives rise to anxiety over the very real possibility of judicial arbitrariness, or, at the very least, excessive judicial activism which is held to be a usurpation of legislative, policy-making functions. The juxtaposition of the need for judicial independence, with the fear of arbitrariness, leads to an on-going tension under liberal legalism. Independence requires fewer institutional checks and balances; it means insulation from

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[17] Joseph H. Beale. 1887. A Treatise on the Conflict of Laws. 135.

[18] It should be noted that to posit law as scientific truth attempts to frame it in objective, descriptive and hence ostensibly non-normative terms.

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the political process, that the judiciary is not subject explicitly to the popular will as expressed in periodic elections etc. And, ironically, the absence of these external constraints upon judicial behaviour in order not to compromise the value of judicial independence, is the very factor which creates the conditions for possible judicial arbitrariness. Traditional analytic jurisprudence redresses the "arbitrariness anxiety" by positing certain potent internal constraints upon judicial action.

Internal, is to say, internal to the nature of law itself. We can distinguish between descriptions of law which draw upon perceived variables internal to law versus accounts which suggest that law can best be understood by recourse to considerations (e.g. the psychology of judges) external to legal practice. The legal formalist, for instance, considers that the stable, abstract, general form of law constrains interpretive latitude. This formal aspect of law allows meanings to be assigned and interpretations made consequent to knowledge of the law's general formal principles. Crucial to formalism is the view that form enables us to distinguish law from non-law and also allows law to acquire a certain predictability with respect to outcomes. Interpreters bring with them nothing from life since interpretation is removed from contingencies of human interest and entails simply discerning and applying the relevant formal, objective principles of law. All competent

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practitioners perceive the same formal principles in any given situation and must by necessity come up with the same solutions to legal problems.

Textualism or literalism is a version of formalism which proposes that the form of the legal text constrains or guides interpretation. This presumes that the meaning of these texts--namely the Constitution, statutes, regulations--is stable determinate and accessible. For the textualist, legal texts possess essential meanings and are thereby self-sufficient and so nothing other than the text itself is needed for legal interpretation to proceed.

One indubitably has to acknowledge that legal texts, more often than not, are plagued by textual ambiguities which make them not amenable to textual literalism.[19] For instance, most legal opinions are replete with conceptual disputes over the meaning of concepts, debates over what particular tokens instantiate or denote examples of concepts whose meaning might be somewhat settled, and so forth. The idea that the text per se is not sufficient to produce meaningful interpretation is an intuitively obvious proposition and requires that the judicial production of

[19] The idea that acts of interpretation only occur when the text is unclear must be avoided. As Frederick Schauer points out, "there is [no] pre-theoretical notion of what distinguishes a hard case from an easy one, with interpretive theory only being necessary for hard cases." See "The Occasions of Constitutional Interpretation" quoted from Susan J. Brison and Walter Sinnott-Armstrong (eds.) 1993. Contemporary Perspectives on Constitutional Interpretation. 37.

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meaning rely on sources which reach beyond the texts themselves. Judicial interpretation here necessarily relies upon certain notions of context. Sociological jurisprudence calls for interpretation to be driven by the notion of contemporaneous context as determined by the felt necessities of the time. Alternatively, originalism, more conservatively demands that the original intention of the framers of the legal text set the parameters for interpretation. The historical reconstruction of meaning is grounded in authorial intention, contingent upon the notion that intention is stable, determinate, accessible and can be constructed in a non-controversial way. This is often a stretch and insofar as intentional inferences are speculative, the originalist's claim that framers' intent is a curb on possible arbitrary judicial action cannot fully be sustained. Likewise in admitting of the ambiguities inherent in texts, the originalist undermines the literalist's thesis that textual form acts as an internal constraint in legal interpretation. The gist of the legal realist's argument is then that the norms of formalism do not square with actual legal practice and that external variables such as political considerations, personal predispositions and ideological orientations of judges best explain the process of judicial interpretation.

Originalism and Intention

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Theories of jurisprudence largely revolve around the problem of legal justification and are motivated by normative concerns over judicial legitimacy. Problems related to legitimacy are alleged judicial arbitrariness and the commensurate action of the judiciary seemingly usurping policy-making functions delegated to political branches, here breaching the sacred norm of departmentalism whereby adjudication is separated from legislation. Originalism is one effort to generate judicial legitimacy by proposing that judges remain interpretively restrained and removed from political considerations. A famous contemporary exchange on originalism occurred between former Reagan Attorney-General Edwin Meese III and Justice William J. Brennan Jr. On July 9, 1985 Meese delivered a speech to the American Bar Association insisting that only a jurisprudence "seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection." He moreover maintains that this commitment to the will of the Framers of the Constitution is the only manner of recognizing the Constitution as the supreme law of the land.[20]

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[20] Meese's global claim is that judges are merely to apply the perceived will of the Framers as expressed by original intent and only these forms of interpretation are justifiable. Judges are not permitted to possess or apply their own conceptions of the good. To so do would be to compromise the ideal of judicial impartiality and also endanger the notion law as the neutral application of principles. In the background of Meese's argument, which is echoed by all those who subscribe to a conservative jurisprudence and who call for judicial restraint, is the idea of a gross asymmetry

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Meeses' general intuition, that the judicial branch requires a commitment to a distinctive set of norms, is a valid one. What is perhaps less obvious is whether the norm he proposes is the most appropriate source for judicial legitimacy. For example, the phenomenon of a "Dred Scott"[21] Court describes the situation where a stubborn commitment to originalism resulted in the Court being perceived as out of touch with the political and social realities of the day. Here originalism ultimately detracted from, rather than promoted, judicial legitimacy.

In a speech at Georgetown University on October 12 of the same year, Justice Brennan dismisses originalism as naive and misunderstanding the nature of interpretation. He stated,

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between the political and judicial terrains. Thus the legislature, which presumably also makes reference to the Constitution when framing laws, interprets the document in a political fashion. Judges, on the other hand, rectify constitutional anomalies caused by the legislature's "political reading" by resorting to a different norm of interpretation, namely the apolitical norm of originalism. Unconstitutionality is then to be defined as when legislative action deviates from what is judicially permissible according to originalist assumptions. The obvious question is how any political action passed by the legislature with the belief that it has acted in a constitutionally acceptable manner, can stand up to the apolitical, originalist scrutiny of the judiciary? If, alternatively, the legislature in its own actions is guided by the same norm as the judiciary, then the analytic distinction between judicial and legislative acts collapses. And it is this very distinction which, for Meese, confers legitimacy upon judicial conduct--the fact that judges are not to be equated with legislative policy makers.

[21] Dred Scott v. Sandford 16 How. 393 (1857) was where Chief Justice Taney declared that blacks were not citizens under an originalist reading of the United States Constitution.

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"in its most doctrinaire incarnation, [originalism] demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgements of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific contemporary questions. All too often, sources of potential enlightenment such as records of ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality."[22]

Brennan's comments reflect the view that judicial legitimacy is not jeopardized by interpretation which does not rely upon originalist presumptions. Indeed, he goes even further to suggest that the presumptions of originalism themselves are spurious and not helpful. The issue of intention and interpretation is of considerable interest to philosophers. In 1939 C.S. Lewis spoke of what he termed the "personal fallacy" of thinking that the meaning of a poem is entailed in making inferences about the poet's state of mind.[23] The question needing consideration is whether a text or work of art must mean only what the author intended it to mean or whether meaning can be detached from authorial

[22] William J. Brennan Jr. "The Constitution of the United States and Contemporary Ratification." Reprint of Speech with the permission of the author in Craig R. Ducat and Harold W. Chase 5th Edition 1992. Constitutional Interpretation. 62.

[23] C.S. Lewis & E.M.W. Tillyard. 1939. The Personal Heresy: A Controversy.

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intention. This debate came to a head in 1946 with the Wimsatt/Beardsley thesis called the "intentional fallacy."[24] They argued that causal explication of a poem in terms of psychological claims concerning authorial intent could not count as evidence for interpretive or critical assessments. The only legitimate criteria were features internal to the work itself. The external phenomenon of a supposed state of mind of the author which lurks "behind" a text is seen as a vanity of romanticism. Hence, it is a fallacy to engage in inferences of intention--a factor extrinsic to text--based upon evidence drawn from the text itself. At issue is whether some imputation of authorial intention is relevant or necessary in the interpretation and evaluation of legal texts such as the Constitution.

Distinctions between intrinsic and extrinsic sources of meaning turn upon separating the ideas of the meaning of a text itself versus the meaning which the author intended to express. Since understanding authorial intention proceeds on the basis of some determination of the meaning of the text itself, answering the second question is parasitic upon resolving the first.[25] Furthermore, Wimsatt

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[24] W.K. Wimsatt & Monroe Beardsley. 1946. "The Intentional Fallacy." 54 Sewanee Review. 468.

[25] As Mary Mothersill suggests, intentionalism can be taken as an instance of the "genetic fallacy"--the error of assuming that where "a" is the cause of "b" and therefore "a" and "b" are distinct, information about "b" can be inferred on the basis of information about "a." Mary Mothersill. 1984. Beauty Restored. 16.

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and Beardsley point out that texts have a certain public character which suggests that their meaning can evolve over time. They can acquire new meanings consonant with the scope of the text but which are beyond the purview of what an author might have intended, and this in turn dilutes the significance of authorship. In contrast to Wimsatt and Beardsley, intentionalists insist that motives and intentions of authors are indispensable for interpretation.

E.D. Hirsch is a notable example of one who subscribes to the thesis that meaning intended by an author is identical to and determines a text's meaning. Hirsch's identity thesis, which is a critique of so-called semantic autonomy, considers that meaning is determined for a given word sequence by one's construing what a speaker intended to say. Intentionalism is used here to solve the problem of ambiguity.[26] Hirsch acknowledges that we can only have imperfect access to other people's intentions, and that the imputation of intention is based upon evidence in an utterance which entails a kind of guesswork. What is most troublesome for his view is the fact that we must already

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[26] E.D. Hirsch. 1967. Validity in Interpretation. Another well-known intentionalist is H.P. Grice who holds the view that meaning is derived from inferences an audience makes from the intentions of a speaker. Recognition of speaker-intention largely reduces to inferences about another's psychological state. John Searle has an insightful critique of Gricean speaker-meaning in his observation that for Grice any sentence with any variety of semantic permutations can be uttered and thought to be intelligible, so long as circumstances permit access to the appropriate speaker-intention.

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have a settled idea of meaning in mind in order to make the interpretive leap into deciding what an author's intention is. In other words, if authorial intentionality is that thing that resolves the problem of semantic ambiguity by allowing us to arrive at a determinate meaning for an utterance, haven't we already come up with a meaning with which we feel comfortable when we impute a certain intention to an author?[27] So, intention is then not the source of meaning but is simply taken as confirmation for a particular choice among several plausible interpretations. And the way intention is derived occurs in a wholly circular fashion since the inference of intention can only occur from the text or utterance.

Though Hirsch's theory of meaning is obviously flawed since we generally can have a sense of what a text means without possessing any knowledge of its author's intention, the idea that issues of ambiguity can be settled by reference to authorship is not a wholly implausible proposition. Whilst authorial intentionality might not be constitutive of meaning, we do use intentionality in a justificatory way in disputes over ambiguity. Information about authorship certainly can animate a text and add to the

[27] Another apparent difficulty dealt with by many of Hirsch's critics is the issue of mis-speaking--when one intends to say one thing but utters another. Hirsch would claim that meaning is identical with the intention regardless of how the utterance comes out. There is a significant epistemological problem of how an interlocutor would have access to speaker's intention in instances of mis-speaking.

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contextual framework in which it is interpreted. In addition, we do consider that authorship is of significance when we make claims that we prefer the work of one author over another or show interest in a single author's literary oeuvre. What is clear is that intention is not wholly determinative of a text's meaning. Even more significantly, if intention were singularly the source of meaning, then a text or utterance is more of a psychological than linguistic phenomenon. Anyone in a position to generate the right propositional attitudes about intention in the minds of an audience can create meaning which defines meaning in non-semantic terms. In offering a reductive account of meaning as speaker-intention, Grice analyzes semantic meaning in non-semantic terms i.e. intentional propositions, which is a psychological account. It is an open question as to whether the psychological element itself can be understood in non-semantic terms, and if it cannot, then we are still left with the puzzle as to what is meaning, relocated from the text and now simply lodged in the mind.

It appears clearly inappropriate to consider a public, political document like the Constitution as being identical with fixed, inner psychological states of its framers. The framers most probably saw themselves only as articulating general political concepts which future generations would have to elaborate based upon their own distinctive political conceptions. It is implausible to claim that fidelity to

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the Constitution requires that interpretation must be confined only to those specific subjects which we imagine the framers originally had in mind. The broad, general political concepts found in the Constitution allow for a certain elasticity which accommodates a variety of particular conceptions without necessarily compromising the overall integrity of the general constitutional principles of which the Constitution is comprised. As instantiations of Constitutional concepts, these particular conceptions accrue truth conditions as the values of political culture evolve and coalesce. Why any future generation would wish to hold itself bound to specific conceptions of the right and the good which are fixed by views of those who lived more than two centuries earlier is not obvious. In addition, the idea of fidelity to the general concepts contained in the Constitution can surely accommodate the notion that conceptions of what those concepts mean must change with the social and political norms of the day.

Given its fundamentally political character, even as intentionalists we cannot appropriately analogize the Constitution to something like a poem which might be thought to represent an articulation of a certain inner state of the poet. Nor is the Constitution like a musical score whereby certain dynamic markings and tempo indications constrain performance. The practice of law involves judges extending certain general principles into novel cases whose fact

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patterns could not originally have been foreseen when the principles were first established. What comprises a plausible extension of these general principles requires certain justificatory legitimating grounds, grounds that are contextually relevant to the values of political culture. Originalism in legal interpretation cannot in any meaningful sense be taken to require that only interpretations which authors themselves can be alleged to have envisaged, are plausible or correct interpretations.[28]

At the same time, one ought to resist the claim that intentions are completely irrelevant. Most often texts do not have plain meanings which fall out from the words themselves and here we are usually given to speculating as to what the communicative intention of an author might have been. While intention is not to be identified with meaning, a sense of intention is, one might argue, always in the background of any reading, while granting that intention is not a determinate phenomenon and can usually only be specified at a very broad level of generality.

It is a fact about persons that we generally consider other people and ourselves as creatures with wills, thereby

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[28] Nevertheless, in making historical claims there need to be certain criteria as to what can acceptably be imputed to a individuals. In the interests of historical accuracy, Quentin Skinner proposes the maxim that "no agent can eventually be said to have meant or done something which he could never be brought to accept as a correct description of what he had meant or done." See Quentin Skinner. 1969. "Meaning and Understanding in the History of Ideas" in 8 History and Theory. 28

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holding actions to have certain purposive dimensions. At any level of the hermeneutic enterprise, and however much one thinks that reading is all reader-response, the intentional attitude of an author lurks in the background as a presence in the reader's consciousness. Despite the fact that we recognize the myriad of difficulties in fixing with any degree of certainty just what version of authorial intention ought to govern, to be Kantian about it, we cannot escape intentionality as a category of understanding by which we structure experience. Yet, we can nonetheless reject adherence to intention as being inappropriate or inexpedient for arriving at interpretations which allow us to deal with particular contemporary problems.

The aim of the foregoing discussion is to point out the salient difficulties with intention-based semantics and concordantly show how relying upon a jurisprudence of originalism in law, as a means of proposing an internal constraint upon judicial action, in actuality produces the reverse effect. More, not less, interpretive latitude is provoked. Likewise there is greater and not less semantic indeterminacy and ambiguity when interpretive claims are made about the original intent of the framers of a legal text. Originalism is then the consummate wolf in sheep's clothing when deployed in support of a legal formalism. Stanley Fish underlines this point when he writes:

> "It is at this point that we see the full implications of the shift by which meaning is disengaged from

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> language and relocated in the (interpreted) intentions of speakers: there are no longer any constraints on interpretation that are not themselves interpretive. Since intentions themselves can only be known interpretively, the meanings that follow upon the specification of intention will always be vulnerable to the challenge of an alternative specification."[29]

Originalism is actually an antithesis of formalism and textualism, and not its handmaiden. This point is lost by those who would appeal to originalism as the source of judicial legitimacy insofar as it is alleged closely to constrain judicial action and therefore prevent the ubiquitous fear of arbitrariness which compromises legitimacy.

This problem of legal legitimacy can be located at the very core of judicial debate. Whether a judge is a textualist or holds to alternative views concerning judicial interpretation, the legitimacy issue motivates argument. Consider one of the celebrated debates in American constitutional law, between Justices Black and Frankfurter on the question of incorporation.[30] Frankfurter champions the idea of incorporation proceeding by judicial discretion on a case by case or piecemeal basis whereas Black claims that the original intent of Due Process in the Fourteenth

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[29] Stanley Fish. 1989. Doing What Comes Naturally: Change Rhetoric and the Practice of Theory in Literary and Legal Studies. 8.

[30] Incorporation entails the process of nationalizing clauses of the Bill of Rights i.e. applying various aspects to restrict state action as they do for the federal government. The procedure occurs by reading various provision of the Bill of Rights into the Due Process clause of the Fourteenth Amendment.

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Amendment requires that the entire Bill of Rights be incorporated in toto. According to Black, relying on some extra-textual norm[31] to guide interpretation such as Cardozo's notion of what is "implicit in the concept of ordered liberty"[32] is tantamount to a judicial arbitrariness. For Frankfurter, on the other hand, wholesale incorporation is excessive judicial activism and an abrogation of judicial responsibility to reinterpret the Bill of Rights with regard to restricting the state action, in light of felt necessities.

Behind the views of both these justices ultimately lies the idea that the position advocated by the other would serve to compromise judicial legitimacy. The specter of manifest arbitrariness is seen as the curse of judicial action, yielding decisions which do not stand up to criteria of justification. It is interesting that both justices are able to employ this same negative charge against the other. For Black it is not the province of judges to reinterpret fundamental rights nor impose upon the Constitution their own views of "canons of conduct," "immutable and fundamental principles of justice" or as to what "shocks the conscience." To act as such is to act arbitrarily. He

[31] This is to say, not in the text of the Constitution. Cardozo's criterion of what to incorporate as restrictions against the states, and what not, in Black's eyes smacks of a misuse of judicial discretion.

[32] from Palko v. Connecticut 302 U.S. 319 (1937)

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argues:

> "I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our notions of "civilized standards of conduct."[33]

Frankfurter considers the demand for wholesale incorporation to constitute arbitrariness insofar as it flouts, by its broadly activist brush strokes, the role of judicial interpretation and the concomitant idea of constitutional change occurring in a slow and incremental manner. In Frankfurter's eyes there exists no textual warrant for incorporation, nor is it supported by recourse to describing the original intentions of the framers of the Fourteenth Amendment as Black would have us believe. And so, incorporation is a judicial procedure that needs to be approached sensitively and cautiously. Black's protestations, alternatively, raise the important question of the appropriate scope of judicial action. At what point does a decision cease to have legitimate grounds? The obvious background point of reference which motivates Black's anxiety is Lochnerism whereby the Court thwarted New Deal legislation with the doctrine of substantive due process. Here an intransigent judiciary consistently overturned congressional economic policies by treating economic laissez-faire as an a priori constitutional

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[33] Dissenting in Griswold v. Connecticut 381 U.S. 479 (1965)

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principle.

Substantive due process, much discredited for its Lochnerist manifestation, represents what is largely considered to be a dark period in constitutional history during which the Supreme Court was seen to have exceeded its mandate: ignoring the popular will, violating departmentalism by allegedly intruding into the political sphere, and acting arbitrarily, capriciously and in a wholly ideological fashion. All of these were held to call into question the very legitimacy of the Court as a non-ideological, impartial and apolitical body charged with applying neutral principles according to rule of law. The idea of the Court acting ideologically as opposed to neutrally and impartially becomes a notable means of discrediting the legitimacy of judicial action. The whole issue of ideology will be taken up in a later section. It is, nevertheless, interesting to notice how justices use the taint of ideology to discredit opinions with which they disagree, decisions which are thought to breach constitutive norms of legitimate judicial action.

In Lochner Justice Holmes levels a charge against the Court similar to Black's in the incorporation debate:

> "This case is decided upon an economic theory which a large part of the country does not entertain...I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law...a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relationship of the

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citizen to the State or of laissez-faire."[34]

Thirteen years later in arguing for the constitutionality of a congressional statute prohibiting transport of goods manufactured with child labor Holmes wrote,

> "if there is any matter upon which civilized countries have agreed--far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused--it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States."[35]

Both Holmes and Black seem to be suggesting that it is inappropriate for judges to read their opinions concerning what is decent, reasonable or appropriate into the Constitution. To do so is to inflict various subjective moral conceptions upon the text, and this would not constitute conduct becoming of judicial impartiality. In Hammer, Holmes does allude to the idea of moral standards but hastens to stipulate that conceptions of the good are for the legislature to decide based upon its notions of felt necessities, and not for judges to impose. But it is important to realize that by allowing the legislative will

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[34] Justice Oliver Wendell Holmes dissenting in Lochner v. New York 198 U.S. 45 (1905)

[35] Dissenting in Hammer v. Dagenhart 247 U.S. 251 (1918) in which the Court ruled five to four that manufacturing was antecedent to commerce and thus the legislation in question was not a legitimate exercise by Congress of its constitutionally delegated authority to regulate interstate commerce.

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to prevail on a certain subject in the guise of judicial deference, judges implicitly engage in moral assessment of legislation.

In not overturning a piece of legislation, judges endowed with the power of judicial review and hence the capacity to strike down legislative policies on constitutional grounds, are expressing their opinion that the statute passes the constitutional test. Hypothetically, if Holmes were writing for the majority in Lochner, his opinion would be arguing that the regulation of bakers' labor conditions passed by the New York legislature is consonant with the moral conceptions flowing from the federal constitution.

This reading of Holmes' actions draws upon Dworkin's insight that we cannot get around the fact that background conceptions of the good continuously and perpetually inform adjudication. Thus Holmes and Black both commit an error predicated upon a misapprehension about what is entailed in judicial action: they fail to comprehend that all interpretive understandings pertaining to the Constitution can be traced to certain moral conceptions. What Holmes and Black should be arguing is not that judges have no right to possess or refer to these moral conceptions, but that the majority opinions in these cases in which Holmes and Black dissent, rely upon the wrong moral conceptions.

In Lochner, what Holmes must argue instead is that

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laissez-faire is wrong, and not, as he does, that the Court is not entitled to hold a view on economic theory and the constitution. The overwhelming anxiety belabored by Black concerning judges subjectively imposing moral values upon the constitutional text, pushes him to the untenable position in which judicial review and the discretionary authority associated with judicial action are never to be exercised in a meaningful way. In Black's scheme, whenever values are explicitly invoked to justify a decision, this is like a return to natural law and these decisions stand disjustified for their arbitrary character. Judicial arbitrariness then becomes a virtual synonym for judicial discretion, and judicial restraint becomes the corrective panacea.

Our difficulties with Black notwithstanding,[36] what is critical to perceive is the role that the arbitrariness anxiety plays as a check upon judicial action. The rhetorical force of the charge of arbitrariness makes avoiding it a constitutive ideal for judicial legitimacy under liberal legalism. Clearly, impartiality and

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[36] It should be noted that one can agree with Black's position on wholesale incorporation while still criticizing the grounds on which he holds it. As a restriction upon governmental action, perhaps the Bill of Rights ought to be applied completely against the states and not be interpreted and reinterpreted as to which rights are more or less fundamental or implicit in the scheme of ordered liberty etc. This point can be argued as a substantive conception of the good that judges consider to be required by the Constitution as a positive interpretive determination, rather than as a "non-interpretation" as Black grounds his position.

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neutrality, as the antitheses of arbitrariness, are simply ideals and can never fully be instantiated in an imperfect legal universe. Nonetheless, there is utility to the terms in the rhetorical sense. Both Black and Frankfurter make arguments for certain justified interpretations by characterizing their opponent's alternatives as arbitrary. Just how we are to decide which justice is correct, and in addition, how is the negative charge of judicial arbitrariness to be made sense of given possible instances of plausible contradictory usages, remains to be seen. If, for instance, we believe that Black is correct, does this then mean that Frankfurter's position is indeed the arbitrary one which would rob the Court of the all-important notion of legitimacy? Obviously, a decision which is conducive of legitimacy for the Court is to be preferred over its opposite. But, regardless, is the term "arbitrary" one that can be employed in a meaningful way when speaking of judicial interpretation?

Arbitrariness in liberal legalism, like its related concept, ideology, seems simply to be a shorthand for describing anything which cannot stand up to a certain view of justificatory scrutiny. And the want of justification is to be equated with a lack of legitimacy. "Arbitrary" is hence a catch-all term, including anything from breaching departmentalism to violating procedural due process, and, as an adjective, is only meaningful by reference to the

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underlying criteria which generate its usage. In its most non-rhetorical sense, arbitrariness in judicial action would entail judges doing something like flipping a coin to decide an outcome of a decision, or basing a decision on whether a plaintiff or defendant will prevail in a particular case, say, upon what the various individuals are wearing. This would be the height of illegitimate judicial action. Insofar as judges are required to justify their opinions in some principled manner, an absolute charge of arbitrariness perhaps cannot obtain. However, this is a point for CLS to engage. The quest for objectivity in law expressed in its strongest form by the right answer thesis, is the countervailing claim to arbitrariness. Here, yet again, we see at work the need to address the demand for judicial legitimacy, to justify decisions upon a certain set of criteria which are held to uphold the constitutive norms of liberal legalism.

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CHAPTER 6

LEGAL OBJECTIVITY

Interpretive Latitude, Judicial Arbitrariness and Legitimacy

There is nothing obscure about the idea that a given practice is constituted by a set of norms. The fact that these norms in some sense confer legitimacy is also a point of no particular difficulty. We have also seen how traditional jurisprudence has labored under the contention that legal norms internal to law provide checks upon judicial behaviour, serving to assuage the anxiety in liberal legalism concerning judicial arbitrariness. This anxiety, often understood as the usurpation of the political role, inheres in the practice of law under liberal legalism, particularly given the fact that the normative demands of neutrality, impartiality and judicial independence require judges, ideally, to be accorded broad parameters of discretion free from mechanisms of political influence and constraint. It should be clear that for most judicial practice, jurisprudential debates can be meaniningfully understood when framed by the issue of judicial legitimacy, an issue exacerbated by a number of facts: the fact that judicial action lacks the popular mandate accrued from democratic processes enjoyed by so-called political branches; the fact that law, in a sense, entails a justification for coercion; that fact that judicial decisions need to rely for their justification upon certain

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reasons beyond the mere notion of their simply being subjective interpretations of individual judges etc.

The positivist's attempt to give an account of legal autonomy--for example, law as a system of rules--is one such effort to posit an internal set of constitutive norms which characterize law as a distinctive and autonomous enterprise, unsullied by external variables. The formal properties of law are seen as what enable us to recognize law as something distinct from other social practices. This formal aspect is also held to confer legitimacy upon the legal enterprise. Natural law theory also entails a similar background motivation--to bestow legitimacy on positive law based here on the claim that law is symmetrical with some fundamental moral scheme. The idea of a moral scheme has been proposed as a transcendental ideal (which we associate with the Thomist view) or as deriving from the moral conventions which undergird a particular political culture (which is the contemporary NLT of which Dworkin is a prominent exponent).

We can distinguish two forms of skepticism that deny legitimacy to law based upon the claims of traditional jurisprudence. First, there is skepticism that there are indeed formal legal norms that exist. This is an ontological point that law cannot be accounted for in terms of a series of constitutive norms and insofar as there are norms, these are the norms of other social activities. This claim is problematic in that it reduces law to something

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else, refusing to grant to law any distinctive identity. If law were all and only politics, then we could not really speak of an ontologically singular thing that is law. This would seem to be a self-defeating claim in that it makes no sense to speak about a thing, namely law, in one breath while at the same time averring that law in actuality does not exist. And yet, we also would be naive to assert that law possesses a complete autonomy and is driven by norms only internal to the practice. For instance, nobody for a moment would claim that law is never influenced by political contingencies since examples of this are readily available. What is problematic is the reductionist move which simply equates the legal with the political, the psychological, or whatever external variable the reductionist chooses to appropriate.

The more interesting question is how law can survive as a distinct and justified practice, as one can surely maintain that it does, despite the fact that it is indeed influenced by external, independent variables. For example, it is interesting how sociological jurisprudence, in effect, posits that social considerations should be the guiding norm for judicial interpretation. Here social factors become the definitive, causal variables when specifying what constitutes the legal. For the sociological jurist this causes no anxiety about the legitimacy of legal practice. The legal is seen as inextricably linked to contemporary

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social demands and indeed it is law's responsiveness to these demands which vindicates and justifies legal practice.

The normative stipulation of sociological jurisprudence--that law ought to follow the felt necessities of the time--is usually framed in denotational terms, which is to say that antecedent connotational issues have already been determined. For instance, consider the jurisprudence surrounding application of the Commerce Clause to create a federal police power. At issue was whether the Commerce Clause, in conjunction with the Elasticity Clause, could support efforts by Congress to criminalize certain activities, a power thought to be constitutionally reserved to the states under the Tenth Amendment. Once the Court settled the question that the existence of a federal police power could be constitutionally sustained,[1] the question remained as to what kinds of activities could legitimately be policed under the newly-created federal constitutional power. Here is where the sociological argument had utility, to denote what things Congress could regulate. The creation and constitutionality of the power itself was not predicated upon sociological claims and so the connotational question was resolved by non-sociological means. However, the debate

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[1] This was determined by holding that federal police power, whereby Congress could regulate certain forms of conduct, occupied a logical nexus as a "means" of bringing into being a legitimate federal legislative "end," viz. the regulation of interstate commerce specifically delegated to Congress as an enumerated power in Article I section 8.

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over what background conceptions of the good would define and give content to the power was contested sociologically.

The point of this example is to show how appeals to sociological considerations in the denotational context do not compromise legal justification. This is because certain antecedent, first order connotational questions have already been settled through non-sociological reasoning. Connotational questions, on the other hand, are not as amenable to sociological justifications, and to reduce law completely to sociological facts at this level, jeopardizes the demand for robust legal justification. Robust legal justification under liberal legalism cannot simply entail a transparent appeal to external, extra-legal facts. This would be too patent an assault upon the normative value of legal autonomy. The fact that sociological jurisprudence can work as a theory is that it is a mode of justification which does not reach all the way down, as it were, but rather is only marshalled to resolve denotational disputes after connotational problems have already been resolved. As such, sociological jurisprudence is a limited theory of justification in that it cuts only in one direction. It leaves a certain substrate of legal practice immune from sociological content. And this phenomenon of layering allows for a limited reductionism without pulling off a complete reductionist move as would be had under legal realism. Thus, we can see aspects of how one level of

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practice of law can be appropriately influenced by an extraneous variable, but how at another level of practice, law retains a semblance of autonomy.

This layering also allows us to make sense of the fact that the normative criteria for what constitutes the legal is not simply a definition of what makes up the social. Hence, we can intelligibly speak of a gap between the sociological demands of a political culture and what its constitutional requirements actually demand. In certain instances these twin requirements may be symmetrical but this is a contingent and not a necessary fact. This feature of a gap makes room for the whole judicial practice of adjudication as represented by the process of judicial review. If the judiciary in a given legal system were simply to rubber stamp the will of the majority, expressed as the felt necessities of the time, then the very efficacy of judicial review would be questionable since no adjudicatory criteria are brought to bear upon the alleged requirements of social necessity.[2] And those criteria which judges use to assess constitutionality cannot simply be the criteria of social necessity. Here we turn again to

[2] Insofar as it draws upon background conceptions of the right and good in justifying legal interpretation, adjudication is attentive to societal moral understandings. But these understandings are not to be simply equated with public opinion or the felt necessities of the times. Also, BCGs are not matters of fact, out there in the world waiting to be discovered. They are socially constructed, and are often constituted by the interpretive activities of judicial actors themselves.

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the Kantian point that the mere description of social needs does not necessarily warrant that those needs be instantiated in law. For this to occur there must be some independent normative criteria[3] of assessment which is where the idea of entrenched constitutional principles fits into the equation. So, a gap between the constitutional and the social is an integral feature of any political culture which vests in an independent judiciary the power of judicial review. This critical idea of gap explodes the reductionist claim that law has no autonomy or that it does not generate discrete, normative criteria which stand apart from extraneous, non-legal phenomena. Though they might at times be guided by non-legal considerations, judges are at liberty to ignore these sources when they see fit, or when relying upon them possibly compromises the legitimacy of a decision.

The second form of skepticism concerns the character of legal norms themselves. Predicated on the notion that there are indeed a set of things termed legal norms, this form of skepticism holds that the norms can be pulled into shape to justify whatever outcomes judges seek to impose. This claim is not that there is no set of distinctively legal norms, but rather that these norms are malleable or that the norms are indeterminate or incommensurable or

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[3] This demand addresses the need to distinguish between the right and the good.

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somehow flawed in their basic or general character. Judges themselves would seem capable of acknowledging to varying degrees, the validity of this second form of legal skepticism. There is, therefore, something interesting about the practice of law in that an informed practitioner can both acknowledge a level of indeterminacy, the interpretive dimension to law, and so forth, while at the same time granting that justification and objectivity in law are meaningful and tenable notions. It is this paradox which is most interesting about the activity of law, particularly with respect to legal justification.

The question of the degree of interpretive latitude appropriate for a particular interpretation to stand justified is the issue of crucial importance. This significant issue of degree relates to the notion of there being certain parameters to interpretation which constrain judicial decisions. Where certain boundaries are transgressed, a legal opinion would no longer be justified, judicial legitimacy would be compromised, and here law is susceptible to the skeptic's portrait of legal reasoning as being amorphous, arbitrary or indeterminate. Another question pertaining to legal justification is as follows: assuming that both sides in a given decision avail themselves equally, in identical degrees, of interpretive latitude in declaring the relevant legal principles which ought to govern, how is it that one side's argument is

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better than the other?[4]

Generally speaking, most judges, with rare exception, possess sufficient self-consciousness and acumen about the activity of interpretation to understand that judicial activity entails the making of law. We can contrast the idea of judges making law with the notion that judges find or discover law. A useful illustration of this difference falls out of the landmark case of Marbury v. Madison (1803).[5] Chief Justice John Marshall writes:

> "The question, whether an act repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it...It is emphatically the province and duty of the judicial department to say what the law is...So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the

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[4] This picks up the point that justification of a decision and our ability to engage in critical assessments of it must rely on certain evaluative criteria. The mere fact that a majority of the Court are persuaded to a certain point view, does not, in and of itself, make that view the better one. Indeed, we can plausibly imagine instances where the dissents are more persuasive, and even more problematically, where both majority and dissenting opinions are equally justifiable. In this latter instance, we have no account beyond the numerical notion of the majority prevailing, to describe why one view possesses persuasive sway over its alternative. There is no unique right answer where two possibilities equally draw upon all the relevant justificatory criteria. The question then to be posed is whether this phenomenon ought to prompt us to be skeptical about law.

[5] 5 U.S. (1 CR.) 137 (1803)

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case. This is the very essence of judicial duty."[6] The question of how one is to view the predicate "constitutional" is answered in a formal, Blackstonian manner by Chief Justice Marshall. He submits the logical, formal proposition that when a statutory principle conflicts with a constitutional principle, the latter overrides. At the same time, the issue of whether a statute repugnant to the Constitution can become the law of the land, is somewhat dismissed by Marshall as noncontroversial. An act which is essentially repugnant to the Constitution simply cannot become the law of the land in Marshall's view because it violates a rule which is imperative to constitutional jurisprudence--i.e. the idea of constitutional supremacy. The activity of judicial review entails recognition of this rule which governs repugnance, by judges who apply it as a simple, formal principle. Unconstitutionality is treated here as tied to the essence[7] of the law itself which judges merely articulate as a matter of discovery.

An alternative view of unconstitutionality is that judges call the quality into being by active pronouncement. This allows us to understand how an unconstitutional act can and does become the law of the land until such time as it is

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[6] supra note 4.

[7] This idea is analogous to the essentialism of Juliet in Romeo and Juliet when she asserts that a rose by any other name would smell as sweet. Thus, the essence of a rose survives and transcends the linguistic act of naming.

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overturned by express judicial activity. Here judges do not "detect" but rather "make" unconstitutionality in a nominalist sense. The predicate is conferred by the act of judicial performance. This allows us to understand how a law can be assumed to be constitutional at the moment it is passed, (providing that it possesses the appropriate causal pedigree in the positivist sense of having been created by a de jure body), and then later be declared unconstitutional, and perhaps subsequently be reinstituted as being constitutional. In this example, the differing attitude of the Court towards the law from t1 to t2 to t3 reflects the point that it is improper to consider constitutionality as an essentialist predicate which is tied to laws as a kind of rigid designator.[8] To do so is to misunderstand the actual practice of judicial review and how the attribute of constitutionality is more of conferred property, called into being by judicial pronouncement.

On the other hand, the performative account of law-

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[8] The essentialist of course would claim that a law is essentially constitutional or unconstitutional from its inception. If l (law) is c (constitutional) at t1 (time 1) and ~c at t2 and then later declared c at t3, assuming that he thinks c to be true, the essentialist would argue that l at t2 is a mistake. The grounds by which the essentialist would make the determination of l being c remain obscure. It is not as if there were physical evidence upon which one could rely in the way in which we can appeal to physics for settling disputes as to whether the earth is round. If l at t2 were equivalent to the argument that the earth is flat, the error is easily corrected. Physical necessity makes the proposition about shape of the earth a non-contingent truth. On the other hand, the contingent element of judicial interpretation is clearly preponderant.

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making does not permit us to speak of how judges can be mistaken or wrong. Consider the example of assigning proper names. When parents decide to name their baby Jill, their act of naming confers a nomenclature upon the child. She joins a set of individuals who share the name and also have certain other general common properties, such as being female. But the parents could never be said to be recognizing some essential quality of Jill-ness in their child which has been detected and is being mirrored in the name conferred. Nor can we speak of them having made a mistake by making a claim along the following lines: "Mr. and Mrs. Jones, you have named your daughter in error; this is really not a Jill but a Jane!" The performative account of the ascription of predicates of which the legal nominalist would avail herself grants plenary authority to the judiciary.

While it would seem accurate to state that judges make law, it is problematic to hold that judicial acts cannot be critically assessed in the same way that naming a child is beyond critique. Legal justification demands that judges supply reasons for their decisions, beyond the simple matter of stating that a decision must be accepted as true for the mere reason of the judge having said so. And these reasons are of a public character such that they can be scrutinized and must satisfy certain criteria pertaining to the constitutional culture _writ large_. So, while it is more

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accurate to think of judges as making rather than finding law, just because they say something is the case does not necessarily make it true or the most justifiable solution to a legal problem. This fact points to the public nature of judicial reasoning and to be understood needs to be considered in light of the way in which judicial justification is parasitic upon certain general modes of political justification.

At issue is simply how it is that we can deem a judge to be mistaken, while yet acknowledging that judges do "make" law. This means that is no corresponding external reality, in the sense of ontological realism, to which we can refer as evidence of the truth or falsity of judicial propositions. Dworkin would have us think of truth in terms of coherence: that a judicial interpretation is true if it coheres with judicial principles that precede it and which are generally constitutive of the legal system. Certainly, this is a more persuasive view of justification than a correspondence theory, but it nonetheless fails to offer us right understanding of how we speak of judicial error. We can think of judicial interpretations which seem wholly consonant with the canons of judicial precedent and cohere with existing principles but at the same time are wrong when assessed against the criteria of the political culture. This situation is most acute in those so-called hard cases when the judge, acting as Hercules, elaborates readings of

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legal principles which break new ground.

The idea of objectivity in law and the extent to which legal justifications can be thought of as truth claims are core issues in jurisprudence in the face of skeptical attack. As Kent Greenawalt points out, objectivity in law needs to be considered in terms of certain evaluative criteria, what he calls "broader standards" such as law being "anchored in sound political morality, economic efficiency, cultural morality."[9] This means that legal decisions can be considered as being objective to the extent that they are consonant with or serve to instantiate the certain general criteria by which decisions are critically assessed. We have discussed attempts to propose objectivity in law which derive from certain claims about law's source or causal authority. In this regard, both natural law and legal positivism share a common proclivity: both seek to couch the objectivity of law in terms of its derivation. Natural law supposes that legal principles are objective in that they conform to certain a priori moral principles or natural truths. Alternatively, the claim of legal positivism is that the objectivity of law relates to pedigree, the circumstances under which a law is created. Correct answers to legal problems then refer back to the undergirding objective moral truths in one instance, or in the other, the causal history of the law which controls in a

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[9] Kent Greenawalt. 1992. Law and Objectivity. 4.

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given legal problem.

The view which will be defended here is a more Wittgenstinian position that law has a certain public character as a distinctive form of life and that objectivity obtains interpretively according to the accepted modes by which meaning is produced in the constitutional culture _writ large_. One can declare unequivocally that judges do make law, but legal decisions hinge on more than pedigree in order to be justified. This means that legal interpretation and justification are not something on which judges have a monopoly. Indeed, what renders validity and objectivity to a given interpretation predicated on certain legal justification, is the fact that the judicial arguments sit comfortably with the accepted, settled background social principles in the general political culture. This does not deny the fact that sometimes the political culture may reflect certain distortions and that the principles which animate law ought to be revised. The Marxist, for instance, would make such a claim in arguing how capitalism perverts justice by having law serve as a tool for those who control the means of production. Certain version of feminism, likewise, advance a similar claim concerning the preference law accords to a male point of view.

But both these critiques of law rely fundamentally on the idea of the way in which law is parasitic upon the general social understandings of the political culture.

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This view is nothing new and while we tend to credit Dworkin for its present popularization[10], it can be associated with German thinkers who often spoke of law in Hegelian terms of volksgeist etc.[11] Law must primarily to be conceived of as a broadly social phenomenon, sociologically driven rather than composed of timeless eternal verities. But of course the social facts[12] upon which judges draw to justify decisions are not an unambiguous category. A misreading of these facts, also, can lead to a loss of judicial legitimacy as occurred in the situation of the Dred Scott Court.[13] So, while one can acknowledge judges play an active role in making law interpretively[14], this does not mean that a

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[10] It can be noted that Marx also makes something of the same claim when he understands law in terms of the role it plays in society. But the idea of law as being justified in terms of it harmonizing with background conceptions of the good is different from the Marxist notion of law as epiphenomenal and reflective of distorted relations of production giving rise to alienation.

[11] Friedrich von Savigny. 1831. Of the Vocation of our Age for Legislation and Jurisprudence. We can also recall the close relationship posited between nomos and ethos in ancient Greek thought.

[12] It must be stressed that these "facts" are contingent and socially constructed through interpretive deliberations but are capable, nonetheless, of achieving transpersonal acceptance.

[13] Dred Scott v. Sandford 16 How. 393 (1857) Here the Court explicitly rejects ruling in a way coherent with the felt necessities of the time and this compromises the Court's legitimacy.

[14] This idea is met with broad resistance. Consider, for instance, a famous comment by Justice Black in his dissent from In re. Winship 397 U.S. 358 (1970). He states, "I prefer to put my faith in the words of a written Constitution itself than to rely on the shifting, day-to-day standards of fairness of individual judges." This on-going theme in jurisprudence represents the

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decision is automatically justified simply in virtue of it being an act of judicial pronouncement. There are certain definitive criteria by which the legitimacy of a decision is determined.

Most obviously, since courts lack coercive power, a decision must be able to be accepted by the body politic. The extent to which this point is not lost on judicial practitioners is evinced in the evolution of a wide variety of doctrine which have been framed in order to enhance legal legitimacy. Examples of these are the doctrine of political questions where the Court avoids certain issues thought to be non-justiciable and which would constitute an alleged intrusion into the political domain, breaching the norm of non-usurpation under departmentalism. Also, there are the so-called Ashwander rules[15] under which the Court declines from assessing the constitutionality of congressional action if a case can be disposed of on other grounds. Here the message being sent is that the Court is capable of self-

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refusal both to acknowledge and to understand that judicial interpretation is constitutive of constitutional meaning. The words of the written Constitution are defined by the judges who interpret them. And interpretation does not mean arbitrariness and unjustifiable value judgements. The source of interpretive judgements does not necessarily undermine their justification. In other words, just because judges might rely on certain personal points of view, private intuitions, individual opinions etc., it does not follow that these opinions cannot be justified as appropriate readings of constitutional language. Every personal reading of a text can be submitted to public scrutiny and indeed must be able to withstand probing critical analysis if it wishes to be justified as a convincing reading that ought to be adopted.

[15] Ashwander v. Tennessee Valley Authority 297 U.S. 288 (1936)

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imposed rules of restraint. And furthermore, despite the Madisonian assumptions that political institutions will seek, by definition, to expand their spheres of influence (thus ambition must be made to counter ambition), the Court is displaying resolve not to subvert the actions of a popularly elected Congress if this can be avoided. Ironically, this deference to Congress serves to strengthen the power and authority of the Court rather than diminish it. By purportedly denying itself authority, the Supreme Court gains even more and increases its overall prestige and influence when indeed it does choose to act.

The idea of objectivity in law meets with a natural skepticism. For instance, are the members of the Supreme Court not appointed by particular presidential administrations because of their individual perspectives on matters of law? Are they not there in order to further a certain ideological line[16], to advance, as it were, a quasi-political agenda? Can we not readily identify the difference between individual justices based on their subjective views and further still, isn't the complexion of the Court generally, defined by a certain ideological orientation? After all, we can meaningfully contrast the Warren Court with the Rehnquist Court by alluding to two distinctive ideological perspectives which stand in

[16] Ideology is being used here in an innocuous and non-critical sense, purged of Marxist connotations of false consciousness and the like. It simply means adhering to certain convictions.

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contrast.

Legal objectivity is mainly subject to skepticism in light of claims concerning the indeterminacy of the legal text itself, and the background social understandings alleged to animate that text. Here there are two distinct claims. The first is that the legal text itself lacks semantic and syntactic stability and determinacy. Thus, there are no constraints upon interpretation and the text can be read in any number of ways. This is a weak claim based upon accepting, in the first instance, erroneous textualist assumptions that texts can be thought of as self-sufficient or self-sustaining. In other words, to state that a text has no autonomous meaning or that it can support a plurality of interpretations arbitrarily imputed, one accepts the dubious normative proposition that the text ought to have a plain, autonomous meaning, and that this is a goal of which the text falls short.

But no intelligent commentator thinks of the legal text as being self-declaring and the repository of anything but a thin layer of meaning. Meaning accrues as a result of background social understandings--the context of the text's creation, its on-going interpretation and juxtaposition against background conceptions of the good. It is here where skepticism takes on its true critical bite in the assertion that legal rules, which purportedly render law stable and predictable, are inordinately susceptible to

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manipulation. This manipulation is possible and indeed inevitable because the background conceptions which animate legal interpretation are themselves unstable and fraught with internal contradictions. This, in essence, is a Marxian theoretical claim insofar as it proposes systemic, philosophical contradiction which cannot be redressed under the premises of liberal legalism given the asymmetry of core liberal values.

The elemental incoherence which bleeds contradiction at every juncture into legal practice, can be simplified as the alleged incompatibility of normative liberal values of individual freedom and social control, both of which are integral to the liberal's conception of the good. The incoherence of these liberal values as they are reified in social structures and institutions yields the base indeterminacy which pervades legal discourse. Roberto Unger, a primary exponent of this thesis, exposes the major defect in the deep structure of liberal legalism in his discussion of contract doctrine. He writes:

> "The better part of contract law and doctrine can be understood as an expression of a small number of opposing ideas: principles and counterprinciples. These ideas connect the more concrete legal rules and standards to a set of background assumptions about the kinds of human associations that can and should prevail in different areas of social life. The principles and counterprinciples are more than artifacts of theoretical curiosity. They provisionally settle what would otherwise remain pervasive ambiguities in the more concrete legal materials. But they themselves can be understood and justified only as expressions of background schemes of possible and desirable human association...

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> ...The first principle is that of the freedom to enter or refuse to enter into contracts. More, specifically, it is the faculty of choosing your contract partners. It might be called for short, the freedom to contract...Other areas of law and doctrine, however, do circumscribe the principle of freedom to contract on behalf of an entirely different idea. They embody a counterprinciple: that the freedom to choose the contract partner will not be allowed to work in ways that subvert the communal aspects of social life...The most instructive application of the counterprinciple lies [in] the rules of contract law that discourage contract in noncommercial settings. These rules express a reluctance to allow contract law to intrude at all upon the world of family and friendship lest by doing so it destroy their peculiar communal quality."[17]

And so, it is not so much vagueness, ambiguities and other linguistic disorders which give rise to the justificatory malady in law, as it is a crisis in law's normative undergirding: vagueness, indeterminacy or contradiction obtain not in the text of law per se, but in its background context. The strongest indeterminacy thesis then is not the claim that law cannot reflect the values it espouses but that it does indeed instantiate those values, and that the values themselves give rise only to incoherence and contradiction. Since law's background values serve as a limiting condition in the manner in which they bear upon legal interpretations, how can one hope for a legitimate and justified legal practice?

Unger's critique is that indeterminacy and contradiction can be located in the deep structure of law,

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[17] Roberto Unger. 1986. The Critical Legal Studies Movement. 60-64.

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which gives rise to systemic logical indeterminacy. Where legal realism simply asserted empirical claims that legal rules and doctrines can be manipulated to achieve a variety of results because rules are malleable, Unger declares an inherent antinomy in the normative substance of law which cannot be resolved in any coherent way. This cuts much further than any simple legal realism. For legal realists, that there can be two cases with identical fact patterns which might be resolved in logically contradictory ways is held simply to display that legal reasoning functions arbitrarily. On the other hand, Unger proposes that the roots of legal reasoning--the very background conceptions of the good that prop up legal decisions--necessarily give rise to incoherence in the first order practice. Pushed to its conclusion Unger's thesis would have us describe this antinomy not so much as resulting from acts of will of legal practitioners as related to an endemic problem in the structure of rule of law itself as conceived under liberal legalism.

A further problem that Unger identifies in law concerns the distinction under liberal legalism between rules and values. He states:

> "To understand the nature of adjudication one must distinguish two different ways of ordering human relations. One way is to establish rules to govern general categories of acts and persons, and then to decide particular disputes among persons on the basis of established rules. This is legal justice. The other way is to determine goals and then, quite independently of rules, to decide particular cases by

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> a judgement of what decision is most likely to contribute to the predetermined goals, a judgement of instrumental rationality. This is substantive justice."[18]

Unger cashes in this claim as articulating the major problem of liberal legalism insofar as the liberal insists upon distinguishing legislation from adjudication. Unger suggests that adjudication is justified based upon the notion that it entails a commitment and adherence to neutral, general rules. But as interpretivists and therefore critics of naive formalism, we know that the linguistic content of rules can only be fixed by the background values that animate them. Unger maintains that the distinction between legislation and adjudication, so central to liberal legalism, collapses in on itself. This is because liberalism advances the notion that one can have a neutral language of objective rules while at the same time acknowledging that values--the normative, background conceptions of the good that give rise to those rules--are patently subjective. But of course legal rules do not admit of essential meanings since the language of rules is only intelligible in the context of an over-arching normative scheme.

The crux of the problem which Unger identifies can be analogized to the fact-value distinction discussed in earlier parts of this work. We can imagine that liberal

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[18] Roberto Mangabeira Unger. 1989. "Liberal Political Theory" in Critical Legal Studies. Allan C. Hutchinson (ed.) 28.

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legalism considers legal rules to be like facts and that rules are held to be objective both in terms of their ontology and in the way that they are purportedly applied in adjudication. On the other hand values, obviously, are normative. The problem for liberal legalism arises from the severance of facts and values, in other words, from the erroneous belief that facts (viz. legal rules) can stand apart from values. From a purely semantic point of view we know that a severance thesis is not meaningful, let alone from the point of view of epistemology or ontology.

The general philosophical problem over rules versus values, is compounded by the liberal's commitment to the view that values are individual and must be oriented towards maximizing the individual's freedom to pursue his or her own private vision of the good life. This is the "deep structure antinomy" already alluded to above. How is individual freedom located in the realm of pursuit of subjective private values, to be reconciled with the demands of human association--a shared conception of the good? Unger suggests that there are two ways of portraying shared values under liberalism: as a coincidence of subjective individual preferences or as group values that are neither individual nor subjective. Both of these conceptions are not satisfactory. The first cannot yield a sufficient theory of how private interests converge and possess stability as they translate into common interest. The

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second idea, of giving objective force to shared values in order to redress the notion that communal values are merely contingent, accidental and arbitrary, implicates a metaphysics of common human nature. This latter move, rather surprisingly, is something which Unger is prepared to entertain. He writes,

> "the intuitive idea from which one might start is that man's choices express his nature, that common choices maintained over time and capable of winning ever greater adherence reflect a common human nature; and that the flourishing of human nature is the true basis for moral and political judgement...The political event would be the transformation of the conditions of social life, particularly the circumstances of domination, that produce the experience of the contingency and arbitrariness of values."[19]

With this assertion Unger leaves us wondering, "oh critical theory, where is thy sting?" What is simply prescribed is a conversion away from the false gods of liberalism and value conflict will then magically dissolve. Why a similar structural skepticism that Unger applied to liberalism would not be applicable to his own prescriptions is not clear.

We find an analogous sort of move in another critical thinker, Paul Brest, who shows up the emptiness of legal interpretation, and then suggests:

> "Having abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decisionmaking, let me propose a designedly vague criterion: How well, compared to possible alternatives, does the practice contribute to the well-being of our society--or more narrowly,

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[19] Roberto Mangabeira Unger. 1989. "Liberal Political Theory" ibid. 35.

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> to the ends of constitutional government? Among other things, the practice should (1) foster democratic government; (2) protect individuals from arbitrary, unfair and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace."[20]

The core issue is that once we embark on the road of value skepticism, how can we then privilege a new set of prescriptive values. What neither Unger nor Brest provide is a plausible new theory of objectivity in law. Both rely on objectivity when proposing their prescriptions for change in light of their claims that liberal legalism is philosophically bankrupt. While they debunk objectivity based upon the view that liberal claims to objectivity obfuscate what is really occurring in judicial discourse, they resuscitate the notion of objectivity in the quasi-utopian, transformative visions of a new legal order which is proposed. This ultimately begs the question of how values are to be justified.[21]

We can interrogate the truth of Unger's critique in several ways. Most obviously, there is the question of whether Unger has provided a correct account of liberal legalism in identifying antinomy in its deep structure. But to deny the validity of his critique by simply stating that

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[20] Paul Brest. 1980. "The Misconceived Quest for the Original Understanding." 60 Boston University Law Review. 204.

[21] This problem of objectivity and justification will be dealt with as the main subject of the next chapter.

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Unger has mischaracterized liberalism is disingenuous since all but naive commentators would agree that liberalism does espouse values which potentially conflict. Examples of these are the demands of the individual versus community, equality versus liberty, deontological rights versus furthering of utilitarian social goals, and the like, all being values which inhere in the liberal scheme.

Unger's view about the indeterminacy of liberal core values makes ultimately more of a syntactic than a semantic point. The claim is not so much that the values are wrought with vagueness or ambiguity as that grammatical rules have not been respected. Assessment of the truth or appropriateness, or semantic stability of the normative propositions themselves entails different questions from considering the more syntactical structural question of whether grammaticality obtains. The latter is ultimately a logical question which can be answered analytically rather than by recourse to any empirical investigation. Thus, the claim that the normative propositions of law conflict suggests primarily that they lack a certain quality of grammaticality: that they in some sense breach the rules for how such propositions ought to be formed. Unger holds that the rules of legal syntax, as it were, are flawed, just as the Marxist teases out the inherent contradiction in political economy. To be meaningful, Unger's argument requires us to assume that liberal values possess sufficient

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semantic stability and that they are passably intelligible such that their structure can be discerned. Unger therefore understands the manner in which liberal legalism is undergirded by background moral conceptions--i.e. the theory of rule of law--but maintains that the propositions of rule of law are defective and serve to compromise legal practice. Thus, law is incapable of the level of synonymy needed to realize its claim to being a stable and predictable enterprise. And this stability and predictability is one of the reasons that law makes claim to being justified in the liberal scheme. Recall, that part of the redemptive quality of law in the liberal social contract was that it would redress certain deficiencies of the pre-civil, pre-legal, state of nature by providing predictable and orderly procedural mechanisms whereby disputes could be resolved.

What is meant by synonymy is that like cases will be treated alike. For two cases with identical fact patterns to result in disparate outcomes would seem, at first blush, to violate a core desideratum of liberal formalism, especially if adjudication is to be thought of as the neutral application of formal rules. On the other hand, one can question the extent to which interchangeability is a normative goal in liberal legalism. Synonymy suggests that where two forms can be described as synonymous, i.e. have like fact patterns broadly speaking, the same background conceptions of the good must hold. This is to say that

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legal reasoning must be constructed based upon the same rules of syntax. It is not evident that liberal legalism requires a complete synonymy which reaches all the way down. The liberal can acknowledge that circumstances change as indeed background conceptions of the good do, which would result in contradictory outcomes to facially identical cases.

More significantly, liberal legalism allows for the fact that majority and dissenting sides in a legal opinion can draw upon conflicting background conceptions to justify their outcomes. This seems to be the essence of interpretive latitude and distinguishes an adjudicatory practice from one that entails simples mechanistic observation. For example, the majority of the Court in Dolan v. City of Tigard[22] found a city conditioning a permit for land development upon the individual dedicating some her land to public use, to be an unconstitutional violation of the Taking Clause. The majority here drew upon the background notion of private property being something of an inviolate right. The dissenters alternatively argued that private property can be charged with a public interest and that certain utilitarian imperatives should prevail. This latter claim is also a plausible and valid background conception of the good which has, over time, been drawn to justify outcomes in a variety of cases. The point is that

[22] 114 S. Ct. (1994)

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the choice between competing background values, whilst it can be identified as a source of potential contradiction, is what it means to be placed in a moral dilemma and also requires a balancing of possible outcomes which rely on plausible competing justifications. The problem then is not that contradictory values exist which can lead to conflicting outcomes, but rather that one must choose between competing value imperatives, in some justifiable way. It is not necessary that all the ethical values in the vocabulary of a given political culture be logically consistent with each other. We can readily conceive of the usefulness of a wider vocabulary which allows for greater latitude of choice in order to address a greater array of ethical dilemmas. We can also say that claims about the truth of the ethical propositions which obtain in the society at large are not the same as truth claims about legal validity.

This revisits the idea of the legal and the moral being distinct phenomena and the notion that legal justificatory criteria, insofar as they rely upon moral considerations, do not require that these moral assumptions be true unequivocally. The idea of fit--that there is some congruence between legal interpretations and the background conceptions of the good in the political culture--is a loose, albeit necessary, requirement for judicial legitimacy. So, a judge can, say, choose to privilege

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individual liberty in certain situations or the general utility in others, without being accused of moral incapacity or logical incoherence. Law can gain the stability and determinacy needed for meaningful legal justification despite the fact that we can acknowledge its background moral conceptions as provisional or themselves unstable. Unlike the Marxist, who seeks dialectical resolution to the inherent contradictions of political economy, the liberal is much more comfortable with contradiction. And liberal rule of law in some sense trades upon the fact that there are a variety of normative propositions, some potentially in conflict, which animate legal interpretation.

If there were not an alternative set of plausible background values upon which judges could draw in order to resolve a case, then dissenting arguments would be reduced to meaningless rhetoric. We readily observe situations of a dissenting argument in an earlier case later becoming the majority opinion and being used to overrule a precedent. This is a routine operation in liberal legalism and is not a threat to liberal rule of law. It is not even obvious that the liberal seeks full harmony with respect to competing background values, but rather accepts the need for compromise. At the same time, certain versions of legal formalism do posit a law as a seamless, fully coherent and autonomous enterprise. As Rogers Smith points out,

> "accepting the law's logical indeterminacy does require some sensible modifications in the way certain

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> defenses of the "rule of law" are made, but extensive modifications are not needed. Dworkin's writings on jurisprudence, for example, can plausibly be read as concurring fully with the CLS claim that legal rules gain determinacy only from the broader political practices, customs, and values of our political culture. Dworkin's contribution has in fact been to call us to accept our reliance upon these often tacit sources of legal meaning as a perfectly appropriate aspect of legal reasoning and to elaborate them more systematically and explicitly as much as possible."[23]

This reference to background sources of legal meaning is an elementary move once one accepts that law is an interpretive undertaking and that texts are not self-sufficient and hence lack semantic autonomy.

The choice between competing background sources is obviously not impartial for the judge, but rather a choice that needs to meet certain criteria of transpersonal justification. Adjudication does not reach towards the kind of interpretive purity that might be spoken of as a normative goal in aesthetic experience. For example, Rilke states of the aesthetic experience,

> "surely one has to take one's impartiality to the point where one rejects the interpretive bias even of vague emotional memories, prejudices, and predilections, transmitted as part of one's heritage...One has to be poor unto the tenth generation...One has to feel beyond them into the roots and into the earth itself. One has to be able at every moment to place one's hand on the earth like the first human being."[24]

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[23] Rogers M. Smith. 1989. "After Criticism: An Analysis of the Critical Legal Studies Movement" in Michael W. McCann and Gerald L. Houseman (eds.) Judging the Constitution: Critical Essays on Judicial Lawmaking. 101.

[24] Rainer Maria Rilke. 1985. Paris VIe, rue Cassette, Sunday afternoon, October 20, 1907. Letters on Cezanne. 73-74.

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The judge is never called upon even to approximate this state of being. Adjudication is not analogous to the intensely private experience of aesthetic judgement. Legal interpretation, given its public character and implications, cannot be thought of as purely a matter of individual taste.

If one were to claim that the background sources lack completely stability, then law could not survive. There must exist some modicum of logical coherence between the background principles of law and the first order practice. But we need not insist that this logical coherence be a matter of logical necessity, or that the background principles are consonant with each other. At issue is the choice between competing background values, the question of why one value is better than its rival? We know that there is no algorithm or meta-language of value which points out which of two seemingly incommensurable values is the better one. And yet, when that choice is made, and assuming that some reasonable justification is provided, the decision is treated as having a level of objectivity associated with it. Of course, there is also the view that judges ought not to be allowed to engage in value choice at all because this is inconsistent with the liberal demand for value neutrality and the fact that values are ultimately private and subjective. If the liberal truly held to this premise then social life itself unravels. Some unified commitment to common values is a prerequisite for social life. There is

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also the oft-cited distinction made by a certain orthodox version of liberal legalism that holds value-choice to be beyond the province of the judicial activity. Associated with the alleged difference between policy-making legislation and interpretive adjudication, the claim is that values can only emanate from legislation. Legislators as delegates of the people, express the popular will in the laws they enact and the judiciary is simply to implement the values of the day by strict and neutral adherence to the letter of the law.

The various problems with this are manifold. Firstly, the idea of judicial review means that legislative activity in some sense exists in order to check the right of the majority to embody their values in law. This point is aptly made by Justice Jackson who argued that

> "the very purpose of the [Constitution] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as principles to be applied by the courts."[25]

In order for judicial review to be an intelligible practice, there must exist a corpus of judicial values which judges can avail themselves of when assessing the constitutionality of legislation. It is patently ludicrous to posit judicial

[25] West Virginia State Board of Education v. Barnette 319 U.S. 624 (1943)

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review as a value-free activity.[26] Moreover, the idea of value-free fidelity to the text which the legislature bequeaths, as also previously argued, lacks understanding of the pronounced hermeneutic dimension to adjudication. So, adjudication is value-ridden because this is built into a fundamental aspect of the judicial role, (judicial review which requires judicial value-assessment of legislative action), and also for the fact that interpretation functionally draws upon background conceptions of the good. We can thus dispense with the thought that the distinction between adjudication and legislation lies in the fact that the former is value free and the latter value laden. Thus, critiques of law which attack judicial activity on grounds that adjudication is supposed to be value free and yet in actuality is value laden, are worthless.

Once we have acknowledged that both legislation and adjudication are, as it were, in the value business, we can nonetheless still preserve a semblance of distinction between law and politics insofar as legal norms are not generated through political processes. Liberal legalism does seek to insulate the judicial from the political. But this does not mean that judicial interpretations of law cannot be animated by background political values. The law/politics distinction hinges upon the idea that there are

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[26] This point revisits the discussion in the earlier chapter of Holmes' dissent in Lochner and Black's claims re. incorporation.

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distinctive sets of norms constitutive and regulative of each of these two practices. Given that law justifies politics in the liberal scheme through the idea of rule of law, the normative underpinnings of law--its core system of values--cannot be reduced to, or placed in an identity relation with, the values (or lack thereof) of politics.

To recapitulate, the themes of legal skepticism, as discussed so far, entail the central claim that law fails to make good when it comes to realizing its normative criteria. This asymmetry between the normative goals of liberal legal order and the practice of law on one hand is traced to a dissonance in the deep structure of liberalism i.e. that liberalism embraces contradictory values which cannot be reconciled. On the other hand, there is a version of skepticism, perhaps less potent, that holds not so much that the background normative values are contradictory, as that they are imperfectly instantiated in legal practice. Thus, law claims to uphold justice, but in actual practice justice (as defined by the background theory) is meted out in an imperfect fashion. This rendition of the critical argument simply asserts that those engaging in legal practice are not truly playing by the rules. It is not that the rules themselves are problematic, but rather that players are cheating. As with any game or rule-governed activity, there is always some possibility for fudging rules or using their malleability to advantage.

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The crucial question is at what point does the bending of rules mean the practice has been transgressed i.e that the practice has lost all vestiges of its integrity? Is the practitioner who utilizes malleability to be considered a virtuoso or villain? It seems to be a misunderstanding of the nature of rules and the manner in which they function, to construe that the mere existence of a rule prescribes action in black or white terms. In fact, rules often push us into regions of grey.

Then there is the skeptic who argues that the rules are meaningless and indeterminate. This critique does not claim asymmetry between normative rules and the practice, but instead maintains that the rules do not play any significant constitutive and regulative role. This claim is nihilistic and as such self-defeating since it offers us no basis on which to hang a critique. Without some general level of normative underpinning, a practice lacks regularity and becomes completely random and arbitrary. For example, if someone purporting to be playing chess simply moved pieces around with no rhyme or reason, we would not be able to make any sense of what they were doing and certainly could not criticize their chess game since they would not, in effect, be playing chess. The competence of the practitioner is moot since she is engaging in a non-rule-governed enterprise because the activity in question is held not to be amenable to any determinate, intelligible and

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stable rules.

The skeptic who argues for the indeterminacy of background rules is related also to those that assert that there are no such rules at all. This latter claim, for law, is simply nonsense. The fact that we have multiple individuals who all engage in some likewise manner in an identifiable enterprise points to the fact that the practice exhibits certain stability and regularity. And these qualities obtain because of mutual observance by practitioners of certain common, normative criteria. The more interesting question relates to the degree of elasticity of the normative criteria whereby practitioners can still be held to be engaged non-arbitrarily in a justified and identifiable practice while yet exhibiting qualities of originality, initiative and interpretive latitude.

Finally, there is the critic who argues that the normative bases of law ought to be changed because their content warrants denunciation. This is not so much a skeptical claim about the coherence of law as it is a call for reform of its substantive principles. Here the possibility of consonance between normative goals of a legal system and a first order practice is conceded, in other words the critic is not making a grammatical point about indeterminacy or lack of intelligibility of normative rules, nor is he primarily asserting that the rules are imperfectly

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observed.[27] This is an argument about the inappropriate content or teleology associated with liberal legalism and as such the critique concerns political value choice.

There are thus two major thrusts to skeptical attack. One version of skepticism announces a severance of the connection between law and its normative undergirding either in semantic terms (indeterminacy) or syntactic terms (ungrammaticality). The other asserts that the normative content itself is vacuous, morally destitute or generally requiring revision. The claims are, of course, not mutually exclusive and we find that those who make the point about normative vacuity also speak about the indeterminate quality of legal terms. Also, the claim that law lacks grammaticality in that normative rules are imperfectly heeded in the first order practice, can be couched in terms

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[27] Some who employ this form of skepticism do make their call for reform (or revolution) based on the notion that the inadequacy of normative concepts means that law cannot ever realize its normative goals. Nevertheless, this critique predominantly attacks the normative principles of law themselves rather than focusing on claims that the principles lead to incoherence or inconsistency. Thus, the exponent of say critical race theory would mainly argue that the background normative concepts which animate legal categories (such as justice, equality, fairness etc.) are not attentive to entrenched patterns of racism.

In addition, there are those in CLS who term the normative values of liberal legalism (justice etc.), transcendental nonsense. Though there might be no explicit revisionary project associated with this critique, it can also be thought of as a call for reform. What drives critique is a view that a certain situation demands amelioration, and thus the critic, explicitly or tacitly, must entertain some vision of a preferable, alternative state of affairs. Unfortunately, many CLS exponents simply unleash their critical claims without specifying the alternative they have in mind. This point will be engaged in the next chapter when discussing ideology.

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of logical (rather than semantic) indeterminacy. We can nevertheless, for the purposes of clarification, distinguish between varieties of skeptical claims. Both forms of skepticism share the ultimate conclusion that law under liberal legalism is not what it purports to be.

The Indeterminacy Thesis

As suggested above, criticism based on assertion of indeterminacy is a major way in which law has been subject to critique. For instance, Duncan Kennedy[28] among others states that given the indeterminacy of legal form, doctrines can be shaped at will by practitioners. This argument can be analogized to the familiar example of the duck-rabbit figure from gestalt psychology and used in philosophy to demonstrate that objects of perception can be amenable to different interpretations depending upon the perceiver's point of view. There is no justification for choice of naming the figure a duck or a rabbit other than the fact that this is simply just what one sees.[29] It is important

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[28] Duncan Kennedy. 1976. "Form and Substance in Private Law Adjudication." 89 Harvard Law Review. 1685.

[29] The use of the duck-rabbit thesis to shed light on CLS' skeptical claims is borrowed from Andrew Altman. 1990. Critical Legal Studies: A Liberal Critique. 130. Altman also speaks of the patchwork thesis and the truncation thesis. The former is that it is impossible to provide a rational reconstruction of legal doctrine which derives from a consistent set of underlying norms because doctrines are derived from contradictory underlying principles. This renders doctrine an unprincipled patchwork. Its corollary, the truncation thesis, is that background normative principles underlying legal doctrines are applied in a truncated

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to explain that no meaningful legal skepticism can doubt the existence of law itself and as such skeptics are committed to at least a minimal ontological realism with respect to law. Law is an object, albeit one for which meaning accrues interpretively. To assert that law does not possess any ontological status deprives the critic of the object which she is criticizing. What certain CLS exponents would have us believe is that meaning, as socially constructed, cannot be meaningfully ascribed to law. Meanings are merely relative, contingent and arbitrary projections onto law.

The critic who sees no necessary relationship between legal terms and the meanings which they are held to have is thus an epistemological relativist. But to make this claim, the relativist is forced to presuppose that the category meaning has meaning. As a category, meaning itself cannot be seen as an indeterminate thing but has to assume some determinate status. In fact, to make the claim that legal terms have no meaning, presumes some veritable notion of meaning which hovers above as it were, the contingent and arbitrary meanings allocated to legal terms. Thus, if the epistemological relativist is to avoid nihilism, (in which case nothing would be meaningful, and there would be no

manner, only partially expressing the force of those principles, when they are carried forward into actual cases. This is because background principles ultimately clash with another alternative normative principle, both of which are incompatible, and this prevents either from being instantiated in a morally authoritative or conclusive way in the first order practice of law. (Altman. 1990. 119,139).

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sense or truth content even to his own critical statements), he must be an absolutist about meaning. Hutchinson and Monahan rely upon this point about epistemological relativism when they speak of the difficulty for CLS associated with offering any sort of reconstructive agenda. They write,

> "The Critical scholars argue that all social worlds are never natural, but rather the contingent result of interrupted fighting. Any proposal for a future society would only be possible if we were prepared to deny or hedge on the premise of contingency. It would require the Critical scholars to claim that their proposed society was not merely contained fighting, but it was in fact a vision endowed with enduring normative value. Accordingly, the Critical scholars cannot offer a vision of a reconstituted society while remaining faithful to their own basic theoretical assumptions.[30]

Hence, it is impossible for the epistemological relativist really to be true to his values, being forced instead to privilege certain categories (or values) as being meaningful and thereby not consonant with the premises of relativism which he espouses.

The indeterminacy thesis is much misused and also most often is employed with misguided assumptions about how language operates. Moreover, the most meaningful indeterminacy claim is not about linguistic indeterminacy, but about indeterminacy of choice. When faced with competing value imperatives, both of which are meaningful

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[30] Allan C. Hutchinson and Patrick J. Monahan. 1984. "Law Politics, and the Critical Scholars: The Unfolding Drama of American Legal Thought" 36 Stanford Law Review. 236.

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and intelligible, how and why does the practitioner choose to endorse one over the other? This is surely the central question which needs to be addressed. And given this obvious feature about legal practice, at issue is how law can survive as a justified enterprise considering that equally rational and competent practitioners can reach diverse outcomes which may be equally defensible. This is the problem which the indeterminacy thesis, at its most meaningful expression, discloses.

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CHAPTER 7

OBJECTIVITY AND JUSTIFICATION

The problem of objectivity and justification can be considered the salient issue which falls out of legal skepticism. The authority of law under liberal legalism turns upon the fact that one can give an account of the practice as an orderly and rule-governed enterprise. The practice of law faces the tribunal of justification in two ways. First, an entire legal system is justified under liberal legalism through the general normative buttress of the theory of rule of law. On the other hand, individual legal interpretations stand in need of their own justification each time they are made. The fact that equally rational agents can come up with incompatible interpretations which may be jointly defensible, makes justification a cause for interest.

To return briefly to the issue of objectivity, this is generally thought of in a number of ways. Most commonly, objectivity is taken to mean correspondence with an external reality in the sense of ontological realism. Descriptive statements made by individuals are considered to be verifiable based upon the independent existence of an external world. For example, in arguing that the social realities of the day should count as the determining factor which guides legal outcomes, some advocates of sociological jurisprudence commit themselves to a version of

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correspondence theory with the external world and experience serving as the touchstone of justification. The truth or falsity of interpretations is vindicated by appeal to putative extant phenomena known through experience. The duck-rabbit indeterminacy thesis points out, alternatively, the ambiguity of experience and how our interpretations of reality are colored by perspective, and more radically, how experience can also be contoured by agents in order to bring about outcomes sought. Another related version of jurisprudence, early legal realism, sought to achieve objectivity in justification by appeals to pragmatic utility. But here again justificatory stability is not assured since there can be competing conceptions of utility, or instances where the term cannot be unambiguously assessed, (the duck-rabbit effect again), which lead to problems of indeterminacy.

But the feature of indeterminacy does not mean that we must commit ourselves to a nihilistic solipsism. Despite the duck-rabbit phenomenon, we can still meaningfully speak of interpretations as being more or less justified. Beliefs about the world can surely be subject to an inter-subjective reality test, just as we can criticize the individual who perceives the duck-rabbit as say a house or train. This point revisits the arguments pertaining to the fact-value distinction made in chapter three. We have, in justificatory language, a register of discourse which we can

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call the factual, (as contrasted with the evaluative), which operates transpersonally and allows us to justify the interpretive claims we make.

It has already been proposed that a coherence theory of truth, (Dworkin, for instance, has such a theory), is perhaps a more apt conception upon which to peg objectivity in law. To state that lawyers and judges can manipulate rules is a trivial observation in and of itself. All interpretive activities entail elements of interpretive latitude and no one imagines adjudication to proceed along the lines of mathematical problem solving. The fact that legal outcomes are declared in a zero sum manner where one party wins and the other looses, tends towards suggesting that one side is correct and the other wrong. But, despite the adversarial nature of legal disputes which requires a winner and a loser, we can readily acknowledge that incompatible legal interpretations often each admit of commensurable justification. This is to say that both sides in a given case, the majority and dissenting arguments are equally plausible and can both be construed as logically and substantively equivalent truth claims.

This scenario is surely the most significant case for legal skepticism and challenge to objectivity. Here contradictory interpretations are deemed equally plausible, reasonable and defensible, and are equally supported by the background normative theories. Thus, the demands of

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coherence can be satisfied and thereby equivalent alethic or truth content can be ascribed to each of two incompatible interpretations. The question then is whether it is still possible for legal interpretation to make claims of being grounded upon a meaningful notion of justification and objectivity?

The quest for objectivity is something of a perennial theme in legal history. Both the traditional natural law thesis and legal positivism frame objectivity of law in terms of law's derivation. For the natural law theorist, law is objective because it derives from certain objective principles of morality and so mirrors certain natural truths. On the other hand, the positivist maintains that law's objectivity is to be found in its causal history--that it is created by a de jure body empowered to create it. In both instances, our ability to give an account of law in terms of its so-called objectivity, is a way in which law acquires its justification. But the way objectivity is formulated under these two major theories of law, minimizes the significant interpretive dimension of law and hence does not achieve descriptive accuracy of the practice.

Moving beyond natural law and positivism and embracing interpretivism instead, the problem of justification is just as pronounced, as is the fact that interpretive justifications here too stand or fall based upon a notion of objectivity. But objectivity in the interpretive context is

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not linked to the derivation or provenance of an interpretation as much as to whether or not it can stand up to the scrutiny of an interpretive community. We can call this the transpersonal requisite for objectivity in legal interpretation. The requirement for a transpersonal standard of objectivity is also a core demand in liberal political theory. This point is explored by Thomas Nagel who writes,

> "Ethics always has to deal with the conflict between the personal standpoint of the individual and some requirement of impartiality...The clash between impartiality and the viewpoint of the individual is compounded when we move from personal ethics to political theory. The reason is that in politics, where we are all competing to get the coercive power of the state behind institutions we favor--institutions under which all of us have to live--it is not only our personal interests, attachments, and commitments that bring us into conflict, but our different moral conceptions."[1]

Nagel speaks of the need for a higher-order impartiality as the standard for political justification. The key point of Nagel's article is that justificatory impartiality needs to reach across persons in a significant way.

Political legitimacy under liberalism, for Nagel, means that those values which ultimately the coercive potential of the state is going to support must not simply be partisan expressions of particular conceptions of the good. If this were the case, liberalism is reduced to a

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[1] Thomas Nagel. 1987. "Moral Conflict and Political Legitimacy" Volume 16 Number 3 Philosophy and Public Affairs. Summer 1987. 215, 216.

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sectarian doctrine. What it means for the liberal to privilege a certain political value or vision of the right or the good means that it would be unreasonable even for someone who disagrees with the value itself to argue that the state ought to impose it. An example Nagel uses is abortion, where people who nevertheless believe that the practice is morally wrong can still hold that it does not warrant legal prohibition. And, Nagel insists, this doctrine of toleration does not entail that one be skeptical about the truth of one's own belief as much as exercise epistemological restraint. Invoking the idea that there is a crucial difference between believing something to be true and its actually being true, Nagel suggests that there is a highest-order framework of moral reasoning which takes us outside ourselves to a point of view which is independent of who we are.[2]

This point is reminiscent of the Rawlsian insight that for the principles favored by agents in the Original Position to have authority, they must be chosen under conditions of impartiality. This is achieved through the mechanism of the "veil of ignorance"--that agents, when bargaining over principles, are unaware of their particular

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[2] Oliver Cromwell's Letter to the General Assembly of the Church of Scotland, 3 August, 1750, is a famous historical reminder of the need in moral and political argument for a transpersonal perspective which demands that an agent to be skeptical about his own position. Cromwell wrote, "I beseech you, in the bowels of Christ, think it possible you may be mistaken."

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social circumstances and conceptions of the good. As Nagel points out, Rawls has a mixed theory which draws upon "convergence" of rational support arising from separate motivational standpoints of distinct individuals and seeks a "common standpoint" that all the agents can occupy which yields agreement on what is reasonable to accept.[3] The crucial issue for public justification is how appeal to the truth of a proposition is really tantamount to the proposition "I believe "x" to be true." How is one person then to convince another that she should accept what might be considered as essentially a statement of subjective contingency?

The answer, as has already been proposed, is that the proposition must be able to sustain itself in terms of impartiality and neutrality so that even though I might be the one to believe "x," another person can also share the conviction. And if the other person does not share the belief, they can still be deemed wrong, not in any dogmatic, fundamentalist sense of missing the truth, but because they

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[3] Nagel. 1987. ibid. 218, 219. Nagel gives as an example of a pure "convergence" theory, Hobbes' notion that fear of death makes it rational that individuals desire to escape the brutal and anarchic state of nature. The starting point is self-referential and convergence of points of view is merely a contingent factor that eventuates.

A "common standpoint" theory is utilitarianism since it proposes a common normative standpoint by which to evaluate moral action which makes no reference to the viewpoints of particular individuals. An action is right because it conforms to the accepted common standard by which the criterion of rightness is generated, not because the action itself is universally acceptable.

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engaged in erroneous reasoning, ignored the relevant arguments which ought to have been persuasive, drew mistaken conclusions etc. It is important to distinguish between public moral reasoning where the coercive capacities of the state can be brought to bear to curtail individual liberty, and private morality. Clearly, in the latter sphere agents are more entitled to justify their actions based upon personal opinion, private intuition and the like. These personal convictions are not completely inadmissible in political argument but can be allowed only under the caveat they can stand up to the test of impartiality.[4]

To return to the judicial realm, justification in law requires that we do not consider judges as acting ex cathedra, but that they supply meaningful reasons for the

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[4] Dissolving the boundary between the public and private with the familiar slogan that the personal is the political, has been held as the battle cry of much of feminist writing. As Denys Turner shows, the argument was first used by proponents of Christian liberation theology. See "Religion: Illusions and Liberation." 1991 in Terrel Carver (ed.) The Cambridge Companion to Marx. 334.

The idea is that domains not regulated by law are often primary in constituting social relations and matters of identity and power. (Consider Aristotle's treatment of the family or oikos as paradigmatic of the polis in the Nichomachean Ethics.) At issue is whether public policy and legal sanction should be brought to bear against oppressive structures considered to exist in sites outside of the general purview of law. For instance, does a societal commitment to an equality principle require enforcement of that principle across the entire social terrain. The liberal argues for a sphere of privacy and liberty which is impervious to state regulation. The point being made above is that if we hold to a separation of the public and private realms, it is reasonable to argue that a stronger notion of justification obtain for the former domain given that liberalism privileges liberty and that in the public sphere the state can coerce obedience.

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interpretations they offer. Though judges do often rely on personal points of view, (and in this respect the realist makes an accurate description), this does not foreclose the possibility of transpersonal justification. Nor should recognizing that there are extra-legal sources to law--i.e. acknowledging that law is not a distinct and autonomous but a relatively autonomous phenomenon--lead necessarily to a justificatory problem. But the fact that a legal interpretation made by an individual judge can stand up to transpersonal scrutiny and acquire a level of objectivity does not dissolve the core problem of legal skepticism.

At issue is the fact that we can have two contradictory interpretations which are equally justifiable under the standard of impartiality alluded to above. Put another way, this line of skepticism fundamentally attacks the idea of there being a uniquely justifiable right answers to legal problems. The situation of a law being constitutional at t1 and unconstitutional at t2 has already been discussed. And if we are non-essentialists about legal interpretation, in other words we think that judges make more than find law, then there is no problem accounting for incompatible contradictory interpretive predicates at t1 and t2 since they differ diachronically in terms of their temporality. The problem here is how a given law "l" can be both "c" and "~c" at t1. Synchronic incompatibility where alethic content can nonetheless be ascribed is, as

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previously suggested, the most meaningful account of legal skepticism.

One solution to this problem which is often proposed in aesthetics is to jettison a bivalent theory of truth.[5] At issue is whether the existence of contradictory interpretations which can be jointly defended at the same time requires that we think that two logically incompatible propositions can both be bona fide truth-claims. On a bivalent theory of truth, an object cannot be held to be both a thing and its opposite. One solution is to propose that incompatible interpretations may be simply called acceptable or reasonable but need not be treated as true. Alternatively, incompatible interpretations which are regarded as truth claims might be considered to exist in different logical universes. This notion of mixed worlds whereby incompatible interpretations can possess alethic characteristics but not pose a logical challenge to each other, relativizes incompatible interpretations to diverse and distinctive normative schemes.

Both these options are unsatisfactory in legal interpretation. For one thing, a meaningful notion of justification does, in some sense, implicate what it means for an interpretation to be true. To substitute the terms reasonable or acceptable for truth seems to be merely a

[5] Joseph Margolis calls for such a move in The Truth About Relativism. 1991. So does David Carrier. 1991. Principles of Art History Writing.

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semantic shuffle. Alternatively, to salvage bivalent logic with the pluralist argument for mixed worlds--that the truth of two incompatible interpretations is relative to and generated by particular, incommensurable normative schemes--is also troublesome. Granted, all truth claims must be considered as parasitic upon a background conceptual scheme. But to make the point about mixed worlds would afford justification to a multiplicity of incompatible interpretations stemming from different "realities" as it were. This compromises our ability to hold that a particular interpretation is wrong when compared to its incompatible counterpart.

Incompatible interpretations in law are in a dialogical juxtaposition with each other and they are each, in a sense, in alethic competition. The fact that one is given primacy over the other is not because it wins out in terms of truth content, but because it achieves a majoritarian sway. But in this regard one can only repeat the familiar idea that the truth and justifiability of a viewpoint carries no relationship to the number of people who hold the view. The relative truth of one interpretation over another is related to the coherence relation between what is asserted and the associated normative scheme. The background values of the legal system and more generally, the political culture, contribute the normative scheme.

A multivalent logic allows for the fact that

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incompatible interpretations make truth claims and belong to the same universe which is to say that they are a part of the same formal, normative system. The set of possible alternative interpretations is not {x,~x} where one is true and the other false. Instead, the set is expanded to look something like {x,~x, y,~y, z,~z} where all these propositions under a multivalent logic can make alethic claims.[6] This explains how equally rational and competent practitioners can arrive at different interpretations which nonetheless have the status of a truth-claim. At the same time, we can still speak of a particular interpretation as being wrong or untrue because the set is not infinite. Criticism of an interpretation as being false amounts to stating that the person proposing it came up with "a" or "b," which are not members of the set of plausible alternatives.

Despite the idea of multivalent logic, the problem of indeterminacy remains--indeterminacy of choice. While it can be shown that multiple interpretations are defensible as truth claims predicated upon a genuine notion of transpersonal justification, it is not possible to furnish a meaningful account of why an agent ought to choose "x," "y" or "~z." Given that each of these is equally defensible and

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[6] Multivalent logic does not amount to denying that there can be false interpretations, nor can it salvage the extreme relativist alluded to at the outset of Chapter 4 from his logical incoherence.

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passes the relevant alethic criteria of coherence, impartiality etc., why one choice ought to be endorsed over the other is not apparent. It is not simply a matter of stating that choice boils down to subjective criteria and is ultimately arbitrary and capricious. Choice here can be made in a meaningful sense and is capable of appealing to justificatory objectivity. Yet, absent a meta-language which directs how one plausible interpretation must be preferred over an equally compelling counterpart, choice may assume an indeterminate character. A key variable is that all other things remain equal. Obviously, the consequences of choosing one interpretation over its alternative may vary enormously and this can provide grounds for preference.

It is evident that the claims that justify interpretations are distinct from the content of the interpretations themselves. We accept that justifications in law are socially constructed and contingent phenomena and not necessary or discovered. We grant also that justifications are themselves interpretations and not subject-independent descriptions of an ontological reality. Justifications, nonetheless, do admit of truth conditions. They are not, for example, like the assertion "the present King of France is bald," a statement that has no truth conditions, which is to say that it is neither true nor false since there is no referent to whom the predicate "bald" applies. The cognitive content of legal

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interpretations is fixed by means of reference to background moral conceptions and as such we might consider that these conceptions provide a world "out there" by virtue of which legal interpretations are vindicated.

But the indeterminacy problem still endures where two plausible interpretations exist, without their necessarily being in alethic competition since multivalent logic dissolves the problem of a single right answer. Each interpretation avails itself in equal measure of relevant justificatory criteria, which is to say that legitimacy is conveyed in a commensurate manner upon each of two outcomes. The problem is somewhat analogous to the idea of synonymy in a language. Two or more words can occupy identical semantic fields and engender the same cognitive responses. Given that all can satisfy the demands of connotational and denotational coherence for a particular sentence in a given language, on what basis is a person to prefer usage of one word over another? The apparent defect in this example is that synonymous words are compatible whereas equally justifiable legal interpretations might not be so. And yet, as illustrative of the problem of choice between equally defensible alternatives, synonymy provides an appropriate example in its depiction of justificatory equivalence.

A Dworkinian might assert that the political culture can provide direction as to which out of two or more plausible alternatives ought to be chosen where all

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coherently instantiate values of the legal system. Granted, the political culture provides a pragmatic against which consequentialist calculations as to the desirability of choosing "x" over "y" can be fashioned. The same phenomenon, however, frequently obtains at the level of political culture. Indeed, the elasticity of political culture, stemming from its diversity and pluralism, often readily allows it to accommodate a variety of incompatible interpretations. In this case appeals to the political culture too are no help for the question of which option ought to be preferred. Indeterminacy still persists with regard to the issue of choice between equally defensible possibilities.

Political cultures, and most notably liberal pluralism guided by a principle of tolerance, are often characterized by disparate operative conceptions of the right and good, all of which sit comfortably within the general political vocabulary. Alternatively, inconsonant background conceptions of the good can be so radically in conflict as to demand revision of the political vocabulary. Such is the case for, say, a Marxist who would claim that the background conceptions which inform interpretation reflect distorted power relations. But this is a second order critique about the content of the morality of a political community and can only be resolved through political conflict and social change.

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Indeterminacy is then, ultimately, not to be equated with vagueness of background moral principles. These, as Dworkin would say, reach all the way down and continuously serve to undergird legal interpretations. Vagueness entails absence of determinate criteria which enable justified choice between competing plausible alternatives. So, we _can_ supply reasons to justify a particular point of view in and of itself. But when placed in juxtaposition with a counter-view, we are often required to grant that alternative justifications which support the counter-view are also as compelling. The point is that indeterminacy obtains when an interpretation is relativized or placed in a comparative perspective with a plausible alternative. Here, where equally forceful justificatory reasons can be supplied, choice of one possibility over another is made on indeterminate grounds. Thus, we can say why we choose "x," but only limitedly can we assert why "x" is better than "y" or "z," where all three are members of the finite set of plausible alternatives.

Some people might make the non-cognitivist claim that questions of the good life--the background moral considerations that animate and justify interpretations--cannot be settled in any rational or meaningful way. This is not the argument here. It is rather that justifications are available, but justification does not direct us towards unique right answers. This idea, frames an important

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general point about political deliberation: that politics implicates choices which do not rest upon unequivocal grounds and that holdings can be, and in fact routinely are, revisited through the various mechanisms of political process. Yet, in law, though background causal justificatory principles may be in flux, functional necessity demands that a decision be rendered in every case. For this courts simply rely upon the will of the majority. But this procedural convenience does not in any sense translate into the notion of a decision being the best and most justified alternative just because a majority decided it.

The crucial detail--that choice is the issue with respect to indeterminacy--is lost on many who deploy the indeterminacy thesis with profligate abandon. The way indeterminacy tends to be applied requires the exponent to be a nihilist about justification in the spirit of Von Jhering's dream.[7] Justification is not the problem since multiple, incompatible interpretations all can be meaningfully justified. Nor is there an issue to be had <u>per</u>

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[7] Von Jhering dreamed that he went to a heaven populated by eminent jurists where there existed a dialectic-hydraulic interpretation press which could extort an infinite number of meanings out of any text or statute. There was also a hair-splitting machine which could divide a single hair into 999,999 equal parts and when operated by expert jurists could split these parts another 999,999 ways. The denizens of this heaven drank the Lethean draught which made them forget terrestrial concerns and some most accomplished jurists did not even need to drink for they had nothing to forget. See Felix S. Cohen. 1953. "Transcendental Nonsense and the Functional Approach" 35 <u>Columbia Law Review</u>. 809.

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se with multiple, incompatible interpretations and truth since a multivalent logic can allow for this possibility.

The insights of the early legal realist are helpful here in stating that at some level the psychologies of individual judges are the significant determining factor in predicting legal outcomes and describing legal practice in terms of regularity.[8] When faced with multiple, plausible alternatives and indeterminacy of choice, the account of why one option is preferred over another reduces to psychological motivations and dispositions of the individual who does the choosing. This is virtually a trivial point since all interpretations must start at the level of persons. To plumb the depths of what constitute the source of inspiration requires examining the complex, interior world of an individual, a world to which an outsider has very limited access and of which the individual himself might have limited self-consciousness. A private intuition, hunch, or dispositional state of mind describes the source for choice but cannot meaningfully justify it.[9] What is

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[8] For instance, see Joseph C. Hutcheson Jr. 1929. "The Judgement Intuitive: The Function of the 'Hunch' in Judicial Decision" 14 Cornell Law Quarterly. 274.

[9] The claim here is that though psychological accounts might be treated as the source of an action, we ultimately lack a full blown explanation of what causes a psychological state without engaging in an infinite regress. Moreover, while it is true that psychological descriptions are routinely employed to explain behaviour, (e.g. racism is linked to a racist mindset or class consciousness used to analyze forms of social protest), a psychological state is usually treated as something value-neutral and as such lacks normative import. To say that Smith ill-treats

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interesting is that this choice, made from a finite set of plausible alternatives, though it might be based upon personal predilection, nonetheless can be framed impartially and fulfil the criteria for suitable justificatory objectivity.

An alternative description of objectivity than the above has been suggested by Richard Posner.[10] Posner speaks of so-called "conversational objectivity" which has to do with persuasion having successfully achieved consensus. This occurs on an ad hoc, contingent basis and has no element of regularity associated with it. Posner argues that since legal interpretations are not vindicated by correspondence with an external world, objectivity obtains only through the process of on-going disagreement and negotiation about values. In a world of protean values, conversational objectivity is realized only at brief moments of cultural uniformity when points of view temporarily intersect.

Fundamentally, persuasion and justification need to be distinguished. As Nagel points out,

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Saturnians because he has a racist mentality simply describes an aspect of Smith's psychology. Why the psychological state ought (or ought not) to govern is not a consideration. Nor is there a justificatory argument generated as to why others ought not to possess the same psychology. The point is that psychology explains but cannot justify.

[10] See The Problems of Jurisprudence. 1990. Posner calls himself a pragmatist more than a Crit. He is also associated with the law and economics movement.

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"[Justification] is a normative concept: arguments that justify may fail to persuade, if addressed to an unreasonable audience; and arguments that persuade may fail to justify. Nevertheless, justifications hope to persuade the reasonable, so these attempts have a practical point: political stability is helped by wide agreement to the principles underlying political order."[11]

For Posner, persuasion bears very little relationship to justification, as the latter may be meaningfully conceived. Persuasion occurs through a process Posner calls, conversion, "a sudden deeply emotional switch from one non-rational cluster of beliefs to another that is no more (often less) rational."[12] Conversions take place in a random, arbitrary and private manner, so law is ultimately an unstable and unpredictable practice bereft of orderliness and regularity, There are ultimately no settled criteria which provide law with a normative undergirding. All criteria are contestable, political and unyielding to formal, rule-governed constraints.

The sheer incoherence of legal practice which Posner's account portrays is startling and appears exaggerated. Pushed to its logical conclusion, Posner's thesis affords a very stark picture of the possibility of politics and social life generally. Whilst we can recognize the contingency of values, it is harder to be a skeptic or non-cognitivist, like Posner, about justification. On Posner's view values

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[11] Thomas Nagel. 1987. "Moral Conflict and Political Legitimacy." 218.

[12] Posner. 1990. ibid. 150.

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are just asserted and assumed through acts of conversion rather than based upon acts of principled justification. And yet, as individuals we constantly seek to justify our patterns of thought and systems of belief both to ourselves and to others. We are incapable of living under the hypothesis of Descartes' evil genius: that all our beliefs which we take to be true are in fact false and not amenable to any meaningful justification.

Moreover, justification of belief has to mean something more than just "true for me." In other words, justification, in the purely logical sense, only settles into something authoritative when it can appeal to reasons which reach further than the person whose point of view is being defended. Wittgenstein's argument against the notion of a private language is the classic argument against the kind of solipsism to which Posner's theorizing ultimately leads. As a non-cognitivist about the possibility of justifying a conversion, Posner would have us believe that they simply occur, as private experiences, persuading individuals to change their minds.

At first blush, one would assume that something intelligible has transpired in the minds of those who have conversion experiences. Posner would have us assume that only the individual converted can understand what has happened since she only knows her inner experiences in some logically private way. This is what it means for conversion

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to resist justification. And yet, the descriptive idea of conversion cannot be a private phenomenon impervious to inter-personal understanding. It is treated as a regulative idea which ipso facto carries with it a certain normative understanding of what forms of phenomena satisfy the term in an infinite number of cases.

If conversion were a truly private thing without any meaningful public expression, then the associated mental sensations could only be identified and named from a private point of view. The agent "A" who names conversion "c" would be naming something which has no behavioral manifestation and so the term "c" is meaningless since it does not refer to anything. Furthermore, "A" would have difficulty employing "c" even to herself since "c" does not possess a criterion of usage. If a second conversion occurred "A" could use "d" instead of "c" to describe it since absent any semantic rule, any term could be applied. In actuality, conversion results in behavioral change and must be subject to certain inter-personal description and justification. There must be a justificatory relationship between behavioral change which has public consequences and an altered point of view inwardly experienced by an agent. Public justification, when we interact with others or more significantly when political values are debated, requires a robust notion of justification which is capable of working transpersonally. This is to say that beliefs must be

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vindicated impersonally from the perspective of an outsider who does not have an insider's point of view. Conversion, as Posner frames it, is simply not a meaningful description of legal justification and is certainly not a normative category according to which adjudication ought to proceed. At the same time, conversation is a social notion which implicates inter-subjective communication. Individuals have conversations about the content of their beliefs as well as the grounds in order to justify those beliefs both to themselves and to others.

Critical Theory

Critical Legal Studies (CLS) and its philosophical forebear, Critical Theory (CT), can be distinguished from criticism *tout court*. An example of straight out criticism would be say Plato's attack on *doxa* and sophistic relativism, or the assault on the ideals of classicism by the Romantics. A full-blown account of CT, however, must look beyond the mere fact that it entails a dimension of critique. Furthermore, exploring the role played by skepticism in the critical project, the problem of objectivity of values is brought into sharp relief. It is not appropriate to characterize the critical theorist as simply a skeptic. Reduction of CT to mere skepticism fails, in an important sense, fully to grasp the character of the critical enterprise which, after all, can claim a certain

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intellectual pedigree, reception history and degree of self-consciousness about its own method and end.

The task of CT from Kant, through the Frankfurt School, to the present has most exclusively concerned the status and nature of knowledge, whether this be knowledge of culture, the metaphysical foundation for knowledge or lack thereof, the manner in which cultures produce knowledge etc. In large measure the focus of CT has been critique of all or some of the aspects of the Enlightenment Project. This has included critiques of the notion of the autonomy of knowledge, the idea of science as a pure, descriptive enterprise which yields knowledge,[13] claims concerning a naturalized epistemology regulated by laws of necessity etc. For Kant the pressing issue of critique concerned the authority of reason. While reason could readily be harnessed to criticize the seeming hollowness of dogmatic belief to advance the goals of Aufklarung, the notion of whether reason could be applied to criticize itself presented an enigma for philosophy. Furthermore, Kant fiercely conceded the limits upon knowledge. For example, there could be no knowledge of morality since he held this not to be a matter of natural necessity but rather a

[13] The sociology of knowledge aspect of CT tends to be most apt concerning the social rather than natural sciences. Particularly prone to critique are positivistic attempts to couch social theory in terms of natural sciences. Here contingent, socially constructed phenomena are treated as if they were natural facts.

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condition of freewill.

To the extent that CLS is parasitic upon CT, the two share common preoccupations. Raymond Geuss defines CT as "a reflective theory which gives agents a kind of knowledge inherently productive of enlightenment and emancipation."[14] The term "reflective" is set in contrast to positivist theories that rely upon the dominant paradigm of natural science which proposes theory as disinterested, neutral and descriptive and whereby theory assumes an objectifying or reifying structure and anti-humanist character. In contrast, CT seeks to portray man as a product of history and not nature. It discusses the way social reality is constituted through social relations which embody interests rather than viewing relations as being merely instrumental.

Kant showed that mind is not a mirror of nature which is a passive repository for sense data, but in fact plays a significant role in structuring experience, thereby making an active contribution to the understanding of reality. This was Kant's critique of empiricists who framed mind as a tabula rasa. But he also argued for the autonomy of reason, suggesting that it could operate in a disinterested manner, independently of other faculties for which he was accused of hypostasizing reason by locating it in a noumenal realm of

[14] Raymond Geuss. 1981. The Idea of a Critical Theory: Habermas and the Frankfurt School. 2.

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being.

Hegel, in contrast, moves away from abstract reason by historicizing mind and therefore thinking and reason. In the Hegelian scheme thinking proceeds dialectically and is temporal, historical and transformative.[15] From Hegel we get the idea of immanent critique, which means that critique is internal to the subject being studied and not engaged in from the privileged position of any Archimedean point. The criteria for validity of knowledge cannot be stipulated as an external standard imposed from without, but must be seen to be present within existing forms of knowledge. Hegel argues that the search for an external standard by which to vindicate knowledge, such as by having it correspond to an external reality, leads to an infinite regress since other criteria are needed by which to corroborate the correspondence. Furthermore, seeking to provide a foundation for knowledge which is external to it, is itself a form of knowledge which leads into a problem of circularity. Immanent critique tests knowledge against

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[15] The categories of thought are not causally related solely to the structure of mind but also to the agent's location in history. Thinking thus changes historically.

Clearly, there is more to Hegel's grand theoretical design than just this. Hegel's project is ultimately to unify all the discrete moments of history, (social reality) into a notion of an historical totality which embodies the dialectical unfolding of the Absolute Idea. The Idea, which is outside of time and space, is actualized by its negation, Nature. Nature and the Idea achieve synthesis in Geist (Spirit) which is man's historical consciousness moving teleologically closer with each epoch of history towards consciousness of the Absolute Idea.

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itself and exposes the intrinsic contradictions. It also recognizes that the very activity of critical theorizing constitutes the subject matter being made the object of critique.

Benhabib describes a further key element of critique as "defetishizing" critique, drawn from Hegel's Phenomenology of Spirit, and defines this as "a procedure for showing that what appears as a given is in fact not a natural fact but a historically and socially formed reality."[16] Hegel's critique of natural rights theories is an example of where a counter-factual abstraction--the state of nature--is treated as a natural fact. The normative criteria of the historical reality of bourgeois society are picked up in framing the conditions of the state of nature and so pre-social human nature, which is posited as a natural fact, merely instantiates these criteria.

The historicism associated with Karl Marx and Max Weber places them also as pivotal figures in the development of CT. Both explicitly reject the idea of treating sociology as a natural science in the positivist mode[17] and

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[16] Seyla Benhabib. 1986. Critique, Norm and Utopia: A Study of the Foundations of Critical Theory. 21, see also 44-69.

[17] There are some who would argue that Marx is offering an objective science of history. However, it should be obvious that Marx is not intelligible in strict positivist terms. While Marx employs scientific materialism to dismiss bourgeois ethics, this does not mean that he advocates moral neutrality and a strict severance of facts and values. For a useful discussion of this see Steven Lukes. 1985. Marxism and Morality and Eugene Kamenka. 1969. Marxism and Ethics.

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share the conviction that knowledge must be harnessed to play an emancipatory role in the service of humanist goals.[18] In this regard, Marx decries the alienation associated with commodification of social relations under capitalism and Weber is concerned with the negative effects of science and technology and of rationalization which leads to dehumanizing bureaucracy.[19]

The Frankfurt School[20] of critical theorists draws heavily upon the works of Marx, Weber, Lukacs and Freud in order to produce a systematic social theory of critique. David Held writes,

> "the motivation for this enterprise appears similar for each of the theorists--the aim being to lay the

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[18] Humanism has been criticized from various quarters. We see this, for example, in the structuralist ambition to decenter man as subject. Heidegger is the major influence based upon his attacks upon the subjectivist tradition which he argues is the dominant theme in Western philosophy from Plato to Nietzsche. The subject has been relegated to a technological role of trying to control or overcome nature, reality etc. which results in estrangement from the authentic self-hood of Being.

[19] Weber and Marx diverge in that Marx understood the behaviour of individuals under capitalism as an expression of their location with respect to control of the means of production, in other words in terms of their material interests. Weber's explanation, rather than relying on objective material facts, argues that secularization of religious values associated with ascetic Protestantism best accounts for the capitalist "spirit." Thus for Weber, history cannot be interpreted in materialistic terms nor in terms of the development of ideas.

[20] The term refers to the Institute of Social Research established in Frankfurt in 1923. Leading figures originally associated with the school were Max Horkheimer, Theodor Adorno, Herbert Marcuse, Leo Lowenthal and Friedrich Pollock. Jurgen Habermas, Albrecht Wellmer and Claus Offe, among others, carry on the critical theory tradition of the School in contemporary philosophy.

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> foundation for an exploration, in an interdisciplinary research context, of questions concerning the conditions which make possible the reproduction and transformation of society, the meaning of culture, and the relation between the individual, society and nature."[21]

A central focus of their efforts was critique of ideology (Ideologiekritik) and a major dimension of this entailed critique of the precepts of positivism. Positivism privileged scientific knowledge and as such hypostasizes the abstract concept of a fact as something which cannot be questioned. Meaning is taken to derive solely from sense observation of data held to be external to the subject and this, for the critical theorist, forecloses understanding of how ideas are actually constituted in the dialectics of experience.

For the critical theory, although truth is held to be socially conditioned and knowledge produced through socio-historical and cultural forces, critical theory proceeds based upon significant article of faith: that critical truth claims are possible through immanent critique. This does not mean that there is an autonomous critical moment when the theorist can step out of history, society or culture in order to critique it. Nor does it require a context-transcending sense of truth or reality. Remaining within the reality, there is held to exist the possibility of achieving critical distance in order to engage in critique.

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[21] David Held. 1980. Introduction to Critical Theory. 16.

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The critical aspect of CLS can perhaps be distinguished substantively from CLS legal skepticism. The CLS critical project is parasitic generally upon the theoretical constructs and preoccupations of CT but is something less of a systematic philosophical enterprise. Nevertheless, one can, loosely speaking, relate the two. At its best the task of CLS has been to identify the role of law and legal reasoning in shaping social consciousness; the way law contributes to the process whereby social structures are naturalized and acquire the semblance of inevitability and so forth. CLS questions whose interests are being served by legal categories which often operate in rigid and hegemonic ways, and views law as a source of meaning which itself possesses symbolic authority and hence needs to be interpreted hermeneutically and deconstructed. Since meaning, a property in language, is ascribed to social phenomena, these are to be treated as texts or tropes which have rhetorical and other properties which require critical interpretation.

CLS as CT criticizes the reification[22] of law, the process where social phenomena take on the appearance of natural objects, (literally, "things"), rather than being

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[22] The term comes from the Hungarian philosopher Georg Lukacs who identifies this as a process whereby systems of oppression are sustained. See History and Class Consciousness. 1923.

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seen as socially produced. It decenters[23] law by dismantling the separation between law and other social phenomena, most notable law and politics. CLS debunks the autonomy of law as a pure concept associated with versions of formalism and legal positivism whereby law is held to be a distinctive thing. The instrumentalist view of law as reducible to politics or as the instrument of politics can be traced to the Marxian claim that bourgeois law is in the service of the ruling class. Also, in the nineteenth century within mainstream jurisprudence in the United States there was argument that law ought to be harnessed as an instrument of social policy.[24] Judges were urged to eschew rigid formalism and mechanistic interpretations of the common law and to orient the law towards pragmatic goals of social change. Having exposed the emptiness of formalism, nineteenth century realists sought to place law in the service of politics.[25]

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[23] Decentering may be thought of as springing from an aesthetic impulse to bring about novel and original ways of seeing. For instance, the cubist painter decenters the object and reverses the background and foreground which gives rise to a different perspective for the viewer.

[24] See Morton J. Horwitz. 1977. The Transformation of American Law 1780-1860.

[25] The realist argued that law should serve pragmatic social goals and move away from being framed in terms of empty abstract formalism. But realism is not per se a theory of how legal interpretations are justified. Realism did not, generally, point out how even the formalist is committed to relying upon background conceptions of the good when elaborating interpretations of legal doctrine.

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The idea of law as a hegemonic tool of the ruling class was explored significantly by Antonio Gramsci. Gramsci identified two ways in which law imposed domination: one was by consent through social conformism, the other was through actual coercion.[26] A work in the critical genre from a member of the Frankfurt School which echoes Gramsci's thesis is Otto Kirchheimer's Political Justice (1961). Kirchheimer discussed the role of law and legal procedures as a "political force" in society providing institutional apparatus which curb political associations and activities of citizens.

It is inevitably useful to show how law is related to other factors in the web of relations which constitute the life world. But, as has already been argued, where law is simply reduced to something else (usually politics or to a lesser extent psychology) in an identity thesis, our ability to speak about and engage in critique of law is obscured. It is generally problematic to reduce questions emerging from immanent critique of a practice to a narrative of outside practices. We need instead to give an account which focuses on the justificatory norms which are generated from within the practice itself. The authorizing structures of law which give law its symbolic authority arise from within law. And for the critic these structures are held to

[26] Antonio Gramsci. 1971. Prison Notebooks.

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embody ideologies which require demystification.[27] Clearly, the close relationship between the legal and the political is undeniable. Avoiding crude reductionism by considering the two as discrete yet related phenomena, it is more productive to explore the idea of the boundary, albeit a porous one, between the two domains.

The theory of relative autonomy is a compromise between the reductionist pitfalls of instrumentalism and the autonomy thesis associated with formalism which denies the relationship between law and other social variables. The idea of social practices being relatively autonomous while yet being related to other social phenomena comes from the French neo-Marxist Louis Althusser.[28] With respect to law, an inquiry which illustrates the notion is the study by Isaac Balbus of Chicago urban riots. The riots were a patent threat to liberal rule of law with its interest in

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[27] The allusion to structure here serves as an example of the larger point concerning critique. In no sense is this advocating that structuralist critique be the dominant line of analysis. Structuralism has the obvious problem of ascribing excessive autonomy to structure and thereby ignoring agency. A structure does not have intentions, and so while it is useful to discuss structure as an analytic tool, its causal role is limited. The problem is to wed structural or institutional analysis with the concept of agency in a meaningful way. Despite this imperative, there is an on-going tendency to vest social phenomena with autonomy, moves which flirt with the danger of reification. For example, there are recent attempts to view law as autopoietic--a self-creating and perpetuating epistemic subject. See Gunther Teubner. 1989. "How the Law Thinks: Toward a Constructive Epistemology of Law." 23 Law and Society Review. 727.

[28] See Louis Althusser. 1969. "Contradiction and Over-Determination" in For Marx.

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preserving public order, formal rationality and organizational maintenance.[29]

Balbus' working hypothesis was that under these harsh conditions of having to deal with urban riots which placed severe strains upon liberal legalism, law would not be able to sustain itself. This is to say that commitment to norms attendant in the notion of rule of law, and most notably to procedural due process, would not be conserved. Law was treated here as a dependent variable and expected to change according to the effects of the independent variables which were the external factors of violence and extreme pressure placed upon the legal system. From the empirical fact that law actually did not change, Balbus concluded that it was a mistake to consider it as a dependent variable, subject to the influence of external independent variables such as political circumstances, crises etc. The constitutive and regulative norms of liberal rule of law were not compromised as being simply incidental and an instrument of other social phenomena. This study attacks reductionism, and also the idea harking back to Marx that law is merely epiphenomenal. Conceived of as part of the superstructure of society, law is held to be determined ultimately by the base conditions of society, which for the Marxian are the relations of production which place law in the service of the ruling

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[29] Isaac D. Balbus. 1973. The Dialectics of Legal Repression.

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class.

The Ideology Thesis

In Lewis Carroll's Through the Looking Glass Humpty Dumpty says to Alice,

> "There's a glory for you!"
> "I don't know what you mean by "glory"," Alice said.
> "I meant, there's a nice knock-down argument for you!"
> "But glory doesn't mean "a nice knock down argument"," Alice objected.
> "When I use the word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean--neither more nor less."

The significance of this speech, as Thrasymachus also showed us centuries earlier, is that meanings can be created by those who are in the position of power to define the terms. And the way terms are defined can befuddle, be unsympathetic to, victimize etc., the less empowered. To unmask or decode the way power operates in linguistic discourses is a battle cry of the ideology thesis. Intrinsic to the project is the absolute politicizing of all aspects of the life-world to show how power distorts relations, gives rise to false consciousness and operates in a manner to favor some and oppress others.

The term "ideology" traces its origins to the Enlightenment philosophe Antoine Louis Claude Destutt, Comte de Tracy. He thought of ideology as a science of ideas and linked it to zoology as an off-shoot of the general science of studying the human animal. Napoleon Bonaparte, on the other hand, is credited with turning the word into a term of

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derogation when he dismissed the members of the elite Institut Nationale, De Tracy included, as ideologues. Marx and Engels later appropriated the term in The German Ideology (1845-6) to show how those who controlled the material means of production of a society were also the dominant ruling intellectual power. Marx here elucidates the relationship between the material base of a society and its superstructure, a claim which is taken to have scientific facticity as an objective description of the human condition under capitalism and thereby escapes the false consciousness of ideology. It is ideology then to understand ideas in terms of other ideas rather than relating them to the material conditions which give rise to them and it is ideology which stymies individuals from correctly discerning their interests and position in the social order.

The term ideology is used in many ways, sometimes neutrally simply to mean ideas, other times in a strictly pejorative sense. John B. Thompson defines ideology as follows:

> "to study ideology is to study the ways in which meaning serves to establish and sustain relations of domination. Ideological phenomena are meaningful symbolic phenomena insofar as they serve, in particular social-historical circumstances, to establish and sustain relations of domination."[30]

What is common to most accounts of ideology and its usage is

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[30] John B. Thompson. 1990. Ideology and Modern Culture. 56.

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that the term is used to mean the corpus of ideas which make up a social group or class. In the critical locution, ideology is usually employed non-neutrally to signify dominant forms of thought which serve to define (usually falsely) a subject's knowledge of the world, which operates typically against her better interests.

Nicos Poulantzas, following Althusser, conceives of ideology as a necessary component for the production and conditioning of subjects. He speaks of the "institutionalized fixing of agents of production as juridical subjects."[31] Juridical relations empower some and disempower others, robbing the latter of class membership and inscribing them as subjects in the dominant ideology of capitalism. Juridical relations are thus constitutive of people as subjects, conditioning them, locating them socio-politically and, by conferring rights and powers, law estranges individuals ideologically from their class, hence denying them the emancipatory possibility of class consciousness.

Poulantzas is an exponent of what has come to be known as the "dominant ideology" thesis which means that there exists a preponderant ideology which overshadows all others, usually the ideology of the ruling class under capitalism. In CLS, Alan Freeman's work is illustrative and he argues

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[31] Nicos Poulantzas. 1973. Political Power and Social Classes. 128.

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that despite decades of anti-discrimination law, racism persists.[32] This leads him to conclude that anti-discrimination law has "served more to rationalize the continued presence of racial discrimination than it has [resolved] the problem."[33]

Freeman distinguishes two themes in anti-discrimination law--the "victim" perspective versus the "perpetrator" perspective. Anti-discrimination law vacillates between these two in three distinct epochs of Supreme Court anti-discrimination jurisprudence. The latter perspective is a decontextualized, color-blind approach whereas the former is more cognizant of the systematic and entrenched nature of racial discrimination. Freeman claims that rather than alleviating racism, anti-discrimination law functions ideologically to legitimize existing patterns of race and class divisions. The adoption of the apparently more efficacious "victim" perspective actually serves the interests of the ruling class because it creates a semblance of dealing with racism. But this purported responsiveness simply paves the way for the "perpetrator" perspective to be readopted.

The "perpetrator" perspective legitimizes capitalism

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[32] See Alan Freeman. 1988. "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay." 23 Harvard Civil-Rights Civil-Liberties Law Review. 295. "Anti-discrimination Law: A Critical Review" in David Kairys (ed.) 1982. The Politics of Law. 95.

[33] Freeman. 1982. in Kairys (ed.) 97.

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(the dominant ideology) by offering a "credible measure of tangible progress without disturbing the basis of class structure."[34] According to Freeman, the only means by which racism can be abolished is if it is linked to class, since race and class are inextricable in the "deep level" of class structure. A forceful critique of Freeman is provided by Bartholomew and Hunt. They appropriately argue,

> "his analysis is class reductionist in the way in which it treats the priority of class oppression over racial oppression. It is functionalist in arguing that capitalism has "needs" which are, in some unspecified way, recognized and satisfied by the courts."[35]

Moreover, the dominant ideology thesis, as routinely employed, rather than leading to analytic clarity often has the effect of obscuring. Once a dominant ideology has been identified, it can be held continuously to manifest itself in insidious and arcane ways, and everything else is easily subsumed under it. To refuse to accept the ideology claim is to succumb to co-optation and resist "freeing oneself from the strait-jacket of prevailing ideology"[36] and this is held to entail being in the thrall of false consciousness.

Geuss identifies three situations when consciousness

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[34] Freeman. 1982. ibid. 110.

[35] Amy Bartholomew and Alan Hunt. 1990. "What's Wrong With Rights?" 9 Law and Inequality. 1.

[36] Freeman. 1988. "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay." supra note 30 at p 324.

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can be deemed to be false.

> "A form of consciousness is ideologically false in virtue of some epistemic properties of the beliefs which are its constituents;...in virtue of its functional properties;...in virtue of some of its genetic properties."[37]

Epistemic falsehood entails a mistake about the epistemic status of a belief. For example, the category mistake of confusing natural and social phenomena, or accepting a non-cognitivist proposition as having cognitive content are instances of epistemic misunderstandings which lead to false consciousness. Functional properties relate to when ideologies function to support, stabilize or foster hegemony, or justify or legitimize hegemony.[38] The genetic fallacy is the idea that the content of a belief may be true, but the motive or ground for holding it is spurious such that if the agent becomes aware of her true motive, she would no longer be motivated as strongly to hold the belief. An example would be my believing that the earth is round because when I look at the moon, the moon is also round.

A number of theorists argue that the false consciousness thesis is riddled with problems and ought to

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[37] Raymond Geuss. 1981. The Idea of a Critical Theory. 13.

[38] Geuss distinguishes between the two by arguing that while a set of beliefs which justify a social practice will most often support it, the converse does not hold since a belief which bolsters hegemony will not necessarily be justificatory. He uses as an example the belief that resistance to the ruling class is futile. Though this belief stabilizes hegemony, it is not likely to be used to justify the relations of domination of the social order.

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be cautiously employed.[39] Terry Eagleton contends that,

> "there are several reasons why the "false consciousness" view of ideology seems unconvincing. One of them has to do with what we might call the moderate rationality of human beings in general, and is perhaps more the expression of a political faith than a conclusive argument...if human beings really were gullible and benighted enough to place their faith in great numbers in ideas which were utterly devoid of meaning, then we might reasonably ask whether such people are worth politically supporting at all. If they are that credulous, how could they ever hope to emancipate themselves?"[40]

From the point of view of philosophy of language, if we were not able in some sense to show that the statements "snow is white" and "la neige est blanche" are a logically equivalent order of truth claim, communication, through our ability to understand other speakers, breaks down. Imagining a culture or sub-culture that "speaks" ideology which is to say false statements, translation of their language is impossible. We also fall into something like the Cretan paradox if I were to assert, as a truth claim, that all my conscious thoughts are ideological and therefore false. Objections too numerous to rehearse here can also be raised against the false consciousness thesis which draw upon philosophy of mind and psychology.

One brief point is that it is an open question just

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[39] Various examples of those who make this point more or less forcefully are Martin Seliger. 1976. Ideology and Politics., Alex Callinicos. 1985. Marxism and Philosophy., Goran Therborn. 1980. The Ideology of Power and the Power of Ideology., Bhikhu Parekh. 1982. Marx's Theory of Ideology., Raymond Geuss. 1981. The Idea of a Critical Theory.

[40] Terry Eagleton. 1991. Ideology. 12.

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what is the ontological status of false consciousness? Is the content of consciousness to be conceived of as an intentional act? Are mental images in consciousness which give rise to ideas intentional objects? Consciousness would seem more related to the way an individual experiences things than to what he experiences. Criticism of consciousness as being false, then, is different from critique of the objects of consciousness. If I think of a dragon or unicorn and thereby conceive of the image of a dragon or unicorn in my consciousness, the image has ontological status and is real insofar as it exists in my consciousness even though dragons or unicorns do not exist in the world. Also, the familiar inverted spectrum argument can be brought to bear to illustrate how difficult it is actually to know (and therefore subject to critique) just what an agent actually is conscious of when she uses language. If instead of seeing blue I see green, you have no way of knowing this since I would have learned to call green blue and would hence use language in a way consistent with your practice, even though I experience blue as green.

Justifications are beliefs about the world. They are causally related to social reality as interpreted by an agent and insofar as those beliefs have some validity, it is difficult to derive criteria by which the beliefs can be termed ideological or false. For example, if there were equally sound grounds for believing "x" or "y," there seems

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little basis for deeming one of the two beliefs ideological and the other not the case. Even where "y" is more persuasive a view than "x," it is not evident that solely in virtue of this fact, "x" becomes a matter of ideology and false consciousness when placed in juxtaposition with "y."

Claims about false consciousness notwithstanding, what is interesting about the ideology thesis is that it also represents an attack upon justification. As we have seen, justification entails supplying reasons of a certain sort to say why a particular point of view ought to be accepted. Critiques relying upon the ideology thesis argue that justifications often obscure the real interests (or at the very least, alternative interests) being advanced. This asymmetry between the explicit reason supplied to justify an interpretive legal claim and alternative reasons which might seem to be at work behind the scenes as it were, suggests that a certain strategy of reading social phenomena can expose a different set of causal factors, other than those supplied by agents themselves, to explain action.

Ideology points out the way social practices are rationalized or legitimated, and indeed the way reality is structured and constituted for reasons which are not always apparent. In this regard the ideology thesis runs counter to the familiar pragmatic from anthropology that a culture must be understood through participant observation. This is to say that the rules for understanding a culture must be

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only those which are employed by members of the culture itself. Ideology claims, fundamentally, require a critical distance from the insider perspective and generate depictions of reality which are distinct from those in the mind of the cultural indigene. Magritte's painting of a pipe with the caption "this is not a pipe!" is an example of the dilemma of perceiving an object as one thing, but being told that it is, in actuality, something else, in this case the negative idea of what is being experienced.[41] The critical moment is one of irony and calls into doubt the first order interpretation of an object of perception, here the pipe. This gives rise to a cognitive dissonance between two alternative readings of reality which are in conflict.

In legal interpretation, a judge might supply a justification for a decision on the ground that it expands a general right. But the critic might allege that the justification is merely ideology since upon another reading, the right in question is held to be actually contracted by the decision. Unlike the viewer of the Magritte painting, we can plausibly state that the judge might be blind to ideological implications of her decision. Implicit in this claim is the notion that ideological understandings might not be available because of the perspective of being an insider within a practice. For this reason legal

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[41] Another interpretation of the caption is that the artist is reminding the audience that the painting is but a representation of a pipe and not a real pipe.

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justification has a certain autonomy from external critical assessments.

But at the same time, if we grant that justifications of legal decisions are parasitic upon wider social understandings, justification must be seen as loosely related to critical perspectives which are not necessarily employed by or even accessible to, insider practitioners. The matter involves an issue of degree as to when critiques of legal interpretations relying upon the concept of ideology serve to disjustify legal decisions. In certain instances, decisions are not robbed of legitimacy when subject to critique. On other occasions, where the concept of ideology shows how the law constitutes social relations in non-impartial ways or how it produces distortions or traffics in incoherences, legal interpretations can be meaningfully disjustified.

Invariably, ideology critiques point to the way in which the background understandings which undergird law give rise to perverse interpretations. For example, the feminist might argue that the ideology of law is patriarchal and that it ought not to be so. While she might well be correct, the fact remains that the law might also still be able operate in a justified manner as if impervious to the feminist's complaints. Often debates over what prevailing ideology ought to govern legal interpretations implicate a wider range of discourse and are settled in the realm of politics,

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outside of law. A distinctive feature of liberal legalism is that ideology disputes are generally relegated to the political culture so as to leave the stability of law and legitimacy of legal justification more or less intact.

However, that this does not for a moment imply that legal debates never entail ideology questions. Nor is the law to be accurately conceived of as a pure sphere of discourse as formalists would have it. On the contrary, political understandings percolate all the way through legal interpretations. Nevertheless, we lose something distinctive in our analytical understanding of law under liberal legalism if we posit all law as mere ideology and therefore lacking legitimacy. It is obvious that legal decisions can be interpreted as serving the interests of some classes, or groups of people at the expense of others. The point here is that legal legitimacy and the justificatory bases of law are not generally called into question only on these grounds.

A familiar ideology claim to consider is that justification "x" really masks "y" for "L." At issue is whether "x" can justify "L" regardless of "y" or if "y's" existence as an alternative justification compromises the relationship {x,L}? Invariably, ideology critiques do not propose that both "x" and "y" are legitimate justifications of "L." Only one of "x" or "y" is held to promote the goals of rule of law (RL), or, alternatively, "y" shows how the

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goals of RL are not, in reality, served by "x." As suggested above, debates about reforming RL to make "y" the dominant justificatory point of view will take place, in their most substantive aspects, in the political culture. Until "y" supplants "x" for "L," "L" will continue to be justified by "x."

We can once again appeal to the paradigm of multivalent logic to show how both "x" and "y" can have truth conditions with regard to "L." Though at some level incompatible, "x" and "y" are also both plausible and non-converging justifications for "L." "L" is justified by "x" relative to the distinctive conceptual scheme through which "x" is generated, whereas "y" is drawn from a different set of interpretive understandings about what it means for "L" to be appropriately justified. The synchronic co-existence of "x" and "y" as coherent, plausible and truth-bearing interpretive claims about "L" points out that disparate interpretive perspectives can give rise to a variety of viable readings. In terms of justification, a specific interpretive culture (e.g. the community of judicial interpreters under liberal legalism) will privilege its own particular justificatory norms. This conservative aspect of interpretation relativizes interpretive claims to the specific paradigm framework out of which they emerge. The goal in liberal legalism of ensuring an on-going stability to legal practice tends to insulate the legal interpretive

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culture from the radical change associated with continuous paradigm shifts. But the constitutive norms of judicial culture can be challenged when pressure is brought to bear from the larger political culture upon which legal practice relies for its legitimacy.[42] However, this requires more than the mere existence of a "y" for "L" as an alternative to "x." In and of itself, "y" is not necessarily a sufficient condition for revision of "x" in order to incorporate "y."

The Rights Critique (RC)

The CLS rights critique raises skepticism about the philosophical grounding of rights. RC arguments range from the claim that rights lack objective foundation and are simply contingent, non-neutral, interpretive phenomena treated as if they were objective, to the idea that rights-talk distorts social affinities and the possibility for

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[42] The manner in which such pressure obtains varies widely but will invariably be framed in the context of law needing to be modified in order to ensure its continued legitimacy. Examples of forces within political culture which bring this change into effect are social movements, pressure from the legislature etc. Sometimes the judicial culture will initiate change in anticipation of shifting forces within the political realm. Some commentators disparage this as a usurpation of the political role, a common charge made against the Warren Court. The extent to which the judicial culture is held to be leading the way is often overplayed. Given the core issue of legitimacy which constantly arises for judicial practice, one can state that even the Warren Court was acting responsively rather than proactively. Granted, the Warren Court was often ahead of the legislature, but its moves were wholly consonant with trends in the political culture. Thus, the prestige, legitimacy and perceived integrity of judicial action remained intact.

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achieving community by placing individuals in adversarial relations as rights-bearers. Stuart Scheingold, in a section of an essay entitled "The Politics of Rights," states that,

> "the core ambivalence of rights is doctrinal. A right once proclaimed is available to protect the interests of rich and poor, black and white, democrat and fascist. The ACLU...provides ample testimony to the neutrality of rights...The problem is that rights are not simply neutral. The rights written into the Constitution as well as their interpretation and implementation are shaped by the prevailing balance of political, economic, social, institutional and cultural forces...Still more fundamentally, the practice of rights is itself inextricably linked to the prevailing liberal democratic hegemony, thus imposing significant limitations on what can be expected, even in the most receptive political climate, from a politics of rights."[43]

Scheingold's general claim is for the inefficacy of rights since rights are an artifice of bourgeois liberal legalism. To the extent that rights are central in the liberal scheme of rule of law, the critical arguments of CLS consistently implicate either an explicit or implicit attack on rights.[44]

In fact, it has long been open season on rights. Mary

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[43] Stuart Scheingold. 1989. "Constitutional Rights and Social Change" in Michael W. McCann and Gerald L. Houseman (eds.) Judging the Constitution. 76,77.

[44] An oft-quoted example of explicit rights critique is Duncan Kennedy's contention that "rights discourse is internally inconsistent, vacuous or circular. Legal thought can generate equally plausible rights justifications for almost any result." Duncan Kennedy. 1982. "Legal Education as Training for Hierarchy." In David Kairys (ed.) The Politics of Law. 46. Note that Kennedy's rights critique is predicated on an indeterminacy thesis.

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Ann Glendon, who is far from being a Crit, argues in a recent book that rights talk trivializes political discourse, detracts from democracy and obscures ideals of civic responsibility and citizenship by exaggerating adversarial forms of political interaction.[45] Critics of rights in fact run the gamut and couch their arguments in the language of conservatism, communitarianism, feminism, socialism, relativism, and nihilism, to out and out totalitarianism. They variously seek to portray rights as thwarting freedom or as importing egregious concepts of coercive authority, isolatedness, insularity, absoluteness and false consciousness into social theory. The general claim is that rights are problematic in a descriptive, cognitive or normative sense.

Mark Tushnet provides perhaps the most extensive contribution to CLS rights critique. In his attempt to deconstruct the liberal theory of rights, he maintains that rights are indeterminate, unstable, lacking in political utility and also subject to reification.[46] The instability of rights is linked by Tushnet to the fact that rights are relative to specific cultures and subject to cultural attitudinal changes and redefinitions. Further, this feature is used to debunk any idea that rights can

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[45] Mary Ann Glendon. 1991. Rights-Talk: The Impoverishment of Political Discourse.

[46] Mark Tushnet. 1984. "An Essay on Rights." 62 Texas Law Review. 1363.

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function trans-culturally. Tushnet continues, that rights lack political utility for effecting political change because there is no substantial relationship between rights assertions and political effectiveness.

On the point of lack of efficacy, Tushnet is plainly mistaken. Rights claims can and have led to political change and examples are numerous. For instance, passage of the Wagner Act[47] which codified rights for unions followed union militancy and assertions of rights to organize, engage in collective bargaining etc. This illustrates the position contrary to Tushnet's claim that rights do not feature in changing society nor do they assist in understanding how society changes. The fact that rights are relative to cultural contexts would not seem to pose any great difficulty. It is also obvious that there can be cross-cultural consensus about certain rights being fundamental, worthy of protection and so forth.[48]

CLS rights critique invariably relies upon the indeterminacy and ideology theses to make its point and

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[47] The Act is formally known as the National Labor Relations Act (1935). It was upheld after constitutional challenge in NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

[48] Of note are those who write from a critical perspective but nonetheless see fit to engage in a defense of rights. We find examples in feminism and critical race theory. For instance see Martha Minow. 1990. Making all the Difference: Inclusion, Exclusion and American Law.; Patricia Smith (ed.) 1993. Feminist Jurisprudence.; Robin West. 1988. "Jurisprudence and Gender." 55 University of Chicago Law Review. Patricia Williams. 1991. The Alchemy of Race and Rights.

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Tushnet is no exception. He maintains that rights are indeterminate because they produce no determinate consequences, which he calls "technical" indeterminacy, and because they may be declared by widely disparate interests. This he terms "fundamental" indeterminacy, which is related to the fact that rights claims are made at an abstract level of generality. Technical indeterminacy is a non sequitur. Why consequential inefficacy of rights would compromise the determinacy of rights as an entity is not clear. The "fundamental" indeterminacy problem is not necessarily a difficulty. Liberal legalism portrays rights as a neutral phenomena. Thus, the Nazi Party is just as much able to avail itself of constitutional rights to free speech as is the NAACP. Would that it not be any other way.

Tushnet also discusses that fact that rights talk tends to give priority to negative over positive rights. This is genuine cause for critique and can be changed by expanding the scope of rights talk within the context of the political culture to which it is relativized. Tushnet's critique that rights do not do justice to the full spectrum of human experience attacks what is perhaps a constitutive principle of liberalism. Liberalism creates a separation between the public and the private and many liberals would argue that it is desirable that there remain some domains of the life world which are impervious to the juridical notion of rights assertion. Certain relationships demand that

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rights and obligations be rendered more explicit, while other spheres are more appropriately casual and fluid in the way human beings relate to one another.

Tushnet applies the ideology thesis with respect to rights in holding that they support privileged interests over those not in positions of power. Rights held to be a bulwark of capitalism which reify human experience in ways that are contrary to the interests of subjects. If this is true, then one can just as plausibly argue for rights revision. Tushnet's analysis is essentially devoid of reconstructive thrust. While granting some of Tushnet's critique, that there are limitations to rights talk, it does not follow that the notion of rights must automatically be jettisoned. To acknowledge that rights are sometimes incoherent does not yield the conclusion that rights are "nonsense on stilts."

In political theory, the emergence of subjective-rights theories annexed to the view that rights are a fundamental moral feature of human beings arises with the idea of the individual constituted as an autonomous moral subject, capable of assuming external and self-imposed moral obligations. Originally associated with natural law, rights talk is secularized through the liberal tradition and in liberal jurisprudence legal rights become matters for explicit enumeration and dispute. As such, rights are best perceived as contested entities not easily subject to

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delineation or settled meaning. Certain natural or moral rights are deemed inalienable. Others are relinquished in order to gain the legal rights associated with living in civil society. By defending interests and conferring duties, the major function rights serve is to effect stability against the potentially contingent nature of social life.

The core problem at the heart of rights critique concerns the question of who gets accorded rights, and to what. Often at issue is the allocation of rights to groups which traditionally have been discriminated against, or thought not to be worthy of being granted rights. For instance, in Goss v. Lopez[49] the Supreme Court held that school children are entitled to certain rights of procedural due process when subject to disciplinary procedures, such as suspension, by school officials. In a fierce dissent Justice Powell argued that by mandating due process procedures to protect pupils from unfair disciplinary actions as a constitutional requirement, the Court misapprehends the reality of the normal teacher-pupil relationship.

This case illustrates clashing background conceptions of the good. The majority of the Court sought to hold school officials to certain minimal standards of fairness and due process. Thus, children facing suspension are

[49] 419 U.S. 565 (1975).

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entitled to respond to charges against them and school officials cannot act in an arbitrary or capricious fashion when meting out punishments. Those who disagree with the decision feel that the law here is intruding into a domain where legal procedural requirements ought not to obtain. Relationships in the family, school or community must not be thought of as adversarial and so, even in the case of administering discipline, do not warrant constitutional due process rights. In bringing them up the Court mistakenly treats children as rights-bearers, thereby constituting them as autonomous legal subjects and casting an important social relationship (pupil-teacher) in erroneous terms.

There are a number of points of interest here. We see how rights, far from being neutral, constitute and define social relations. There is also the fact that in deciding for the due process rights of school children, the Court chooses between two competing BCGs, both of which are attendant in liberal political thought. On one hand there is the liberal value of privacy and that family and the rearing of children must remain as much as possible impervious to state control. Then there is the idea which the Court applies--that incursions upon liberty must be coupled with strict procedural requirements to ensure fairness and reasonableness of disciplinary action. The analog to school officials suspending youngsters is the punitive power of the state which, in order to be respected,

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must be perceived as operating in a fair and impartial way. Furthermore, the fact that the social context is the educational environment makes the demand for exemplary conduct on the part of school officials all the more important. After all, it is in public schools that civic values and qualities of good citizenship are to be inculcated.

Skeptics about rights could argue that there is no determinate way to proceed on whether school students should be accorded due process rights. This derives from the fact that alternative BCGs are more or less equally persuasive, serving equally well as justifications for respective incompatible rights claims. Someone who agrees with Goss has interpretive access to the competing BCG employed by his opponent. With both arguments equally plausible, each position is advanced mainly on rhetorical grounds since advocates have sound evidence for their particular interpretation of the appropriate BCG being correct. They each can make the fitting logical step from BCG to the right (or ~right) that ought to be articulated. And within the framework of multivalent logic, both outcomes can be ascribed truth conditions and commensurate justificatory objectivity. But is does not follow from the fact that rights claims are contestable and by no means unequivocal, that rights talk is vacuous and ineffectual. Soft skepticism allows us to see incompatible rights claims as

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meaningfully justifiable and sitting comfortably within the moral vocabulary of the broader political culture. It dissolves the quasi-positivist requirement that outcomes must be subsumed under a bivalent logical form and allows for ambiguity in interpretive choices. Though there is sometimes indeterminacy when selecting which rights prevail over others, this does not mean that rights generally lack tenable normative foundations and fail to serve useful functions.

Human Rights

A brief concluding remark concerns the fact that while rule of law and the language of rights and justice is being debunked by Crits as transcendental nonsense, there is resurging appeal to these concepts in international law. Outrage over atrocities in the former Yugoslavia has resulted in renewed interest within the international community to set up a permanent international criminal court. To this end, the International Law Commission has produced a draft statute predicated largely upon the concept of international justice.

Opening the first hearing of the International Criminal Tribunal for the Former Yugoslavia in November, 1994 in the Hague, Prosecutor Richard Goldstone stated:

> "In the aftermath of the horrors of the Second World War, and the trials by the victorious powers of the Nazi leaders at Nuremberg, it was generally anticipated by the international community that a new

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> era had begun. An era in which the human rights of all citizens of the world would be universally respected. It was not to be. The past five decades have witnessed some of the gravest violations of humanitarian law. Those responsible have too frequently escaped trial and punishment by national courts...There was no mechanism devised by the international community for establishing the guilt of the perpetrators and for punishing them. Justice was denied to the millions of victims of murders, disappearances, rape and torture."[50]

The notion of there being certain actions which offend a transnational standard of justice which reaches beyond the jurisdictions of particular legal systems is not new. Piracy is one example of an activity which has a long history of being considered an international crime and which placed states under obligations to apprehend perpetrators. The idea that there are human rights is also not of any particular controversy. In 1948, the United Nations adopted a Universal Declaration of Human Rights, a covenant which has been ratified by many governments. In addition, the European Convention on Human Rights (1950, effective 1954), several other United Nations covenants, and regional treaties promulgated under the auspices of various multinational organizations, all codify sets of fundamental human rights as elements of international law.

The concept of human rights raises questions about the background normative framework or moral undergirding for these rights. As Alan Gewirth points out,

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[50] Quoted from "The Quest for International Justice: Time for a Permanent International Criminal Court." July 1995 Amnesty International. AI Index: IOR 40/04/95 Distr: SC/CO/PG/PO.

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> "The questions, "Are there any human rights?" or "Do persons have any human rights?" may indeed be interpreted as asking whether the rights receive positive recognition and legal enforcement. But in the sense in which it is held that humans have rights (so that such rights exist) even if they are not enforced, the existence in question is normative: it refers to what entitlement legal enactments and social regulations ought to recognize, not or not only to what they in fact recognize. Thus, the criterion for answering the question must not be legal or conventional but moral. For human rights to exist there must be some valid moral criteria or principles that justify that all humans, qua humans, have the rights and hence also the correlative duties. Human rights are rights or entitlements that belong to every person; thus, they are universal moral rights."[51]

The intention here is not to commence a lengthy discussion on human rights. Nevertheless, the idea of a genuine and universal moral basis for deeming certain rights as fundamental and beyond social contingency is an interesting counter-argument to rights critique. By virtue of being moral agents that pursue desired ends, human beings can claim rights to certain basic goods which ensure the necessary circumstances for the possibility of each individual leading his or her vision of the good life. These rights inhere in some necessary sense in the notion of what it means to be a human being. Denial of these basic rights unravels the entire fabric of all rights and is a threat to a person's very humanity and concomitantly to humanity in general.

Martha Nussbaum echoes this idea in arguing for the

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[51] Alan Gewirth. 1982. Human Rights: Essays on Justification and Applications. 42.

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need to "identify a group of especially important functions in human life" which she terms coming up with a "thick vague theory of the good" against which the general form and content of human life can be assessed.[52] She insists that there can be broad consensus about certain goods whose absence entails the end of a human form of life, and that her conception is not a transcendental idea but is derived from the actual self-interpretations and self-evaluations of historically located human beings. Nussbaum identifies the dangerous public policy implications of those who propound extreme forms of relativism whereby all values are contingent and no one set of values can ever be privileged over any other. Radical discourses of otherness which insist that difference always be respected and rail against culturally hegemonical essentialist binary oppositions (such as the preference of health over disease)[53] can broach the absurd.

The fact that human beings are constituted in a particular way with certain core needs and desires is the basis for asserting that when deprived of certain rights, something fundamental about what it means to be a human

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[52] Martha C. Nussbaum. 1992. "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism." Vol. 20 No. 2 Political Theory. 214.

[53] Nussbaum alludes to a conference paper presented by a French anthropologist lamenting that the smallpox vaccine eliminated the cult of Sittala Devi in India (the goddess prayed to for relief from smallpox symptoms.) ibid at 203.

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being has been compromised. Whether one holds that human rights are a transcendental feature of human nature or arise socio-historically by convention does not detract from the fact that human rights warrant respect and protection. One can even be a non-cognitivist about human rights and hold that they exist simply as a matter of linguistic convention but, once again, general agreement about the need for human rights to be upheld is possible.

With regard to human rights violations, those who infringe upon human rights of individuals or groups of individuals harm not only their victims but offend the moral conscience of humanity in general. The concept of crimes against humanity which an International World Court would have jurisdiction to prosecute, concerns acts so heinous and abhorrent that they offend a universal conception of justice even though the actions are not necessarily crimes under national laws. At base, the notion of a crime against humanity proposes a common moral sensibility which reaches beyond national and cultural affiliations and as such challenges critical assumptions of those who would be nihilists about rights, justice and the rule of law.

Conclusion

There seems to be a general anxiety which attends interpretive practices. To grant that law is interpretive but the same time is able to avail itself of justifications

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which have truth conditions, is difficult for many to accept. This issue is compounded by the fact that there are often at least two plausible interpretations which compete for acceptance. The fact that legal meanings are fixed by a variety of sources, sometimes appealing to reasons outside of law itself, is also often treated as cause for concern. But closer examination of law as interpretation requires us to give up the demand that law exists as a seamless practice whereby meanings are fixed and determinate or discovered as a matter of analysis of legal terms. We can grant that there is a contingent and socially constructed aspect to law, but this does not mean that legal justification collapses. The relationship between legal interpretations and background moral understandings as well as with existing legal precedents, allows for critical assessment of legal decisions. While there are objective criteria for appraising individual legal outcomes, law writ large is justified by virtue of the overall normative scheme--the doctrine of rule of law--in which it is located.

The issue of justification is the frame through which all legal practice can best be understood. All theories of jurisprudence entail, at some level, a claim about how law ought to be justified. Legal positivism seeks to justify law as a sovereign utterance and thereby make legal commands out to be an objective social fact. Similarly, the NLT attempts to link positive law with a pre-existing natural

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order. This also represents an effort to justify law in professing a congruent relation between law and a higher order of morality. It is clear that law is parasitic upon certain moral understandings. We have termed these BCGs. Objectivity in legal justification obtains when there is a symmetry between the background moral understandings and a particular legal interpretation being advanced. This symmetrical relationship is capable of achieving transpersonal acceptance, in other words it is something that other rational and competent practitioners are willing to endorse. We can therefore allow for disagreement about the particular content of individual legal decisions but can agree that the grounds for the decision are valid and appropriate. Thus, disagreeing with an outcome in a case is different from stating that the decision lacks meaningful justification.

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